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BOOK 1:
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BOOK 2:
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federal register

Book 1 of 2 Books
Friday, January 23, 1981

Highlights

7913-7931 **Release of American Hostages in Iran** Executive orders relating to (10 documents) (Part XXII of this issue)

7846 **Food Relief Programs** USDA/FNS publishes final regulations regarding income eligibility criteria for participation in the Special Supplemental Food Program for Women, Infants and Children (Part XVI of this issue)

7748 **Food Stamps** USDA/FNS proposes to mandate photo identification in certain areas as a result of changes in the Food Stamp Act; comments by 3-24-81 (Part VII of this issue)

7666, 7684 **Hazardous Waste** EPA publishes rule and proposal regarding incinerator standards for owners and operators of hazardous waste management facilities; effective 7-22-81; comments by 4-23-81 (Part IV of this issue) (2 documents)

7402 **Occupational Safety** Labor/OSHA proposes identification, classification and regulation of potential occupational carcinogens; comments by 3-31-81

7562-7639 **Medical Devices** HHS/FDA proposes general rules applicable to the classification of all gastroenterology-urology devices; comments by 3-24-81; (Part II of this issue) (58 documents)

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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.

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7509 **Juvenile Delinquency** Justice invites comments until 2–23–81 on proposed guidelines, Prevention of Juvenile Delinquency through Capacity Building—Cycle II

7457 **Grant Programs** HHS/HSA announces accepting applications for genetic diseases testing and counseling services and sickle cell screening and education clinics; apply by 4–10–81

7267 **Immigration** Justice/INS eliminates duration of status for all nonimmigrant students; effective 2–23–81

7806 **Consumer Affairs** Office of the Special Assistant to the President, the White House publishes background report on executive order 12264 on Federal policy regarding the export of banned or significantly restricted substances (Part XIII of this issue)

7269 **Social Security** HHS/SSA publishes interim rule regarding regression formula in computation of Federal fiscal liability rates; effective 1–23–81; comments by 3–24–81

7846 **Grant Programs** USDA/FNS describes allocation of fiscal year 1981 program and administrative grants for Special Supplemental Food Program for Women, Infants and Children; effective 1–1–81

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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.
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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 271, 272, 275, and 277

[Amendment No. 169]

Food Stamp Program—Sanction/Incentive Systems

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: These final regulations establish the rules for the Food Stamp Program Sanction and Incentive Systems. This rulemaking implements Sections 125 and 126 of Public Law 96–249, which modified Section 16(c) of the Food Stamp Act of 1977 and added Section 16(g). These sections establish systems for determining (1) whether a State is eligible for enhanced administrative funding and (2) whether a State is liable to the Federal Government for the dollar value equivalent of a portion of its food stamp issuance. Both determinations are made upon the basis of quality control error rates. These regulations define the national annual rate of reduction, specify what will constitute good cause for excessive error rates, and outline the role of the Food and Nutrition Service's (FNS') role in monitoring and, when necessary, adjusting States' error rates. These regulations are intended to implement the sanction and incentive systems in a manner that treats States consistently and achieves the legislative goal of reducing States' rates of error in their administration of the Food Stamp Program.

EFFECTIVE DATES: Effective as of February 23, 1981. These provisions shall apply to the period beginning October 1, 1980, except that to the extent applicable the negative case provisions for enhanced funding shall apply from October 1, 1978.

FOR FURTHER INFORMATION CONTACT: Maurice C. Tracy, Chief, Performance Reporting Systems Branch, Food and Nutrition Service, USDA, Washington, D.C. (202) 447–4002. The final rules and the impact of the decision made on each issue is available upon 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 as "significant".

Background

In the October 3, 1980, **Federal Register** [45 FR 65932, et seq.], the Department issued proposed rulemaking on the sanction and incentive systems as contained in Sections 16(c) and 16(g) of the Food Stamp Act of 1977 (Public Law 95–113, 91 Stat. 958, September 29, 1977), as amended by Public Law 96–249 (94 Stat. 364–365, May 26, 1980) (hereafter referred to as the Act).

The sanction system outlined in the proposed regulations reflected the structure established by Congress in Public Law 96–249. Due to the specificity of the Act, the Department had little flexibility in many areas of the proposed rulemaking. The Department met with representatives from interested State agencies and the American Public Welfare Association (APWA) to explain the sanction and incentive systems and to obtain input on the issues that were subsequently addressed in the proposed rules. The Department relied upon the information and suggestions obtained at these meetings in conjunction with the House Report No. 96–788 (96th Congress, 2nd Session, February 27, 1980) and the Conference Report No. 96–704 (96th Congress, 2nd Session, May 14, 1980) in the development of the proposed regulations. The Department established a 60-day period for public comment on the proposed rules.

A total of 105 States, counties, FNS Regional Offices and other interested parties commented upon the proposed rules within the 60 day period. All pertinent comments were taken into consideration in developing these final rules. However, many comments were directed to provisions of the Act. While the Department recognizes commenters' concerns over the sanction system, only the comments pertinent to matters over which the Department has administrative discretion can be considered in this rulemaking. The following is a discussion of the comments received and an explanation of the decisions made. Because the explanation of many of this rule's provisions is set forth in the proposed rule of October 3, 1980, it may be necessary to refer to that publication for a full understanding of the basis and purpose of this rule.

Sanctions—General

The sanction system will operate as follows. The first 6 months of each Federal fiscal year serve as the base period for the following fiscal year. During each base period, a national standard payment error rate is constructed, which is the weighted (by each State's total issuance) mean payment error rate for all States during the base period. Each State's individual payment error rate is then evaluated relative to the national standard.

Each State with an error rate less than or equal to the national standard during the base period must remain at or below the national standard for the base period during each 6-month period of the following fiscal year to avoid any liability. Those States with payment error rates greater than the national standard during the base period must reduce their error rates during each 6-month period of the following fiscal year to either the national standard for the base period, or by a rate specified by the Secretary as the national annual rate of error reduction, whichever results in a higher error rate as the State's goal. Thus, States must either remain at or below the national standard or reduce their error rates all or part of the way to the national standard to avoid liability for excessive error rates.

The payment error rate is defined in the Act as ". . . the percentage of all food stamp allotments which are issued in a given period by a State agency to households which fail to meet the eligibility requirements of Sections 5 and 6 of this Act, are overissued to eligible households, and are underissued to eligible households. . . ." Sec. 126, Pub. L. 96–249, 94 Stat. 364–365, May 26, 1980.

The Act also states that the base period for fiscal year 1981 is the October 1979–March 1980 reporting period and

for all subsequent fiscal years the base period is the first 6 months of the prior fiscal year. The Act also specifies that States shall be liable to the Secretary for the dollar value equivalent of the difference between their payment error rate and their error rate goal.

As discussed in the proposed rules, the Act does give the Secretary the authority to establish the required national rate of error reduction which will be applied to those States with error rates which are above the national standard payment error rate during the base period. The Act also allows the Secretary to determine whether good cause exists for a State which exceeds its error rate goal. Finally, the Act directs the Secretary to study the feasibility of including in States' payment error rates invalid decisions by State agencies in denying eligibility to households which are, in fact, eligible.

These discretionary provisions of the Act together with the issues of Federal monitoring and incorrect/incomplete sampling, were discussed and options were presented in the proposed regulations. In developing these final regulations, the Department has attempted, as with the proposed regulations, to establish a sanction system that is consistently applied to States, meets the intent of the Act and recognizes States' difficulties in administration of the Food Stamp Program in a variety of different and changing circumstances.

Several States opposed the basic concept of the quality control sanction system. The commenters pointed out that high error rates are often caused by a lack of staff which is a result of the State's financial difficulties. They stated that the sanction system could remove a portion of the State's available resources and thereby impede the State's efforts to reduce error rates.

While the Department understands commenters' concerns, the Act clearly requires that States be liable for error rates in excess of their goals. Other commenters opposed the idea of basing sanctions on the quality control error rates. Another group of commenters believed it was improper to include underissuance dollars in the payment error rate. Some States and counties did not believe that the error rates should include those dollar losses caused by participants since these are difficult to control.

The Department has not modified the proposed regulations in response to these comments. The Act requires that sanctions be based upon quality control findings and that underissuances be included in the payment error rate. The Department has no discretion to modify this provision. The quality control system has historically included participant-caused errors in the States' error rates. Neither the Act nor its legislative history suggest that Congress intended a major modification in the definition of errors to exclude these types of errors. Further, it is often difficult to distinguish participant-caused errors from those caused by the agency. Since the overall sanction system is based upon the relative performance of States, the Department believes that consistency in evaluation of States' performance is the most important factor in structuring the system. Since participant error will be counted in all States, the Department sees no strong justification for excluding participant errors from payment error rates. If anything, it appears that such a change would complicate the process of determining a State's payment error rate.

One State proposed that the claims collected by States should be subtracted from any sanction assessed against the State. This is a most difficult procedure to implement and would probably result in relatively minor savings to States. Any claims discounted from the amount of a State's liability would have to be based upon a loss incurred during the period for which liability was established and the reason for the claim would have to coincide with a situation in which quality control would cite an error. Thus, claims collected for duplicate issuances, for example, could not be offset against the quality control based liability since these are not included in the quality control error rates. Therefore, this suggestion was not adopted.

Another commenter pointed out that if the Department of Health and Human Services (HHS) and the Department both established liability on the part of a State for the same reporting period, there would be a certain amount of overlap between the two sanctions since food stamp error rates in part, include error made in determining households' payments in the Aid to Families with Dependent Children (AFDC) Program. The Department proposed to compensate for this "double-counting" of Federal losses in the April 10, 1979 **Federal Register** [44 FR 21504, et seq.], but withdrew this proposal due to State opposition as discussed in the August 3, 1979 **Federal Register** [44 FR 45880, et seq.].

Following are those issues which received the greatest attention from commenters and are central to the operation of the quality control sanction system.

Incomplete Sampling. The Department received a total of 38 comments on this area of the proposed regulations, the vast majority of which were critical of the proposed rulemaking. Commenters' primary concern with the Department's proposed solution for incomplete sampling related to the lack of a definition or guidelines for determining whether minimal or significant bias exists in a State's error rate when its sample is less than 95 percent complete. FNS had proposed to examine each State's sample when the 95 percent completion standard was not met and determine whether it was likely that the uncompleted cases would have an error rate which was significantly higher than the completed cases. If it were determined that the State's error rate reflected no significant bias, FNS would not adjust the State's error rate based upon the low completion rate. If FNS determined that bias had been introduced, the State's error rate would be adjusted by assigning the upper limit of the confidence interval (the statistical bounds of the reported error rate) to each uncompleted case up to 100 percent of the sample.

The State's error rate would then be recalculated and this new estimate would become the State's final error rate for sanction purposes. Several commenters noted that FNS had not proposed any definition for what would constitute significant bias in the above determination and asserted that this determination must be consistent and based upon sound evidence. Other commenters suggested that the completion standard be adjusted to 90 percent. They asserted that 95 percent is unreasonable due to the number of migrant households and other households which have moved from the area, and households which refuse to cooperate. Other commenters raised objection to adjusting all noncompleted cases and recommended that States' error rates be adjusted only to the 95 percent completion standard.

The final regulations have been modified from the proposal in recognition of the above concerns. The Department agrees that the significant bias test is difficult to apply consistently. The Department is not prepared to define bias and has therefore deleted the requirement for an FNS determination of whether significant bias exists. Instead, the final regulations requires FNS to adjust *all* States' error rates when the completion standard is not met. As with the proposed procedure, the upper level of the confidence interval will be used as the adjustment factor for the

uncompleted cases. The Department has taken this action in response to commenters' concerns and for the reasons mentioned above. While this method does not assume that States "true" error rates will be produced, the Department believes its results will be fair (it may well understate the "true" error rate in some States) and it will be applied consistently to all States. There is general agreement that uncompleted cases by and large are more prone to error (i.e., refusal to cocperate, unable to locate the household). The comments from the Texas State Agency underscored this point. The procedure included in the final rules should compensate to some degree for the resulting bias when such cases are not included in the final error rates. This provision will provide States with an incentive to complete as many cases as possible, which enhances the overall validity of the system.

The Department has modified the original proposal in two additional significant ways. First, adjustment will be made to the 95 percent completion standard rather than 100 percent of the required sample. The Department has adopted this suggestion since it is inconsistent to establish a standard, and then adjust beyond the standard if it is not met. The Department does, however, disagree with the notion that the 95 percent completion standard should be reduced. It is critical that the error rates be as accurate as possible, given their added significance under the sanction system. Most States did achieve the 95 percent standard in the October 1979–March 1980 reporting period which seems to indicate that the standard is, in fact, reasonable. Further, reducing the completion standard would not, in any real sense, address the problem of bias in the sample.

Second, the Department will use a relatively low confidence interval in assigning an error rate to the uncompleted cases. Rather than using the more common 95 percent confidence interval, the Department will use a 67 percent confidence interval. A 67 percent confidence interval corresponds to one standard deviation from the mean, a common measuring of the dispersion in a simple distribution and a natural breakpoint. While this does not in any way threaten the validity of the QC error rates, it will result in somewhat lower error rates being assigned to uncompleted cases. The use of the 67 percent confidence interval should not have a major affect on the error rates of States which are close to the 95 percent completion standard.

Therefore, when a State fails to meet the 95 percent completion standard, FNS will adjust the State's rate by multiplying its error rate by the percentage of cases completed relative to the 95 percent standard, multiplying the remaining percentage of cases relative to the 95 percent standard by the upper level of their 67 percent confidence interval (or one standard deviation) and summing these two products.

Beyond the mechanics of adjustment, FNS is committed to avoiding this problem to the extent possible. To this end, the Department has adopted some commenters' suggestions that FNS assist States in completing cases. During the validation reviews discussed below, FNS will attempt to complete those cases or return cases to the States for completion that the State initially failed to complete. Further, the Department is now seriously considering issuing a proposal to modify existing regulations so that cases with missing casefiles can be removed from the not completed category as specified in § 275.12(b)(2). This modification would increase States' completion rates since these cases could be counted as completed cases.

State QC reviewers would complete reviews based upon the households' circumstances in the sample month in relation to the allotment issued in that month. The only major difficulty with such a proposal (and the primary reason why these cases are currently classified as not completed) is that the excluded variances outlined in § 275.12(b)(1)(iv) could not generally be applied in these cases since the lack of a casefile would rule out the documentation necessary to exclude these variances. Thus, the error rates resulting from completed reviews of such cases could be higher due to the lack of a casefile.

In regard to a related issue, the question has been raised of whether FNS would provide States with enhanced funding if the 95 percent completion standard was not met. If after the adjustment described above, the State's error rate is at or below the required level the State would receive enhanced funding.

Incorrect Sampling. Commenters' basic concern with the proposed provision dealing with incorrect sampling and FNS's right to assign a new error rate centered upon the lack of specificity. They believed that FNS should include in the regulations exactly what information would be used to assign States an error rate and in what circumstances this would be done. One State believed that this area of the regulations should be clarified and reproposed. Other commenters pointed out that if FNS monitors States closely enough, this problem should not occur. Many comments also suggested that if FNS approves a State's sampling plan, that FNS should somehow be limited in what action could be taken in assigning a new error rate if the plan results in an incorrect sample selection.

The Department understands commenters' concerns in this area, but does not agree that FNS's future actions can be specified or, in general, limited. The proposed regulations were intended to be general to allow FNS to use the best information available when a State's sample selection, estimation, or data management procedures are deficient and cannot be corrected accurately. The point at which such a deficiency is detected and the resources available to the State and the Department will determine what data is available or can be obtained in a timely manner. FNS is committed to the idea, and agrees with commenters' assertions, that avoidance of this problem through close monitoring is the best solution to the problem. However, if this problem should develop and a State's sample and reported error rate are invalid (regardless of whether the State's sampling plan was incorrectly approved), it is FNS's responsibility to develop some estimate of the State's performance in order to ensure all States are accurately included in the payment error rate, and that States are treated equitably in relation to each other. Therefore, in assigning error rates, FNS will negotiate with the State to attempt to select a source of information that is acceptable to the State. Furthermore, States have the right in all such situations resulting in a claim to request an administrative hearing. In assigning error rates, FNS will seek in every instance to use the data that most closely reflects the State's performance for the reporting period in question. However, it must be recognized that it is unlikely that any assigned error rate will be as accurate as a correct and complete quality control sample would generate.

Therefore, these final regulations retain the provision of the proposed regulations on incorrect sampling with some clarification.

Rate of Reduction. This issue was discussed in some detail in the preamble to the proposed regulations and four alternatives that the Department has considered were explained. The Department proposed that States with payment error rates above the national standard payment error rate be required to reduce their error rates by 12 percent of the difference between each State's error rate in the base period and a goal

of 5 percent or to the national standard of the base period, whichever results in a higher error rate goal for the subsequent fiscal year. Thus, if a State's error rate is 15 percent in a base period and the national standard is 12 percent, the State would be required to achieve an error rate of 13.8 percent to avoid liability (15−(15–5) (.12)=13.8).

A total of 46 comments were received on this proposal, 43 of which disagreed with the basic proposal or some aspect of it. Some States felt the proposal was not justified sufficiently and lamented the lack of comparable historical data for use in determining a reasonable future reduction standard.

A few commenters supported one or another of the other options discussed in the proposed regulations, which would set a fixed single rate of reduction or establish a variable rate based upon the rate of reduction in the national standard payment error rate. However, the majority of commenters seemed to support retention of the proposed formula for determining States' goals (at least until historical data is available), but recommended that either the 5 percent national goal be modified to 8 percent or the proposed 12 percent reduction factor be reduced to 10 percent, or both.

The principal recommendation advanced by State agencies objecting to the proposal was that the national goal be established at 8 percent rather than 5 percent. States observed that Public Law 96–249 provides enhanced funding for States that achieve error rates of 8 percent or less and that Congress therefore has indicated that 8 percent is an appropriate error reduction goal.

The Department has determined, however, that the goal should remain at 5 percent, as proposed. Five percent was the level originally established by Congress (in Public Law 95–113) as the level for receiving enhanced funding, and under Public Law 96–249, the Congress has provided for a higher level of enhanced funding for States with error rates below 5 percent than for States with error rates between 5 and 8 percent. That Congress distinguished between the 5 percent and the 8 percent level is further illustrated by the fact that the Act sets the level for 60 percent enhanced funding at 8 percent or that national standard, whichever is lower. By contrast, the Act sets the level for 65 percent enhanced funding at 5 percent, regardless of whether the national standard should drop below this. Clearly, Congress does not believe that 8 percent should be a final goal for error reduction efforts or the final indicator of outstanding performance. Therefore, the final regulations retain 5 percent as the goal in the error rate sanction system.

Commenters also recommended that the 12 percent reduction factor be modified to 10 percent. This modification would have less of an effect than the increase in the goal from 5 to 8 percent. The Department considered this comment in light of the decision to drop efforts to identify significant bias when a State did not achieve a 95 percent completion rate, and instead, to assign the upper limit of the confidence interval to all States not achieving the desired 95 percent completion standard. The Department recognizes that this decision will likely increase a number of States' error rates, and thereby make achievement of these States' reduction goals more difficult than would have been the case under the proposed rules. In light of this fact, and taking into consideration the lack of historical data on error rate reduction, and the nearly unanimous opposition of commenters to the proposal, the Department has adopted the suggestion to set the reduction factor at 10 percent. The Department does share the concern of commenters over the lack of historical data and will reexamine the reduction factor when more information becomes available. In addition, the Department will examine the required rate of reduction in light of future program changes and could modify these regulations in response to changing circumstances.

Good Cause. This provision of the proposed rules also received relatively heavy comment, with 47 comments. About one-half of the commenters were critical of the Department's proposal. The comments were directed at three aspects of the good cause provision. Some commenters asked that the final regulations establish a timeframe for submission of a request for good cause when a State's error rate would place it in a sanction position. The Department has adopted this suggestion by adding a 30-day period for such requests. The 30-day period will begin upon notification by FNS of the State's final error rate and of the State's liability.

The second concern raised by commenters concerned § 275.25(d)(5)(i)(D) of the proposed regulations, which established as one of the good cause criteria "changes in the food stamp or other Federal or State programs that have a substantial adverse impact upon management of the State's Food Stamp Program." Some commenters believed that whenever a change affects more than a specified percentage of the food stamp caseload (such as 25 percent), this should be considered good cause. The Department examined this suggestion, but has concluded that the percentage of caseload affected by a change is not a sufficient gauge of whether the change was sufficiently disruptive of food stamp operations to constitute good cause. For example, the annual adjustment in food stamp allotments affects virtually all households. The change in food stamp rounding rules which took effect on July 1, 1980 resulted in a benefit change of $1 for a significant proportion of the caseload. Both of these changes affected a large proportion of the caseload, and neither was substantially disruptive of program management. Some changes that affect many households are minor and are not difficult for States to handle. A simple percentage threshold would thus result in an inappropriate and rather arbitrary good cause standard. The Department, therefore, has retained this provision as originally proposed.

The third and most difficult issue relating to the good cause standards was the strong recommendation of many commenters, including a large number of States, that the good cause provisions should include a standard for "good faith effort" similar to the one now used by the Department of Health and Human Services in its AFDC and Medicaid sanction systems. States suggested that a number of criteria be utilized to determine whether a good faith effort has been made to reduce errors. The suggested criteria included: demonstrated commitment by top management to the error reduction program, sufficiency and quality of systems designed to reduce errors, use of effective systems and procedures for the statistical and program analysis of QC and related data, and effective management and execution of the corrective action process.

In the preamble to the proposed rules, the Department stated that the effort States have expended toward error reduction should be considered in determining whether a good cause exemption from all or part of a sanction should be granted. The Department noted, however, that "good faith effort" alone should not automatically result in a good cause ruling. It was pointed out that it is difficult to evaluate States' intentions and efforts in a sufficiently objective manner to make this criterion, by itself, an automatic trigger for a finding of good cause. The Department expressed its concern over the possibility of a State claiming "good faith effort" year after year without actually achieving error rate reduction.

The preamble concluded that State error reduction efforts would be taken into consideration, and that a State might be able to establish good cause by proving it had made an exemplary effort to reduce errors, or had invested an unusual amount of resources into error reduction, and that error reduction had begun to result after the conclusion of the QC measurement period.

The Department has considered the comments, but continues to believe that "good faith effort" alone cannot automatically justify a good cause determination. The Department does agree, however, that when a good faith effort produces concrete error reduction result, this warrants the most serious consideration. Moreover, the Department recognizes that major error reduction efforts often take some time to produce results, and that successful results may then become a permanent characteristic of the State's operation, providing continued savings for years to come.

With these concerns in mind, the Department has restructured this aspect of the good cause standards to recognize State efforts that produce markedly successful results, and to provide even stronger incentives for States with error problems to make major, permanent reductions in errors. The revised good faith effort standard is designed both to provide equity when State effort is particularly successful, and to increase the savings to the Federal Government through reduced errors in future years.

The essense of the new standard is that States that are subject to a sanction because they did not achieve their goal in a given 6-month period will be determined to have made a major effort that constitutes good cause if they have achieved substantial error rate reduction by the corresponding 6-month period of the following fiscal year. The error rate the State must achieve in the following fiscal year is the rate it would have had to achieve for that period if it had met its initial goal in the preceding year. An example will help to clarify this matter. If a State's error rate was 15 percent in a base period and remained at the 15 percent level for both periods of the following fiscal year, the State would incur a 1 percent liability for each period of that fiscal year, since its goal was 14 percent. The State's goal for the succeeding fiscal year would then again be 14 percent. However, if the State had achieved its initial goal of 14 percent, its goal for the succeeding fiscal year would have been 13.1 percent. Therefore, the State's liability for missing its goal in the initial fiscal year would be determined to come within the good cause exception provided by the statute if the State actually achieved the 13.1 percent level in the comparable period of the next fiscal year.

The State would, in essence, have two goals for the next fiscal year: a 13.1 percent goal to substantiate its claim of good faith effort and secure a good cause finding with regard to its liability, and a 14 percent goal to avoid assumption of a new additional liability.

For States whose error rate was below the national standard in the original base period, and who exceed their error rate goal, the new standard would be slightly different. The States would have to achieve the *lower* of the following to substantiate their good faith effort: the error rate that would have been the State's goal in the succeeding fiscal year if the State had met its initial goal, or the State's original error rate in the original base period. For example, if a State's error rate was 9.5 percent during a base period, and the national standard payment error rate for this base period was 10 percent, the State would be liable for errors in each period of the following fiscal year that were in excess of the 10 percent level. If the State's error rate in the following year was 10.2 percent, the State would incur a liability of 0.2 percent. The State's goal for the succeeding fiscal year would then be 9.7 percent (assuming the national standard error rate had dropped to at least this level). However, FNS would compute what the State's goal for the succeeding year would have been had the State achieved its initial goal; in this case its goal would have been the national standard payment rate during the initial six month period for which it is liable. If the national standard had been 9 percent during this period, the State's liability for each period of the initial fiscal year would qualify for a good cause determination if the State actually achieved the 9 percent level in the comparable period of the next fiscal year. However, if the national standard payment error rate during the period the State was liable had remained at 10 percent, the State's liability would qualify for a good cause determination if it achieved its original error rate during the original base period, or 9.5 percent, since this is lower than the appropriate national standard payment error rate.

This standard accomplishes several purposes. First, it provides an objective measure to substantiate a State contention that it had made laudable and successful efforts to achieve error rate reduction, but that the results had not yet shown up in the first year's error rates because major error rate reduction may take a longer period of time to achieve. Since error reduction efforts may entail acquisition or redesign of automated data processing systems, hiring of additional personnel, and other such actions, the Department agrees that some time may be needed before the results are fully reflected in State's error rates.

Second, this standard should result in added savings to the Federal Government over the long run. It is designed to induce States to increase their error reduction efforts by setting lower error reduction goals than would otherwise be the case. If a State achieved the lower goal, then its next goal for the following year would be lower still. Thus, this standard is designed to induce even larger, permanent decreases in errors.

In addition to specifying this standard, the Department has also incorporated into the regulations much of the discussion on good faith effort that appeared in the preamble to the proposed regulations. The proposed good cause standard based on direction of resources to other aspects of the program which FNS determined to be of higher priority (§ 275.25(d)(5)(i)(F) of the proposal) has been eliminated because the Department felt it was too vague. Its purpose is met under the revised good faith effort provision described above and under a new provision describing a good faith finding due to other circumstances beyond the control of the State. Otherwise the good cause criteria remain unchanged in the final rules. The final rules maintain the stringent sanction system as directed by Congress while also following the Congressional directive to recognize legitimate instances of good cause for not meeting an error rate goal in a given period.

Federal Validation. The Department received a total of 27 comments on this area of the proposed regulations. While commenters did not, in general, oppose the idea of FNS validating States' error rates, several concerns over the provision as proposed were raised. Commenters believed that the Federal sample size and the Federal error rate adjustment procedure should be valid and specified in the final regulations together with a description of the Federal review process. The Department agrees with this and has included the formula for the Federal sample size with an outline of the Federal review procedures in the final regulations.

Many commenters recommended that the Department establish a system for resolving differences between State and Federal case findings. Again, the Department agrees with this suggestion and has established a procedure in the

final regulations which will require each FNS Regional Office to appoint an official, who is not involved in the Federal QC validation process, to arbitrate policy issues which may develop between Federal reviewers' and State reviewers' findings. The Department does not intend to designate an entity outside of FNS for the purpose of resolving differences since determinations on food stamp policy are clearly an FNS responsibility. However, if a policy difference cannot be resolved at the Regional Level, the State can appeal through the Region to the FNS National Office where a final decision will be made.

Another group of commenters felt that timeframes must be specified for the establishment of each State's payment error rate and the national standard payment error rate. Related to this concern was a recommendation by some commenters that FNS begin conducting reviews concurrent with the State or as soon as possible in the review period. The former concern is one over which the Department has little control. Establishment of the national standard is largely dependent upon how quickly States report quality control findings. If even one State is late in reporting, the delay will be passed on to all States. In the October '79–March '80 period, several States had to be given extensions. The last States reported over 3 months after the required date in the regulations. However, FNS will make every effort to process States' reports as soon as possible. FNS is currently working on a nation-wide automated QC reporting system which should substantially reduce reporting and processing time. When this system is implemented, the Department will examine the feasibility of establishing more exact timeframes for generation of final error rates. In reference to the commenters' second concern, the point that Federal reviews can begin is again dependent upon the States' efforts in selecting and reviewing cases and supplying this information to FNS. The earlier this is done, the sooner FNS can begin the Federal review process. The final regulations have been modified to reflect this by stating that FNS will begin its review process as soon as possible after the State supplies the necessary information.

A number of States also recommended that FNS should conduct "blind" reviews. This concept was discussed in the preamble for the proposed regulations. While it is possible that this procedure could have advantages over the current procedure (where FNS uses the State's review results in determining the correctness of the QC case determination), this has not been demonstrated at the present time. What is known is that the blind review approach would require a substantial increase in Federal manpower and in Federal expenditures for travel costs. Blind reviews could also, as one State observed, delay the establishment of State payment error rates and the national standard. Therefore, a requirement that every case in the Federal validation should be subjected to a blind review is not warranted or practicable at this time. However, the Department does recognize that this is a significant issue, and is committed to exploring the matter in a more thorough and systematic manner. As a result, FNS will initially conduct blind reviews in a percentage of the Federal case reviews to gather data on the impact of blind reviews. FNS will then reassess this matter based on the results of the blind reviews it has conducted.

The final regulations also include an added provision that FNS will attempt to assist States in completing cases that the State failed to complete initially. This provision in no way relieves the States of their responsibility for completion of the required sample size. FNS will examine cases the State has failed to complete due to an inability to locate the household or to obtain a household's cooperation. If FNS can locate the household or obtain cooperation, the case will be returned to the State for completion or if circumstances warrant, FNS will complete the case for the State. The second possibility will only take place in a limited number of cases.

States' Liability for Error Rates. Several commenters questioned what rules FNS will use in rounding a State's error rate and pointed out that the method must be consistent and should be precise. The final regulations contain a provision for rounding States' payment error rates, the national standard payment error rate, and States' error rate goals, generated by the rate of reduction formula, to the nearest one-hundredth of a percent.

Several commenters questioned the relationship between the QC sanction system and the negligence provisions of § 276.3. Both the preamble to the proposed QC sanction regulations and the preamble to the final Federal Sanctions and State Agency Liability Regulations of the November 21, 1980 **Federal Register** [45 FR 77258, et. seq.] addressed this issue. The primary factors in the relationship are: (1) FNS will not bill a State for negligence based upon QC data or other information that monitors overall certification error rates; (2) FNS will base negligence billings on failure to comply, due to negligence on the part of a State agency, with specific program requirements; and (3) FNS will not bill the State for the same dollar loss twice. If a State is billed for negligence and is held liable for QC error rates during the same period of time, any overlapping loss will be subtracted from either the negligence claim or the QC sanction.

Negative Cases. The Department received 22 comments on the concept of including the dollar loss from invalid denials and terminations in States' payment error rates. The majority of commenters opposed this concept with some advocate groups expressing support. Those opposing the inclusion of invalid denials and terminations did not believe it to be possible to accurately combine error rates from active cases and negative cases or did not believe inclusion is appropriate since the system should be based upon Federal dollar loss rather than on food stamps that have not been issued. Some commenters pointed out that HHS does not include negative case losses in the AFDC sanction determination. Those supporting the inclusion of negative case results expressed a concern that States may deny households improperly in an effort to avoid liability based upon the active case payment error rate.

The Act is specific on this and requires inclusion of negative case losses in payment error rates, if this is feasible. While the Department is continuing to study this issue, the Department has not established the feasibility of including these losses at this time. Therefore, the regulations have not been modified in this area. If in the future the Department concludes that a particular method is feasible and equitable, a new proposed rulemaking will be issued with its own comment period, so that interested parties can carefully examine the method and provide comments before any final decision is made.

Enhanced Funding

The Department received 21 commments on the proposed provisions dealing with enhanced funding. While most comments seemed to favor the idea for enhanced funding, several concerns were expressed regarding the proposed negative case standard that must be reached for a State to qualify for the 60 or 65 percent enhanced administrative funding. The Department proposed that the national weighted mean negative case error rate be the standard for each review period. One commenter objected to the proposed

standard on the grounds that it would eliminate the possibility of all States receiving enhanced funding in the same period. First, this should not be a concern at this time with most States well above even the 8 percent error rate level. Second, the department views the enhanced funding as an incentive for those States with outstanding performance, rather than a reward that all States can qualify for easily. Further, establishing a fixed percentage rate as the standard rather than the weighted mean negative case error rate (as this commenter suggested) could work to States' disadvantage if the average negative error rates prove to be higher for a given period than the fixed percentage standard. For these reasons the Department has retained the provision of the proposed regulations in these final regulations with some clarifications.

The other provision of the proposed rules that received a number of comments is the retroactive implementation of the negative case standard provision. The legality of this action was questioned. This provision is mandated by the Act and therefore, the Department has no discretion in this matter.

Therefore, Part 271 is amended to include the following definitions and Parts 272, 275 and 277 are amended as follows:

PART 271—GENERAL INFORMATION AND DEFINITIONS

1. Section 271.2 is amended by adding the following definitions in alphabetical order:

§ 271.2 Definitions.

* * * * *

"Base Period" means the first 6-month reporting period of each fiscal year.

* * * * *

"National Standard Payment Error Rate" means the weighted mean of all States' payment error rates during a base period.

* * * * *

"Payment Error Rate" means cumulative allotment error rate.

* * * * *

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

2. Subparagraph (31) is added to § 272.1(g) in numerical order to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

(31) Amendment 169. The provisions of Amendment 169 shall be effective (insert 30th day after publication). These provisions shall apply to the period beginning October 1, 1980, except that the provisions of § 277.4(b)(2) shall apply to the period October 1, 1978 through October 1, 1980. No State shall be subject to sanctions based upon quality control error rates for any period prior to October 1, 1980. No State shall receive enhanced funding based upon quality control data for a period prior to the date upon which its quality control system was in operation.

* * * * *

PART 275—PERFORMANCE REPORTING SYSTEM

3. In Section 275.3, paragraph (b)(2) is removed and paragraph (c) is revised to read as follows:

§ 275.3 Federal monitoring.

* * * * *

(c) *Validation of States' Payment/Cumulative Allotment Error Rates.* FNS shall validate each State's reported payment error rate during each 6-month quality control (QC) reporting period. Each validation review shall consist of the following actions.

(1) FNS will select a subsample of a State's completed sample. The Federal review sample size for completed active cases is determined by the following equation:

$n^1 = .14n + 50.31$

where

n^1 is the subsample size (maximum 180), and

n is the State's minimum required active sample size as determined by § 275.11(d)(1)

This number (n^1) represents the minimum number of Federal review sample cases which must be selected and reviewed by a Regional office when conducting a validation review.

(2) FNS will conduct case record and field investigations to the extent necessary to determine the accuracy of the State's findings using the household's certification records, the State's QC records, collateral contacts, and home visits as a basis for this determination.

(3) Each FNS Regional office shall appoint an individual to arbitrate disputes between State and Federal findings on a case-by-case basis. This individual will not be directly involved in the validation effort and will accept questions of certification policy only upon written request by the State.

(4) FNS will review the State's sampling procedures, estimation procedures and the State's system for data management to ensure compliance with § 275.11 and § 275.12.

(5) FNS will begin each State's validation review as soon as possible after the State has supplied the necessary information regarding its sample and review activity.

(6) FNS will review each State's negative case sampling and review procedures against the provisions of §§ 275.11 and 275.13 in at least one 6-month period of each fiscal year.

(7) FNS will validate the negative case error rate for each period a State's cumulative allotment error rate is below 8 percent or the national standard, whichever is lower, following the guidelines similar to those of paragraphs (c) (1), (2), (3) and (4) of this section.

(8) FNS will assist States to the extent possible in the completion of cases where the participant refuses to cooperate or cannot be located. Any deficiencies detected in a State's QC system shall be included in the State's corrective action plan. The findings of validation reviews shall be used as outlined in § 275.25(d)(6).

* * * * *

4. Section 275.16(b)(3) is revised to read as follows:

§ 275.16 Corrective action planning.

(b) * * *

(3) Are the causes for a cumulative allotment error rate for States which do not receive enhanced funding as described in § 275.25(c)(2) for any reporting period (actions to correct errors in individual cases, however, shall not be submitted as part of the State plan);

* * * * *

4. Section 275.25(c) is revised and a new paragraph (d) is added to read as follows:

§ 275.25 Determination of State agency program performance.

* * * * *

(c) *Federal enhanced funding.* (1) Before making enhanced funding available to a State agency as described in Part 277.4(b), FNS will:

(i) Validate the State's reported cumulative allotment error rate as provided for in § 275.3(c);

(ii) Ensure that the sampling techniques used by the State are FNS-approved procedures as established in § 275.11 of this part;

(iii) Validate the State's quality control completion rate to ensure that the rate is at the level required by § 275.11(f) of these regulations; and

(iv) For States claiming 60 or 65 percent enhanced funding, validate the State's negative case error rate following the procedures of (i), (ii) and (iii) above.

(2) Upon completion of the activities specified in paragraph (c)(1) of this section, FNS will, if necessary, correct or adjust a State's error rate as described in paragraph (d)(6) of this section. After validation and any necessary adjustment of States' error rates, the following levels of funding will be provided.

(i) States with cumulative allotment error rates of less than 5 percent for a 6-month period shall be eligible for a 65 percent Federally funded share of administrative costs, provided that the State's negative case error rate is less than the national weighted mean negative case error rate for the period of enhanced funding.

(ii) States with a cumulative allotment error rate during a 6-month QC period of 5 percent or more but less than 8 percent of the national standard of the prior year's base period, whichever is lower, shall be entitled to a 60 percent share of federally funded administrative costs, provided that the State's negative case error rate is less than the national weighted mean negative case error rate for the period of enhanced funding.

(iii) States with a 25 percent or greater reduction in their cumulative allotment error rate from one QC period to the comparable period of the next fiscal year shall be entitled to a 55 percent share of Federally funded administrative costs for the 6-month QC period(s) of the second fiscal year.

(3) States entitled to enhanced funding shall receive such funding on a retroactive basis only for the review period in which their error rates are less than the levels described in paragraph (2) above. No State shall be eligible for more than one of these increased funding levels in a six-month period with the higher level always taking precedence.

(d) *State Liabilities for Payment Error Rates.* (1) During each 6-month QC reporting period, States' payment error rates will be evaluated to determine whether they exceed the goals established in the paragraphs below. If a State's payment error rate is equal to or less than its goal, the State will have no liability for its payment error rates. If a State's payment error rate exceeds its goal for a 6-month period, the State will be held liable for a percentage of its payment error rate as specified in paragraph (3) below.

(2) *Establishment of Payment Error Rate Goals.* For each 6-month period, the base period shall be the first 6-month period of the preceding fiscal year.

(i) The payment error rate goal for each State with a payment error rate below the national standard payment error rate during the base period shall be the national standard payment error rate for the base period. For example, if the national standard payment error rate during the base period is 10 percent and a State's payment error rate is 9 percent during the same period, the State's goals for each 6-month period of the following fiscal year would be 10 percent or less.

(ii) The payment error rate goal for a State with a payment error rate above the national standard payment error rate during the base period shall be the higher of either:

(A) The national standard payment error rate during the base period; or

(B) The State's payment error rate during the base period less 10 percent of the difference between that error rate and the payment error rate of 5 percent. For example, if the national standard is 10 percent during the base period and a State's payment error rate is 12 percent during the same period, the State's goal for each 6-month period of the following fiscal year would be an error rate of 11.3 percent (12−(12−5)(.10)=11.3). However, if the State's payment error rate had been 10.5 percent during the base period, its goal would be 10 percent rather than 9.95 percent since 10 percent is the higher of the two figures.

(C) States' payment error rates, payment error rate goals, and the national standard payment error rate shall be rounded to the nearest one hundreth of a percent with .005 and above being rounded up to the next highest one-hundredth and .004 and below being rounded to the next lowest one-hundredth (i.e., an error rate of 10.544 will become 10.54 while 10.555 will be 10.56).

(3) *States Failing to Achieve Payment Error Rate Goals.* Each State which fails to achieve its payment error rate goal during a 6-month period shall be liable for the dollar value equivalent of the difference between its goal and its actual error rate expressed as a percentage of its total issuance during the 6-month period. Thus, if a State's goal is 10 percent during a 6-month period and its payment error rate is determined to be 12 percent, the State would be liable for 2 percent of its total issuance during the 6-month period.

(4) *Relationship to Warning Process and Negligence.* (i) States' liability for payment error rates as determined above are not subject to the warning process of § 276.4(d). However, States shall be notified 30 days in advance of any billing and may request a good cause waiver or reduction at any time during the 30-day period. If a State requests a good cause determination, FNS shall hold the billing pending a decision on the good cause request. If a determination is made that good cause did not exist, FNS shall promptly issue the billing. While the amount of a State's liability may be recovered through offsets to their letter of credit as identified in § 277.16(c), FNS shall also have the option of billing a State directly or using other claims collection mechanisms authorized under the Federal Claims Collection Act, depending upon the amount of the State's liability.

(ii) FNS shall not determine negligence (as described in § 276.3) based on the overall allotment error rate for issuances to ineligible households and overissuances to eligible households in a State or political subdivision thereof. FNS may only establish a claim under § 276.3 for dollar losses from failure to comply, due to negligence on the part of the State agency (as defined under § 276.3), with specific certification requirements. Thus, FNS will not use the results of States' QC reviews to determine negligence.

(iii) While FNS may determine a State to be liable for dollar loss under the provisions of this section and the negligence provisions of §276.3 for the same period of time, FNS shall not bill a State for the same dollar loss under both provisions. If FNS finds a State liable under both the sanction system and the negligence provisions, FNS shall adjust the billings to ensure that two claims are not made against the State for the same dollar loss.

(5) *Good Cause and Appeals.* (i) When a State is found to be liable for a portion of its payment error rate as described in paragraphs (2) and (3) above, FNS may determine that the State had good cause for not achieving its payment error rate goal. FNS shall evaluate requests for a good cause determination based upon one or more of the following criteria:

(A) Natural disasters or civil disorders that adversely affect program operations;

(B) Strikes by State staff necessary to the determination of eligibility and processing of case changes;

(C) Significant caseload growth prior to or during a 6-month period of, for example, 15 percent;

(D) Changes in the food stamp or other Federal or State programs that have a substantial adverse impact upon management of the State's Food Stamp Program;

(E) Misapplication of Federal policy where such misapplication directly affects the State's QC error rates and was incorrectly provided or approved by an FNS representative who is reasonably believed to have the necessary authority;

(F) Other circumstances beyond the control of the State; and

(G) Good faith efforts by the State to reduce or maintain its error rate. Efforts expended by States will be considered. It may be possible, for example, for a State to establish good cause by proving it has made exemplary efforts to reduce errors or has invested an unusual amount of resources into achieving error reduction, and that error reduction has begun to result after the conclusion of the QC measurement period. A State may also be able to show that its efforts to reduce errors, in combination with other factors, should constitute a basis for a good cause finding. However, implementation of an approved corrective action plan and other efforts to reduce errors shall not automatically, in and of themselves, result in a good cause finding. Each State's circumstances shall be evaluated on its own merits. Substantial weight shall be given to the achievement of results stemming from the State's efforts. Good cause shall automatically be determined to exist when the following standards have been met by a State:

(1) The State implemented in good faith an FNS-approved corrective action plan prior to the 6-month period in which the State's error rate exceeded its established goal, and the plan was specifically designed to reduce the State's payment error rate; and

(2)(i) If a State's payment error rate exceeded the national standard payment error rate in a base period, and the State did not meet its goal in a period(s) of the following fiscal year, the State achieved a reduction of its payment error rate for the comparable period(s) of the succeeding fiscal year to the level that would have been required if the State had met its initial goal. (For example, if a State's error rate was 15 percent in a base period and remained at the 15 percent level for both periods of the following fiscal year, the State would incur a 1.0 percent liability for each period of that fiscal year, since its goal was 14 percent. The State's goal for the succeeding fiscal year would, based on the required rate of reduction, again be 14 percent. However, FNS would compute what the State's goal for the succeeding year would have been had the State achieved its initial goal; in this case, had the State initially achieved its 14 percent goal, its goal for the next fiscal year would have been 13.1 percent. The State's liability for each period of the initial fiscal year would be eliminated if the State actually achieved the 13.1 percent level in the comparable period of the next fiscal year. The State would thus, in essence, have two goals for the next fiscal year: a 13.1 percent goal to substantiate its claim of good faith effort and secure a good cause finding, and a 14 percent goal to avoid assumption of a new, additional liability.); or

(ii) If a State's payment error rate was at or below the national standard payment error rate in a base period, and the State did not meet its goal in a period of the following fiscal year, the State achieved a reduction of its payment error for the comparable period(s) of the succeeding fiscal year to the level that would have been required if the State had met its initial goal, or to its original level in the original base period, which ever is lower. For example, if a State's error rate was 9.5 percent during a base period, and the national standard payment error rate for this base period was 10 percent, the State would be liable for errors in each period of the following fiscal year that were in excess of the 10 percent level. If the State's error rate in the following year was 10.2 percent, the State would incur a liability of 0.2 percent. The State's goal for the succeeding fiscal year would then be 9.7 percent (assuming the national standard error rate had dropped to at least this level). However, FNS would compute what the State's goal for the succeeding year would have been had the State achieved its initial goal; in this case its goal would have been the national standard payment error rate during the initial six month period for which it is liable. If the national standard had been 9 percent during this period, the State's liability for each period of the initial fiscal year would be eliminated if the State actually achieved the 9 percent level in the comparable period of the next fiscal year. However, if the national standard payment error rate during the period the State was liable had remained at 10 percent, the State's liability would be eliminated if it achieved its original error rate during the original base period, or 9.5 percent, since this is lower than the appropriate national standard payment error rate.

(ii) If FNS determines that there was good cause for all or part of a State's payment error rate to exceed its goal in a 6-month period, FNS shall reduce or eliminate the State's liability as appropriate.

(iii) Whenever a State is assessed for an excessive payment error rate, the State shall have the right to request an appeal in accordance with the procedures of § 276.7.

(6) *Determination of Payment Error Rates.* As specified in § 275.3(c), FNS will validate all States' reported error rates through rereviewing a sample of each State's QC sample and ensuring that each State's sampling, estimation and data management procedures are correct.

(i) FNS will adjust States' reported error rates through findings of rereviewed cases. Once the Federal case rereviews have been completed and all differences with the State agency have been resolved, the State's reported error rate will be adjusted using the following linear regression equation.

$y' = y + b(X - x)$ where

y' is the average value of allotment issued in error to participating households,

y is the average value of allotments issued in error in the rereview sample according to the Federal finding,

b is the estimate of the slope parameter,

x is the average value of allotments issued in error in the rereview sample according to State findings, and

X is the average value of allotments issued in error in the full quality control sampling according to the State findings.

The adjusted error rates are then given by:

$r = y'/u$ Where u is the average value of allotments issued to participating households.

The allotment error rates for eligibility, overissuance, and underissuance are each adjusted separately as detailed above and the sum of these after adjustments is the State's payment error rate. This adjusted error rate will then become the State's official error rate for use in the liability determination and in determinations for enhanced funding under paragraph (c) of this section.

(ii) If FNS determines that a State has sampled incorrectly, estimated improperly, or has deficiencies in its QC data management system, FNS will correct the State's reported error rate based upon a correction to that aspect of the State's QC system which is deficient. If FNS cannot accurately correct the State's deficiency, FNS will assign the State an error rate based upon the best information available. After consultation with the State, this assigned error rate will then be used in the above described liability determination and in determinations for enhanced funding under paragraph (c) of this section. States shall have the right to appeal assignment of an error rate in this situation in accordance with the procedure of § 276.7.

(iii) Should a State fail to complete 95 percent of its required sample size as required by § 275.11(f), FNS shall adjust the State's error rate by assigning an error rate equal to the upper limit of the confidence interval to that portion of cases between the State's completion rate and 95 percent, and recalculate the

State's error rate. A 67 percent confidence interval shall be used.

(iv) When a State's reported error rates are modified through assignment or adjustment of error rates by FNS as described in paragraphs (d)(6)(ii) and (iii) of this section, the State's final error rate shall continue to be subject to adjustment as described in paragraph (d)(6)(i) of this section.

PART 277—PAYMENT OF CERTAIN ADMINISTRATIVE COSTS OF STATE AGENCIES

8. Section 277.4(b) is amended by renumbering paragraph (b)(5) as (b)(8), revising paragraph (b)(2), and adding paragraphs (b) (5), (6), and (7) to read as follows:

§ 277.4 Funding

* * * * *

(b) *Federal Reimbursement Rate.*

* * *

(2) For the period beginning October 1, 1978, a State agency's federally-funded share of Food Stamp Program administrative costs shall be increased to 60 percent when the State's cumulative allotment error rate is less than 5 percent; provided that the State's negative case error rate is less than the national weighted mean negative case error rate for the period of enhanced funding.

* * * * *

(5) For the period beginning October 1, 1980, a State agency's federally-funded share of Food Stamp Program administrative costs shall be increased to 65 percent when that State meets the standards contained in § 275.25(c)(2)(i).

(6) For the period beginning October 1, 1980, a State agency's federally-funded share of Food Stamp Program administrative costs shall be increased to 60 percent when the State meets the standards contained in § 275.25(c)(2)(ii).

(7) For the period beginning October 1, 1980, a State agency which meets the standards of § 275.25(c)(2)(iii) shall be eligible for 55 percent federal funding for allowable program changes.

* * * * *

(P.L. 95–113, 91 Stat. 958 (7 U.S.C. 2011–2027), as amended by Pub. L. 96–249, 94 Stat. 364–365, May 26, 1980.)

[Catalog of Federal Domestic Programs No. 10.551, Food Stamps.]

Dated: January 19, 1981.

Carol Tucker Foreman,

Assistant Secretary.

[FR Doc. 81–2555 Filed 1–22–81; 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 assign functional responsibilities under the Swine Health Protection Act.

EFFECTIVE DATE: January 23, 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 functional responsibility for administering the provisions of the Swine Health Protection Act which was signed into law October 17, 1980. The Act regulates the feeding of garbage to swine and is considered necessary to prevent outbreaks of Hog Cholera and African Swine Fever and other such swine diseases which have become an increasing threat to the American hog industry. The Secretary has delegated this responsibility 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 85696).

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 adding a new paragraph (d)(2)(xvix) to read as follows:

§ 371.2 The Office of the Administrator.

* * * * *

(d) * * *

(2) * * *

(xvix) The Swine Health Protection Act (Pub. L. 96–468, 94 Stat. 2229 (7 U.S.C. 3901–3812)).

* * * * *

Authority: 5 U.S.C. 301.

Issued at Washington, D.C., this 12th day of January, 1981.

Harry C. Mussman,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 81–1845 Filed 1–22–81; 8:45 am]

BILLING CODE 3410–34–M

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 289]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This regulation establishes the quantity of fresh California-Arizona lemons that may be shipped to market during the period January 25–31, 1981. Such action is needed to provide for orderly marketing of fresh lemons for this period due to the marketing situation confronting the lemon industry.

EFFECTIVE DATE: January 25, 1981.

FOR FURTHER INFORMATION CONTACT: William J. Doyle, 202–447–5975.

SUPPLEMENTARY INFORMATION: *Findings.* This regulation is issued under the marketing agreement, as amended, and Order No. 910, as amended (7 CFR Part 910), regulating the handling of lemons grown in California and Arizona. The agreement and order are effective under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601–674). The action is based upon the recommendations and information submitted by the Lemon Administrative Committee, and upon other information. It is hereby found that this action will tend to effectuate the declared policy of the act.

This action is consistent with the marketing policy for 1980–81 which was designated significant under the procedures of Executive Order 12044. The marketing policy was recommended by the committee following discussion at a public meeting on July 8, 1980. A final impact analysis on the marketing policy is available from William J. Doyle, Acting Chief, Fruit Branch, F&V,

AMS, USDA, Washington, D.C. 20250, telephone 202–447–5975.

The committee met again publicly on January 19, 1981, at Los Angeles, California, to considered the current and prospective conditions of supply and demand and recommended a quantity of lemons deemed advisable to be handled during the specified week. The committee reports the demand for lemons is steady.

It is further found that there is insufficient time between the date when information became available upon which this regulation is based and when the action must be taken to warrant a 60 day comment period as recommended in E.O. 12044, and that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553). It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

Section 910.589 is added as follows:

§ 910.589 Lemon Regulation 289.

(a) The quantity of lemons grown in California and Arizona which may be handled during the period January 25, 1981, through January 31, 1981, is established at 215,000 cartons.

(b) As used in this section, "handled" and "carton(s)" mean the same as defined in the marketing order.

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

Dated: January 21, 1981

D. S. Kuryloski,

Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 81–2862 Filed 1–22–81; 8:45 am]

BILLING CODE 3410–02–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

Nonimmigrant Classes; Revised Requirements for Nonimmigrant "F–1" Students

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule eliminates the duration of status for all nonimmigrant students; limits their admission to definite stated periods; provides for extensions of stay; and establishes uniform criteria for use by Service district directors in reinstating students to lawful status.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT:

For general information: Stanley J. Kieszkiel, Acting Instructions Officer, Immigration and Naturalization Service, 425 Eye Street, N.W., Washington, DC 20536. Telephone: (202) 633–3048.

For specific information: Robert E. Coughlon, Immigration Examiner, Immigration and Naturalization Service, 425 Eye Street, N.W., Washington, DC 20536. Telephone: (202) 633–3946.

SUPPLEMENTARY INFORMATION: On March 19, 1980, the Service published proposed rules in the **Federal Register** at 45 FR 17590 to give interested persons an opportunity to participate in the rule making prior to adoption of the final rules revising the "F–1" student regulations. During the sixty day comment period following publication of the proposed rules in the **Federal Register**, the Service received 237 comments from educational institutions, educational associations, and individuals. The majority of commenters opposed eliminating the duration of status for nonimmigrant students and replacing it with annual extensions of stay. Duration of status for foreign students was initially implemented in January 1979 to reduce the continual need to process vast numbers of applications for extension of stay. While the duration of status regulations eased the administrative workload for the Service and the educational institutions affected, this procedure resulted in questionable control over the foreign students and has contributed to problems in record keeping. Recent events have highlighted the problem of control of foreign students in the United States. To meet this obligation, the Service proposed eliminating duration of status for foreign students and imposing an annual reporting requirement.

Additionally, the Service proposed uniform criteria for use by Service district directors in reinstating students to lawful status, where students overstayed or otherwise violated their status in circumstances beyond their control, or in hardship cases. Most commenters favored regulations which provided uniform criteria for reinstatement of students to lawful status to ensure equal treatment throughout the Service. The proposal revising the rules as to student transfers from one school to another, student employment, and temporary absences from the United States with subsequent reentry, also generated considerable controversy.

After carefully considering the comments received, reassessing the administrative costs involved, and the need for more effective accountability for foreign students admitted to the United States, the Service is modifying its position to provide for a graduated implementation of necessary regulations. This final rule represents the first step in a series of regulatory changes being planned to more effectively monitor foreign students and the schools which enroll them. It eliminates duration of status for all incoming foreign students as of the effective date of this order. Those foreign students who were previously admitted or granted duration of status are converted to date certain status based upon the anticipated completion date of their studies as certified on Form I–20. Students are not required to report to the Immigration and Naturalization Service to have their Form I–94 changed from duration of status to date certain. Date certain changes will be made on the Form I–94 as the students come in contact with the Immigration and Naturalization Service. Students returning to the U.S. after a temporary absence or who seek a benefit from the Service will have a date certain recorded on their Form I–94 at that time. Extensions of time to remain in the United States to pursue additional courses of study will be reviewed by the Service on a case-by-case basis. Extensions of time may be granted only for periods necessary to complete courses of study. The Service will no longer grant duration of status to any foreign students.

The proposed uniform criteria for reinstating students to lawful status are adopted as a final rule except that the second condition listed in the proposed subparagraph, i.e., "(2) is pursuing the same general educational objective for which he/she was originally granted student status," is deleted from the final revision as being too vague for uniform application. Reference to eligibility of an alien to receive deferred action treatment or voluntary departure in the same subparagraph is also deleted from the final revision as superfluous language. The proposed rule dealing with student temporary absence from the United States is substantially adopted as a final rule. The revised text merely eliminates reference to duration of status and provides for a specific expiration of status date on Form I–94. The proposed rules relating to student employment and school transfer will not be adopted in this order. The regulations

currently in force will remain unchanged pending further future assessment by the Service. The Service will not adopt the proposed rule revising § 214.5 which would have required all foreign students to report to their respective district offices on an annual basis.

Accordingly, the following amendments are made to Chapter I of Title 8 of the Code of Federal Regulations:

PART 214—NONIMMIGRANT CLASSES

1. Section 214.2, paragraph (f) is amended by revising subparagraphs (2), (3), (5), and adding (8) to read as follows:

§214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(f) * * *

2. *Admission.* A nonimmigrant who has a classification under section 101(a)(15)(F)(i) of the Act shall not be eligible for admission unless he/she establishes that he/she is destined to and intends to attend the school specified in his/her visa or the school specified on Form I–94 presented by a student returning from a temporary absence in accordance with subparagraph (3) of this paragraph. In all cases, the name of the school a student is authorized to attend and the expiration of status date shall be endorsed by the examining immigration officer on the student's Form I–94. The period of admission for a nonimmigrant student shall be for the period of time necessary to complete the course of study indicated on Form I–20, subject to the condition that the student maintains his/her passport valid for a minimum period of six months at all times while in the United States unless exempt from the presentation of a passport requirement. The period of stay will be adjusted if the student transfers to a different course of study. Extensions of stay may be applied for as described in subparagraph (5) of this paragraph.

3. *Temporary absence.* Form I–20 presented by a student returning from a temporary absence may be retained by him/her and used for any number of reentries within one year of the date of its issuance. However, a Canadian national or an alien landed immigrant of Canada who has a common nationality with Canadian nationals who has been temporarily absent in Canada, or any alien whose visa is considered to be automatically revalidated pursuant to 22 CFR 41.125(f)(2) or is within the purview of that regulation except that his/her nonimmigrant visa has not expired, returning to the United States as a nonimmigrant under section 101(a)(15)(F)(i) of the Act, shall, if otherwise admissible, be readmitted, without presentation of Form I–20, for the remainder of his/her initial admission or current extension of stay as shown on Form I–94, provided a specific expiration of status date is shown thereon. Any student whose Form I–94 indicates duration of status must present Form I–20 when applying for any admission to the United States after a temporary absence.

4. * * *

5. *Extension of stay and revocation of duration of status.* Each student previously granted duration of status is converted to date certain status as certified on Form I–20 unless adjustment of the date is made by the Service. Extensions of stay may be granted for the period of time necessary to complete a course of study if the student establishes that he/she is currently maintaining student status and is able to and in good faith intends to continue to maintain such status for the period for which the extension is requested. Application for extension of stay must be made on Form I–538. A student who desires an extension of stay for his/her spouse and children in a classification under section 101(a)(15)(F)(ii) of the Act may include them in his/her application. A student's spouse or children are not eligible for an extension of stay unless the student is eligible for an extension of stay. A student who has been compelled by illness to interrupt his/her schooling may be granted an extension of stay without being required to change his/her nonimmigrant classification provided he/she establishes that he/she will resume a full course of study after treatment.

6. * * *

7. * * *

8. *Reinstatement of student status.* Any alien who was admitted to the United States as, or whose status has been changed to, an F–1 nonimmigrant student, and who has overstayed the authorized period of stay granted by the Service or who has otherwise violated the conditions of such status may be reinstated in the discretion of the district director to lawful nonimmigrant student status only if the student:

(1) is currently pursuing a full course of study at an approved school,

(2) has not been employed without authorization, and

(3) is not deportable on any ground other than section 241(a)(2) or (9) of the Act, or, § 214.1(g) of this Chapter.

Additionally, the student must establish to the satisfaction of the district director that his/her violation of status resulted from circumstances beyond his/her control or that failure to receive reinstatement to lawful status would result in considerable hardship to the student.

No appeal shall lie from the decision of the district director.

* * * * *

(Secs. 103 and 214; U.S.C. 1103 and 1184)

Dated: January 16, 1981.

David Crosland,

Acting Commissioner of Immigration and Naturalization.

[FR Doc. 81–2514 Filed 1–22–81; 8:45 am]

BILLING CODE 4410–10–M

CIVIL AERONAUTICS BOARD

14 CFR Part 203

[Economic Regulations; Amendment No. 2 to Part 203; Docket 38783]

Removal of Certificate Restrictions

AGENCY: Civil Aeronautics Board.

ACTION: Erratum to ER–1207.

SUMMARY: The CAB corrects interim final rule ER–1207 (46 FR 1664, January 7, 1981) from which a clause was inadvertently omitted. The interim final rule amended the Board's restriction removal program by only granting unrestricted authority to domestic certificated carriers that have been found fit, willing and able to operate under the Federal Aviation Act.

FOR FURTHER INFORMATION CONTACT: Joseph A. Brooks, Office of the General Counsel, Civil Aeronautics Board, 1825 Connecticut Avenue, N.W., Washington, D.C. 20428; 202–673–5442.

SUPPLEMENTARY INFORMATION: In ER–1206 (45 FR 86413, December 31, 1980), the Board added paragraph (f) to 14 CFR 203.3. Paragraph (f) states that any new authority that the Board grants to an air carrier will include nonstop authority to all other points on its certificate, except where new authority has been deferred pending environmental analysis. ER–1207 (46 FR 1664, January 7, 1981) in turn amended paragraph (f) to state that the award of additional nonstop authority under § 202.3 only applies to those carriers that have been found fit, willing, and able under the Federal Aviation Act. In making this amendment, the exception clause in the last line of paragraph (f) was inadvertently dropped.

In column 3 of ER–1207, at 46 FR 1664, the rule should read as follows:

§ 203.3 Timetable of automatic removal of restrictions.

* * * * *

(f) After December 31, 1980, any route authority granted by the Board to a carrier that has been found fit, willing, and able to provide scheduled passenger air transportation will include nonstop authority to all existing points on the carrier's route system, except for those points where new authority has been deferred by Board order pending environmental analysis.

Dated: January 19, 1981

Phyllis T. Kaylor,

Secretary.

[FR Doc. 81-2515 Filed 1-12-81; 8:45 am]

BILLING CODE 6320-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

Supplemental Security Income for the Aged, Blind, and Disabled; State Supplementation Provisions; Agreements; Payments—Use of Regression Formula in Computing Federal Liability

AGENCY: Social Security Administration, HHS.

ACTION: Interim rule with request for comments.

SUMMARY: This regulation will afford States for whom SSA administers both optional and mandatory State supplementation payments under the Supplemental Security Income (SSI) program, the use of a regression formula in the computation of Federal fiscal liability (FFL) rates. With FFL the Federal government assumes responsibility for Federal errors discovered by the quality assurance system, which exceed the 4 percent tolerance for error as established in the regulations. The regression formula is a means of determining the relationship between our original quality assurance findings and the results of an independent State review of a subsample of these same cases. It is an alternative to the current method of correcting only the differences noted in the States subsample, before we compute the FFL error rates. The use of the regression formula is at the option of the State, and is effective with 6-month sample periods beginning October 1, 1980.

EFFECTIVE DATE: This interim regulation is effective (enter date of publication), but States may start applying it with the 6-month sample periods beginning October 1, 1980. We will consider any comments we receive on or before March 24, 1981.

ADDRESSES: Send your written comments to the Social Security Administration, Department of Health and Human Services, P.O. Box 1585, Baltimore, Maryland 21203.

Copies of all comments we receive can be seen at the Washington Inquiries Section, Office of Government Affairs, Department of Health and Human Services, Switzer Building, Room 1212, 330 C Street, S.W., Washington, D.C. 20201.

FOR FURTHER INFORMATION CONTACT: Willie H. Dow, Room 4123 Annex Building, 6401 Security Boulevard, Baltimore, Maryland 21235, (301) 597-2516.

SUPPLEMENTARY INFORMATION: Some States have entered into an agreement for us to administer the States' mandatory and optional supplementary payments in the SSI program. Part of our responsibility is to review a valid sample of cases for each 6-month period beginning in April and October of each year, and to compute our FFL if our error rate based on the review exceeds a prescribed standard (currently 4 percent). Additionally, a State may rereview the cases we select. Traditionally, the States have chosen to rereview a small subsample of these cases. If we agree with the State's review findings, we revise our data base and compute our FFL by treating the State's findings as if they were our own on a case-by-case basis.

Recently the States, through the National Council of State Public Welfare Administrators (NCSPWA), have proposed the use of a mathematical regression formula to weight the value of errors detected by a State in its subsample review. A regression methodology estimates the extent of differences in the full sample, whereas the present case-by-case methodology corrects only differences noted in the State's subsample and our sample. The regression formula produces more accurate final error rates without having to subject to rereview every case in the quality assurance sample. The effect of using the regression formula in any particular FFL determination may be to raise, lower, or not change original error rate projections. However, use of a regression formula in the Aid to Families with Dependent Children (AFDC) program results most often in raising error rates.

Historically, the quality control systems in SSI and in AFDC have been similar. The regression formula has been used for some time in the AFDC program. The States have requested that the use of the regression formula be an available option in the SSI program. Accordingly, we have amended § 416.2086(h)(2) to allow a State, at its option, to use the regression formula for 6-month sample periods beginning October 1, 1980.

The proposal provides the States with an option that they presently do not have in their subsample review of SSI cases. Use of the regression formula will increase accuracy of the payment error rate used for FFL determination and may lower administrative costs for both the States and us. Prompt effectuation of the new rules effective with the six month sample period beginning October, 1980 will remove the final barrier to negotiation of a new model agreement with the States. Accordingly, we find that good cause exists for publication of these rules without notice of proposed rulemaking in accordance with § 553(b) of the Administrative Procedure Act. (5 U.S.C. 553(b)).

(Secs. 1102 and 1631 of the Social Security Act, as amended; 49 Stat. 647, as amended, 86 Stat. 1745, as amended; 42 U.S.C. 1302 and 1383)

(Catalog of Federal Domestic Assistance Program No. 13.807 Supplemental Security Income Program)

Dated: January 15, 1981.

William J. Driver,

Commissioner of Social Security.

Approved: January 19, 1981.

Patricia Roberts Harris,

Secretary of Health and Human Services.

Part 416 of Chapter III of Title 20 of the Code of Federal Regulations is amended at § 416.2086 by revising paragraph (h)(2) to read as follows:

§ 416.2086 Federal liability when error rate in payment of federally administered State supplementation exceeds national standard.

* * * * *

(h) * * *

(1) * * *

(2) *Adjustment to liability.* If a State's finding in a case differs from ours and if we agree that the State is correct, we will use this revised finding in computing FFL. We will then determine our liability—

(i) By treating the State's findings on cases that we agree upon as if they were the findings of our sample review; or

(ii) At the State's option, through the use of a regression formula as specified in the Federal-State agreement. For purposes of this section, the term "regression formula" means a mathematical technique commonly used in statistical analysis. The results derived from analyzing a subsample of the total cases selected for quality

review will be mathematically adjusted to project an accurate computation of the case errors in the total sample of cases selected for quality review. This option is available for 6-month sample periods beginning on or after October 1, 1980.

[FR Doc. 81-2520 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-07-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 614

Unemployment Compensation for Ex-Servicemembers; New Schedule of Remuneration

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: The Department of Labor is revising 20 CFR 614.19, to increase the monthly rates of remuneration in the Schedule of Remuneration used to compute the Federal wages of ex-servicemembers covered by the program of Unemployment Compensation for Ex-Servicemembers (UCX Program). The new schedule will apply to new claims under the UCX Program that are filed on and after January 4, 1981.

DATES: Effective date: January 4, 1981, with respect to first claims filed on and after that date.

Comments: All comments on this proposal must be received on or before February 27, 1981.

ADDRESSES: Send comments on this proposal to the U.S. Department of Labor, Employment and Training Administration, Room 7000, Patrick Henry Building, 601 "D" Street, N.W., Washington, D.C. 20213.

All comments received will be available for public inspection during normal business hours, in room 7000 at the above address.

FOR FURTHER INFORMATION CONTACT: Bert Lewis, Administrator, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, N.W., Washington, D.C. 20213, telephone: 202-376-7032.

SUPPLEMENTARY INFORMATION: The UCX Program was established by the "Ex-Servicemen's Unemployment Compensation Act of 1958," and is now codified at Subchapter II of Chapter 85, in Title 5 of the United States Code (5 U.S.C. 8521-8525). It is a program of unemployment benefits for individuals who are separated from military service and are unable to obtain work.

In most unemployment compensation programs the benefit amounts payable to claimants are computed on the basis of the wages paid to each claimant in a designated base period. For the UCX Program, the statute provides that benefit amounts shall be computed on the basis of wages as prescribed in the current Schedule of Remuneration.

Section 8521(a)(2) requires the Secretary of Labor to issue, from time to time, after consultation with the Secretary of Defense, a Schedule of Remuneration specifying the pay and allowances for each pay grade of members of the military services, which reflect representative amounts for appropriate elements of the pay and allowances whether in cash or in kind.

A Schedule of Remuneration adopted in accordance with the law has been published from time to time as changes in military pay and allowances occur, and appears in 20 CFR 614.19. These schedules adopted from time to time are made effective for new claims filed on and after the effective date of each new schedule, and new claims established under a prior schedule are not changed.

The new Schedule of Remuneration in this document adjusts the scheduled monthly rates of pay upward to reflect the military pay increase that became effective on October 1, 1980, under Executive Order 12248. The new schedule set forth in this document is made effective with respect to first claims which are filed on and after January 4, 1981, to conform to the new pay schedules that went into effect on October 1, 1980. The purpose of making the new schedule effective in the first week of the quarter succeeding the quarter in which the pay increase takes effect is to regularize the effective dates of new schedules. This stabilizes administration of the UCX Program and is fairer to claimants.

In order to accomplish this goal with respect to the 1980 military pay raise it is essential to make the new schedule effective on January 4, 1981. For this reason I, as Secretary of Labor, find that, irrespective of 29 CFR 2.7, it is contrary to the public interest to publish the new Schedule of Remuneration as a proposal with opportunity for comment, and for the same reason I find that it is necessary that the new Schedule shall become effective on January 4, 1981.

Although the new Schedule is being published in final form and is made effective as stated above, it is the policy of the Department of Labor to solicit and consider comments on the regulations it issues. Therefore, comments will be received, just as though the new schedule were a proposal, until February 27, 1981, after which time the comments received will be evaluated and, if warranted, the Schedule will be appropriately revised. Meanwhile, in the interest of making the new Schedule effective as stated above, it shall remain in force until revised.

Interested persons are invited to submit written data, views, or arguments on the new Schedule, on or before February 27, 1981.

Note.—The Department of Labor has determined that this document does not contain a major regulation that requires the preparation of a regulatory analysis, within the meaning of Executive Order 12044 and the Department's guidelines published at 44 FR 5570. This note also reflects that I have certified, in accordance with 5 U.S.C. 605(b), that the regulation in this document will not have a significant economic impact on a substantial number of small business entities.[1]

This document was prepared under the direction and control of Bert Lewis, Administrator, Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, N.W., Washington, D.C. 20213; telephone: 202-376-7032.

Accordingly, it is proposed to amend 20 CFR Part 614 as follows:

1. The authority citation for Part 614 is revised to read as follows:

Authority: 5 U.S.C. 8508; Secretary's Order No. 4-75, 40 FR 18515; (5 U.S.C. 301). Interpret and apply secs. 8521-8525 of title 5, United States Code.

2. In Part 614, § 614.19 is revised to read as follows:

§ 614.19 Schedule of remuneration.

(a) The following Schedule of Remuneration is issued pursuant to 5 U.S.C. 8521(a)(2), and shall apply to first claims which are filed on or after January 4, 1981:

Pay grade	Monthly rate
(1) Commissioned Officers:	
O-10	$5,388
O-9	5,386
O-8	5,385
O-7	5,004
O-6	4,149
O-5	3,376
O-4	2,788
O-3	2,343
O-2	1,868
O-1	1,392
(2) Warrant Officers:	
W-4	$2,638
W-3	2,138
W-2	1,852
W-1	1,593
(3) Enlisted Personnel:	
E-9	$2,299

[1] A copy of a letter of certification is filed with the Office of the Federal Register as part of the original document.

Pay grade	Monthly rate
E-8	1,950
E-7	1,680
E-6	1,429
E-5	1,207
E-4	1,037
E-3	922
E-2	854
E-1	783

(b) The Schedule of Remuneration published at 45 FR 1014, on January 4, 1980, remains applicable to first claims filed prior to the effective date of the new Schedule of Remuneration set forth in paragraph (a). The new schedule in paragraph (a) does not revoke the prior schedule or any preceding schedule or change the periods of time they were in effect.

Signed at Washington, D.C., on January 16, 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-2403 Filed 1-19-81; 4:02 pm]

BILLING CODE 4510-03-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket No. 80F-0122]

Antioxidants and/or Stabilizers for Polymers; N,N'-Hexamethylenebis(3,5-di-Tert-Butyl-4-Hydroxyhydrocinnamamide)

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the food additive regulations to provide for the safe use of *N,N'*-hexamethylenebis(3,5-di-*tert*-butyl-4-hydroxyhydrocinnamamide) as an antioxidant and/or stabilizer for nylon resins used in articles intended for food-contact use. This action responds to a food additive petition filed by Ciba-Geigy Corp.

DATES: Effective January 23, 1981, objections by February 23, 1981.

ADDRESS: Written objections 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: Marvin D. Mack, Bureau of Foods (HFF-334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5740.

SUPPLEMENTARY INFORMATION: In a notice published in the **Federal Register** of April 29, 1980 (45 FR 28496), FDA announced that a food additive petition (FAP OB3499) had been filed by Ciba-Geigy Corp., Ardsley, NY 10502, proposing to amend § 178.2010 *antioxidants and/or stabilizers for polymers* (21 CFR 178.2010) to provide for the safe use of *N,N'*-hexamethylenebis(3,5-di-*tert*-butyl-4-hydroxyhydrocinnamamide) as an antioxidant and/or thermal stabilizer for nylon resins used in articles intended for food-contact use.

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.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will have no significant impact on the human environment and that an environmental impact statement, therefore, is not required. The agency's finding of no significant impact and the evidence supporting this finding, may be seen in the Dockets Management Branch (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.

Therefore, 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)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Part 178 is amended in § 178.2010(b) by alphabetically inserting a new item in the list of substances to read as follows:

§ 178.2010 Antioxidants and/or stabilizers for polymers.

* * * * *

(b) * * *

Substances	Limitations
* * *	* * *
N,N'-Hexamethylenebis(3,5-di-tert-butyl-4-hydroxyhydrocinnamamide) (CAS Reg. No. 23128-74-7).	For use only: 1. At levels not to exceed 1 percent by weight of nylon resins complying with § 177.1500(b) of this chapter, items 1 through 8, that contact food only of the types identified in categories in § 176.170(c) of this chapter, table 1, except VI-A and VI-C. 2. At levels not to exceed 0.75 percent by weight of nylon 12 resins complying with § 177.1500(b) of this chapter, item 9, that contact food only of the types identified in categories in § 176.170(c) of this chapter, table 1, except VI-A and VI-C.

* * * * *

Any person who will be adversely affected by the foregoing regulation may at any time on or before February 23, 1981, submit to the Dockets Management Branch (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 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 23, 1981.

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

Dated: January 12, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-1715 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 201

[Docket No. 75N-0066]

Content and Format for Labeling for Human Prescription Drugs; Amendment of Effective Date for Certain Biological Products

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the effective date of its regulations designating a required content and format for the professional labeling of certain biological products for human use. FDA is taking this action to reduce the burden of the regulations on

manufacturers of certain biological products licensed after July 1, 1972.

DATES: Effective January 23, 1981; comments by March 24, 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: About this notice: Paul K. Hiranaka, Bureau of Biologics (HFB–620), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20205, 301–443–1306.

About labeling requirements and changes in biological licenses: Michael G. Beatrice, Bureau of Biologics (HFB–720), Food and Drug Administration, 8800 Rockville Pike, Bethesda, MD 20205, 301–443–5433.

SUPPLEMENTARY INFORMATION: In the **Federal Register** of May 16, 1980 (45 FR 32550), FDA issued a final rule establishing in § 201.59 (21 CFR 201.59) effective dates for compliance with the content and format requirements in §§ 201.56, 201.57 and 201.100(d)(3) (21 CFR 201.56, 201.57, and 201.100(d)(3)) for the professional labeling of prescription drugs. The regulation also gives dates for the submission of revised labeling by manufacturers.

With respect to biological products, the rule provides for manufacturers of products licensed after July 1, 1972, to submit revised labeling copy by November 1, 1980. The rule provides, however, that manufacturers of products licensed before July 1, 1972, and reviewed generically by an advisory panel under FDA's review of licensed biological products, are not required to comply with the labeling requirements until 6 months after a final order is published under § 601.25(g) (21 CFR 601.25(g)). The agency has reconsidered this requirement and concludes that it unnecessarily burdens manufacturers of products that are both licensed after July 1, 1972, and also reviewed generically by an advisory panel under FDA's review of licensed biological products. Those manufacturers would be required to revise their professional labeling now and may be required to revise their labeling again after a final order is published.

To relieve this burden, FDA is amending the regulations to provide the same due dates for submission of revised labeling and the same effective dates for all biological products that are reviewed generically by an advisory panel, and are the subject of a final order, regardless of whether the products were licensed before or after July 1, 1972. The due date for submission of the revised labeling is 6 months after a final order is published. The effective date is 2 years after the due date. This amendment does not, however, affect the due dates and effective dates of November 1, 1980, and November 1, 1982, respectively, for products licensed after July 1, 1972, that are not being reviewed under FDA's review of licensed biological products.

The agency has determined pursuant to 21 CFR 25.24(d)(13) (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 (secs. 201, 502, 701, 52 Stat. 1040–1042 as amended, 1050–1051 as amended, 1055–1056 as amended (21 U.S.C. 321, 352, 371)) and the Public Health Service Act (sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.1), Part 201 is amended in § 201.59(a) in the table by revising the entries under "Biologics" to read as follows:

§ 201.59 Effective date of §§ 201.56, 201.57, 201.100(d)(3), and 201.100(e).

* * * * *

Effective	Revised labeling due	Drug class	Mail routing code
Biologics			
Nov. 1, 1982	Nov. 1, 1980	Bacterial vaccines and antigens with no U.S. standard of potency.	HFB–720
Do	do	Skin test antigens	HFB–720
Nov. 1, 1982, except the effective date for all biological products reviewed generically by the advisory panel is 30 months after a final order is published under 21 CFR 601.25(g).	Nov. 1, 1980, except the due date for all biological products reviewed generically by the advisory panel is 6 months after a final order is published under 21 CFR 601.25(g).	Bacterial vaccines and toxoids with standards of potency.	HFB–720
Do	do	Viral and rickettsial vaccines	HFB–720
Do	do	Allergenic extracts	HFB–720
Do	do	Blood and blood derivatives	HFB–720
* * *	* * *	* * *	*

* * * * * * *

Under the Administrative Procedure Act (5 U.S.C. 553 (b) and (d)) and 21 CFR 10.40 (c)(4) and (e)(1), the agency concludes that there is good cause to find that notice, public procedure, and delayed effective date are unnecessary for the amendment of § 201.59 because the revision does not impose any new substantive burden on any person. However, interested persons may, on or before March 24, 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 final rule. Such comments will be considered in determining whether amendments or revisions to the regulation are warranted. 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.

Effective date. This final rule becomes effective January 23, 1981.

(Secs. 201, 502, 701, 52 Stat. 1040–1042 as amended, 1050–1051 as amended, 1055–1056 as amended (21 U.S.C. 321, 352, 371); sec. 351, 58 Stat. 702 as amended (42 U.S.C. 262))

Dated: January 12, 1981.

William F. Randolph,
Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-1749 Filed 1-22-81; 8:45 am]
BILLING CODE 4110-03-M

21 CFR Part 444

[Docket No. 80N-0187; DESI 8674]

Oligosaccharide Antibiotic Drugs; Antibiotic Otic Preparations; Confirmation of Effective Date and Amendment

Correction

In FR Doc. 80-34057, at page 73034, in the issue of Tuesday, November 4, 1980, on page 73035, make the following corrections:

(1) In the first column, under § 444.442a, second line from the end of the page, correct "§ 444.442(a)(1)" to read "§ 444.42a(a)(1)".

(2) In the second column, paragraph (a)(3)(ii)(*b*)(*1*) of § 444.442a, capitalize the "a" after the colon which appears at the end of the first line.

(3) In the second column, paragraph (b)(1), the third line down, correct "§ 444.442a" to read "§ 444.42a".

BILLING CODE 1505-01-M

21 CFR Parts 510 and 522

Implantation or Injectable Dosage Form New Animal Drugs Not Subject to Certification; Chorionic Gonadotropin

Correction

In FR Doc. 80-37892, published at page 81037, in the issue of Tuesday, December 9, 1980, and corrected at 46 FR 2998, January 13, 1981, the correction should have been to § 510.600(c)(2). In the first column on page 2998, second paragraph, the phrase in the first sentence now reading "In § 522.600(c) * * *" should read "In § 510.600(c) * * *".

BILLING CODE 1505-01-M

21 CFR Parts 436 and 446

[Docket No. 80N-0297]

Tests and Methods of Assay of Antibiotic and Antibiotic-Containing Drugs and Tetracycline Antibiotic Drugs—Doxycycline Hyclate Tablets

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 dosage form, doxycycline hyclate tablets. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective January 23, 1981, comments by February 23, 1981.

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

FOR FURTHER INFORMATION CONTACT: 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 dosage form, doxycycline hyclate tablets. The agency concludes that the data supplied by the manufacturer on doxycycline hyclate tablets are adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in Parts 436 and 446 (21 CFR Parts 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, 52 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 446 are amended as follows:

1. Part 436 is amended in § 436.541 by revising the section heading, by alphabetically inserting a new item into the table in paragraph (b), and by adding paragraph (c)(3), to read as follows:

§ 436.541 Dissolution test.

* * * * *

(b) * * *

Dosage form	Dissolution medium	Stirring blade[1]	Sampling time(s)
Doxycycline hyclate tablets.	900 mL distilled water.	75	60 min. and 90 min.

[1] Stirring blade rotation rate (revolutions per minute).

(c) * * *

(3) *Doxycycline hyclate.* Proceed as directed in paragraph (c)(1) of this section, except use the doxycycline working standard.

2. Part 446 is amended by adding new § 446.120c to read as follows:

§ 446.120c Doxycycline hyclate tablets.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Doxycycline hyclate tablets contain doxycycline hyclate with or without one or more disintegrants, lubricants, colorings, and coating substances. Each tablet contains doxycycline hyclate equivalent to 100 milligrams of doxycycline. Its potency is satisfactory if it is not less than 90 percent and not more than 120 percent of the number of milligrams of doxycycline that it is represented to contain. Its moisture content is not more than 5.0 percent. It passes the dissolution test. It passes the identity test. The doxycycline hyclate conforms to the standards prescribed by § 446.20(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 doxycycline hyclate used in making the batch for potency, safety, moisture, pH, doxycycline content, identity, and crystallinity.

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

(ii) Samples required:

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

(*b*) The batch: A minimum of 100 tablets.

(b) *Tests and methods of assay*—(1) *Potency.* Proceed as directed in § 436.106 of this chapter, preparing the sample for assay as follows: Place a representative number of tablets into a high-speed glass blender jar containing 0.1*N* hydrochloric acid to obtain a stock solution of convenient concentration containing not less than 150 micrograms of doxycycline per milliliter (estimated). 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 0.100 microgram of doxycycline per milliliter (estimated).

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

(3) *Dissolution.* Proceed as directed in § 436.541 of this chapter, except in lieu of paragraph (d) of that section, use the interpretation described in the United States Pharmacopeia XX dissolution test. The quantity, *Q* (the amount of doxycycline dissolved) is 55 percent at 60 minutes and 85 percent at 90 minutes.

(4) *Indentity.* Proceed as directed in § 436.308 of this chapter, except prepare the sample and standard solutions as follows: Grind tablet to a powder. Dissolve precise amount of the doxycycline tablet and of the doxycycline working standard in methanol and further dilute each solution to a concentration of 1 milligram of doxycycline per milliliter. Prepare the sample-standard mixed solution by mixing equal volumes of the final standard and sample solutions. The standard and sample must each produce a major, yellow flourescent spot with the same R_f value and the standard-sample mixed solution must show no separation of major spots.

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 23, 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 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 adversely affected by this regulation may file objections to it, request a hearing, and show reasonable ground for the hearing. Any person who decides to seek a hearing must file (1) on or before February 23, 1981, a written notice of participation and request for hearing, and (2) on or before March 24, 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 a 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 23, 1981.

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

Dated: January 12, 1981.

Mary A. McEniry,

Assistant Director for Regulatory Affairs, Bureau of Drugs.

[FR Doc. 81-2205 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 449

[Docket No. 80N-0300]

Antifungal Antibiotic Drugs Griseofulvin (Ultramicrosize) Tablets

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) amends the antibiotic drug regulations to provide for certification of a new type (without polyethylene glycol 6,000) of griseofulvin (ultramicrosize) tablet. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective January 23, 1981; comments by February 23, 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 type (without polyethylene gylcol 6,000) of griseofulvin (ultramicrosize) tablet. The agency concludes that the data supplied by the manufacturer concerning this antibiotic drug are adequate to establish its safety and efficacy when the drug is used as directed in the labeling and that the regulations should be amended in Part 449 (21 CFR Part 449) 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), Part 449 is amended in § 449.120d by revising paragraphs (a)(1) and (a)(3)(i)(*a*), to read as follows:

§ 449.120d Griseofulvin (ultramicrosize) tablets.

(a) * * *

(1) *Standards of identity, strength, quality, and purity.* Griseofulvin (ultramicrosize) tablets are composed of ultramicrosize crystals of griseofulvin which may or may not be dispersed in polyethylene glycol 6,000. Each tablet contains 125 milligrams of griseofulvin. The griseofulvin content is satisfactory if it is not less than 90 percent and not more than 115 percent of the number of milligrams of griseofulvin that it is represented to contain. The loss on drying is not more than 5.0 percent. It passes the solubility characteristic test. If it is dispersed in polyethylene glycol 6,000, the griseofulvin used conforms to the standards prescribed by § 449.20(a)(1). If it is not dispersed in polyethylene glycol 6,000, the griseofulvin used conforms to the standards prescribed by § 449.20(a)(1), except specific surface area.

* * * * *

(3) * * *

(i) * * *

(*a*) The griseofulvin used in making the batch for potency, safety, loss on drying, melting point, specific rotation, identity, residue on ignition, heavy metals, specific surface area (if it is dispersed in polyethylene glycol 6,000), and crystallinity.

* * * * *

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 23, 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 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 23, 1981, a written notice of participation and request for hearing, and (2) on or before March 24, 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 a 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 23, 1981.

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

Dated: January 12, 1981.

Mary A. McEniry,

Assistant Director for Regulatory Affairs, Bureau of Drugs.

[FR Doc. 81–2204 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 7762]

Income Tax; Defined Benefit Plans for Self-Employed Individuals and Shareholder-Employees

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document provides final regulations relating to defined benefit plans for self-employed individuals and shareholder-employees. Changes to the applicable tax law were made by the Employee Retirement Income Security Act of 1974. These regulations provide necessary guidance to the public for compliance with the law and affect sole proprietorships, partnerships, and "Subchapter S" corporations which maintain tax-qualified defined benefit plans.

DATE: The regulations are generally effective for taxable years beginning after December 31, 1975, and to plan years beginning with or within such taxable years.

FOR FURTHER INFORMATION CONTACT: Richard J. Wickersham of the Employee Plans and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3250) (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

On May 26, 1978, the **Federal Register** published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 401(a)(18), 401(j), 404 and 1379 of the Internal Revenue Code of 1954 (43 FR 22734). The amendments were proposed to conform the regulations to section 2001(d) of the Employee Retirement Income Security Act of 1974 (88 Stat. 953). A public hearing was held on October 4, 1978. After consideration of all comments regarding the proposed amendments, those amendments are adopted as revised by this Treasury decision.

Organization of the Regulations

In response to criticism that the proposed regulations were unnecessarily confusing, the final regulations have been reorganized. The sections have been substantially reordered, but the substance is unchanged except as discussed below.

Defined Benefit Plans

Section 401(j) applies only to defined benefit plans benefitting self-employed individuals or shareholder-employees. Several commentators asked whether a target benefit plan would be considered a defined benefit plan for purposes of section 401(j). A target benefit plan is a money purchase pension plan which specifies a targeted benefit commencing at normal retirement age. Under such a plan contributions equal the amount necessary to fund the targeted benefit if all the actuarial assumptions are realized. However, because contributions are not adjusted to reflect experience gains and losses, a participant's actual benefit, which is provided solely from amounts allocated to the participant's account, may differ from the participant's targeted benefit. A sentence has been added to § 1.401(j)–1(a)(2) to make it clear that a target benefit plan is not a defined benefit plan even though the amount contributed is based on estimates of amounts necessary to fund specified benefits.

Adjustments for Nonbasic Benefits

Several commentators objected to adjustments to the statutory percentages for various nonbasic benefits, particularly pre-retirement death benefits and qualified joint and survivor annuities. Other commentators suggested that organizations other than insurance companies, such as banks and savings and loans, be permitted to offer benefits for a term greater than life expectancies. Benefits for longer than life expectancy are permitted, although an adjustment is required because benefits for any period other than life are nonbasic benefits. However, adjustments for nonbasic benefits are required under section 401(j)(3)(B)(ii) to provide for comparability between defined contribution and defined benefit plans for owner-employees and shareholder-employees. Therefore these adjustments cannot be eliminated. Section 1.401(j)–1(g)(2)(i) of the final regulations provides that the actuarial equivalents for nonbasic benefits must be based on the 1971 Group Annuity Mortality Table for males and an interest rate of 6% compounded annually. These are the assumptions used to determine the applicable percentages in section 401(j)(3) and § 1.401(j)–1(f)(1).

Several commentators objected to the prohibition of cost of living adjustments in proposed § 1.401(j)–1(g)(2)(ii). As a result, cost of living adjustment has been added to the list of nonbasic benefits in § 1.401(j)–1(g)(3)(i) of the final regulations. While the cost of living adjustment may be based on any index (for example, the Consumer Price Index, the performance of a particular group of stocks, or the prime rate) the plan must provide a maximum annual percentage increase. The adjustments for cost of living adjustments will be based on those maximums.

Adjustments for various nonbasic benefits were set forth in a proposed Revenue Ruling, IRS Announcement 78–96, 1978–23 I.R.B. 42 (June 5, 1978). The Service intends to finalize that Revenue Ruling in the near future.

Multiple Plans

Proposed § 1.401(j)–2(b) provided that benefits under all plans of a single employer and all plans in which an individual is a self-employed individual would be aggregated in determining whether the benefit for that individual exceeds the maximum basic benefit permitted under section 401(j). Several commentators suggested that the final regulations clarify to what extent Subchapter S plans must be aggregated, for purposes of section 401(j), with other Keogh, Subchapter S and non-Subchapter S corporate plans that are aggregated under section 414 (b) or (c).

Under § 1.401(j)–2(a) of the final regulations Subchapter S plans must be aggregated with other Subchapter S or Keogh plans only if they are part of a controlled group within the meaning of section 414 (b) or (c). If a controlled group includes both Subchapter S corporations and non-Subchapter S corporations, the plans of the non-Subchapter S corporations will be disregarded for purposes of section 401(j). All Keogh plans in which an individual is a self-employed individual must be aggregated, whether or not under common control.

Aggregating Plans

Section 1.401(j)–2(c) provides a method for determining the maximum benefit permitted on behalf of an employee subject to the limitations of section 401(j) when a defined benefit plan and defined contribution plan covering that employee are required to be aggregated. Under this method the plan first determines the 401(j) defined contribution fraction (the amount deductible for the participant under the defined contribution plan over the maximum amount deductible). The 401(j) defined benefit fraction is then determined by subtracting the 401(j) defined contribution fraction from one.

A new provision has been added to § 1.401(j)–2(c)(3) to cover situations where the 401(j) defined contribution fraction varies from year to year because of varying contributions.

Insured Plans

Section 1.401(j)–2(c) of the proposed regulations provided an adjustment to a participant's maximum benefit under a fully insured plan if the cash value exceeded the rates set forth in that paragraph of the proposed regulations. That rule has been revised in the final regulations. New § 1.401(j)–4(a) limits the cash value which may be accumulated under a fully insured level premium plan described in section 412(i). New § 1.401(j)–4(b)(1) limits the value of all other insurance or annuity contracts to the actuarial equivalent of the maximum benefit, using the same assumptions used to determine the applicable percentages (1971 Group Annuity Mortality Table (male) without projection and 6 percent interest compounded annually). For single premium participating or variable annuity contracts purchased at or near normal retirement age the value of the contract equals the premium. Limits on variable or participating contracts purchased at other times or in installments equals the premium for a comparable single premium contract.

Under § 1.401 (j)–4 (c) of the final regulations, an insured plan that does not distribute insurance or annuity contracts to its participants or otherwise provide that a participant may receive the cash surrender value or dividends under such contract will not be subject to the limitations of § 1.401 (j)–4.

Participating and Variable Annuities

Proposed § 1.401 (j)–1(g)(2)(ii) prohibited variable annuities in section 401(j) plans. Several commentators objected that variable benefits may be a desirable feature in a defined benefit plan. As a result of these comments, the final regulations permit the use of participating and variable annuity contracts in section 401(j) plans.

Transitional Rule

Section 401(j) and the regulations thereunder are effective for taxable years beginning after December 31, 1975. However, § 1.401(j)–6(b) provides a transitional period during which a plan can be amended to limit future accruals to compensate for accruals in excess of the maximum benefit permitted under section 401(j). Under the proposed regulations, the transitional rule applied only to excess benefits accrued in plan years beginning before July 25, 1978. Under the final regulations, the transitional rule applies to all plan years beginning before January 23, 1982.

The transitional rule has also been expanded to explain how a plan can limit future accruals to comply with the

transitional rule. A fully insured level premium plan described in section 412(i) will comply with the transitional rule if a new level premium is established which, when combined with the cash surrender value of the current contract, will result in a cash surrender value at or below the limits described in § 1.401(j)–4(a).

Integration

Several commentators were uncertain whether a Subchapter S plan could be integrated with Social Security. Section 401(j)(4) and § 1.401(j)–2(f) provide that a plan benefiting owner-employees will not satisfy the requirements of section 401(j) unless the plan is nondiscriminatory without taking into account contributions or benefits provided under Social Security or other state or federal law. There is no similar restriction on plans benefiting shareholder-employees. Thus, a Subchapter S plan may be integrated with Social Security.

Drafting Information

The principal author of this regulation is Ellen A. Hennessy of the Employee Plans and Exempt Organizations 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 regulation, both on matters of substance and style.

Adoption of Amendments to the Regulations

Accordingly—

1. Paragraphs 3 and 4, as set forth in the notice of proposed rulemaking, are withdrawn.

2. The other amendments to 26 CFR Part 1 are hereby adopted as set forth below.

Paragraph 1. Section 1.401(a)–18, as set forth in paragraph 1 of the notice of proposed rulemaking, is added immediately after § 1.401(a)–17:

§ 1.401(a)–18 Special requirements for defined benefit plans providing benefits for self-employed individuals or shareholder-employees.

For special requirements which apply to a defined benefit plan which provides benefits for an employee who is either an employee within the meaning of section 401(c)(1) or a shareholder-employee within the meaning of section 1379(d), see §§ 1.401(j)–1 through 1.401(j)–6.

Par. 2. Sections 1.401(j)–1 through 1.401(j)–6, as set forth in paragraph 2 of the notice of proposed rulemaking, are revised to read as follows and added immediately after § 1.401(e)–6:

§ 1.401(j)–1 Defined benefit plans covering self-employed individuals or shareholder-employees.

(a) *Application of section 401(j)*—(1) *Qualification.* A defined benefit plan (as defined in section 414(j)) which provides benefits for a self-employed individual or shareholder-employee is not a qualified plan (and a trust forming part of such plan is not a qualified trust) unless the plan satisfies the applicable requirements of section 401(j) and §§ 1.401(j)–1 through 1.401(j)–6. "Self-employed individual" refers to an employee within the meaning of section 401(c)(1). "Shareholder-employee" refers to a shareholder-employee of an electing small business (Subchapter S) corporation within the meaning of section 1379(d).

(2) *Section 401(j) limitation.* Except in the case of a final average pay plan, section 401(j) imposes a limitation on the amount of the basic benefit, as defined in paragraph (c)(2) of this section, which may be accrued under a defined benefit plan for any plan year of participation, as defined in paragraph (c)(4)(iii) of this section, by any employee who is either a self-employed individual or a shareholder-employee. Section 401(j) and this section do not, however, limit the benefit of an employee which may be accrued under a plan for any plan year in which the employee is neither a self-employed individual nor a shareholder-employee nor do they require a plan to provide accrued benefits in the form of a basic benefit. For purposes of section 401(j), a target benefit plan is not a defined benefit plan.

(3) *Outline of regulations*—(i) *Limitations on benefits-career average plans.* This section (§ 1.401(j)–1) provides limitations on benefits under section 401(j) for plans other than final average pay plans ("career average plans").

(ii) *Aggregation of plans and other plan requirements.* Section 1.401(j)–2 provides rules under section 401(j)(1) (relating to certain plan aggregations) and under section 401(j)(4) (relating to the requirement that a plan covering owner-employees may not be integrated with social security, etc.).

(iii) *Changes in accrual rate or compensation base-career average plans.* Section 1.401(j)–3 provides rules under section 401(j)(3)(B)(iii) relating to changes in the rate of benefit accrual and compensation base under a career average plan.

(iv) *Insured plans.* Section 1.401(j)–4 provides a special rule for certain plans funded with insurance or annuity contracts.

(v) *Final average pay plan.* Section 1.401(j)–5 provides limitations on benefits under section 401(j) for final average pay plans. A final average pay plan is a defined benefit plan accruing benefits based on the employee's compensation over a period less than the total period of the employee's participation in the plan. Thus, for example, a plan which provides that an employee's accrued benefit is based on compensation earned over the last five years would be a final average pay plan.

(vi) *Effective dates.* Section 1.401(j)–6 provides the effective dates for the application of section 401(j) to a plan and special transitional rules.

(b) *Maximum benefit—career average plan*—(1) *In general.* For purposes of section 401(j), in the case of a plan other than a final average pay plan or an insured plan described in § 1.401(j)–4 (a) or (b), the maximum benefit of a self-employed individual or a shareholder employee for a plan year equals—

(i) The employee's annual compensation not in excess of the compensation base for such year, as defined in paragraph (d)(2) of this section, multiplied by

(ii) The applicable percentage as determined under paragraphs (c), (d)(1), and (e) of this section and § 1.401(j)–3 (change in compensation base or rate of accrual), if applicable.

For special rules governing final average pay plans, see § 1.401 (j)–5.

(2) *No possibility of excess accruals.* A plan to which this section applies is not a qualified plan (and a trust forming a part of such a plan is not a qualified trust) if the benefit accruing under the plan for any plan year of participation by an employee exceeds the maximum benefit. Further, the plan is not qualified unless the plan contains provisions that preclude any such benefit accrual proscribed in the preceding sentence, irrespective of whether or not there is, in fact, an excess accrual for such an employee.

(3) *Section 415 limitations.* A plan to which this section applies is also subject to the limitations on benefits set forth in section 415. Consequently, even though a plan provides benefits which are not in excess of the maximum benefit set forth in this section, the plan will not be qualified under section 401(a) if the plan benefits are in excess of the section 415 limitations.

(c) *Applicable percentage*—(1) *Table of applicable percentages.* For purposes of section 401(j) and the regulations thereunder, the applicable percentage for an employee for any plan year shall

be the percentage shown on the following table opposite the age of the employee at the time the current period of participation in the plan by the employee began, with adjustments as provided by these regulations:

Age	Applicable percentage
30 or less	6.5
31	6.3
32	6.0
33	5.8
34	5.6
35	5.4
36	5.1
37	4.9
38	4.8
39	4.6
40	4.4
41	4.2
42	4.1
43	3.9
44	3.8
45	3.6
46	3.5
47	3.4
48	3.2
49	3.1
50	3.0
51	2.9
52	2.8
53	2.7
54	2.6
55	2.5
56	2.4
57	2.3
58	2.2
59	2.1
60 or over	2.0

The applicable percentages above may be adjusted by the Commissioner from time to time to take into account changes in prevailing interest and mortality rates occurring after December 31, 1973.

(2) *Basic benefit.* The term "basic benefit" means that—

(i) The benefit is in the form of a straight life annuity,

(ii) The benefit commences at the later of age 65, or the day 5 years after the day the participant's current period of participation began,

(iii) The plan provides no ancillary benefits, and

(iv) The employee does not contribute to the plan.

(3) *Adjustments for nonbasic benefits.* (i) A plan to which section 401(j) applies may provide benefits other than the basic benefit. Other benefits which a plan may provide include, but are not limited to, pre-retirement death and disability benefits, benefits that vary with a cost of living formula (up to a maximum stated by the plan), and benefits payable in the form of either a joint and survivor annuity or an annuity certain for a specified period. The Commissioner shall provide adjustments to the applicable percentage for such nonbasic benefits, based on the 1971 Group Annuity Mortality Table (male) without projection and an assumed interest rate of 6 percent compounded annually, to assure that the total benefit, including the nonbasic benefit, does not exceed the actuarial equivalent of the maximum basic benefit.

(ii) If a plan provides a benefit in the form of life, accident, health, or other insurance protection, no adjustment is required for any such plan benefit attributable to amounts considered to be contributed by the employee under the rules of section 72(f) and paragraph (b) of § 1.72–16 if such amounts are includable in the employee's gross income.

(4) *Definitions*—(i) *Determination of ages.* For determining the applicable percentage, the age of an employee when the employee's current period of participation began is the employee's age (last birthday) on or before the beginning of the first plan year in the current period of participation.

(ii) *Current period of participation.* The term "current period of participation" means any period of consecutive plan years of participation beginning with the first day of the first plan year of participation in the period and ending with the last day of the last consecutive plan year of participation in the period. The status of an employee at the time the employee's current period of participation began (*i.e.*, as a common-law employee, self-employed individual, or shareholder-employee) is not relevant.

(iii) *Plan year of participation.* The term "plan year of participation" means a plan year for which a participant accrues a benefit under the terms of the plan (determined only with respect to benefits provided by the plan and without regard to any plan provision not in effect in that plan year). Thus, for example, benefits provided under the Social Security Act or past service benefits for prior years are not included for purposes of determining plan year of participation.

(d) *Compensation and compensation base*—(1) *Compensation.* The term "compensation" means—

(i) In the case of a self-employed individual, the earned income of the individual,

(ii) In the case of a shareholder-employee, the compensation received (or accured in the case of an individual who computes income under the accrual method) by the individual from the electing small business corporation, or

(iii) In the case of any employee not included in subdivision (i) or (ii) for any relevant year, the compensation includible in the individual's gross income derived from the sole proprietorship, partnership or electing small business corporation (see the change in status rules in paragraph (e) of this section for application of this provision).

(2) *Compensation base.* The term "compensation base" means the highest level of annual compensation of the employee which may be taken into account for a plan year under the plan for determining benefits. The compensation base must be specified in the plan and may not exceed $100,000. If a plan initially specifies a compensation base in excess of $50,000, the applicable percentage shall be adjusted by multiplying such percentage by the ratio of $50,000 to the initial compensation base of the plan. For rules applicable to plans which change compensation bases, see § 1.401(j)–3.

(e) *Change in status*—(1) *Participant becomes subject to section 401(j).* In the case of a participant who is neither a self-employed individual nor a shareholder-employee and who becomes a self-employed individual or shareholder-employee during the plan year, the applicable percentage for such year is not less than the applicable percentage determined under this section for the age of the participant when he becomes a self-employed individual or shareholder-employee. A higher applicable percentage is allowed, limited to the accrual rate established by the lesser of (A) the past accrual rate for the participant or (B) the applicable percentage determined under this section for the age when the participant's current period of participation commenced, and for the compensation base in effect when the participant becomes a self-employed individual or shareholder-employee.

(2) *Subchapter S plan.* If a defined benefit plan of a Subchapter S corporation is established prior to the first plan year to which section 401(j) applies (e.g., before the employer makes the Subchapter S election), the applicable percentage shall be determined as if the time section 401(j) applies to the plan is the time of a change in status. A plan amendment required (with respect to the first plan year) to satisfy the requirements of section 401(a) (18) and (j) shall not be treated as a change in the plan's compensation base or rate of accrual for purposes of applying the rules of § 1.401(j)–3. Thus, for example, if a plan provided for a 7.5% past accrual rate (calculated in accordance with subparagraph (3)) on $50,000 of compensation for Participant A, who commenced participation at age 30 in 1966, and the plan is amended for 1976 to meet the requirements of section 401(j), the applicable percentage for 1976

is determined under subparagraph (1) and equals 6.5% (the lesser of 7.5% (past accrual rate) or 6.5% (applicable percentage at age 30); but not less than 4.4% (the applicable percentage at age 40)).

(3) *Past accrual rate.* (i) For purposes of this paragraph, the past accrual rate equals the ratio determined by dividing (A) the employer-derived accrued benefit of the participant as of the close of the plan year immediately preceding the year in which the participant becomes a self-employed individual or a shareholder-employee, by (B) the sum of the compensation earned by the participant in each year (limited to the compensation covered by the plan for each year) for all periods of plan participation ending with the close of such immediately preceding plan year. The accrued benefit of the participant as of the close of the immediately preceding plan year shall be determined by disregarding any increase in the benefit not in effect at such time. Thus, for example, a subsequent past service benefit provided retroactively for the plan year would be disregarded.

(ii) If records are unavailable to compute the sum of the compensation earned by the participant, the compensation of the participant, referred to in subdivision (i) of this subparagraph, shall be determined by assuming that the participant earned compensation in each year of plan participation equal to the compensation earned in the plan year immediately preceding the plan year in which the participant becomes a self-employed individual or shareholder-employee. This assumption shall not apply to any plan years of participation ending after December 31, 1975.

(f) *Employee contributions*—(1) *Voluntary contributions.* The maximum benefit shall not be adjusted for voluntary contributions within the meaning of section 411. In such a case the plan can provide a benefit equal to the sum of the maximum benefit and the benefit derived from employee contributions accounted for separately. See section 411 (b) (2), (c) (2) (A), and (d) (5), and § 1.411 (c)–1 (a) for rules which require separate accounting in the case of voluntary-employee contributions.

(2) *Mandatory contributions.* Under section 411(c) and § 1.411(c)–1, the employee's total accrued benefit (determined without regard to any accrued benefit attributable to voluntary employee contributions) must be allocated between the part attributable to mandatory employee contributions and the part attributable to employer contributions according to specified rules. For purposes of determining the participant's maximum benefit in a career average pay plan under section 401(j) the following rules apply with respect to each plan year. For each plan year, the total benefit accruing derived from all contributions and the benefit accruing from mandatory employee contributions must be computed in accordance with the rules in section 411 (c) (2) (B). Then the participant's total benefit accruing for the year must be reduced by the benefit accruing derived from his mandatory contributions for the year and the remaining difference must be compared with the maximum basic benefit. The total benefit accruing for the year is determined by ascertaining the increase from the total accrued benefit (for all prior years) as of the close of the immediately preceding plan year and the benefit accruing from mandatory employee contributions is determined only with respect to those contributions made for the year. For a final average pay plan, the rules of section 411 (c) and § 1.411 (c)–1 apply.

(g) *Examples.* The provisions of this section can be illustrated by the following examples, in which, except where otherwise specified, it is assumed that the plan is a career average pay plan and that the participant is not married and has continuous service and plan years of participation:

Example (1). Maximum benefit. (i) A enters a defined benefit plan as a self-employed individual at age 30. The plan provides benefits on compensation up to $50,000 in the form of a single life annuity commencing at age 65 with no ancillary benefits. A's compensation for the first year is $20,000. The applicable percentage for A is 6.5%, determined under paragraph (c) for the age at which A's participation began (age 30). Under this section the maximum benefit that A could accrue for the plan year is $1,300 (6.5% of $20,000).

(ii) The second plan year, A's compensation is $25,000. The applicable percentage for A is still 6.5%, the applicable percentage for age 30 when A's current period of participation began, even though A is older in the second plan year. The maximum benefit A may accrue under this section for the plan year is $1,625 (6.5% of $25,000).

Example (2). Section 415 limitations. Assume the same facts as in Example 1, except that in the first plan year and all subsequent plan years, A's compensation is $50,000. A works 35 years. A's maximum benefit for each year under this section equals $3,250. Under this section, A's maximum accrued benefit at the end of 35 years would be $113,750 (35 years × $3,250). However, section 415 (b) (1) limits A's benefit to 100% of A's average compensation for A's high 3 years. A's average compensation in the high 3 years is $50,000. Therefore, under section 415 (b) (1), A's accrued benefit may not exceed $50,000.

Example (3). Multiple periods of participation. (i) A, a self-employed individual, enters a defined benefit plan at age 30. The plan provides benefits on compensation up to $50,000 in the form of a single life annuity commencing at age 65 with no ancillary benefits. A's compensation for the first year equals $20,000. The maximum benefit accruing which could be provided by the plan for A under paragraph (f) of this section equals $1,300 (6.5% of $20,000). The applicable percentage for such year is determined under paragraph (c) of this section for the age at which A's participation begins, age 30.

(ii) Assume that for the next four years, A's compensation remains at $20,000. Under this section, A's maximum benefit accruing for each of these years is still $1,300 (6.5% of $20,000). The applicable percentage is still measured by the 6.5% applicable to age 30, when A's current period of plan participation began, even though A is older.

(iii) Assume that, after five years of participation, A leaves the plan and recommences participation at age 50. In the first year after his return, A earns $30,000. Under this section, A's maximum benefit for the year cannot exceed $900 (3% of $30,000). The applicable percentage is determined for age 50, when A's next current period of plan participation began, and not at age 30. If A's compensation remains at $30,000 for four more years, A's maximum benefit for each of these four years remains at $900 (3% of $30,000).

(iv) Assume that, at age 55, A's compensation is $40,000. Under this section, A's maximum benefit for the year cannot exceed $1,200 (3% of $40,000). The percentage limit of paragraph (c)(1) of this section remains at 3% because the determination is made by reference to age 50, when A's current period of plan participation began. If A's compensation remains at $50,000 for four more years, A's maximum benefit for each of these four years remains at $1,200 (3% of $40,000).

(v) Assume that, at age 60, A's compensation is $40,000. Under this section, A's maximum benefit for the year cannot exceed $1,500 (3% of $50,000). The percentage limit of paragraph (c)(1) of this section remains at 3 percent. If A's compensation remains at or above $50,000 for four more years, A's maximum benefit for each of these four years remains at $1,500 (3% of $50,000).

(vi) Accordingly, when A retires at age 65 the maximum benefit which could be paid to A under the plan would be $24,500 per year, computed as follows:

Age	Compensation per year	Rate	Benefit earned per year	Total benefit
30 to 34	$20,000	6.5	$1,300	$6,500
50 to 54	30,000	3.0	900	4,500
55 to 59	40,000	3.0	1,200	6,000
60 to 64	50,000	3.0	1,500	7,500
Total				24,500

Example (4). Joint and survivor annuity. Assume the same facts as in *Example (3),*

except that A is married. Under section 401 (a)(11), the plan is required to offer the payment of benefits in the form of a qualified joint and survivor annuity. If A receives the joint and survivor annuity, which is a nonbasic benefit, A's applicable percentage (and therefore A's maximum benefit) will be reduced to reflect the actuarial value of the nonbasic benefit. A's maximum benefit ($24,500) will be multiplied by a factor determined by the Commissioner for the age of A's beneficiary. Assuming for example that the factor were .90, A's maximum benefit after adjusting for the joint and survivor annuity would be $22,050 ($24,500×.90).

Example (5). Annual accrual in excess of maximum. A career-average defined benefit plan covers employee F who is a self-employed individual. In 1980, F's total accrued annual benefits equal $13,000. Had F accrued the maximum benefit for each year, F's total accrued benefit would have been $13,500. The plan, however, for plan year 1980 accrued an annual benefit for F equal to $1,800 when the maximum benefit equaled $1,625. The plan fails to satisfy the requirements of this section in 1980 and thus the plan is not qualified. Under § 1.401(j)-1(b)(1), the limitation on an employee's benefits must be satisfied with respect to the incremental increase in accrued benefits in each plan year, even though the employee's aggregate benefits could have been higher if the employee had accrued the maximum benefit for each year of participation.

§ 1.401(j)-2 Aggregating plans and other rules.

(a) *Plans required to be aggregated—*(1) *General rules.* In determining whether or not the requirements of section 401(j) are satisfied—

(i) All plans of an employer must be aggregated;

(ii) All plans of all trades or businesses in which the employee is a self-employed individual must be aggregated whether or not under common control under section 414(c); and

(iii) All plans in which an employee is a shareholder-employee must be aggregated with all other plans in which the employee is a self-employed individual or a shareholder-employee that are maintained by employers described in section 414 (b) or (c).

(2) *Special rule for Subchapter S plan.* In determining whether the requirements of section 401(j) are satisfied, a plan in which an employee is a shareholder-employee is not aggregated with any plan not described in subparagraph (1)(iii) of this paragraph. Thus, if an individual is a shareholder-employee in a Subchapter S corporation and an employee of a non-Subchapter S corporation, whether or not part of a controlled group under section 414(b), benefits under the non-Subchapter S corporate plan will be disregarded in determining whether the requirements of section 401(j) are satisfied. Similarly, if an individual is a shareholder-employee in a Subchapter S corporation and a self-employed individual in a partnership that are not under common control within the meaning of section 414(c), the limitations of section 401(j) will be applied separately to each plan.

(b) *Two or more defined benefit plans—*(1) *Limit on accrued benefit.* If two or more defined benefit plans are required to be aggregated under paragraph (a) of this section, then the accrued benefit under all such plans for any employee subject to the limitations of this section must be aggregated in determining whether or not the limitation on benefit accruals is exceeded.

(2) *Same plan year required.* In order to insure reasonable comparability of retirement benefits between qualified defined benefit plans and qualified defined contribution plans, or combinations thereof, as required by section 401(j)(1), this subparagraph sets forth certain conditions which must be satisfied in order for a defined benefit plan to be qualified. If one defined benefit plan ("first plan") is established and another defined benefit plan ("second plan") is established by the same employer subsequent to the establishment of the first plan, and if the second plan is required to be aggregated with the first plan under paragraph (a) of this section, then the second plan shall be deemed not to satisfy the requirements of section 401(j) unless both plans have the same plan year. Notwithstanding the preceding sentence, in the case where two or more such plans have been adopted prior to January 23, 1981 with different plan years, the second plan shall not fail to satisfy the requirements of this section solely by reason of having a different plan year if the plans are amended to adopt, for years beginning after that date, the same plan year and to adjust plan benefits as determined by the Commissioner. Such amendments must also comply with section 412(c)(5). Irrespective of any limitation on the time of amendment, the amendment required by the preceding sentence may be adopted within the 1 year period beginning January 23, 1981.

(c) *Defined benefit and defined contribution plans—*(1) *Defined benefit fraction.* If a defined benefit plan and a defined contribution plan are required to be aggregated under paragraph (a) of this section, the maximum benefit with respect to the defined benefit plan for a plan year on behalf of an employee subject to the limitations of section 401(j) shall be determined by multiplying the maximum benefit otherwise determined under section 401(j) for the defined benefit plan (determined without regard to this subparagraph) by 1 minus the fraction determined under subparagraph (2) of this paragraph, for the taxable year ending with or within that plan year.

(2) *Section 401(j) defined contribution fraction.* The fraction for any taxable year in which an employee is a participant in a defined contribution plan is a fraction—

(i) The numerator of which is the amount deductible for the participant under the defined contribution plan, and

(ii) The denominator of which is the maximum amount that would be deductible (and not includable in gross income under section 1379(b)) under the defined contribution plan if the plan provided for the maximum deduction allowable for the participant under section 404 and the regulations thereunder.

(3) *Increase in 401(j) defined benefit fraction.* If a plan limits the benefit of an employee by stating the above fractional rule, any increase in the 401(j) defined benefit fraction described in subparagraph (1) of this paragraph resulting from a decrease in the 401(j) defined contribution fraction described in subparagraph (2) under the defined contribution plan will be considered an amendment to the defined benefit plan increasing the plan's rate of benefit accrual. Thus, the plan will be subject to the rules of § 1.401(j)-3, which requires that the maximum benefit be calculated by reference to the age of the participant at the time of the amendment.

(d) *No integration for plan benefiting owner-employees.* A defined benefit plan which provides contributions or benefits for owner-employees does not satisfy the requirements of section 401(j) and this section unless such plan meets the requirements of section 401(a)(4) without taking into account contributions or benefits under chapter 2 of the Code (relating to tax on self-employment income), chapter 21 of the Code (relating to Federal Insurance Contributions Act), Title II of the Social Security Act, or under any other Federal or State law. Thus, a plan covering owner-employees will not qualify if the plan integrates its benefits with benefits provided under Social Security or under similar laws.

(e) *Deductions and inclusions.* A defined benefit plan to which section 401(j) applies is not subject to the special limitations on deductions for self-employed individuals set forth in section 404(e) or the special deduction computations, for common-law employees and self-employed

individuals, set forth in section 404(a)(9). (See § 1.404(e)–1A.) Except as provided in § 1.401(j)–6(c) for Subchapter S plans in existence before January 1, 1976, the rules on taxability of shareholder-employees set forth in section 1379(d) do not apply to a defined benefit plan to which section 401(j) applies. Section 404(a)(1) sets forth the rules with respect to deductions for defined benefit plans.

(f) *Nondiscrimination.* Section 401(a)(4) requires that a defined benefit plan not discriminate in favor of employees who are members of the prohibited group. The term "prohibited group employees" means those employees in whose favor the benefits provided under a defined benefit plan may not discriminate under section 401(a)(4). For purposes of testing discrimination under a plan which provides for full and immediate vesting, the plan will not be considered to be discriminatory merely because the accrued benefit determined under the plan for any employee is limited to the maximum basic benefit as determined under section 401(j). Thus, for example, a plan which provides for full and immediate vesting and which bases benefits on percentages of compensation determined at the age when an employee's participation in the plan commences will not be considered to be discriminatory merely because the prohibited group employees are younger than other employees at such time and consequently have benefits determined at higher percentages.

(g) *Definitely determinable benefits.* A defined benefit plan to which this section applies is also subject to the requirements under section 401(a) to provide definitely determinable benefits. Thus, for example, for a final average pay plan to satisfy both the requirements of section 401(j) and the definitely determinable requirements, the plan would have to provide for a plan benefit formula under which a self-employed individual's or shareholder-employee's accrued benefit does not exceed the lesser of the final average pay formula, determined without regard to § 1.401(j)–5 but with regard to other applicable requirements (such as those set forth in section 415), or the limitation in that section.

(h) *Examples.* The provisions of this section can be illustrated by the following examples, in which, except where otherwise specified, it is assumed that the participant is not married and has continuous service and plan years of participation:

Example (1). Two defined benefit plans. Employee D is a self-employed individual in a partnership which has a defined benefit plan. D also has an unrelated sole proprietorship which has a defined benefit plan. The two plans both have the same plan years. Under paragraph (a)(1)(ii) of this section, both plans are required to be taken into account in determining whether or not the requirements of this section are satisfied.

Example (2). Defined contribution plan and defined benefit plan. Employee E is covered by both a defined benefit and a defined contribution plan required to be aggregated under paragraph (a) of this section. If, for 1980, the defined contribution plan is subject to the limitation of section 404(e) and E had $50,000 of earned income in 1980, the maximum amount deductible with respect to E equals $7,500 (15% of $50,000). If, for 1980, there is a deductible contribution for E under the defined contribution plan of $1,875, the fraction referred to in paragraph (c)(2) of this section equals $7,500÷$1,875 or ¼. If, for 1980, E's maximum benefit under the defined benefit plan, determined without regard to paragraph (d)(1) of this section, equals $2,200, E's maximum benefit is determined by multiplying $2,200 times ¾ (that is, 1 minus ¼) which equals $1,650. Consequently, if E accrues a benefit in 1980 in excess of $1,650 under the defined benefit plan, the plan fails to satisfy the requirements of section 401(j).

Example (3). Related Sub-S and non-Sub-S corporations. (i) Employee E, age 30, is a shareholder-employee in S, a Subchapter S corporation. E is also an employee of C, a non-electing corporation related to S under section 414(b). E is covered by career average, defined benefit pension plans of S and C. E accrues a basic benefit of 6.5% of compensation under the S plan and an annual benefit accrual of 10% of compensation in the C plan. The compensation base in the S plan is $50,000. E earns $30,000 from each corporation. The plans comply with all other requirements of section 401(a).

(ii) Although C is related to S, the limitations of section 401(j) do not apply to the C plan, because C is not a Subchapter S corporation. Therefore, E's benefits under the C plan need not be aggregated with the benefit E accrues under the S plan to determine whether the section 401(j) limitations are satisfied by the S plan. E's maximum benefit under the S plan is $1,950 (6.5% of $30,000). E accrues a benefit of $1,950 under the S plan, satisfying the section 401(j) limitations.

Example (4). Unrelated Partnerships. (i) Employee F, age 30, is a partner in P1 and P2, partnerships which are not under common control within the meaning of section 414(c). F is covered by career average, defined benefit pension plans of P1 and P2. F accrues a basic benefit of 6.5% of compensation under each plan. The compensation base in each plan is $50,000 and F earns $30,000 from each partnership.

(ii) F's benefit accrual under the P1 and P2 plans must be aggregated because all plans in which F is a self-employed individual, whether or not related under section 414(c), must be aggregated under paragraph (a)(ii) of this section. F's maximum benefit under the P1 and P2 plans together is $3,250 (6.5% of $50,000). However, F accrues a benefit of $3,900 ($1,950 under the P1 plan and $1,950 under the P2 plan). Because F's benefit accrual for the year exceeds F's maximum benefit, neither the P1 nor P2 plan is qualified.

Example (5). Unrelated Subchapter S Plans. (i) Assume the same facts as in Example (4) except that F is a shareholder-employee in S1 and S2, Subchapter S corporations which are not under common control within the meaning of section 414(b).

(ii) The benefit F accrues under S1 and S2 need not be aggregated because the two Subchapter S corporations are not related under section 414(b). The benefit E accrues under each plan ($1,950) equals E's maximum benefit (6.5% of $30,000) for that plan. Thus, the plans satisfy the section 401(j) limitations.

Example (6). Partnerships and Subchapter S corporation. (i) Employee G, age 30, is a partner in P1 and P2, partnerships which are not under common control within the meaning of section 414(c). G is also a shareholder-employee in S1, a Subchapter S corporation under common control with P1 within the meaning of section 414(c). G is covered by career-average, defined benefit pension plans of P1, P2, and S1. G accrues a basic benefit of 6.5% of compensation under the terms of the S1 and P2 plans. G accrues a basic benefit of 4% of compensation under the P1 plan. G earns $30,000 from each business.

(ii) Under paragraph (a)(ii) of this section, G's benefit accrual under P1 and P2 must be aggregated because both are plans in which G is a self-employed individual. Under § 1.401(j)–1(b), G's maximum benefit under the P1 and P2 plans together is $3,250 (6.5% of $50,000). G accrues a benefit of $1,200 under the P1 plan and $1,950 under the P2 plan for a total of $3,150. Because G's benefit accrual for the year ($3,150) is less than G's maximum benefit ($3,250) both the P1 and P2 plans satisfy the section 401(j) limitations for the plan year.

(iii) Separately, G's benefit accrual under the P1 and S1 plans must be aggregated because S1 and P1 are under common control within the meaning of section 414(c). G's maximum benefit under the S1 and P1 plans together is $3,250 (6.5% of $50,000). G accrues a benefit of $1,200 under the P1 plan (4% of $30,000) and $1,950 under the S1 plan (6.5% of $30,000), totaling $3,150. Because G's benefit accrual is less than G's maximum benefit under the two plans, the P1 and S1 plans satisfy the section 401(j) limitations for the plan year.

(iv) Even though the P1, P2 and S1 plans satisfy the section 401(j) limitations for the plan year the plans will not be qualified under section 401(j) unless the plan contains a provision precluding excess accruals (see § 1.401(j)–1(b)(2)).

§ 1.401(j)–3 Change in compensation base or rate of accrual.

(a) *Changes in rate of benefit accrual or compensation base*—(1) *In general.* Except as provided in subparagraph (2) of this paragraph, if a plan changes either the rate of benefit accrual or the compensation base (or both) with respect to a participant, the applicable percentage for any level of compensation is the greater of (i) the prior-benefit accrual rate with respect to

that level of compensation, or (ii) the attained-age applicable percentage with respect to that level of compensation. If a plan changes its compensation base applicable to a participant, an applicable percentage shall be determined for that participant for each level of compensation that results from such change.

(2) *Fresh start.* If with respect to any participant subject to the requirements of section 401(j) a plan is amended so that the participant is treated under the plan as commencing a new period of plan participation and the applicable percentage is determined on the basis of the participant's age at that time, then the plan shall be deemed to be a new plan with respect to that participant. Thus, such a plan amendment would not be subject to the requirements of this section.

(b) *Definitions.* For purposes of this section—

(1) *Level of compensation.* The term "level of compensation" means (i) the initial compensation base and (ii) the difference between each prior compensation base (beginning with the initial base) and the next succeeding compensation base.

(2) *Prior-benefit accural rate.* The term "prior-benefit accrual rate" means the benefit accrual rate, if any, determined under the plan for each level of compensation under the plan prior to any change in the plan's compensation base or the benefit accrual rate. If a plan decreases its benefit accrual rate, the decreased benefit accrual rate (not the rate prior to the decrease) shall, on and after the effective date of the decrease, be deemed to be the plan's prior-benefit accrual rate. In no event shall the prior-benefit accrual rate exceed the entry-age applicable percentage.

(3) *Attained-age applicable percentage.* The term "attained-age applicable percentage" means the otherwise determined applicable percentage for the age of the participant when the plan amendment to either the compensation base or the rate of accrual is effective. The attained-age applicable percentage is determined for each different level of compensation by using the compensation base in effect after the plan amendment, including any adjustment for excess compensation base referred to in paragraph (c)(5) of this section.

(4) *Entry-age applicable percentage.* The term "entry-age applicable percentage" means, with respect to a level of compensation, the otherwise applicable percentage determined under section 401(j) for the age of the participant at which a benefit could first accrue under the plan for that level of compensation or, if later, at which that participant's current period of participation began. The entry-age applicable percentage is determined for each different level of compensation by using the compensation base in effect prior to any change in the plan's compensation base and by including any adjustment (in effect prior to such change) for excess compensation base referred to in paragraph (c)(5) of this section.

(c) *Other rules*—(1) *Amendment not applicable to self-employed individual or shareholder-employee.* If a plan never amends its compensation base or rate of benefit accrual (or amends, but makes the changes applicable only to participants who are neither self-employed individuals nor shareholder-employees), the requirements of this section will not apply.

(2) *Adopted and scheduled amendments.* For purposes of section 401(j) and the regulations thereunder, amendments to the compensation base or rate of accrual include both adopted plan amendments and scheduled amendments (that is, amendments which are effective at a later time). Whether a particular amendment results in a change in base or rate shall be determined by the effect of the amendment upon plan benefit accruals and not by either the particular form of the amendment or the specific plan provision amended. For example, any plan amendment which changes the definition of compensation from less than total compensation to increase that amount upon which benefit accruals are based (for example, to add overtime hours to the compensation taken into account) would constitute a change in compensation base. Additionally, an increase in a survivor annuity from 50 percent to 75 percent of the employee benefit without any actuarial reduction would constitute a change in rate of benefit accrual.

(3) *No possibility of excess accruals.* If the rate of benefit accrual for any level of compensation exceeds the applicable percentage for that level determined under this section, the plan does not satisfy section 401(j). Also, the general rule set forth in § 1.401(j)–1(b)(2) that a plan is not qualified unless the plan contains provisions that preclude benefit accruals in excess of permissible section 401(j) amounts is equally applicable to changes in a plan's rate of accrual or compensation base. Thus, even though there is not in fact an excess accrual for a self-employed individual or shareholder-employee by reason of such an amendment, the plan is not qualified if there could be such an excess under the plan amendment.

(4) *Amendments effective at same time.* All plan amendments which effect a change in the plan's rate of benefit accrual or compensation base, and which are effective at the same time, shall be deemed to be a single amendment for purposes of applying the rules of this section.

(5) *Compensation bases in excess of $50,000.* (i) In the case of a plan which initially specifies a compensation base in excess of $50,000, the applicable percentage must be adjusted under § 1.401(j)–1)(d)(2) by multiplying such percentage by the ratio of $50,000 to the initial compensation base of the plan.

(ii) In the case of a plan which amends its compensation base to increase such base in excess of $50,000, the percentage applicable to the compensation between the prior compensation base and the new compensation base shall be adjusted by multiplying that percentage by a fraction, the numerator of which equals the excess of $50,000, if any, over the prior compensation base, and the denominator of which equals the new compensation base minus the prior compensation base. However, no adjustment is required to the percentage applicable to a participant's compensation up to the prior compensation base.

(iii) In the case of a plan which has a compensation base in excess of $50,000 and which subsequently amends its compensation base to decrease such base to another base in excess of $50,000, either the adjustment specified in subdivision (ii) or (i) of this subparagraph shall be made, depending on whether there is, or is not, respectively, a prior compensation base less than $50,000.

(d) *Other changes.* If a plan's rate of benefit accrual or compensation base is changed in a manner not dealt with in this section, the applicable percentages for the plan shall be adjusted, as determined by the Commissioner, in a manner consistent with the regulations under section 401(j).

(e) *Examples.* The provisions of this section can be illustrated by the examples set forth below. In each of the examples (except where otherwise specified) the following assumptions have been made: (1) Each plan is a career average defined benefit plan; (2) each plan provides a basic benefit as defined in § 1.401(j)–1(c)(2); (3) each participant has continuous service and one current period of participation; (4) each plan provides no non-basic benefit except an actuarially equivalent joint and survivor annuity required by section

401(a)(11); and (5) each plan is not a fully insured plan subject to § 1.401(j)–4.

Example (1). Change in accrual rate. Participant A, a self-employed individual, begins participation at age 30 in Plan X, which provides a basic benefit accruing at the annual rate of 3.25%. Plan X's compensation base is $50,000. The applicable percentage for A at age 30 is 6.5%. When A is 40 Plan X is amended to increase its rate of benefit accrual to the maximum applicable percentage, and to provide the maximum benefit. A's applicable percentage and maximum benefit are determined as follows:

(i) Under paragraph (a), A's applicable percentage after the plan is amended is the greater of (1) 3.25% (Plan X's prior-benefit accrual rate for A) or (2) 4.4% (the attained-age applicable percentage for a participant age 40). Accordingly, the rate of benefit accrual for A in Plan X after the amendment cannot exceed 4.4%.

(ii) Under § 1.401(j)–1(b), the maximum benefit which could accrue annually for A under Plan X equals the product of A's compensation (up to the compensation base) times 4.4% (the applicable percentage). Accordingly, A's maximum benefit per year equals $2,200, if A's compensation equals or exceeds $50,000.

Example (2). Change in compensation base. B, a self-employed individual, begins participation at age 30 in Plan Y, which provides a basic benefit accruing at the annual rate of 5.0% of compensation up to $20,000. The applicable percentage for B is 6.5%. When B is 40, Plan Y is amended to increase the specified compensation base to $50,000 and to provide the maximum basic benefit. B's compensation equals or exceeds the plan's compensation base at all times. The applicable percentages for each level of compensation and maximum benefit after the plan is amended are determined as follows:

(i) Under paragraph (a), B's applicable percentage after the plan is amended cannot exceed the limitation applicable to each level of compensation. For the initial compensation base of $20,000, the applicable percentage is the greater of (1) 5.0% (Plan Y's prior-benefit accrual rate for B) or (2) 4.4% (Plan Y's attained-age applicable percentage for B). Therefore, B's applicable percentage for the first $20,000 of compensation is 5.0%.

(ii) B's applicable percentage for the level of compensation in excess of $20,000 up to the new $50,000 compensation base, or the next $30,000 of compensation, is 4.4% (Plan Y's attained-age applicable percentage for B). There is no prior-benefit accrual rate for this level of compensation.

(iii) Under § 1.401 (j)–1(b), the maximum benefit which could accrue annually for B under Plan Y after the plan is amended equals the sum of $1,000 (the initial compensation base of $20,000 times the 5.0% applicable percentage) and $1,320 (the $30,000 next level of compensation times the 4.4% applicable percentage). Accordingly, B's maximum benefit equals $2,320.

Example (3). Change to compensation base over $50,000. Assume the same facts as in *Example (2)* for participant C at age 30 in Plan Y except that the annual rate is 6.5%. When C is 40, Plan Y is amended to increase the specified compensation base to $75,000 and to provide the maximum benefit. The applicable percentages for each level of compensation and maximum benefit after the plan is amended are determined as follows:

(i) Under paragraph (a), C's applicable percentage after the amendment cannot exceed a limitation applicable to each level of compensation. For the initial compensation base of $20,000, the applicable percentage is the greater of (*1*) 6.5% (Plan Y's prior-benefit accrual rate for C) or (*2*) 4.4% (Plan Y's attained-age applicable percentage for C). Therefore, C's applicable percentage for the first $20,000 of compensation is 6.5%.

(ii) C's applicable percentage for the level of compensation in excess of $20,000 up to the new $75,000 compensation base, or the next $55,000 of compensation, is the attained-age applicable percentage (there is no prior-benefit accrual rate for this level of compensation). Under paragraph (b)(3), the attained-age applicable percentage for C is determined by making the adjustment for the excess compensation base specified in paragraph (c)(5). Accordingly, the applicable percentage is 2.4% (4.4% times ($50,000 − $20,000)/($75,000 − $20,000)).

(iii) Under § 1.401(j)–1(b), the maximum benefit which could accrue annually for C under Plan Y after the plan is amended equals the sum of $1,300 (the initial compensation base of $20,000 times the 6.5% applicable percentage) and $1,320 ($55,000, the next level of compensation, times the 2.4% applicable percentage). Accordingly, C's maximum benefit per year equals $2,620.

Example (4). Decrease in compensation base to $50,000. D begins participation as a shareholder employee at age 30 in Plan Z, which provides a basic benefit accruing at the annual rate of 3.25% of compensation up to $100,000. D's compensation equals or exceeds the compensation base at all times. In order to determine the applicable percentage, 6.5% must be adjusted for the excess compensation base, as specified in paragraph (c)(5)(i), to obtain an applicable percentage of 3.25% (6.5% times $50,000/$100,000). When D is 40, Plan Z is amended to decrease its specified compensation base to $50,000 and to provide the maximum basic benefit. The applicable percentage for the new compensation base and the maximum benefit after the plan is amended are determined as follows:

(i) Under paragraph (a), the applicable percentage for the new $50,000 compensation base is the greater of 3.25% (Plan Z's prior-benefit accrual rate for D) or 4.4% (Plan Z's attained-age applicable percentage for D). Therefore, D's applicable percentage is 4.4%.

(ii) Under § 1.401(j)–1(b), the maximum benefit which could accrue annually for C under Plan Z after the amendment equals the product of $50,000 (the new compensation base) times 4.4% (the applicable percentage). Accordingly, D's maximum benefit equals $2,200.

Example (5). Change in both accrual rate and compensation base. E, a self-employed individual, begins participation at age 30 in Plan W, which provides a basic benefit accruing at the annual rate of 3% of compensation up to $30,000. The applicable percentage for E at age 30 is 6.5%. When E is age 40, Plan W is amended to increase the compensation base to $50,000, to increase the rate of benefit accrual and to provide the maximum basic benefit. E's compensation equals or exceeds the plan's compensation base at all times. The applicable percentages for each level of compensation, the accrual rates and maximum benefit after the plan is amended are determined as follows:

(i) Under paragraph (a), an applicable percentage is determined for each level of compensation. For the initial compensation base of $30,000, the limitation determined under paragraph (a) is 4.4% (the greater of 3%, Plan W's prior-benefit accrual rate for E, or 4.4%, Plan W's attained-age applicable percentage for E). In this instance, Plan W can raise its benefit accrual rate to 4.4% applicable to the initial compensation base of $30,000.

(ii) The limitation on the applicable percentage for the next level of compensation in excess of $30,000 up to the new $50,000 compensation base (the next $20,000 of compensation) is 4.4%, the attained-age applicable percentage (there is no prior-benefit accrual rate for this level of compensation). In this instance, Plan W can raise its benefit accrual rate to 4.4% applicable to this next $20,000 level of compensation.

(iii) Under § 1.401(j)–1(b), the maximum benefit which could accrue annually for E under Plan W after the plan is amended equals the sum of $1,320 (the initial compensation base of $30,000 times the 4.4% applicable percentage) and $880 (the $20,000 next level of compensation times the 4.4% applicable percentage). Accordingly, E's maximum benefit equals $2,200.

§ 1.401(j)–4 Special rules for certain insured plans.

(a) *Insurance contract plans described in section 412(i)*—(1) *Targeted cash surrender value.* If a plan is described in section 412(i), the cash surrender value of insurance or annuity contracts at normal retirement age (the targeted cash surrender value) may not exceed the product of—

(i) The total annual life annuity benefit commencing at that normal retirement age that would be permitted under section 401(j) for the participant for all years of participation, adjusted to reflect all pre-retirement ancillary benefits provided by the plan, and

(ii) The amount shown in Table A (if the insurance or annuity contracts are based on mortality assumptions determined by the sex of the participant) or Table B (if the contracts are not based on different assumptions by sex) for the normal retirement age.

Table A.—*Sex Based Table*

Normal retirement age	Amount	
	Male	Female
55	$11.78	$13.20
56	11.55	13.00
57	11.32	12.80
58	11.09	12.58
59	10.84	12.36

Table A.—*Sex Based Table*—Continued

Normal retirement age	Amount	
	Male	Female
60	10.59	12.13
61	10.34	11.90
62	10.08	11.65
63	9.81	11.40
64	9.54	11.14
65	9.27	10.88
66	8.99	10.60
67	8.72	10.32
68	8.44	10.03
69	8.17	9.73
70	7.90	9.43

Table B.—*Unisex Table*

Normal retirement age	Amount
55	$12.06
56	11.84
57	11.62
58	11.39
59	11.14
60	10.90
61	10.65
62	10.39
63	10.13
64	9.86
65	9.59
66	9.32
67	9.03
68	8.76
69	8.48
70	8.21

(2) *Benefits before normal retirement age.* A plan described in section 412(i) shall not fail to satisfy section 401(j) because it provides a benefit before a participant's normal retirement age equal to the cash surrender value under the insurance or annuity contracts so long as the targeted cash surrender value does not exceed the limitations of subparagraph (1).

(b) *Other plans involving insurance*—(1) *In general.* If a plan other than a plan described in section 412(i) distributes insurance or annuity contracts (including participating and variable annuities) to provide plan benefits, the value of such contracts together with the value of any other distribution may not exceed the actuarial equivalent of the maximum benefit that could be provided to that participant. The actuarial equivalent will be determined by the Commissioner based on the 1971 Group Annuity Mortality Table (male) without projection and an assumed interest rate of 6 percent compounded annually.

(2) *Participating and variable annuities*—(i) *Single premium contracts.* If a plan purchases a single-premium insurance or annuity contract at or about the time that the participant attains normal retirement age and the participant's benefits may vary because of mortality, interest, or expense experience, the value of the contract will equal the premium paid for the contract.

(ii) *Other contracts.* If a plan purchases an insurance or annuity contract under which a self-employed individual or shareholder-employee may receive a benefit that varies in accordance with mortality, interest, or expense experience in circumstances other than those described in subdivision (i) of this subparagraph, the value of the contract will be the single premium purchase price (at the date of distribution) of an equivalent contract.

(3) *Cash surrender value.* For purposes of this paragraph, the value of any insurance or annuity contract shall not be less than its cash surrender value.

(c) *Nonparticipating contracts with no cash surrender value.* The rules of paragraph (b) shall not apply to any contract which provides for level benefits during the life of the participant, which pays no dividends to the participant or a beneficiary, and which cannot be exchanged by the participant or beneficiary for cash or a contract with cash surrender value.

§ 1.401(j)-5 Benefit limitations applicable to final average pay plans.

(a) *General rule.* A final average pay plan as defined in § 1.401(j)-1(a)(3)(v) is not qualified unless the plan precludes the accrual (or the potential of accurual) of benefits by a self-employed individual or shareholder-employee in excess of the limitation determined under this section. Except as provided in this section, the provisions of § 1.401(j)-1 through 1.401(j)-4, inclusive, and § 1.401(j)-6 apply to a final average pay plan.

(b) *Maximum benefit. Final average pay plan*—(1) *General rule.* If a participant has been subject to the section 401(j) limitations during all plan years for which that participant has accrued benefits under the plan, the participant's accrued benefit is limited to the sum of the products of:

(i) The applicable percentage rate, determined under § 1.401(j)-1, for each period of plan participation, multiplied by

(ii) The sum of the participant's compensation covered under the plan for that period of plan participation including the plan year for which the limitation is being determined.

If the plan changes the participant's rate of accrual, the compensation base with respect to the participant, or both, the Amended Limitation determined under paragraph (c)(2) applies to the participant.

(2) *Change in status.* If a participant has not been subject to section 401(j) during all plan years in which the participant accrued benefits under the plan, the participant's accrued basic benefit is limited to the sum of (i) the participant's pre-401(j) benefit and (ii) the maximum benefit determined under subparagraph (1) of this paragraph for the participant's post-401(j) periods of participation. If the plan changes the participant's rate of accrual, the compensation base with respect to the participant or both, the Amended Limitation determined under paragraph (c)(2) applies to the participant. However, if a plan is amended effective as of the date section 401(j) first applies to the plan to conform the plan to the requirements of section 401(j) the limitations of this subparagraph apply to the plan: *Provided,* That the plan is not subsequently amended.

(3) *Pre-401(j) benefit.* In a final average pay plan, a participant's pre-401(j) benefit equals the greater of—

(i) The accrued benefit of the participant under the plan as of the close of the plan year immediately preceding the first plan year in which section 401(j) applies to the participant (*i.e.*, the later of (A) the plan year in which the participant becomes a self-employed individual or a shareholder-employee or (B) the first plan year for which section 401(j) applies to the plan) determined as if the participant separates at such time; or

(ii) The benefit of the participant obtained by totaling the products of (A) the applicable percentage rate, determined under § 1.401(j)-1, for each period of plan participation by (B) the sum of the compensation earned by the participant for each year during that period of plan participation (ending the current period of participation with the close of the immediately preceding plan year referred to in subdivision (i) of this subparagraph).

The pre-401(j) benefit of the participant determined under subdivisions (i) and (ii) of this subparagraph shall be determined in a manner consistent with the determination of the accrued benefit under § 1.401(j)-1(e)(3) (relating to past accrual rates in the case of an employee's change in status). Notwithstanding § 1.401(j)-1(e)(3) any plan amendment affecting the compensation base or rate of accrual occurring prior to or within the immediately preceding plan year referred to in subdivision (i) of this subparagraph shall be disregarded for purposes of determining the accrued benefit under subdivision (ii) of this subparagraph. Further, the applicable percentage in subdivision (ii)(A) and the compensation for each year described in subdivision (ii)(B) shall be determined with respect to the plan's compensation base in effect for the first plan year in which section 401(j) applies to the participant.

(c) *Change in compensation base or rate of accrual*—(1) *Application.* If a final average pay plan changes either the compensation base or the rate of accrual with respect to a participant who is either a self-employed individual or shareholder-employee, the plan does not satisfy section 401(j) in any plan year for which the plan provides for (or permits) an accrual of benefits for the participant which exceeds the Amended Limitation.

(2) *Amended Limitation.* The Amended Limitation, with respect to a participant, for any level of compensation (see § 1.401(j)–3(b)(1)), equals the sum of—

(i) The accrued benefit of the participant with respect to that level of compensation under the plan as established and

(ii) The accrued benefit of the participant under the plan on account of each subsequent amendment with respect to that level of compensation.

For purposes of this subparagraph and the succeeding rules in this section, the term "under the plan as established" means, with respect to a participant's level of compensation, under the plan at the time the participant first accrues a benefit for a particular level of compensation (or could have so accrued but for his compensation being less than such level). Thus, for example, if a plan is established in year 1 and a designated employee commences participation in year 10, then the plan as established means the plan in year 10.

(3) *Accrued benefit under plan as established.* The accrued basic benefit of the participant under the plan as established equals the lesser of—

(i) The accrued benefit of the participant as determined for each level of compensation based on the plan in effect on the date that the participant is first subject to section 401(j) and based on that participant's service and compensation taken into account under the plan for the participant's period of plan participation, or

(ii) The participant's maximum benefit determined under paragraph (b) of this section for each level of compensation.

(4) *Limitation on increases.* If the accrued benefit of the participant on account of the plan as established with respect to a level of compensation equals the participant's maximum benefit determined under paragraph (b) of this section, then the accrued benefit of the participant on account of each subsequent amendment with respect to such level of compensation is zero.

(5) *Permitted increases.* If the accrued benefit of the participant on account of the plan as established with respect to a level of compensation is less than the participant's maximum benefit determined under paragraph (b) of this section, then the accrued benefit of the participant on account of each subsequent amendment with respect to such level of compensation at any relevant time affected by such amendment equals the lesser of—

(i) The increase in the accrued benefit of the participant determined under subparagraph (6) or

(ii) The Averaged Cap with respect to that participant determined under subparagraph (7).

(6) *Increase in accrued benefit.* The increase in the participant's accrued benefit under the plan formula described in subparagraph (5)(i) of this paragraph equals the difference between—

(i) The participant's accrued benefit determined under the plan in effect prior to the plan amendment and

(ii) The participant's accrued benefit determined under the plan in effect after the plan amendment. Both such accrued benefits are determined with respect to the participant's service and compensation taken into account under the plan as of the plan year for which the limitation is being determined.

(7) *Averaged Cap.* The Averaged Cap with respect to the participant equals the product of—

(i) The difference, if any, between (A) the applicable percentage rate of the participant after the amendment and (B) the prior-benefit accrual rate of the participant before the amendment, as defined in § 1.401(j)–3(b)(2), and

(ii) The sum of the compensation earned by the participant after the amendment (and taken into account under the plan's level of compensation) for each plan year within the participant's current period of plan participation including the plan year for which the limitation is being determined.

The percentage rates of the participant referred to in subdivision (i) (A) and (B) of this subparagraph are the otherwise determined percentages under section 401(j), including the required adjustments under § 1.401(j)–3, relating to changes in compensation base and rate of accrual. Thus, for example, the participant's applicable percentage rate before the amendment for a particular level of compensation must be determined in a manner consistent with the rules in § 1.401(j)–3(d), relating to requirements for changes in compensation bases.

(8) *Limitation on increases.* (i) If the accrued benefit of the participant on account of the plan as first amended with respect to a level of compensation equals the participant's Averaged Cap (determined under subparagraph (7) of this paragraph), then the accrued benefit of the participant on account of each succeeding amendment, after the first such amendment, with respect to such level of compensation is zero.

(ii) If the accrued benefit of the participant on account of the plan's first amendment with respect to a level of compensation is less than the participant's Averaged Cap (determined under subparagraph (7) of this paragraph, then the participant's accrued benefit on account of each succeeding amendment, after the first such amendment, is determined by applying the rules of subparagraphs (6) and (7) of this paragraph to each succeeding amendment as if the plan as established and first amended with respect to a level of compensation constituted the established plan. In that application of the rules under subparagraphs (6) and (7) of this paragraph, the participant's maximum benefit determined under paragraph (b) of this section shall be deemed to be the participant's Averaged Cap (determined under subparagraph (7) of this paragraph).

(d) *Other adjustments.* The Commissioner shall, in the case of a final average pay plan, determine if any other adjustments to plan accruals are required to be made in a manner consistent with section 401(j) including this section and § 1.401(j)–3.

(e) *Examples.* The provisions of this section can be illustrated by the examples set forth below. In each of the examples (except where otherwise specified) the following assumptions have been made: (1) Each participant is a single self-employed individual or shareholder-employee in a final average pay plan; (2) the plan year and employer taxable year coincide; and (3) each plan provides a basic benefit for each participant.

Example (1). Maximum benefit. Participant A begins participation in Plan M at age 50. Plan M provides for an annual benefit accrual of 1% of final year's compensation, not to exceed $50,000, for each year of participation. (A plan would not be qualified if benefits were based on only the last year, but for illustrative purposes assume that such a formula is permissible.) Plan M also limits benefit accruals to satisfy the limitations of this section. A's compensation for each of the first 10 years equals $10,000 per year. At age 60, A's compensation is increased and equals $40,000. A's maximum benefit and benefit accrual for the 11th year is determined as follows:

(A) Because A is always subject to section 401(j) under Plan M, A's maximum benefit is determined under paragraph (b)(1) and equals the product of 3% (the applicable

percentage at age 50) times $140,000 ((10 years times $10,000, or $100,000) plus (1 year times $40,000, or $40,000)), or $4,200.

(B) Under Plan M's benefit formula, without regard to the plan provision required to satisfy this section, A's accrued benefit would equal 1% times $40,000 times 11 years, or $4,400.

(C) Accordingly, Plan M would satisfy section 401(j) if it provided a deferred normal retirement benefit for A of $4,200, if A left the plan at the end of the 11th year of participation.

(D) If Plan M is never amended and A continues plan participation (instead of ending plan participation as in (C), above) for 4 more years at the same compensation of $40,000, then A's accrued normal retirement benefit under the plan equals $6,000 (1% times $40,000 times 15 years). A's maximum benefit in this instance, equals $9,000 (3% times $300,000 ($140,000 over 11 years plus $160,000 over 4 years)). Thus, Plan M would satisfy section 401(j) by providing A with a $6,000 normal retirement benefit.

Example (2). Amended limitation. Participant B begins participation in Plan N at age 50. Plan N provides for an annual benefit accrual of 1% of final year's compensation, not to exceed $50,000 for each year of participation. Plan N is amended to provide for an annual benefit accrual of 2% of last year's compensation, not to exceed $50,000, when B is age 55 (6th year of B's plan participation). Plan N also limits benefit accruals to satisfy the limitation of this section. B's compensation for each of the first 10 years (age 50 to 59) equals $25,000 per year. When B is age 60, B's compensation is increased and equals $40,000 for each of the next 5 years (age 60 to age 64). Assume the Plan N's benefit formula has satisfied this section prior to the plan amendment. B's Amended Limitation and benefit accrual are determined as follows:

(A) B's Amended Limitation under Plan N is determined under paragraph (c). B's Amended Limitation for the plan's $50,000 level of compensation equals the sum of (1) B's accrued benefit under Plan N as established and (2) B's accrued benefit on account of the amendment to Plan N.

(B) B's accrued benefit under Plan N as established equals the lesser of (1) B's accrued benefit under Plan N as in effect when section 401(j) applies to B or (2) B's maximum benefit. In this case these amounts, respectively, equal $6,000 (1% times $40,000 times 15 years) and $13,500 (3%, age 50, times $450,000 (10 years times $25,000, or $250,000) plus (5 years times $40,000, or $200,000)). Accordingly, B's accrued benefit under Plan N, as established, equals $6,000. Because B's maximum benefit exceeds B's accrued benefit under the plan as established, Plan N can amend its plan benefit accrual formula to provide B a greater accrued benefit.

(C) B's accrued benefit on account of the amendment to Plan N equals the lesser of (1) B's increased accrued benefit as a result of the amendment or (2) B's Averaged Cap. B's accrued benefit under the new plan benefit formula equals $12,000 (2% times $40,000 times 15 years). Therefore, B's increased accrued benefit equals $6,000 ($12,000 new minus $6,000 old). B's Averaged Cap equals (under paragraph (c)(7)) the product of a percentage and a career compensation dollar amount. B's compensation for his 10 years of plan participation since the plan amendment equals $325,000 (5 times $25,000 plus 5 times $40,000). The percentage equals the difference between the *post*-amendment applicable percentage and the prior-benefit accrual rate, both determined consistently with the plan amendment rules in § 1.401(j)-3. In this case, B's *post*-amendment percentage equals the attained-age applicable percentage of 2.5% for age 55. B's prior-benefit accrual rate is determined by dividing B's accrued benefit of $6,000 under the original plan by B's $450,000 compensation for his 15 years of plan participation and equals 1.33%. The difference between the two percentages equals 1.17%. Accordingly, B's Averaged Cap under Plan N, as amended, equals $3,803 ($325,000 times 1.17%). B's accrued benefit on account of the amendment equals $3,803 (the lesser of $6,000 or $3,803).

(D) B's Amended Limitation under Plan N equals $9,803 ($6,000 plus $3,803). Because B's accrued benefit on account of the plan amendment is determined by reference to B's Averaged Cap, Plan N could not provide for additional benefit accruals for B, assuming B leaves the plan after his 15 years of participation.

Example (3). Worksheet. Using the facts of Example (2), B's Amended Limitation and benefit accrual can be computed under the following worksheet:

FINAL AVERAGE PAY WORKSHEET

(For one level of compensation and only one period of current participation)

Step No., Operation, and Answer

1. Determine accrued benefit under plan as established, using plan formula and final average pay—$6,000 (1%×15×$40,000)
2. Determine maximum benefit by following steps:
   (a) Limitation on pre-401(j) benefit:
   (i) accrued benefit of participant as of close of last pre-401(j) plan year determined as of that time—0
   (ii) applicable percentage based on age as of beginning of current participation—3%
   (iii) sum of compensations within this level for years prior to 401(j)—0
   (iv) product of (ii) and (iii)—0
   (v) greater of (i) or (iv)—0
   (b) Limitation on post-401(j) benefit:
   (i) applicable percentage in (a)(ii)—3%
   (ii) sum of compensations within this level for years since 401(j)—$450,000 (10×$25,000+5×$40,000)
   (iii) product of (i) and (ii)—$13,500
   (c) Maximum benefit equals the sum of (a)(v) plus (b)(iii)—$13,500

If Step 1 is not less than Step 2(c), or if there are no further plan amendments, enter zero in Step 6 and proceed to Step 7. Otherwise proceed to Step 3.

Amendment: 1, 2, and 3.

3. Determine the accrued benefit on account of each subsequent amendment, using plan formula, and final average pay as follows:
   (a) Accrued benefit based on plan in effect after the amendment—$12,000 (2%×15×$40,000)
   (b) Accrued benefit based on plan in effect prior to the amendment—$6,000
   (c) Increase [(a)-(b)]—$6,000
4. Determine Averaged Cap steps:
   (a) Prior benefit accrual rate:
   (i) accrual rate for plan as established [Step 1÷(Step 2(a)(iii)+Step 2(b)(ii))]—1.33% $6,000 0+$450,000
   (ii) greater of Step 4(a)(i) in this column or Step 4(a)(iv) in prior column—1.33%
   (iii) from prior column [Step 5÷Step 4(d)]—0
   (iv) sum of Step 4(a)(iii) and Step 4 (a)(ii)—1.33%
   (b) Attained age applicable percentage at time of amendment—2.5%
   (c) Excess, if any [(b)-(a)(iv)]—1.17%
   (d) Sum of compensations within this level for years since amendment—$325,000 (5×$40,000+5×$25,000)
   (e) Product of (c) and (d)—$3,803
5. Maximum accrued benefit attributable to this amendment (Lesser of Step 3(c) or Step 4(e))—$3,803

If, for this amendment, Step 3(c) is not less than Step 4(e) or, if there are no subsequent amendments, proceed to Step 6. Otherwise, do Steps 3–5 for the next amendment.

6. Maximum accrued benefit due to all amendments (sum columns of Step 5)—$3,803
7. Maximum accrued benefit under plan as established (lesser of Steps 1 or 2(c))—$6,000
8. Maximum accrued benefit—Total (Sum of Step 6 and Step 7)—$9,803

Example (4). Multiple periods of participation. (i) Assume the same facts as in *Example (3)* of § 1.401(j)-1(g), except that the plan is a final average pay plan instead of a career average plan. The final average pay plan provides for an annual benefit accrual of 2.5% of the participant's average compensation for the high three years. The plan also limits benefit accruals to satisfy the limitation of this section and section 415. In each of the high three years, A earned $50,000. Therefore, A's accrued basic benefit under the plan (without regard to this section) equals $25,000 (2.5% of $50,000×20 years).

(ii) A's maximum benefit is determined by multiplying A's applicable percentage for each period of participation by the sum of A's compensation (not in excess of the contribution base) in that period of participation. As summarized in *Example (3)(vi)* of § 1.401(j)-1(g), A's compensation, applicable percentages and maximum benefits for each period of participation are as follows:

Age	Compensation per year	Rate	Benefit earned per year	Total benefit
30 to 31	$20,000	6.5	$1,300	$6,500
50 to 54	30,000	3.0	900	4,500
55 to 59	40,000	3.0	1,200	6,000
60 to 64	50,000	3.0	1,500	7,500
Total				24,500

(iii) Accordingly, A's maximum benefit under the final average pay plan would be $24,500 (the same as A's maximum benefit under the career average plan described in

Example (3) of § 1.401 (j)–1 (g)). Thus, the plan would satisfy section 401(j) if it provided A with a $24,500 normal retirement benefit instead of the $25,000 benefit determined under the plan formula without regard to this section.

§ 1.401(j)–6 Effective dates and transitional rules.

(a) *Effective dates.* Section 401(j) and the regulations thereunder apply to taxable years of an employer beginning after December 31, 1975, and to any plan year beginning with or within such taxable years.

(b) *Transitional rule.* (1) A plan will be treated as satisfying the requirements of section 401(j) for plan years beginning prior to January 23, 1982 if, for such years, any excess of the benefit accruing under the plan over the maximum benefit permitted for a participant under section 401(j) for such years is used, to the extent reasonably possible, to reduce the maximum benefit permitted under section 401(j) for plan years beginning on or after such date. This subparagraph will apply to a plan only if it is amended to satisfy the requirements of this subparagraph by the beginning of the first plan year beginning on or after January 23, 1982.

(2) A plan other than a plan described in section 412(i) will satisfy subparagraph (1) of this paragraph only if it is amended to provide that a participant who has accrued an excess benefit will reduce the accruals in each subsequent year by the remaining amount of such excess, until the excess is completely eliminated. An amendment required by this subparagraph shall not be considered a change in benefit accruals requiring the adjustments described in §§ 1.401(j)–3 or 1.401(j)–5(c).

(3) A plan described in section 412 (i) will satisfy subparagraph (1) if a new level premium is established based on a targeted cash surrender value at or below the limits described in § 1.401(j)–4(a).

(4) The rules of this paragraph may be illustrated by the following examples:

Example (1). (i) A, a partner in the X partnership, becomes a participant in the X Plan, a career average defined benefit plan, in 1977 at age 32. A accrues a basic benefit of 6.5% of compensation up to $50,000 for each year of service. A earns $20,000 in 1977, $30,000 in 1978, $40,000 in 1979, and $50,000 or more in 1980 and all subsequent years. In 1977, A accrues a basic benefit of $1,300 (6.5% of $20,000); in 1978, $1,950 (6.5% of $30,000); in 1979, $2,600 (6.5% of $40,000); and in 1980, $3,250 (6.5% of $50,000), for a total of $9,100. The plan otherwise complies with the requirements of section 401 and is not a plan described in section 412(i).

(ii) Under § 1.401(j)–1(c)(1) A's applicable percentage is 6.0% and A's maximum benefit accrual is $1,200 (6% of $20,000) for 1977; $1,800 (6% of $30,000) for 1978; $2,400 (6% of $40,000) for 1979; and $3,000 (6% of $50,000) for 1980, for a total maximum benefit of $8,400. Thus, A accrued an excess benefit of $700 in 1977–80. In 1980, the plan is amended effective January 1, 1981, the beginning of the plan year, to provide A with a benefit accrual in 1981 of $2,300 (6% of $50,000, or $3,000, minus $700) and 6% of compensation up to $50,000 thereafter.

(iii) Under subparagraphs (1) and (2), the plan will continue to be qualified because the amendment to reduce future accruals to the extent of past excess accruals was adopted before [one year after publication of this Treasury decision in the **Federal Register**]. A's applicable percentage remains 6.0% because the amendment required by this section does not begin a new period of participation.

Example (2). (i) A, a self-employed individual, begins participation in Plan X, a career average defined benefit plan, in 1976 at age 32. The plan is not a plan described in section 412(i). Each year A accrues a basic benefit of 6.5% of compensation up to $50,000. On May 1, 1980, A ceases to be covered by the plan.

(ii) Under § 1.401(j)–1(b) (1) A's maximum benefit for each plan year is 6.0% (the applicable percentage for age 32) of compensation up to $50,000. Therefore A has accrued a benefit in excess of the maximum benefit permitted under section 401(j). The plan will satisfy the requirements of section 401(j) if it is amended to provide that A's future benefit accruals will be reduced to zero until A's accrued benefit equals the sum of A's maximum benefits for all plan years in which A is or was subject to the section 401(j) limitations. The plan, so amended, will satisfy the requirements of this section even though A never again participates in the plan.

Example (3). (i) Employee A, a shareholder-employee, became a participant in a defined benefit plan in 1976 at age 45. The plan is a plan described in section 412(i) and the insurance company uses sex base tables to determine its premiums. A is male. A's compensation each year from 1976 through 1980 was $20,000. The plan year begins on January 1. In 1981, A's compensation was again $20,000. Under the terms of the plan in effect through 1980 and the terms of the insurance contract purchased to fund A's benefit, A's targeted cash surrender value was $150,000. However, under § 1.401(j)–4(a) the maximum targeted cash surrender value for A at age 65 is $133,488 (3.6% (A's applicable percentage) times 20 (A's years of possible participation to retirement) times $20,000 (A's compensation for each year) times 9.27 (Table A)).

(ii) The plan is amended in December 1980, effective January 1, 1981, to conform to these regulations. A lower annual premium is established to reflect the new targeted cash surrender value of $133,488. Under subparagraph (3), the plan will continue to be qualified because the plan has been amended to conform to these regulations prior to January 23, 1982.

Example (4). (i) Employee B, a shareholder-employee, became a participant in a defined benefit plan in 1979 at age 50. The plan is a plan described in section 412(i) and the insurance company uses sex-based tables to determine the premiums. B is female. B's compensation was $30,000 in 1979 and 1980 and increased to $40,000 in 1981. The plan year begins January 1. Under the terms of the plan in effect through 1980 and the terms of the insurance contract purchased to fund B's benefit, B's targeted cash surrender value was $185,000. However, under § 1.401(j)–4(a) the maximum targeted cash surrender value for B at age 65 was $146,880 (3% (B's applicable percentage) times 15 (B's years of possible participation to retirement) times $30,000 (B's compensation for each year) times 10.88 (Table A)).

(ii) The plan is amended in December 1980, effective January 1, 1981, to conform to these regulations. Because B's compensation increased and because the plan was amended, B's targeted cash surrender value at age 65 under the terms of the plan and insurance contracts purchased to fund B's benefits is $188,000. Under § 1.401(j)–4(a) the maximum targeted cash surrender value for B at age 65 is $189,312 (3% times $30,000 times 10.88 for each of the first two plan years plus 3% times 13 (B's years of possible plan participation from age 52 to retirement) times $40,000 (B's compensation) times 10.88). No adjustment in B's targeted cash surrender value need be made, even though B's targeted cash surrender value under the plan exceeded the maximum targeted cash surrender value for years prior to 1981.

(c) *Subchapter S plan in existence before December 31, 1975.* If a defined benefit plan covered a shareholder-employee in a plan year beginning before December 31, 1975, the pre-401(j) part of the plan is subject to the rules on taxability of shareholder-employees set forth in section 1379(b). The pre-401(j) part of the plan is the part attributable to benefits accrued for plan years beginning prior to December 31, 1975, in which the plan covered a shareholder-employee.

(Secs. 401(j), 7805, Internal Revenue Code of 1954 (88 Stat. 953, 68A Stat. 917 (26 U.S.C. 401(j), 7805)))

Jerome Kurtz,

Commissioner of Internal Revenue.

Approved: January 12, 1981.

Donald C. Lubick,

Assistant Secretary of the Treasury.

[FR Doc. 81–2337 Filed 1–19–81; 11:00 am]

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26 CFR Part 1

[T.D. 7765]

Investment Credit for Energy Property

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the business

investment credit for energy property. Changes in the applicable tax law were made by the Energy Tax Act of 1978. These regulations will provide the public with the guidance needed to comply with the law.

DATES: These regulations are effective, in general, for the period beginning on October 1, 1978, and ending December 31, 1982.

FOR FURTHER INFORMATION CONTACT: Mary Frances Pearson 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 (202-566-3458, not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains amendments to the Income Tax Regulations (26 CFR Part 1) under section 48 of the Internal Revenue Code of 1954. These amendments were proposed in the **Federal Register** for September 19, 1980 (45 FR 62496). A public hearing concerning the proposed amendments was held on December 4, 1980. These amendments conform the regulations to certain changes made by section 301(b) of the Energy Tax Act of 1978 (Pub. L. 95-618, 92 Stat. 3174) and are issued under the authority contained in Code sections 7805 (68A Stat. 917, 26 U.S.C. 7805) and 38(b) (76 Stat. 962, 26 U.S.C. 38).

After careful consideration of the comments submitted in response to the notice of proposed rulemaking, and after consultation with the Department of Energy, the proposed rules are adopted, as revised by this Treasury Decision.

Windfall Profit Tax Legislation

This regulation does not reflect any amendments under sections 221-223 of the Crude Oil Windfall Profit Tax Act of 1980 (Pub. L. 96-223, 94 Stat. 229). Under that Act, certain categories of energy property have been expanded and effective dates for certain energy property have been extended. A subsequent notice of proposed rulemaking will cover those amendments.

In General

In general, a taxpayer may claim a 10-percent investment credit (regular credit) for certain tangible business property. The taxpayer may apply the regular credit against a portion of its tax liability. Unused credits may be carried forward or carried back. If property for which the regular credit was claimed is disposed of before the end of its estimated useful life, the credit must be recomputed on the basis of its actual life.

For the period beginning October 1, 1978, and ending December 31, 1982, section 301(b) of the Energy Tax Act of 1978 adds a 10 percent credit for energy property (energy credit). The rules for the regular credit apply, in general, to the energy credit. However, the energy credit may offset 100 percent of the tax liability remaining after applying the regular credit.

Energy property is defined as alternative energy property, solar or wind energy property, specially defined energy property, recycling equipment, shale oil equipment, and equipment used to produce natural gas from geopressured brine. Energy property must be new section 38 property. For the energy credit only, building and structural components of buildings and property used in lodging facilities (to the extent qualified, *e.g.*, solar or geothermal equipment) are treated as section 38 property. However, since this type of property, in general, is not otherwise section 38 property, the property does not qualify for the regular credit. Public utility property generally does not qualify as energy property. To be eligible, the original use of acquired property must begin after September 30, 1978, and before January 1, 1983. Property constructed by the taxpayer is eligible only to the extent of basis attributable to construction for the period beginning on October 1, 1978, and ending on December 31, 1982.

Recapture

If energy property is sold or otherwise disposed of, the recapture rules of section 47 apply to both the regular credit and energy credit. In response to public comments, the application of the section 47 recapture rules to the energy credit was clarified to emphasize that the recapture determination is based upon the estimated useful life of the property which was taken into account in computing qualified investment. Thus, the principles of recapture for the energy credit are the same as for the regular credit.

Alternative Energy Property

Alternative energy property includes (1) equipment which uses an alternate substance as a fuel, and (2) equipment which produces a snythetic fuel from an alternate substance. An alternate substance is a substance other than oil or natural gas or any product of oil or natural gas. Various comments suggested that the definition of alternate substance in the proposed regulations should be expanded to include the synthetic fuels produced from an alternate substance, oil shale, and tar sands. These suggestions were not adopted.

Congress provided a subsidy for direct use of alternate substances as a fuel as well as for producing synthetic fuels from the alternate substance. The commentators would disregard the word "synthetic" and would treat it as the equivalent of alternate substance, the very product from which the synthetic fuel is produced. Congress did not intend, however, to subsidize the use of synthetic fuel. Such a subsidy is unnecessary because synthetic fuel in most cases is a close substitute for conventional fuel and does not require specialized equipment. For example, a credit is provided for equipment used to produce methane from landfill, but, since such methane is a close substitute for pipeline quality natural gas, no credit is provided for equipment which uses such methane as a fuel and which is indistinguishable from equipment using natural gas.

The suggestion that shale oil and tar sands be considered alternate substances was not adopted because those are oil substances although in a form which makes their recovery more difficult. Of course, in the case of oil shale property, Congress provided a credit for such equipment in section 48(l)(7). The Senate had adopted a $3 per barrel credit for production of oil from tar sands. See H.R. 5263, section 1044, as passed by the Senate on October 31, 1977. However, that provision was rejected in Conference. Such a credit was adopted as section 44D of the Code by Congress in the Crude Oil Windfall Profit Tax Act of 1980. (Pub. L. 96-223 94 Stat. 268)

There were some suggestions that synthetic fuel production equipment be expanded to include an oxygen plant. Under section 48(l)(3)(iii), synthetic fuel equipment is "equipment for *converting* and alternate substance into a synthetic liquid, gaseous, or solid fuel. An oxygen plant does not convert the alternate substance into a synthetic fuel but merely supplies the catalyst use in the conversions process. If the statutory language meant to incorporate equipment not directly involved in the conversion process, language such as "used in connection with the conversion" would have been used instead. For this reason, oxygen plants are not synthetic fuel equipment under the regulations.

In response to comments, the definition of synthetic fuel has been changed to state that fuel derived from biomass which undergoes the process of defiberization is a synthetic fuel. This

change is consistent with the "chemical change" requirement since biomass is changed into a refuse derived fuel through a series of chemical and heat treatments which break down the structural fibers of the substance.

Pollution Control Equipment

Under the proposed regulations, pollution control equipment was eligible for the energy credit only if installed on or in connection with eligible alternative energy property. Pollution control equipment required by Federal, State, or local government regulation in effect on October 1, 1978, with respect to property burning coal on that date was excluded. Any order permitting delayed compliance was to be disregarded in determining whether property was required to be installed on October 1, 1978.

Several comments took issue with the requirement in § 1.48–9(c)(8)(iii) that in order for pollution control equipment to qualify as alternative energy property, it must be installed in connection with eligible alternative energy property. These comments were not adopted. The inclusion of certain pollution control equipment under the energy credit was not intended to provide a general subsidy for pollution control equipment, but rather was intended to provide an incentive for the installation of new property using alternate substances. A credit was provided for pollution control equipment only to the extent that such equipment was required for the installation of the alternative energy property. Therefore, this limitation remains in the final rules.

Comments also suggested that orders which permit delayed compliance should be considered in determining what pollution control equipment was required on October 1, 1978. The statutory language in section 48(l)(3)(C) indicates an intention to determine what equipment was required by reference to rules of general application. The law clearly denies the credit to taxpayers who installed such equipment prior to October 1, 1978. Taxpayers, required to install pollution control equipment on that date, who arranged to delay compliance should not be given preferential treatment.

Geothermal Equipment

Under section 48(l)(3)(A)(viii), alternative energy property includes "equipment used to produce, distribute, or use energy derived from a geothermal deposit (within the meaning of section 613(e)(3)). . . ." The proposed regulations defined geothermal deposit by cross-reference to section 1.44C–2(h), which requires a wellhead temperature exceeding 50°C. The proposed regulations also provided that, to qualify, geothermal equipment (1) must be specially adapted to use geothermal energy and (2) must be used exclusively with energy derived from a geothermal deposit. Under the statute, production and distribution equipment qualifies while exploration and development equipment does not.

Comments suggested elimination of the "dual function rule." The dual function rule prevents unnecessary administrative burdens and reflects Congressional intent to limit the subsidy to equipment exclusively used for geothermal energy. Without such a rule, it frequently would be impossible to determine when energy from a geothermal deposit is being used. Further, property which uses energy from a conventional source in addition to geothermal energy is indistinguishable from property that performs the same function without the use of geothermal energy. Congress did not intend to provide a credit for property that would be purchased for conventional heating or cooling uses. However, as noted below, the rule is clarified to indicate that dual use is determined by reference to the particular application, and not by reference to any uses for any equipment.

In response to comments, the final regulations do not contain the specially adapted equipment rule. The comments noted that, in general, geothermal equipment is not specially designed for geothermal use. Consequently, adoption of this rule would have disqualified most geothermal equipment. In response to requests by commentators, the regulations also make it clear that "downhole" equipment necessary to produce geothermal energy (*e.g.*, screening or slotted liners, tubing and downhole pumps), and reinjection well property are production equipment.

Finally, comments have criticized the § 1.44C–2(h) requirement adopted by cross reference that the wellhead temperature exceed 50°C for an energy source to be considered to be a geothermal deposit. The statutory language "energy derived from a geothermal *deposit* (within the meaning of section 613(e)(3)) (emphasis added)" indicates a clear Congressional intent to limit the credit to property utilizing geothermal energy contained in a distinct, specific, and identifiable reservoir. Reference to the depletion provisions contemplates a depletable energy source, and not an aquifer whose water is being constantly replenished.

The intent to thus restrict the term geothermal is also reflected in the description of geothermal energy in the Ways and Means committee print, Energy Program, Number 11, "Geothermal Tax Provisions and Minimum Tax Treatment of Intangible Drilling Costs for Oil and Gas," prepared by the staff of the Joint Committee on Taxation, June 11, 1977. In the committee print, which provided the technical background material for the legislation which ultimately became the Energy Tax Act of 1978, geothermal energy is described by reference as definable deposits of steam, hot water and hot, dry rocks. The lowest temperature mentioned is 60°C, the highest, 1500°C. The technology described involved direct use of the heat from such resources.

Recognizing the difficulty taxpayers would otherwise face in demonstrating that energy was derived from a sufficiently identifiable and depletable deposit, the proposed regulations provide a 50°C rule as a safe-harbor rule. The final regulations retain this liberal rule.

Solar Energy Property

In response to comments, the definition of solar energy property was expanded to make it clear that it includes storage devices, power conditioning equipment, transfer equipment, and property solely related to the functioning of those items. However, such equipment does not include transmission equipment.

Wind Energy Property

A number of comments cited specific legislative history to the effect that wind energy property includes "transfer equipment." *See*, H. Rep. No. 95–496, Part III, 95th Cong., 1st Sess., p. 121; S. Rep. No. 95–1324, 95th Cong., 2d Sess., p. 62). Accordingly, transfer equipment is specifically added to the definition of wind energy property. Transfer equipment includes equipment which permits the aggregation of electricity generated by several windmills and equipment which alters voltage in order to permit transfer to a transmission line. However, transfer equipment does not include transmission lines, a distinction based upon the technical definition of the terms transfer and transmission, and on specific references to transmission in the Act (both including and excluding such equipment) indicating Congressional cognizance of the differences between the two functions.

Specially Defined Energy Property

Section 48(l)(5) lists items of specially defined energy property, which qualify for the energy credit if installed in an existing industrial or commercial process. The proposed regulations

provided descriptions of the items listed. The proposed regulations also excluded equipment used in connection with general office, retail, and similar activities as not involving industrial or commercial processes.

A large number of comments suggested that the term "industrial or commercial process" should include office, retail, and similar activities. Specifically, many commentators argued that automatic energy control systems even when installed in retail stores, office buildings, or multi-family dwellings should qualify for the energy credit as specially defined energy property. The commentators relied primarily on the fact that the administration had proposed a business energy conservation credit which applied to all business buildings and on the appearance of the term "automatic energy control systems" in the statute. These comments were rejected as being inconsistent with the statute and the legislative history of the provision.

The Administration 1977 energy tax proposals contained a general business energy conservation credit which combined both industrial and commercial conservation property under one category. See the Treasury Department's Technical Explanation A-7, published May 16, 1977. Thus, automatic energy control systems, recuperators, and heart wheels (presently eligible for a credit as specially defined energy property) were on a list with insulation, double glazing, and other business insulation property. The House generally adopted the Administration proposal with respect to the business energy credits. However, the House distinguished between those items that were specially designed to achieve conservation in existing industrial processes and items for general business conservation uses.

Property identified as qualifying for the conservation credit, in addition to insulation, included items to be designated by the Secretary as being designed to reduce the heat loss or gain of an existing commercial or industrial building or facility. In contrast to "specifically" defined energy property the class of property described in the conservation credit was not limited by reference to recovery of waste heat or gas nor was it required that it be installed in connection with an existing process. (See, section 2061 (b) & (c) of H.R. 8444 as passed by the House on August 5, 1977; The Ways and Means Committee report (H. Rep. No. 95-496, Part III, 95th Cong. 1st Sess., p. 121).

The Senate bill expanded the definition of specially defined energy property, and retained the House conservation provision. Under the Senate bill, the requirement of use with an existing process was eliminated because the Senate has expanded the qualifying category of items to include non-process items. Thus, under the Senate bill the result called for in these comments would have been correct. (See section 1031 of H.R. 5263 as passed by the Senate October 31, 1977).

However, in Conference, the conferees adopted the House specially defined energy tax credit provision, reinserting the existing industrial or commercial process limitation which the Senate had deleted. The position taken in the comments would require interpreting "in connection with an existing industrial or commercial process," which Congress specifically reinserted, in a way which would cause it to have no meaning. The insulation and conservation credit was not adopted because of budgetary constraints. (See, S. Rep. No. 95-1324) (Conference Report), 95th Cong., 2d Sess., p. 64-67.)

In response to a number of comments, several technical changes were made in the definition of the listed items.

Recycling Equipment

Under section 48(1)(6), recycling equipment is equipment that sorts or prepares solid waste for recycling or that recycles solid waste, as well as equipment that converts solid waste into useful energy. The proposed regulations defined solid waste by reference to the definition in the regulations under section 103(b)(4)(E), which permits tax-exempt financing of "solid waste disposal facilities." Under the proposed rules, the recycling process for recovering raw materials from solid waste is limited to one in which raw materials are recovered which may be used in fabricating an end product in the same way as materials from a virgin substance.

A number of comments suggested including "reconstituted products for commercial purposes" in the definition of recycling. Thus, equipment used to remanufacture used industrial and automotive parts, such as valves, gaskets, carburetors, and distributors or to retread tires would be eligible for the credit. These suggestions were not adopted. Permitting equipment used in these processes to qualify would be inconsistent with the Senate Report which requires that recycling equipment (other than conversion equipment) be designed to recover raw materials. (See, S. Rep. 95-529, 95th Cong., 1st Sess., at 82.) Thus, no change is made in the proposed rules in response to these comments.

In response to a request for clarification, the final rules specify that equipment that processes animal waste is not recycling equipment.

Some comments suggested that the regulations incorporate by reference the definition of solid waste under 42 U.S.C. § 6903, the Solid Waste Disposal Act, as amended, (which treats *e.g.*, liquid and gaseous wastes as "solid waste") rather than the definition of solid waste in the regulations under section 103(b)(4). It is not appropriate to adopt this suggestion.

There is no indication that Congress intended to alter the tax definition of solid waste (except to the extent described below). The legislative history of section 103(b)(4)(E) incorporates by reference, and specifically cites, the definition of solid waste in the Solid Waste Disposal Act in effect at that time. (See, H. Rep. No. 1533, 90 Cong., 2d Sess., p. 38). When that definition in that Act was subsequently amended, Congress did not conform the tax law to the new definition. Furthermore, the legislative history of the Energy Tax Act of 1978 contains no cross-reference to the Solid Waste Disposal Act, as amended, thereby impliedly accepting the existing tax definition.

As a general rule, Congress is presumed to intend terms to have the same meaning for tax purposes when used in more than one Code section. Therefore, under the final rules, the term continues to have the same meaning for purposes of the energy credit as under the regulations under section 103(b)(4)(E).

However, Congress clearly intended certain changes be made in the tax definition of solid waste for purposes of the energy credit. The section 103 regulation excludes from the definition of solid waste any substance that may be sold (*i.e.*, for value) to an unrelated third party. Under this rule, virtually none of the items identified in the Senate Report, such as scrap metal, newsprint, and fibers would be considered solid waste, since all of these items have a market value at least equal to the price a recycler would pay for the material. See, Senate Report, at 83.

Therefore, the proposed regulation defined solid waste by beginning with the section 103 definition but has modified it by deleting an irrelevant reference to the date of issue of obligations, by adding a provision which indicates that if the market value of material is attributable only to its recycling use the material is not considered to have a market value, and by permitting the recycled material to include not more than 10 percent virgin material during a taxable year.

Shale Oil Equipment

In response to comments, the distinction in the proposed regulations between surface mining equipment and equipment used in *in situ* technology is eliminated in the final rules. The distinction appeared in the Senate Report at page 83, although it was not made in the Conference Report. It was decided that, consistent with the legislative intent to encourage shale oil development, the final rules should not favor any particular shale oil recovery technology. In addition, the rules are clarified to indicate that retorting includes direct cooling and condensing and that water supply and treatment equipment and handling equipment for spent shale qualifies. However, under the statute equipment which is used for hydrogenation, refining, or other process subsequent to retorting does not qualify. Consequently, gas cleanup equipment has not been included within the qualified category of equipment.

Several comments took issue with the incremental cost rule in the proposed regulations. Incremental cost is the excess of the total cost of equipment over the amount that would have been expended for the equipment if the equipment were not used for a qualifying purpose.

One item of property in many instances can be used in part for a qualifying energy purpose and in part for non-qualifying functions. The approach in this situation is to give no energy credit for the property, partial credit or full credit. Denying the credit entirely would discourage energy property investments. On the other hand, property which incidently serves an energy function should not receive the subsidy of a full energy credit. The fairer approach adopted in this regulation is the incremental cost rule.

Drafting Information

The principal author of these regulations is Mary Frances Pearson 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 regulations, both on matters of substance and style.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

Paragraph 1. Section 1.47–1 is amended as follows:

1. Paragraph (a)(1)(i) is amended by adding at the end thereof "For rules applicable to energy property, see paragraph (h) of this section."

2. A new paragraph (h) is added to read as set forth below:

§ 1.47–1 Recomputation of credit allowed by section 38.

* * * * *

(h) *Special rules for energy property*—(1) *In general.* A recapture determination is required for the investment credit attributable to the energy percentage (energy credit) if property is (i) disposed of or (ii) otherwise ceases to be energy property (as defined in section 48(l)) with regard to the taxpayer before the close of the estimated useful life (as determined under paragraph (a)(2)(i) of this section) which was taken into account in computing qualified investment.

(2) *Dispositions.* The term "disposition" is described in § 1.47–2(a)(1). A transfer of energy property that is a "disposition" requiring a recapture determination for the investment credit attributable to the regular percentage (regular credit) and the ESOP percentage (ESOP credit) will also be a "disposition" requiring a recapture determination for the energy credit.

(3) *Cessation.* The term "cessation" is described in § 1.47–2(a)(2). For energy property, a cessation occurs during a taxable year if, by reason of a change in use or otherwise, the property would not have qualified for an energy credit if placed in service during that year. A change in use will not require a recapture determination for the regular or ESOP credit unless, by reason of the change, the property would not have qualified for the regular or ESOP credit if placed in service during that year.

(4) *Recordkeeping requirement.* For recordkeeping requirements with respect to dispositions or cessations, the rules of paragraph (e)(1) of this section apply. For example, the taxpayer must maintain records for each recycling facility indicating the percentage of virgin materials used each year. See, § 1.48–9(g)(5)(ii).

(5) *Examples.* The following examples illustrate this paragraph (h).

Example (1). (a) In 1980, corporation X, a calendar year taxpayer, acquires and places in service a computer that will perform solely energy conserving functions in connection with an existing industrial process. Assume the computer has a 10 year useful life and qualifies for both the regular and energy credits. In 1981, a change is made in the industrial process (within the meaning of § 1.48–9(l)(2)). However, for 1981 the computer continues to perform solely energy conserving functions. In 1982, the computer ceases to perform energy conserving functions and begins to perform a production related function.

(b) For 1981, a recapture determination is not required. For 1982, the entire energy credit must be recaptured, although none of the regular credit is recaptured. If in 1989 the computer first ceased to perform an energy conserving function, no part of the energy credit would be recaptured.

Example (2). Assume the same facts and conclusion as in example (1). Assume further that X sells the computer in 1985. A recapture determination is required for the regular credit.

Example (3). In 1981, corporation Y, a calendar year taxpayer, acquires and places in service recycling equipment. Assume the equipment has a 7-year useful life and qualifies for both the regular credit and energy credit. During the course of 1982, more than 10 percent of the material recycled is virgin material. The energy credit is recaptured in its entirety, although none of the regular credit is recaptured. See § 1.48–9(g)(5)(B)(ii).

Example (4). In 1980, corporation Z, a calendar year taxpayer, acquires and places in service a boiler the primary fuel for which is an alternate substance. The boiler has a 7-year useful life. Assume the boiler is a structural component of a building within the meaning of § 1.48–1(e)(2). Assume further that the boiler is not a part of a qualified rehabilitated building (as defined in section 48(g)(1)) or a single purpose agricultural or horticultural structure (as defined in section 48(p)). Z is allowed only an energy credit since the boiler is a structural component of a building. In 1984, Z modifies the boiler to use oil as the primary fuel. A recapture determination is required for the energy credit. See § 1.48–9(c)(3).

Par. 2. A new § 1.48–9 is added to read as set forth below:

§ 1.48–9 Definition of energy property.

(a) *General rule*—(1) *In general.* Under section 48(l)(2), energy property means property that is described in at least one of 6 categories of energy property and that meets the other requirements of this section. If property is described in more than one of these categories, or is described more than once in a single category, only a single energy investment credit is allowed. In that case, the energy investment credit will be allowed under the category the taxpayer chooses by indicating the chosen category on Form 3468, Schedule B. The 6 categories of energy property are:

(i) alternative energy property,
(ii) solar or wind energy property,
(iii) specially defined energy property,
(iv) recycling equipment,
(v) shale oil equipment, and
(vi) equipment for producing natural gas from geopressured brine.

(2) *Depreciable property with 3-year useful life.* Property is not energy property unless depreciation (or amortization in lieu of depreciation) is

allowable and the property has an estimated useful life (determined at the time when the property is placed in service) of 3 years or more.

(3) *Effective date rules.* To be energy property—

(i) If property is constructed, reconstructed or erected by the taxpayer, the construction, reconstruction, or erection must be completed after September 30, 1978, or

(ii) If the property is acquired, the original use of the property must (A) commence with the taxpayer and (B) commence after September 30, 1978, and before January 1, 1983.

For transitional rules, see section 48(m).

(4) *Cross references.* (i) To determined if depreciation (or amortization in lieu of depreciation) is allowable for property, see § 1.48–1(b).

(ii) For the meaning of "estimated useful life", see § 1.46–3(e)(7).

(iii) The meaning of "acquired", "original use", "construction", "reconstruction", and "erection" is determined under the principles of § 1.48–2(b).

(iv) For the definition of energy investment credit (energy credit), see section 48(o)(2).

(v) For special rules relating to public utility property, see paragraph (n) of this section.

(b) *Relationship to section 38 property*—(1) *In general.* (i) Energy property is treated under section 48(l)(1) as meeting the general requirements for section 38 property set forth in section 48(a)(1). For example, structural components of a building may qualify for the energy credit. In addition, the exclusion from section 38 property under section 48(a)(3) (lodging limitation) does not apply to energy property. For purposes of the energy credit, energy property is treated as section 38 property solely by reason of section 48(l)(1). For example, if property ceases to be energy property, it ceases to be section 38 property for all purposes relating to the energy credit and, thus, if subject to recapture under section 47. See § 1.47–1(h).

(ii) See the effective date rules under paragraph (a)(3) of this section for limitations on the eligibility of property as energy property.

(iii) Section 48(l)(1) does not affect the character of property under sections of the Code outside the investment credit provisions. For example, structural components of a building that are treated as section 38 property under section 48(l)(1) remain section 1250 property and are not section 1245 property.

(2) *Other section 48 rules apply.* (i) In general, section 48(a) otherwise applies in determining if energy property is section 38 property. Thus, energy property excluded from the definition of section 38 property under section 48(a) (except by reason of section 48(a)(1) or (a)(3)) is not eligible for the energy credit. For example, energy property used predominantly outside the United States (section 48(a)(2)) or used by tax exempt organizations (section 48(a)(4)), in general, is not treated as section 38 property for any purpose and thus, is not eligible for the energy credit.

(ii) Other rules of section 48, such as those for leased property under section 48(d), also apply to energy property.

(3) *Regular credit denied for certain energy property.* In computing the amount of credit under section 46(a)(2), the regular percentage does not apply to any energy property which, but for section 48(l)(1), would not be section 38 property. See section 46(a)(2)(D). For example, energy property used for lodging (section 48(a)(3)) and, in general, structural components of a building (section 48(a)(1)(B)) re not eligible for the regular credit even though they may be eligible for the energy credit. However, a structural component of a qualified rehabilitated building (as defined in section 48(g)(1)) or a single purpose agricultural or horticultural structure (as defined in section 48(p)) may qualify for the regular credit without regard to section 48(l)(1).

(c) *Alternative energy property*—(1) *In general.* Alternative energy property means property described in paragraph (c)(3) through (10) of this section. In general alternative energy property includes certain property that uses an alternate substance as a fuel or feedstock or converts an alternate substance to a synthetic fuel and certain associated equipment.

(2) *Alternate substance.* (i) An alternate substance is any substance or combination of substances other than an oil or gas substance. Alternate substances include coal, wood, and agricultural, industrial, and municipal wastes or by-products. Alternate substances do not include synthetic fuels or other products that are produced from an alternate substance and that have undergone a chemical change as described in paragraph (c)(5)(ii) of this section. For example, methane produced from landfills is not an alternate substance; rather it is a synthetic fuel produced from an alternate substance. However, preparing an alternate substance for use as a fuel or feedstock or for conversion into a fuel does not create a new product if no chemical change occurs. For example, pelletizing, drying, compacting, and liquefying do not result in a new product if no chemical change occurs.

(ii) The term "oil or gas substance" means—

(A) oil or gas and

(B) any primary product of oil or gas.

(iii) For the definition of primary product of oil or gas, see § 1.993–3(g)(3)(i), (ii), and (vi). Thus, petrochemicals are not primary products of oil or gas.

(3) *Boiler.* (i) A boiler that uses an alternate substance as its primary fuel is alternative energy property.

(ii) A boiler is a device for producing vapor from a liquid. Boilers, in general, have a burner in which fuel is burned. A boiler includes a fire box, boiler tubes, the containment shell, pumps, pressure and operating controls, and safety equipment, but not pollution control equipment (as defined in paragraph (c)(8) of this section).

(iii) A "primary fuel" is a fuel comprising more than 50 percent of the fuel requirement of an item of equipment, measured in terms of Btu's for the remainder of the taxable year from the date the equipment is placed in service and for each taxable year thereafter. Electricity and waste heat are not fuels. For example, electric boilers do not qualify as alternative energy property even if the electricity is derived from an alternate substance.

(4) *Burners.* (i) A burner for a combustor other than a burner described in paragraph (c)(3)(ii) of this section is alternative energy property if the burner uses an alternate substance as its primary fuel (as defined in paragraph (c)(3)(iii) of this section).

(ii) A burner is the part of a combustor that produces a flame. A combustor is a process heater which includes ovens, kilns, and furnaces.

(iii) A burner includes equipment (such as conveyors, flame control devices, and safety monitoring devices) located at the site of the burner and necessary to bring the alternate substance to the burner.

(5) *Synthetic fuel production equipment.* (i) Equipment (synthetic fuel equipment) that converts an alternate substance into a synthetic solid, liquid, or gaseous fuel (other than coke or coke gas) is alternative energy property. Synthetic fuel production equipment does not include equipment, such as an oxygen plant, that is not directly involved in the treatment of an alternate substance, but produces a substance that is, like the alternate substance, a basic feedstock or catalyst used in the conversion process. Equipment is not eligible if it is used beyond the point at which a substance usable as a fuel has been produced. Equipment is eligible

only to the extent of the equipment's cost or basis allocable to the annual production of substances used as a fuel or used in the production of a fuel. For example, assume for the taxable year that 50 percent of the output of equipment is used to produce alcohol for production of whiskey and 50 percent is used to produce alcohol for use in a fuel mixture, such as gasohol. The alcohol production equipment qualifies as synthetic fuel equipment but only to the extent of one-half of its cost or basis. If, in a later taxable year, the equipment is used exclusively to produce whiskey, all of the equipment ceases to be synthetic fuel equipment.

(ii) A fuel is a material that produces usable heat upon combustion. To be "synthetic", the fuel either must differ significantly in chemical composition, as opposed to physical composition, from the alternate substance used to produce it or, in the case of solid fuel produced from biomass, the chemical change must consist of defiberization. Examples of synthetic fuels include alcohol derived from coal, peat, and vegetative matter, such as wood and corn, and methane from landfills.

(iii) Synthetic fuel equipment includes coal gasification equipment, coal liquefaction equipment, equipment for recovering methane from landfill, and equipment that converts biomass to a synthetic fuel.

(iv) Synthetic fuel equipment does not include equipment that merely mixes an alternate substance with another substance. For example, synthetic fuel equipment includes neither equipment that mixes coal and water to produce a slurry nor equipment that mixes alcohol and gasoline to produce gasohol. Equipment used to produce coke or coke gas, such as coke ovens, is also ineligible.

(6) *Modification equipment.* (i) Alternative energy property includes equipment (modification equipment) designed to modify existing equipment. For the definition of "existing," see paragraph (l)(1)(i) of this section. To be eligible, the modification must result in a substitution for the remainder of the taxable year from the date the equipment is placed in service and for each taxable year thereafter of the items in paragraph (c)(6)(ii)(A) or (B) of this section for all or a portion of the oil or gas substance used as a fuel or feedstock. As a result of the modification, the substituted alternate substance must comprise at least 25 percent of the fuel or feedstock (determined on the basis of Btu equivalency). If the modification also increases the capacity of the equipment, only the incremental cost (as defined in paragraph (k) of this section) of the equipment qualifies.

(ii) The substitutes for an oil or gas substance are—

(A) An alternate substance or

(B) A mixture of oil and an alternate substance.

(iii) Modification equipment does not include replacements or a boiler of burner. If the boiler or burner is replaced, the items must be described in paragraph (c) (3) or (4) of this section to qualify as alternative energy property. Modification may include, however, replacements of components of a boiler or burner, such as a heat exchanger.

(iv) The following examples illustrate this paragraph (c)(6).

Example (1). On January 1, 1980, corporation X is using oil to fuel its boiler. On June 1, 1980, X modifies the boiler to permit substitution of a coal and oil mixture for 40 percent of X's oil fuel needs. The mixture consists 75 percent of oil and 25 percent of coal. The equipment modifying the boiler does not qualify as modification equipment because the alternate substance comprises only 10 percent of the fuel.

Example (2). Assume the same facts as in example (1) except 75 percent of the mixture is coal. The equipment modifying the boiler qualifies.

Example (3). Assume the same facts as in example (2) except, instead of substituting an oil and coal mixture for 40 percent of X's oil fuel needs, X uses the modification to expand the boiler's fuel capacity by 40 percent using the mixture as additional fuel. The additional fuel mixture comprises only 28 percent of X's total fuel needs. Thus, even though 75 percent of the additional fuel mixture is an alternate substance, the boiler does not qualify as modification equipment because the alternate substance comprises only 21 percent of the total fuel.

(7) *Equipment using coal as feedstock.* Equipment that uses coal (including lignite) to produce a feedstock for the manufacture of chemicals, such as petrochemicals, or other products is alternative energy property. Equipment is not eligible if it is not directly involved in the treatment of coal or a coal product, but produces a substance that is, like coal, a basic feedstock or catalyst used in the coal conversion process. Equipment is not eligible if it is used beyond the point at which the first product marketable as a feedstock has been produced. Equipment used to produce coke or coke gas, such as coke ovens, is ineligible.

(8) *Pollution control equipment.* (i) Pollution control equipment is alternative energy property. Eligible equipment is limited to property or equipment to the extent it qualifies as a pollution control facility under section 103(b)(4)(F) and the regulations thereunder except that, if control of pollution is not the only significant purpose (within the meaning of those regulations), only the incremental cost (as defined in paragraph (k) of this section) of the equipment qualifies. However, if a Treasury decision changes the regulations under section 103(b)(4)(F) and, thus, the rules reflected in this subdivision (i), the rules as changed will apply as of the effective date of the Treasury decision.

(ii) To be eligible, the equipment must be required by a Federal, State, or local government regulation to be installed on, or used in connection with, eligible alternative energy property (as defined in paragraph (c)(8)(v) of this section).

(iii) Under section 48(l)(3)(D) equipment is not eligible if required by a Federal, State, or local government regulation in effect on October 1, 1978, to be installed on, or in connection with, property using coal (including lignite) as of October 1, 1978.

(iv) Under this subparagraph (8), pollution control equipment is required by regulation if it would be necessary to install the equipment to satisfy the requirements of any applicable law, including nuisance law. The pollution control equipment need not be specifically identified in the applicable law. If several different types of equipment may be used to comply with the applicable law, each type of equipment is considered necessary to satisfy the requirements of the law. An order permitting a taxpayer to delay compliance with any applicable law is disregarded.

(v) Under this subparagraph (8) "eligible alternative energy property" is energy property (as defined in section 48 (l)(2)) described in paragraph (c) (3) through (7) of this section. If equipment otherwise qualifying as pollution control equipment is installed on, or used in connection with, both eligible alternative energy property and property other than eligible alternative energy property, only the incremental cost (as defined in paragraph (k) of this section) of the equipment qualifies.

(vi) *Examples.* The following examples illustrate this subparagraph (8). Assume that the property or equipment in the examples are described in § 1.103–8(g)(2)(ii) and that their only purpose is control of pollution.

Example (1). On October 1, 1978, corporation X acquires and places in service in State A a paper mill. The facility includes a boiler the primary fuel for which is wood chips. The facility includes equipment necessary to comply with pollution control standards in effect on October 1, 1978 in State A. This equipment qualifies as pollution control equipment.

Example (2). On October 1, 1978, corporation Y was burning coal at its facility

in State B. The emissions from the facility exceeded State air pollution control requirements in effect on October 1, 1978. On January 1, 1979, X installed cyclone separators to comply with the State pollution control requirements. The cyclone separators do not qualify as pollution control equipment.

Example (3). Assume the same facts as in example (2) except that Y installs a baghouse instead of cyclone separators to meet more stringent standards that take effect on December 31, 1978. The baghouse qualifies as pollution control equipment because the baghouse was not necessary to meet the standards in effect on October 1, 1978.

Example (4). On October 1, 1978, corporation Z is burning coal at its facility in State C. The emissions from that facility exceed State air pollution control standards in effect on October 1, 1978. C orders Z to install cyclone separators before January 1, 1979. However, C allows Z to operate its facility until January 1, 1979, under less stringent interim standards applicable only to Z. The separators do not qualify as pollution control equipment. The delayed compliance order is disregarded.

(9) *Handling and preparation equipment.* (i) Alternative energy property includes equipment (handling and preparation equipment) used for unloading, transfer, storage, reclaiming from storage, or preparation of an alternate substance for use in eligible alternative energy property (as defined in paragraph (c)(9)(ii) of this section). Handling and preparation equipment must be located at the site the alternate substance is used as a fuel or feedstock. For example, equipment used to screen and prepare coal for use at a power plant qualifies if located at the plant. However, similar equipment located at the coal mine would not qualify.

(ii) Under this subparagraph (9), "eligible alternative energy property" is energy property (as defined in section 48(l)(2)) described in paragraph (c) (3) through (8) of this section. If equipment otherwise qualifying as handling and preparation equipment is installed on, or used in connection with, property other than eligible alternative energy property, only the incremental cost (as defined in paragraph (k) of this section) of the equipment qualifies.

(iii) The term "preparation" includes washing, crushing, drying, compacting, and weighing of an alternate substance. Handling and preparation equipment also includes equipment for shredding, chopping, pulverizing, or screening agricultural or forestry byproducts at the site of use.

(iv) Handling and preparation equipment does not include equipment, such as coal slurry pipelines and railroad cars, that transports a fuel or a feedstock to the site of its use.

(10) *Geothermal equipment.* (i) Alternative energy property includes equipment (geothermal equipment) that produces, distributes, or uses energy derived from a geothermal deposit (as defined in § 1.44C–2(h)).

(ii) In general, production equipment includes equipment necessary to bring geothermal energy from the subterranean deposit to the surface, including well-head and downhole equipment (such as screening or slotted liners, tubing, downhole pumps, and associated equipment). Reinjection wells required for production also may qualify. Production does not include exploration and development.

(iii) Distribution equipment includes equipment that transports geothermal steam or hot water from a geothermal deposit to the site of ultimate use. If geothermal energy is used to generate electricity, distribution equipment includes equipment that transports hot water from the geothermal deposit to a power plant. Distribution equipment also includes components of a heating system, such as pipes and ductwork that distribute within a building the energy derived from the geothermal deposit.

(iv) Equipment that uses energy derived from a geothermal deposit is eligible only if it uses geothermal energy exclusively. Thus, geothermal equipment does not include equipment that uses energy derived both from a geothermal deposit and from sources other than a geothermal deposit. However, the existence of a backup system designed for use only in the event of a failure in the system providing energy derived from a geothermal deposit will not disqualify any other equipment. For example, radiators, fan-coil units, and baseboard heaters are not eligible if they are used in a particular application with hot water from sources other than a geothermal deposit. If geothermal energy is used to generate electricity, equipment using geothermal energy includes the electrical generating equipment, such as turbines and generators. However, geothermal equipment does not include any electrical transmission equipment, such as transmission lines and towers, or any equipment beyond the electrical transmission stage, such as transformers and distribution lines.

(v) *Examples.* The following examples illustrate this subparagraph (10):

Example (1). In 1979, corporation X installs a system which heats its office building by circulating hot water heated by energy derived from a geothermal deposit through the building. Geothermal equipment includes the circulation system, including the pumps and pipes which circulate the hot water through the building.

Example (2). The facts are the same as in example (1), except that corporation X also installs a boiler to produce hot water for heating the building exclusively in the event of a failure of the geothermal equipment. Such a boiler is not geothermal equipment, but the existence of such a backup system does not serve to disqualify property eligible in example (1).

Example (3). The facts are the same as in example (1), except that the water heated by energy derived from a geothermal deposit is not hot enough to provide sufficient heat for the building. Therefore, X installs a system in which the water is heated by an electric boiler before being circulated in the heating system. In this case, neither the boiler nor the circulating system is considered to be geothermal equipment.

Example (4). Corporation Y acquires a commercial vegetable dehydration system in 1981. The system operates by placing fresh vegetables on a conveyor belt and moving them through a dryer. The conveyor belt is powered by electricity. The dryer uses solely energy derived from a geothermal deposit. The dryer is geothermal equipment while the equipment powered by electricity does not qualify.

(d) *Solar energy property*—(1) *In general.* Energy property includes solar energy property. The term "solar energy property" includes equipment and materials (and parts solely related to the functioning of such equipment) that use solar energy directly to (i) generate electricity, (ii) heat or cool a building or structure, or (iii) provide hot water for use within a building or structure. Generally, these functions are accomplished through the use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water). Property that uses, as an energy source, fuel or energy derived indirectly from solar energy, such as ocean thermal energy, fossil fuel, or wood, is not considered solar energy property.

(2) *Passive solar excluded* (i) Solar energy property excludes the materials and components of "passive solar systems," even if combined with "active solar systems."

(ii) An active solar system is based on the use of mechanically forced energy transfer, such as the use of fans or pumps to circulate solar generated energy.

(iii) A passive system is based on the use of conductive, convective, or radiant energy transfer. Passive solar property includes greenhouses, solariums, roof ponds, glazing, and mass or water trombe walls.

(3) *Electric generation equipment.* Solar energy property includes equipment that uses solar energy to

generate electricity, and includes storage devices, power conditioning equipment, transfer equipment, and parts solely related to the functioning of those items. In general, this process involves the transformation of sunlight into electricity through the use of such devices as solar cells or other collectors. However, solar energy property used to generate electricity includes only equipment up to (but not including) the stage that transmits or uses electricity.

(4) *Pipes and ducts.* Pipes and ducts are solar energy property if used exclusively to carry energy derived from solar energy.

(5) *Specially adopted equipment.* Equipment that uses solar energy beyond the distribution stage is eligible only if specially adopted to use solar energy.

(6) *Auxiliary equipment.* Solar energy property does not include equipment (auxiliary equipment), such as furnaces and hot water heaters, that use a source of power other than solar or wind energy to provide usable energy. Solar energy property also does not include equipment, such as ducts and hot water tanks, whether utilized solely by auxiliary equipment or by both auxiliary equipment and solar energy equipment.

(7) *Solar process heat equipment.* Solar energy property does not include equipment that uses solar energy to generate steam at high temperatures for use in industrial or commercial processess (solar process heat).

(8) *Example.* The following example illustrates this paragraph (d).

Example. (a) In 1979, corporation X constructs an apartment building and purchases equipment to convert solar energy into heat for the building. Corporation X also installs an oil-fired water heater and other equipment to provide a backup source of heat when the solar energy equipment cannot meet the energy needs of the building.

(b) The items purchased in addition to the water heater include a roof solar collector, a heat exchanger, a hot water tank, a control component, pumps, pipes, fan-coil units, and valves. Assume the fan-coil units could be used with energy derived from an oil or gas substance without significant modification. All items are depreciable and have a useful life of three years or more. The use of the equipment to heat the building is the first use to which the equipment has been put.

(c) Water is pumped from the basement through pipes to the roof solar collector. Heated water returns through pipes to a heat exchanger which transfers heat to the water in the hot water tank.

(d) The hot water tank and the oil-fired water heater utilize the same distribution pipe. Pumps and valves at the points of connection between the hot water tank, the oil-fired water heater, and the distribution pipe regulate the auxiliary energy supply use. They also prevent the oil-fired water heater from heating water in the hot water tank.

(e) An integrated control component determines whether hot water from the hot water tank or from the oil-fired water heater is distributed to fan-coil units located throughout the building.

(f) The roof solar collector is solar energy property. The pump that moves the water to the roof collector and the pipes between the roof collector and the hot water tank qualify because they are solely related to transporting solar heated water. The hot water tank qualifies because it stores water heated solely by solar radiation. The heat exchanger also qualifies.

(g) The oil-fired water heater does not qualify as solar energy property because it is auxiliary equipment.

(h) The distribution pipe, the control component, and the pumps and valves do not qualify because they serve the oil-fired water heater as well as the solar energy equipment. All of these items would qualify if used solely in connection with solar energy equipment. The fan-coil units do not qualify because they are not specially adapted to use energy derived from solar energy.

(e) *Wind energy property*—(1) *In general.* Energy property includes wind energy property. Wind energy property is equipment (and parts solely related to the functioning of that equipment) that performs a function described in paragraph (e)(2) of this section. In general, wind energy property consists of a windmill, wind-driven generator, storage devices, power conditioning equipment, transfer equipment, and parts solely related to the functioning of those items. Wind energy property does not include equipment that transmits or uses electricity derived from wind energy. In addition, limitations apply similar to those set forth in paragraph (d)(5) and (6) of this section.

(2) *Eligible functions.* Wind energy property is limited to equipment (and parts related solely to the functioning of that equipment) that—

(i) Uses wind energy to heat or cool, or provide hot water for use in, a building or structure, or

(ii) Uses wind energy to generate electricity (but not mechanical forms of energy).

(f) *Specially defined energy property*—(1) *In general.* Specially defined energy property means only those items described in paragraph (f)(4) through (14) of this section that meet the requirements of paragraph (f)(2) of this section. The items described in paragraph (f)(4) through (14) of this section also consist of related equipment, such as fans, pumps, ductwork, piping, and controls, the installation of which is necessary for the specified item to reduce the energy consumed or heat wasted by the process.

(2) *General requirements.* To be eligible, each item described in paragraph (f)(4) through (14) of this section must be installed in connection with an existing industrial or commercial facility. In addition, the principal purpose of each of those items must be reduction of energy consumed or heat wasted in any existing industrial or commercial process. See section 48(l)(10) and paragraph (l) of this section. If an item performs more than one function, only the incremental cost (as defined in paragraph (k) of this section) of the equipment qualifies.

(3) *Industrial or commercial process.* (i) A process is a means or method of producing a desired result by chemical, physical, or mechanical action. For example, equipment installed in connection with retail sales, general office use, and residential use are not used in a process within the meaning of this paragraph (f)(3).

(ii) An industrial process includes agricultural processes and thermal processes relating to production or manufacture, such as those involving boilers and furnaces.

(iii) A commercial process includes laundering and food preparation.

(iv) More than one process may be conducted in a single facility. The fact that several processes involved in the production of a product are integrated does not cause such integrated processes to be treated as one process. For example, in a food canning facility, producing prepared food from fresh vegetables is not one process but rather an integration of several processes including washing, cooking and canning.

(v) The following example illustrates this paragraph (f)(3).

Example. Corporation X, an advertising agency, acquires an automatic energy control system designed to reduce energy consumed by heating and cooling its office building. Although the use of an office for X's business is a commercial activity, heating or cooling an office is not an industrial or commercial process. The automatic energy control system does not qualify because it does not reduce energy consumed in an industrial or commercial process.

(4) *Recuperators.* Recuperators recover energy, usually in the form of waste heat from combustion exhaust gases, hot exiting product, or product cooling air, that is used to heat incoming combustion air, raw materials, or fuel. Recuperators are configurations of equipment consisting in part of fixed heat transfer surfaces between two gas flows, and include related baffles, dividers, entrance flanges, transition sections, and shells or cases enclosing the other components of the recuperator. In general, a fixed heat transfer surface absorbs heat from a gas or liquid flow or dissipates heat to the gas or liquid flow.

(5) *Heat wheels.* Heat wheels recover energy, usually in the form of waste heat, from exhaust gases to preheat incoming gases. Heat wheels are items of equipment consisting in part of regenerators (which rotate between two gas flows) and related drive components, wiper seals, entrance flanges, and transition sections.

(6) *Regenerators.* Regenerators are devices, such as clinker columns or chains, that recover energy by efficiently storing heat while exposed to high temperature gases and releasing heat while exposed to low temperature gases, fluids, or solids.

(7) *Heat exchangers.* Heat exchangers recover energy, usually in the form of waste heat, from high temperature gases, liquids, or solids for transfer to low temperature gases, liquids, or solids. Heat exchangers consist in part of fixed heat transfer surfaces (described in paragraph (f)(4) of this section) separating two media. Heat exchange equipment does not include fluidized bed combustion equipment.

(8) *Waste heat boilers.* Waste heat boilers use waste heat, usually in the form of combustion exhaust gases, as a substantial source of energy. A substantial source of energy is one that comprises more than 20 percent of the energy requirement on the basis of Btu's during the course of each taxable year (including the start-up year).

(9) *Heat pipes.* Heat pipes recover energy, usually in the form of waste heat, from high temperature fluids to heat low temperature fluids. A heat pipe consists in part of sealed heat transfer chambers and a capillary structure. In general, the heat transfer chambers alternatively vaporize and condense a working fluid as it passes from one end of the chamber to the other.

(10) *Automatic energy control systems.* Automatic energy control systems automatically reduce energy consumed in an industrial or commercial process for such purposes as environmental space conditioning (*i.e.*, lighting, heating, cooling or ventilating, etc.). Automatic energy control systems include, for example, automatic equipment settings controls, load shedding devices, and relay devices used as part of such system. Property such as computer hardware installed as a part of the energy control system also qualifies, but only to the extent of its incremental cost (as defined in paragraph (k) of this section).

(11) *Turbulators.* Turbulators increase the rate of transfer of heat from combustion gases to heat exchange surfaces by increasing the turbulence in the gases. A turbulator is a baffle placed in a boiler firetube or in a heat exchange tube in industrial process equipment to deflect gases to the heat transfer surface.

(12) *Preheaters.* Preheaters recover energy, usually in the form of waste heat, from either combustion exhaust gases or steam, to preheat incoming combustion air or boiler feedwater. A preheater consists in part of fixed heat transfer surfaces (described in paragraph (f)(4) of this section) separating two fluids.

(13) *Combustible gas recovery systems.* Combustible gas recovery systems are items of equipment used to recover unburned fuel from combustion exhaust gases.

(14) *Economizers.* Economizers are configurations of equipment used to reduce energy demand or recover energy from combustion exhaust gases and other high temperature sources to preheat boiler feedwater.

(15) *Other property added by the Secretary.* [Reserved]

(g) *Recycling equipment*—(1) *In general.* Recycling equipment is equipment used exclusively to sort and prepare, or recycle, solid waste (other than animal waste) to recover usable raw materials ("recovery equipment"), or to convert solid waste (including animal waste) into fuel or other useful forms of energy ("conversion equipment"). Recycling equipment may include certain other onsite related equipment.

(2) *Recovery equipment.* Recovery equipment includes equipment that—

(i) Separates solid waste from a mixture of waste,

(ii) Applies a thermal, mechanical, or chemical treatment to solid waste to ensure the waste will properly respond to recycling, or

(iii) Recycles solid waste to recover usable raw materials, but not beyond occurrence of the first of the following:

(A) The point at which a material has been created that can be used in beginning the fabrication of an end-product in the same way as materials from a virgin substance. Examples are the fiber stage in textile recycling, the newsprint or paperboard stage in paper recycling, and the ingot stage for other metals (other than iron and steel). In the case of recycling iron or steel, recycling equipment does not include any equipment used to reduce solid waste to a molten state or any process thereafter.

(B) The point at which the material is a marketable product (*i.e.*, has a value other than for recycling) even if the material is not marketed by the taxpayer at that point.

(3) *Conversion equipment.* Conversion equipment includes equipment that converts solid waste into a fuel or other usable energy, but not beyond the point at which a fuel, steam, electricity, hot water, or other useful form of energy has been created. Thus, combustors, boilers, and similar equipment may be eligible if used for a conversion process, but steam and heat distribution systems between the combustor or boiler and the point of use are not eligible.

(4) *On-site related equipment.* Recycling equipment also includes onsite loading and transportation equipment, such as conveyors, integrally related to other recycling equipment. This equipment may include equipment to load solid waste into a sorting or preparation machine and also a conveyor belt system that transports solid waste from preparation equipment to other equipment in the recycling process.

(5) *Solid waste.* (i) The term "solid waste" has the same meaning as in § 1.103–8(f)(2)(ii)(*b*), subject to the following exceptions and the other rules of this subparagraph (5):

(A) The date the equipment is placed in service is substituted in the first sentence of § 1.103–8(f)(2)(ii)(*b*) for the date of issue of the obligations, and

(B) Material that has a market value at the place it is located only by reason of its value for recycling is not considered to have a market value.

(ii) Solid waste may include a nominal amount of virgin materials, liquids, or gases, not to exceed 10 percent. If more than 10 percent of the material recycled during the course of any taxable year (including the "start up" year) consists of virgin material, liquids, or gases, the equipment ceases to be energy property and is subject to recapture under section 47. The determination of the portion of virgin material, liquids, or gases used is based on volume, weight, or Btu's whichever is appropriate.

(6) *Ineligible equipment.* Transportation equipment, such as trucks, that transfer solid waste between geographically separated sites (*e.g.*, the collection point and the recycling point) is not eligible. Steam and heat distribution systems are also ineligible.

(7) *Increased recycling capacity.* If the equipment both replaces recycling capacity and increases that capacity at a particualr site, only the incremental cost (as defined in paragraph (k) of this section) of increasing the capacity qualifies. Recycling capacity is determined by the ability to produce a product not previously produced by the taxpayer, or more of an existing product, in a way that does not lower overall production.

(8) *Examples.* The following examples illustrate this paragraph (g).

Example (1) Corporation W recycles aluminum scrap metal. W owns a junk yard where it collects and crushes the metal into compact units. W's trucks bring the scrap metal from the junk yard to its main plant located 3 miles away. W's furnace equipment at the main plant reduces the scrap to the molten state and W's rolling equipment rolls the aluminum into sheets. The furnace qualifies, but for two separate reasons the rolling equipment does not qualify. First, the molten aluminum would be a marketable product if reduced to ingots prior to rolling. It is not necessary that W actually reduce the molten aluminum to ingots. Second, the molten aluminum could be used in the same way as virgin material.

Example (2) Corporation X manufactures newsprint using wood chips discarded during X's lumber operations. Assume X could sell the wood chips to other companies located a short distance from X's mill for use as a fuel. None of the equipment used to manufacture the newsprint qualifies.

Example (3) Assume the same facts as in example (2) except X uses old newspapers which have no value except for recycling in the area where X's mill is located. The equipment qualifies.

Example (4) Corporation Y recycles municipal waste. Assume the municipal waste is "solid waste" under paragraph (g)(5) of this section. During the first taxable year Y operates the equipment, Y uses 8,500 pounds of municipal waste and 1,500 pounds of virgin material and liquids. No energy credit is allowed for the equipment.

Example (5) Corporation Z owns a waste recovery facility. The corrugated paper portion of the waste stream is picked off a conveyor as it enters the facility. The corrugated paper is baled and sold as a secondary paper product. Z acquires shredding and air-classification equipment. Corrugated paper that is not removed from the conveyor belt enters the new equipment for production as a fuel. Z increases the input of corrugated paper so that the same amount of corrugated paper is removed from the conveyor to be baled. The excess paper that is not removed for baling enters the shredding and air-classification equipment. The new equipment qualifies.

(h) *Shale oil equipment*—(1) *In general.* Shale oil equipment used in mining or either surface or *in situ* processing qualifies as energy property. Shale oil equipment means equipment used exclusively to mine, or produce or extract oil from, shale rock.

(2) *Eligible processes.* In general, processing equipment qualifies if used in or after the mining stage and up through the retorting process. Thus, eligible processes include crushing, loading into the retort, and retorting, but not hydrogenation, refining, or any process subsequent to retorting. However, with respect to *in situ* processing, eligible processes include creating the underground cavity.

(3) *Eligible equipment.* Shale oil equipment includes—

(i) Heading jumbos, bulldozers, and scaling and bolting rigs used to create an underground cavity for *in situ* processing,

(ii) On-site water supply and treatment equipment and handling equipment for spent shale,

(iii) Crushing and screening plant equipment, such as hoppers, feeders, vibrating screens, and conveyors,

(iv) Briquetting plant equipment, such as hammer mills and vibratory pan feeders, and

(v) Retort equipment, including direct cooling and condensing equipment.

(i) [Reserved]

(j) *Natural gas from geopressured brine.* Equipment used exclusively to extract natural gas from geopressured brine described in section 613A(b)(3)(C)(i) is energy property. Eligible equipment includes equipment used to separate the gas from saline water and remove other impurities from the gas. Equipment is eligible only up to the point the gas may be introduced into a pipeline.

(k) *Incremental cost.* The term "incremental cost" means the excess of the total cost of equipment over the amount that would have been expended for the equipment if the equipment were not used for a qualifying purpose. For example, assume equipment costing $100 performs a pollution control function and another function. Assuming it would cost $60 solely to perform the nonqualifying function, the incremental cost would be $40.

(l) *Existing*—(1) *In general.* for purposes of section 48(l), the term "existing" means—

(i) When used in connection with a facility or equipment, 50 percent or more of the basis of that facility or equipment is attributable to construction, reconstruction, or erection before October 1, 1978, or

(ii) When used in connection with an industrial or commercial process, that process was carried on in the facility as of October 1, 1978.

(2) *Industrial or commercial process.* (i) A process will be considered the same as the process carried on in the facility as of October 1, 1978, unless and until capitalizable expenditures are paid or incurred for modification of the process. The expenditures need not be capitalized in fact; it is sufficient if the taxpayer has an option or may elect to capitalize. In general, the date of change will be the date the expenditures are properly chargeable to capital account. If the taxpayer properly elects to expense a capitalizable expenditure, the date of change will be the date the expenditure could have been properly chargeable to capital account if the expenditure had been capitalized. Recapture will not occur by reason of a change in a process unless the process change also changes the use of the equipment. See example (1) of § 1.47-1(h)(5).

(m) *Quality and performance standards*—(1) *In general.* Energy property must meet quality and performance standards, if any, that have been prescribed by the Secretary (after consultation with the Secretary of Energy) and are in effect at the time of acquisition.

(2) *Time of acquisition.* Under this paragraph (m) the time of acquisition is—

(i) The date the taxpayer enters into a binding contract to acquire the property or

(ii) For property constructed, reconstructed, or erected by the traxpayer, (A) the earlier of the date it begins construction, reconstruction, or erection of the property, or (B) the date the taxpayer and another person enter into a binding contract requiring each to construct, reconstruct, or erect property and place the property in service for an agreed upon use. See example under paragraph (m)(4) of this section.

(3) *Binding contract.* Under this paragraph (m), a binding contract to construct, reconstruct, or erect property, or to acquire property, is a contract that is binding at all times on the taxpayer under applicable State or local law. A binding contract to construct, reconstruct, or erect property or to acquire property, does not include a contract for preparation of architect's sketches, blueprints, or performance of any other activity not involving the beginning of physical work.

(4) *Example.* The following example illustrates this paragraph (m).

Example. Corporation X owns a junk yard. Corporation Y manufactures recycling equipment and operates several recycling facilities. On January 1, 1979, X and Y enter into a written contract that is binding on both parties on that date and at all times thereafter. Under the contract's terms X will supply scrap metals to Y and Y agrees in return to build a recycling facility on land adjacent to the junk yard. Y will own and operate the facility using the scrap metal supplied by X. Y may treat the agreement as a binding contract under paragraph (m) (2) and (3) of this section.

(n) *Public utility property*—(1) *Inclusions.* Public utility property is included in both of the following categories of energy property:

(i) Shale oil equipment and

(ii) Equipment for producing natural gas from geopressured brine.

(2) *Exclusions.* Public utility property is excluded from each of the following categories of energy property:

(i) Alternative energy property,

(ii) Specially defined energy property,

(iii) Solar or wind energy property, and

(iv) Recycling equipment.

(3) *Public utility property.* The term "public utility property" has the meaning given in section 46(f)(5).

(Sec. 7805 (68A Stat. 917, 26 U.S.C. 7805) and 38 (b) (76 Stat. 962, 26 U.S.C. 38) of the Internal Revenue Code of 1954)

William E. Williams,

Acting Commissioner of Internal Revenue.

Approved: January 19, 1981.

Emil M. Sunley,

Acting Assistant Secretary of the Treasury.

[FR Doc. 81-2467 Filed 1-19-81; 5:10 pm]

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26 CFR Parts 20 and 25

[T.D. 7761]

Employee Retirement Benefits Excluded From Gross Estate and Taxable Gifts

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document provides final regulations relating to the estate and gift tax treatment of amounts payable under qualified employee pension, profit-sharing, stock bonus and annuity plans and under individual retirement plans. Changes to the applicable tax law were made by the Tax Reform Act of 1976, the Revenue Act of 1978 and the Technical Corrections Act of 1979. The regulations provide necessary guidance to the public for compliance with the law, and primarily affect the estates of decedents with respect to whom amounts are payable under such plans.

DATE: The regulations are generally effective for decedents dying and transfers made after December 31, 1976.

FOR FURTHER INFORMATION CONTACT: Richard L. Johnson of the Employee Plans and Exempt Organizations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, D.C. 20224, Attention: CC:LR:T:EE-25-78, 202-566-3544 (Not a toll-free number).

SUPPLEMENTARY INFORMATION

Background

On March 2, 1979, the **Federal Register** published at 44 FR 11791 proposed amendments to the Estate Tax Regulations (26 CFR Part 20) and the Gift Tax Regulations (26 CFR Part 25) under sections 2039 and 2517 of the Internal Revenue Code of 1954. The amendments were proposed to conform the regulations to section 2009(c) of the Tax Reform Act of 1976 (90 Stat. 1694) and section 142 of the Revenue Act of 1978 (92 Stat. 2796). No public hearing was requested. After consideration of all comments regarding the proposed amendments, those amendments are adopted as revised by this Treasury decision.

Code section 2039(f) was also amended by section 101(a)(8)(B) of the Technical Corrections Act of 1979 (94 Stat. 201). The regulations adopted by this Treasury decision reflect that amendment.

Rollovers by a Surviving Spouse

The proposed regulations took no position with regard to the consequences to an employee's gross estate if the employee's surviving spouse rolls over to an individual retirement plan all or a portion of a lump sum distribution paid on account of the death of the employee. The final regulations provide that in the case of such a rollover, the lump sum distribution is excluded from the employee's gross estate. The final regulations further provide that, with respect to the gross estate of a spouse who has made such a rollover, amounts payable under an individual retirement plan are not eligible for the estate tax exclusion to the extent that they are attributable to the rollover.

Taxpayer's Election

Under the proposed regulations, no amount paid or payable as a lump sum distribution under a qualified plan is excludable from a deceased employee's gross estate unless the recipient makes the required "section 402(a)/403(a) taxation election." The proposed regulations provided that the election is made by the recipient's filing an income tax return for the taxable year of the distribution that is consistent with the election.

Some comments requested that the regulations be revised to provide that the recipient make the election on the estate tax return. Although the election is provided for under the estate tax law, for the electing taxpayer the election is primarily an income tax election. Accordingly, the final regulations follow the proposed regulations. However, the proposed regulations have been revised to provide that when the estate tax return is filed before the recipient's income tax return, the return for the estate may reflect the exclusion of a lump sum distribution from the gross estate, even though the recipient has not yet made the required election.

The regulations have also been clarified to emphasize that once a recipient files an income tax return or makes a rollover contribution that constitutes the election described in the regulations, the election cannot be revoked. Thus, the filing of an amended income tax return reflecting either the long-term capital gain or 10-year averaging treatment otherwise afforded lump sum distributions will not be given effect for income tax and estate tax purposes. This is true even if the amended return is accompanied by the payment of any estate tax that would be due if the distribution were included in the gross estate.

IRA Provisions Added

The final regulations also contain two additional clarifying rules governing the estate tax exclusion for amounts payable under individual retirement plans. The first of these rules reflects § 1.408-2(b)(7)(ii) of the Income Tax Regulations. That section permits a beneficiary under an individual retirement plan to elect, for purposes of the income tax rules, to treat the plan as one established on the beneficiary's behalf, rather than as a plan under which amounts are payable to the beneficiary as a beneficiary. Under § 20.2039-5(c)(5), the amount with respect to which the decedent, as a beneficiary, made the election is not an amount with respect to which the exclusion described in section 2039(e) will apply.

The final regulations also contain, in § 20.2039-5(c)(6), rules relating to individual retirement plan rollovers. Under section 408(d)(3)(A)(i) or 409(b)(3)(C), amounts paid under an individual retirement plan may, subject to certain conditions, be paid ("rolled over") to another such plan. Under the income tax rules, the rolled over amounts are not included in gross income. The final regulations clarify that the rules under section 2039(e) are applied to the plan that is the recipient of the rollover (the "transferee plan") by taking into account the source of the contributions made to the transferor plan. Under the regulations the exclusion described in 2039(e) does not apply with respect to any portion of the rollover contribution to the transferee plan that is determined to be attributable to a contribution to the transferor plan with respect to which the exclusion is denied.

Examples (3) and (4) have been added to § 20.2039-5(d) to illustrate these added clarifying rules.

Community Property Interests in IRA's

Several persons commenting on the proposed regulations raised questions with regard to the treatment of a decedent's community property interest in an IRA.

Section 2039 does not include rules specifically governing the treatment of community property interests in individual retirement plans. Community property interests are the subject of section 2039(d), but that section by its term applies only to community property interests in a qualified employee plan or certain annuity contracts. Subject to certain limitations, if the non-employee spouse predeceases the employee spouse, the decedent spouse's community interest under the qualified plan or contract is excluded from the gross estate.

Some commenters urged that the final regulations include a parallel rule for IRA's. The final regulations do not include such a broad rule. Absent statutory authority in subsection (d) or (e) of section 2039, a rule like that in subsection (d) cannot be applied to the predeceased spouse's community interest in an individual retirement plan. This does not mean that the exclusion is therefore denied. The community interest of the predeceased spouse is excludible as described in section 2039(e), provided that the qualifying annuity rule in § 20.2039–5(b) is satisfied with respect to that interest.

Employer Securities

The Technical Corrections Act of 1979 amended Code section 2039(f) to provide that a recipient's election under that section does not preclude the application of Code section 402(e)(4)(J) to the recipient's lump sum distribution. In general, section 402(e)(4)(J) provides that the net unrealized appreciation in employer securities received in a lump sum distribution is excluded from the recipient's gross income for the year of receipt.

Clarifying Revisions

In addition to the revisions described above, the final regulations include certain corrective and clarifying changes. In particular, the discussion of the treatment of annuity contracts purchased for and distributed to a decedent's beneficiary under either a qualified plan or an individual retirement plan has been expanded. The example in the proposed regulations relating to individual retirement plans also has been expanded. With regard to distributions under qualified employee plans, this document revises two examples under § 20.2039–2 that were not proposed to be amended in the notice of proposed rulemaking.

Drafting Information

The principal author of this regulation is Richard L. Johnson of the Employee Plans and Exempt Organizations 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 regulation, both in matters of substance and style.

Adoption of amendments to the regulations

Accordingly, the proposed amendments to 26 CFR Parts 20 and 25 are adopted subject to the changes indicated below.

Estate Tax Regulations

[26 CFR Part 20]

Paragraph 1. Paragraph (b) of § 20.2039–2 is amended by revising Examples (2) and (3) to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

* * * * *

(b) *Plans and annuity contracts to which section 2039(c) applies.* * * *

Example 2. Pursuant to a profit-sharing plan, the employer made contributions to a trust which were allocated to the employee's individual account. Under the plan, the employee would, upon retirement at age 60, receive a distribution of the entire amount credited to the account. If the employee should die before reaching retirement age, the amount credited to the account would be distributed to the employee's designated beneficiary. Assume that the employee died before reaching the retirement age and that at such time the plan met the requirements of section 401(a). Since the payment to the designated beneficiary is receivable under a qualified profit-sharing plan, the provisions of section 2039(c) apply. However, if the payment is a lump sum distribution to which § 20.2039–3 or § 20.2039–4 applies, the payment is excludable from the decedent's gross estate only as provided in such section.

Example 3. Pursuant to a pension plan, the employer made contributions to a trust which were used by the trustee to purchase a contract from an insurance company for the benefit of an employee. The contract was to provide the employee, upon retirement at age 65, with an annuity of $100 per month for life, and was to provide the employee's designated beneficiary upon the employee's death after retirement, with a similar annuity for life. The contract further provided that if the employee should die before reaching retirement age, a lump sum payment equal to the greater of (a) $10,000 or (b) the reserve value of the policy would be paid to the designated beneficiary in lieu of the annuity. Assume that the employee died before reaching the retirement age and that at such time the plan met the requirements of section 401(a). Since the payment to the designated beneficiary is receivable under a qualified pension plan, the provisions of section 2039(c) apply. However, if the payment is a lump sum distribution to which § 20.2039–3 or § 20.2039–4 applies, the payment is excludable from decedent's gross estate only as provided in such section. It should be noted that for purposes of the exclusion under section 2039(c) it is immaterial whether or not the payment constitutes the proceeds of life insurance under the principles set forth in § 20.2039–1(d).

* * * * *

Par. 2. Paragraph (c)(1) of § 20.2039–2, as set forth in the notice of proposed rulemaking, is amended by revising subdivisions (ii) and (iii) to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

* * * * *

(c) *Amounts excludable from the gross estate.*

(1) * * *

(ii) In the case of a decedent dying before January 1, 1977, payments or contributions made under a plan described in paragraph (b) (1), (2) or (5) of this section on behalf of the decedent for a period for which the decedent was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the decedent and not by the employer.

(iii) In the case of a decedent dying after December 31, 1976, however, payments or contributions made under a plan described in paragraph (b) (1), (2) or (5) of this section on behalf of the decedent for a period for which the decedent was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the employer to the extent the payments or contributions are, or were, deductible under section 404 or 405(c). Contributions or payments attributable to that period which are not, or were not, so deductible are considered made by the decedent.

* * * * *

Par. 3. Section 20.2039–3, as set forth in the notice of proposed rulemaking, is amended by revising the second sentence in paragraph (a) and the second sentence in paragraph (b). Paragraph (a), as revised, and the revised sentence in paragraph (b) read as follows:

§ 20.2039–3 Lump sum distributions under "qualified plans;" decedents dying after December 31, 1976, and before January 1, 1979.

(a) *Limitation of section 2039(c) exclusion.* This section applies in the case of a decedent dying after December 31, 1976, and before January 1, 1979. If a lump sum distribution is paid with respect to the decedent under a plan described in § 20.2039–2(b) (1) or (2) (a "qualified plan"), no amount payable with respect to the decedent under the plan is excludable from the decedent's gross estate under § 20.2039–2.

(b) *"Lump sum distribution" defined.* * * * The distribution of an annuity contract is not a lump sum distribution for purposes of this section, and § 20.2039–2 will apply with respect to the distribution of an annuity contract without regard to whether the contract is included in a distribution that is otherwise a lump sum distribution under this paragraph (b). * * *

Par. 4. Section 20.2039–4, as set forth in the notice of proposed rulemaking, is amended by revising the second sentence in paragraph (a), by revising paragraphs (b), (c) and (d), by redesignating paragraphs (e) and (f) as paragraphs (f) and (g), by adding a new paragraph (e), and by deleting paragraph (g). As revised, § 20.2039–4 reads as follows:

§ 20.2039–4 Lump sum distributions from "qualified plans;" decedents dying after December 31, 1978.

(a) *Limitation on section 2039(c) exclusion.* This section applies in the case of a decedent dying after December 31, 1978. If a lump sum distribution is paid or payable with respect to a decedent under a plan described in § 20.2039–2(b) (1) or (2) (a "qualified plan"), no amount paid or payable with respect to the decedent under the plan is excludable from the decedent's gross estate under § 20.2039–2, unless the recipient of the distribution makes the section 402(a)/403(a) taxation election described in paragraph (c) of this section. For purposes of this section, an amount is payable as a lump sum distribution under a plan if, as of the date the estate tax return is filed (as determined under § 20.2039–3(d)), it is payable as a lump sum distribution at the election of the recipient or otherwise.

(b) *"Lump sum distribution" defined; treatment of annuity contracts.* For purposes of this section the term "lump sum distribution" means a lump sum distribution defined in section 402(e)(4)(A) that satisfies the requirements of section 402(e)(4)(C), relating to the aggregation of certain trusts and plans. A distribution is a lump sum distribution for purposes of this section without regard to the election described in section 402(e)(4)(B). The distribution of an annuity contract is not a lump sum distribution for purposes of this section, and the limitation described in this section does not apply to an annuity contract distributed under a plan. Accordingly, if the amount payable with respect to a decedent under a plan is paid to a recipient partly by the distribution of an annuity contract, and partly by the distribution of an amount that is a lump sum distribution within the meaning of this paragraph (b), § 20.2039–2 shall apply with respect to the annuity contract without regard to whether the recipient makes the section 402(a)/403(a) taxation election with respect to the remainder of the distribution.

(c) *Recipient's section 402(a)/403(a) taxation election.* The section 402(a)/403(a) taxation election is the election by the recipient of a lump sum distribution to treat the distribution as—

(1) Taxable under section 402(a), without regard to section 402(a)(2), to the extent includable in gross income (in the case of a distribution under a qualified plan described in § 20.2039–2(b)(1)),

(2) Taxable under section 403(a), without regard to section 403(a)(2), to the extent includable in gross income (in the case of a distribution under a qualified annuity contract described in § 20.2039–2(b)(2)), or

(3) A rollover contribution, in whole or in part, under section 402(a)(7) (relating to rollovers by a decedent's surviving spouse).

Accordingly, if a recipient makes the election, no portion of the distribution is taxable to the recipient under the 10-year averaging provisions of section 402(e) or as long-term capital gain under section 402(a)(2). However, a recipient's election under this paragraph (c) does not preclude the application of section 402(e)(4)(J) to any securities of the employer corporation included in the distribution.

(d) *Method of election.* The recipient of a lump sum distribution shall make the section 402(a)/403(a) taxation election by—

(1) Determining the income tax liability on the income tax return (or amended return) for the taxable year of the distribution in a manner consistent with paragraph (c) (1) or (2) of this section, or

(2) Rolling over all or any part of the distribution under section 402(a)(7).

If the date the estate tax return is filed precedes the date on which the recipient makes the section 402(a)/403(a) taxation election with respect to a lump sum distribution, the estate tax return may nevertheless reflect the election, as if the election had been made.

(e) *Election irrevocable.* If a recipient of a lump sum distribution files an income tax return (or amended return) or makes a rollover contribution that constitutes the section 402(a)/403(a) taxation election described in paragraphs (c) and (d), the election may not be revoked. Accordingly, a subsequent and amended income tax return filed by the recipient that is inconsistent with the prior election will not be given effect for purposes of section 2039 and section 402 or 403.

(f) *Lump sum distribution to multiple recipients.* In the case of a lump sum distribution paid or payable under a qualified plan with respect to the decedent to more than one recipient, the exclusion under § 20.2039–2 applies to so much of the distribution as is paid or payable to a recipient who makes the section 402(a)/403(a) taxation election.

(g) *Distributions of annuity contracts included multiple distributions.* Notwithstanding that a recipient makes the section 402(a)/403(a) taxation election with respect to a lump sum distribution that includes the distribution of an annuity contract, the distribution of an annuity contract is to be taken into account by the recipient for purposes of the multiple distribution rules under section 402(e).

Par. 5. All following paragraph (a) in § 20.2039–5, as set forth in the notice of proposed rulemaking, is revised to read as follows:

§ 20.2039–5 Annuities under individual retirement plans.

* * * * *

(b) *Qualifying annuity.* For purposes of this section, the term "qualifying annuity" means an annuity contract or other arrangement providing for a series of substantially equal periodic payments to be made to a beneficiary for the beneficiary's life or over a period ending at least 36 months after the decedent's death. The term "annuity contract" includes an annuity purchased for a beneficiary and distributed to the beneficiary, if under section 408 the contract is not included in the gross income of the beneficiary upon distribution. The term "other arrangement" includes any arrangement arising by reason of the decedent's participation in the program providing the individual retirement plan. Payments shall be considered "periodic" if under the arrangement or contract (including a

distributed contract) payments are to be made to the beneficiary at regular intervals. If the contract or arrangement provides optional payment provisions, not all of which provide for periodic payments, payments shall be considered periodic only if an option providing periodic payments is elected not later than the date the estate tax return is filed (as determined under § 20.2039–3(d)). For this purpose, the right to surrender a contract (including a distributed contract) for a cash surrender value will not be considered an optional payment provision. Payments shall be considered "substantially equal" even though the amounts receivable by the beneficiary may vary. Payments shall not be considered substantially equal, however, if more than 40 percent of the total amount payable to the beneficiary under the individual retirement plan, determined as of the date of the decedent's death and excluding any postmortem increase, is payable to the beneficiary in any 12-month period.

(c) *Amount excludable from gross estate*—(1) *In general.* Except as otherwise described in this paragraph (c), the amount excluded from the decedent's gross estate under section 2039(e) is the entire value of the qualifying annuity (as determined under §§ 20.2031–1 and 20.2031–7 through 20.2031–10) payable under the individual retirement plan.

(2) *Excess contribution.* In any case in which there exists, on the date of the decedent's death, an excess contribution (as defined in section 4973(b)) with respect to the individual retirement plan, the amount excluded from the value of the decedent's gross estate is determined under the following formula:

$$E = A - A(X \div C - R)$$

Where:

E = the amount excluded from the decedent's gross estate under section 2039(e),

A = the value of the qualifying annuity at the decedent's death (as determined under §§ 20.2031–1 and 20.2031–7 through § 20.2031–10),

X = the amount which is an excess contribution at the decedent's death (as determined under section 4973(b)),

C = the total amount contributed by or on behalf of the decedent to the individual retirement plan, and

R = the total of amounts paid or distributed from the individual retirement plan before the death of the decedent which were either includable in the gross income of the recipient under section 408(d)(1) and represented the payment or distribution of an excess contribution, or were payments or distributions described in section 408(d)(4) or (5) (relating to returned excess contributions).

(3) *Certain section 403(b)(8) rollover contributions.* This subparagraph (3) applies if the decedent made a rollover contribution to the individual retirement plan under section 403(b)(8), and the contribution was attributable to a distribution under an annuity contract other than an annuity contract described in § 20.2039–2(b)(3). If such a rollover contribution was the only contribution made to the plan, no part of the value of the qualifying annuity payable under the plan is excluded from the decedent's gross estate under section 2039(e). If a contribution other than such a rollover contribution was made to the plan, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2) of this paragraph, except that for purposes of that formula, X includes the amount that was a rollover contribution under section 403(b)(8) attributable to a distribution under an annutiy contract not described in § 20.2039–2(b)(3).

(4) *Surviving spouse's rollover contribution.* This subparagraph (4) applies if the decedent made a rollover contribution to the individual retirement plan under section 402(a)(7), relating to rollovers by a surviving spouse. If the rollover contribution under section 402(a)(7) was the only contribution made by the decedent to the plan, no part of the value of the qualifying annuity payable under the plan is excluded from the decedent's gross estate under section 2039(e). If a contribution other than a rollover contribution under section 402(a)(7) was made by the decedent to the plan, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2) of this paragraph, except that for purposes of that formula, X includes the amount that was a rollover contribution under section 402(a)(7).

(5) *Election under § 1.408–2(b)(7)(ii).* This subparagraph (5) applies if the decedent at any time made the election described in § 1.408–2(b)(7)(ii) with respect to an amount in the individual retirement plan. If this subparagraph (5) applies, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2), except that for purposes of that formula, X and C include the amount with respect to which the election was made.

(6) *Plan-to-plan rollovers.* (i) This subparagraph (6) applies if the individual retirement plan is a transferee plan. A "transferee plan" is a plan that was the recipient of a contribution described in section 408(d)(3)(A)(i) or 409(b)(3)(C) (relating to rollovers from one individual retirement plan to another) made by the decedent. The amount of the contribution described in section 408(d)(3)(A)(i) or 409(b)(3)(C) is the "rollover amount." The plan from which the rollover amount was paid or distributed to the decedent is the "transferor plan."

(ii) If the decedent made a contribution described in subparagraph (3) or (4) to the transferor plan, the amount excluded from the decedent's gross estate with respect to the transferee plan is determined under the formula described in subparagraph (2), except that for purposes of that formula, X includes so much of the rollover amount as was attributable to the contribution to the transferor plan that was described in subparagraph (3) or (4). The extent to which a rollover amount is attributable to a contribution described in subparagraph (3) or (4) that was made to the transferor plan is determined by multiplying the rollover amount by a fraction, the numerator of which is the amount of such contribution, and the denominator of which is the sum of all amounts contributed by the decedent to the transferor plan (if not returned as described under R in subparagraph (2)), and any amount in the transferor plan to which the election described in subparagraph (5) applied.

(iii) If the decedent made the election described in subparagraph (5) with respect to an amount in the transferor plan, the amount excluded from the decedent's gross estate with respect to the transferee plan is determined under the formula described in subparagraph (2), except that for purposes of that formula, X includes so much of the rollover amount as was attributable to the amount in the transferor plan to which the election applied. The extent to which a rollover amount is attributable to an amount in the transferor plan to which the election applied is determined by multiplying the rollover amount by a fraction, the numerator of which is the amount to which the election applied, and the denominator of which is the sum of all amounts contributed by the decedent to the transferor plan (if not returned as described under R in subparagraph (2)), and the amount in the transferor plan to which the election applied.

(iv) If a transferor plan described in this subparagraph (6) was also a transferee plan, then the rules described in this subparagraph (6) are to be applied with respect to both the rollover amount paid to the plan and the rollover amount thereafter paid from the plan.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

Example (1). (1) A establishes an individual retirement account described in section 408 (a) on January 1, 1976, when A is age 65. A's only contribution to the account is a rollover contribution described in section 402(a)(5). The trust agreement provides that A may at any time elect to have the balance in the account distributed in one of the following methods:

(i) A single sum payment of the account.

(ii) Equal or substantially equal semi-annual payments over a period equal to A's life expectancy, or

(iii) Equal or substantially equal semi-annual payments over a period equal to the life expectancy of A and A's spouse.

(2) The trust agreement further provides that although semiannual payments have commenced under option (ii) or (iii), A (or A's surviving spouse) may, by written notice to the trustee, receive all or a part of the balance remaining in the account. In addition, under option (ii), any balance remaining in the account at A's death is payable in a single sum to A's designated beneficiary. Under option (iii), any balance remaining in the account at the death of the survivor of A or A's spouse is payable in a single sum to a beneficiary designated by A or A's surviving spouse.

(3) A elects option (iii), and the first semiannual payment is made to A on July 1, 1976. On that date, A's life expectancy is 15 years, and that of A's spouse is 22 years. Under option (iii), the semiannual payments to A or A's surviving spouse will continue until July 1, 1998.

(4) A dies on November 20, 1978. On December 15, 1978, the trust agreement is modified so that A's surviving spouse no longer may elect to receive all or part of the balance remaining in the account. The value of the semiannual payments payable to A's spouse is excluded from A's gross estate under section 2039(e).

(5) A's spouse dies July 12, 1981, and the single sum payment payable on account of the death of A's spouse is paid to the designated beneficiary on August 1, 1981. Notwithstanding that the balance in the account was paid to the designated beneficiary within 36 months after A's death, the value of the semiannual payments payable to A's spouse are excluded from A's gross estate, since at A's death those semiannual payments were to be paid over a period extending beyond 36 months. Section 2039(e) does not apply to exclude any amount from the estate of A's spouse, because A's spouse was only a beneficiary and not the individual on whose behalf the account was established.

Example (2). Assume the same facts as in example (1), except that the trust agreement is not modified so that A's surviving spouse no longer may elect to receive all or part of the balance remaining in the account (see (2) and (4) in example (1)). Instead, the balance of the account is applied toward the purchase of a contract providing an immediate annuity, the contract is distributed to A's surviving spouse on December 15, 1978, and under section 408 the contract is not included in the gross income of the spouse upon its distribution. The value of the annuity contract is excluded from A's gross estate, if the contract provides for a series of substantially equal periodic payments (within the meaning of paragraph (b) of this section) to be made over the life of A's surviving spouse or over a period not ending before the date 36 months after A's death.

Example (3). (1) B establishes an individual retirement plan described in section 408(a) ("IRA B") on February 6, 1981, in order to receive a $220,000 rollover contribution from a qualified plan, as described in section 402(a)(5). B dies August 14, 1981. C, an individual, is the sole beneficiary under IRA B. The amount in IRA B ($238,000) is payable to C in whole or part as C may elect. Because the amount in IRA B is payable to C as other than a qualifying annuity, within the meaning of paragraph (b) of this section, no amount is excluded from B's gross estate under section 2039(e).

(2) On October 17, 1981, C contributes $1,500 on C's own behalf to IRA B. Under § 1.408-2(b)(7)(ii), C's contribution will cause IRA B to be treated as being maintained by and on behalf of C ("IRA C"), and C's making the contribution constitutes an election to which paragraph (c)(5) of this section applies. The balance in IRA C immediately before C's contribution is $240,000. Accordingly, the amount with respect to which C made the election is $240,000.

(3) C dies January 19, 1982. E, an individual, is the sole beneficiary under the plan, and the amounts payable to E ($242,000) are payable as a qualifying annuity, within the meaning of paragraph (b) of this section.

(4) The rules described in section 2039(e) and this section are applied with respect to the gross estate of C without regard to whether amounts now payable under IRA C were or were not excluded from B's gross estate. Under paragraph (c) of this section, the amount not excluded from C's gross estate is the value of the qualifying annuity payable to E ($242,000), multiplied by the fraction $240,000/ ($240,000 + $1,500). Thus, the amount not excluded from C's gross estate is $240,497. [($242,000) ($240,000 ÷ $240,000 + $1,500)) = $240,497. The amount excluded is therefore $1,503 ($242,000 − $240,497).

Example (4). (1) F, an individual, establishes an individual retirement plan ("IRA F1") in 1977 and makes $1,250 annual contributions for 1977, 1978, 1979 and 1980 (4 × $1,250 = $5,000), each of which is deducted by F under section 219. In February 1980, F receives an $85,000 distribution on account of the death of G. F's spouse, from the qualified plan of G's former employer, and rolls it over into IRA F1, under section 402(a)(7). Because IRA F1 includes a rollover contribution under section 402(a)(7), paragraph (c)(4) of this section applies. In 1981, F's entire interest in IRA F1, $100,000, is paid to F and contributed to another individual retirement plan ("IRA F2") under section 408(d)(3)(A)(i). IRA F2 is a transferee plan to which paragraph (c)(6) of this section applies because of the rollover. F makes a $1,500 deductible contribution to IRA F2 for 1981.

(3) Under paragraph (c) of this section, the amount not excluded from F's gross estate is the value of the qualifying annuity payable under IRA F2 multiplied by the fraction $96,700/$101,500. Accordingly, the amount not excluded is $139,096. [($146,000) ($96,700/ $101,500) = $139,096.] The amount excluded is $6,904 ($146,000 − $139,096).

(4) The numerator of the fraction ($96,700) is determined by multiplying the amount rolled over from IRA F1 to IRA F2 ($100,000) by a fraction, the numerator of which is the amount of the rollover contribution to IRA F1 ($85,000), and the denominator of which is the total contributions to IRA F1 ($85,000 + $5,000 = $90,000). [($100,000) ($85,000/$90,000) = $96,700.]

(5) The denominator of the fraction ($101,500) is the sum of the contributions to IRA F2 (the $100,000 rollover contribution from IRA F1, and the $1,500 annual contribution to IRA F2).

Gift Tax Regulations

[26 CFR Part 25]

Par. 6. Paragraph (c)(1) of § 25.2517-1, as set forth in the notice of proposed rulemaking, is amended by revising subdivisions (ii) and (vi) to read as follows:

§ *25.2517-1 Employees' annuities.*

* * * * *

(c) *Limitation on amount excludable from gift*—(1) * * *

(ii) For transfers made before January 1, 1977, payments or contributions made to a plan described in paragraph (b)(1), (i), (ii) or (vi) of this section on behalf of an individual for a period for which the individual was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the employee.

* * * * *

(vi) In the case of a plan described in paragraph (b)(1) (i), (ii) or (vi) of this section, an amount includable in the gross income of an employee under section 1379(b) (relating to shareholder-beneficiaries under certain plans) is considered an amount paid or contributed by the employee.

* * * * *

This Treasury decision is issued under the authority contained in sections 2039(f)(2) and 7805 of the Internal Revenue Code of 1954 (192 Stat. 2796.

68A Stat. 917; 26 U.S.C. 2039(f)(2), 7805).

Jerome Kurtz,

Commissioner of Internal Revenue.

Approved: January 13, 1981.

Donald C. Lubick,

Assistant Secretary of the Treasury.

PART 20—ESTATE TAX; ESTATES OF DECEDENTS DYING AFTER AUGUST 16, 1954

Par. 1. Section 20.2039–2(a) is revised to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

(a) *Section 2039(c) exclusion.* In general, in the case of a decedent dying after December 31, 1953, the value of an annuity or other payment receivable under a plan or annuity contract described in paragraph (b) of this section is excluded from the decedent's gross estate to the extent provided in paragraph (c) of this section. In the case of a plan described in paragraph (b) (1) or (2) of this section (a "qualified plan"), the exclusion is subject to the limitation described in § 20.2039–3 (relating to lump sum distributions paid with respect to a decedent dying after December 31, 1976, and before January 1, 1979) or § 20.2039–4 (relating to lump sum distributions paid with respect to a decedent dying after December 31, 1978).

Par. 2. Section 20.2039–2(b) is amended by removing "or" at the end of subparagraph (3), by removing the period at the end of subparagraph (4) and adding in lieu thereof "; or", and by adding a new subparagraph (5) to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

* * * * *

(b) *Plans and annuity contracts to which section 2039(c) applies.* * * *

(5) In the case of a decedent dying after December 31, 1962, a bond purchase plan described in section 405.

* * * * *

Par. 3. Paragraph (b) of § 20.2039–2 is amended by revising Examples (2) and (3) to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

* * * * *

(b) *Plans and annuity contracts to which section 2039(c) applies.* * * *

Example (2). Pursuant to a profit-sharing plan, the employer made contributions to a trust which were allocated to the employee's individual account. Under the plan, the employee would, upon retirement at age 60, receive a distribution of the entire amount credited to the account. If the employee should die before reaching retirement age, the amount credited to the account would be distributed to the employee's designated beneficiary. Assume that the employee died before reaching the retirement age and that at such time the plan met the requirements of section 401(a). Since the payment to the designated beneficiary is receivable under a qualified profit-sharing plan, the provisions of section 2039(c) apply. However, if the payment is a lump sum distribution to which § 20.2039–3 or § 20.2039–4 applies, the payment is excludable from the decedent's gross estate only as provided in such section.

Example (3). Pursuant to a pension plan, the employer made contributions to a trust which were used by the trustee to purchase a contract from an insurance company for the benefit of an employee. The contract was to provide the employee, upon retirement at age 65, with an annuity of $100 per month for life, and was to provide the employee's designated beneficiary upon the employee's death after retirement, with a similar annuity for life. The contract further provided that if the employee should die before reaching retirement age, a lump sum payment equal to the greater of (a) $10,000 or (b) the reserve value of the policy would be paid to the designated beneficiary in lieu of the annuity. Assume that the employee died before reaching the retirement age and that at such time the plan met the requirements of section 401(a). Since the payment to the designated beneficiary is receivable under a qualified pension plan, the provisions of section 2039(c) apply. However, if the payment is a lump sum distribution to which § 20.2039–3 or § 20.2039–4 applies, the payment is excludable from the decedent's gross estate only as provided in such section. It should be noted that for purposes of the exclusion under section 2039(c) it is immaterial whether or not the payment constitutes the proceeds of life insurance under the principles set forth in § 20.2039–1(d).

* * * * *

Par. 4. Section 20.2039–2(c)(1) is revised to read as follows:

§ 20.2039–2 Annuities under "qualified plans" and section 403(b) annuity contracts.

* * * * *

(c) *Amounts excludable from the gross estate.* (1) The amount to be excluded from a decedent's gross estate under section 2039(c) is an amount which bears the same ratio to the value at the decedent's death of an annuity or other payment receivable by the beneficiary as the employer's contribution (or a contribution made on the employer's behalf) on the employee's account to the plan or towards the purchase of the annuity contract bears to the total contributions on the employee's account to the plan or towards the purchase of the annuity contract. In applying this ratio—

(i) Payments or contributions made by or on behalf of the employer towards the purchase of an annuity contract described in paragraph (b)(3) of this section are considered to include only such payments or contributions as are, or were, excludable from the employee's gross income under section 403(b).

(ii) In the case of a decedent dying before January 1, 1977, payments or contributions made under a plan described in paragraph (b) (1), (2) or (5) of this section on behalf of the decedent for a period for which the decedent was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the decedent and not by the employer.

(iii) In the case of a decedent dying after December 31, 1976, however, payments or contributions made under a plan described in paragraph (b) (1), (2) or (5) of this section on behalf of the decedent for a period for which the decedent was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the employer to the extent the payments or contributions are, or were, deductible under section 404 or 405(c). Contributions or payments attributable to that period which are not, or were not, so deductible are considered made by the decedent.

(iv) In the case of a plan described in paragraph (b) (1) or (2) of this section, a rollover contribution described in section 402(a)(5), 403(a)(4), 409(d)(3)(A)(ii) or 409(b)(3)(C) is considered an amount contributed by the employer.

(v) In the case of an annuity contract described in paragraph (b)(3) of this section, a rollover contribution described in section 403(b)(8) is considered an amount contributed by the employer.

(vi) In the case of a plan described in paragraph (b) (1), (2) or (5) of this section, an amount includable in the gross income of an employee under section 1379(b) (relating to shareholder-employee beneficiaries under certain qualified plans) is considered an amount paid or contributed by the decedent.

(vii) Amounts payable under paragraph (b)(4) of this section are attributable to payments or contributions made by the decedent only to the extent of amounts deposited by the decedent pursuant to section 1438 or 1452(d) of Title 10 of the United States Code.

(viii) The value at the decedent's death of the annuity or other payment is determined under the rules of §§ 20.2031–1 and 20.2031–7 through 20.2031–10.

Par. 5. The following new sections are added immediately after § 20.2039-2:

§ 20.2039-3 Lump sum distributions under "qualified plans;" decedents dying after December 31, 1976, and before January 1, 1979.

(a) *Limitation of section 2039(c) exclusion.* This section applies in the case of a decedent dying after December 31, 1976, and before January 1, 1979. If a lump sum distribution is paid with respect to the decedent under a plan described in § 20.2039-2(b) (1) or (2) (a "qualified plan"), no amount payable with respect to the decedent under the plan is excludable from the decedent's gross estate under § 20.2039-2.

(b) *"Lump sum distribution" defined.* For purposes of this section the term "lump sum distribution" means a lump sum distribution defined in section 402(e)(4)(A) that satisfies the requirements of section 402(e)(4)(C), relating to the aggregation of certain trusts and plans. The distribution of an annuity contract is not a lump sum distribution for purposes of this section, and § 20.2039-2 will apply with respect to the distribution of an annuity contract without regard to whether the contract is included in a distribution that is otherwise a lump sum distribution under this paragraph (b). A distribution is a lump sum distribution for purposes of this section without regard to the election described in section 402(e)(4)(B).

(c) *Amounts payable as a lump sum distribution.* If on the date the estate tax return is filed, an amount under a qualified plan is payable with respect to the decedent as a lump sum distribution (whether at the election of a beneficiary or otherwise), for purposes of this section the amount is deemed paid as a lump sum distribution no later than on such date. Accordingly, no portion of the amount payable under the plan is excludable from the value of the decedent's gross estate under § 20.2039-2. If, however, the amount payable as a lump sum distribution is not, in fact, thereafter paid as a lump sum distribution, there shall be allowed a credit or refund of any tax paid which is attributable to treating such amount as a lump sum distribution under this paragraph. Any claim for credit or refund filed under this paragraph must be filed within the time prescribed by section 6511, and must provide satisfactory evidence that the amount originally payable as a lump sum distribution is no longer payable in such form.

(d) *Filing date.* For purposes of paragraph (c) of this section, "the date the estate tax return is filed" means the earlier of—

(1) The date the estate tax return is actually filed, or

(2) The date nine months after the decedent's death, plus any extension of time for filing the estate tax return granted under section 6081.

§ 20.2039-4 Lump sum distributions from "qualified plans;" decedents dying after December 31, 1978.

(a) *Limitation on section 2039(c) exclusion.* This section applies in the case of a decedent dying after December 31, 1978. If a lump sum distribution is paid or payable with respect to a decedent under a plan described in § 20.2039-2(b) (1) or (2) (a "qualified plan"), no amount paid or payable with respect to the decedent under the plan is excludable from the decedent's gross estate under § 20.2039-2, unless the recipient of the distribution makes the section 402(a)/403(a) taxation election described in paragraph (c) of this section. For purposes of this section, an amount is payable as a lump sum distribution under a plan if, as of the date the estate tax return is filed (as determined under § 20.2039-3(d)), it is payable as a lump sum distribution at the election of the recipient or otherwise.

(b) *"Lump sum distribution" defined; treatment of annuity contracts.* For purposes of this section the term "lump sum distribution" means a lump sum distribution defined in section 402(e)(4)(A) that satisfies the requirements of section 402(e)(4)(C), relating to the aggregation of certain trusts and plans. A distribution is a lump sum distribution for purposes of this section without regard to the election described in section 402(e)(4)(B). The distribution of an annuity contract is not a lump sum distribution for purposes of this section, and the limitation described in this section does not apply to an annuity contract distributed under a plan. Accordingly, if the amount payable with respect to a decedent under a plan is paid to a recipient partly by the distribution of an annuity contract, and partly by the distribution of an amount that is a lump sum distribution within the meaning of this paragraph (b), § 20.2039-2 shall apply with respect to the annuity contract without regard to whether the recipient makes the section 402(a)/403(a) taxation election with respect to the remainder of the distribution.

(c) *Recipient's section 402(a)/403(a) taxation election.* The section 402(a)/403(a) taxation election is the election by the recipient of a lump sum distribution to treat the distribution as—

(1) Taxable under section 402(a), without regard to section 402(a)(2), to the extent includable in gross income (in the case of a distribution under a qualified plan described in § 20.2039-2(b)(1)),

(2) Taxable under section 403(a), without regard to section 403(a)(2), to the extent includable in gross income (in the case of a distribution under a qualified annuity contract described in § 20.2039-2(b)(2)), or

(3) A rollover contribution, in whole or in part, under section 402(a)(7) (relating to rollovers by a decedent's surviving spouse).

Accordingly, if a recipient makes the election, no portion of the distribution is taxable to the recipient under the 10-year averaging provisions of section 402(e) or as long-term capital gain under section 402(a)(2). However, a recipient's election under this paragraph (c) does not preclude the application of section 402(e)(4)(J) to any securities of the employer corporation included in the distribution.

(d) *Method of election.* The recipient of a lump sum distribution shall make the section 402(a)/403(a) taxation election by—

(1) Determining the income tax liability on the income tax return (or amended return) for the taxable year of the distribution in a manner consistent with paragraph (c) (1) or (2) of this section, or

(2) Rolling over all or any part of the distribution under section 402(a)(7).

If the date the estate tax return is filed precedes the date on which the recipient makes the section 402(a)/403(a) taxation election with respect to a lump sum distribution, the estate tax return may nevertheless reflect the election, as if the election had been made.

(e) *Election irrevocable.* If a recipient of a lump sum distribution files an income tax return (or amended return) or makes a rollover contribution that constitutes the section 402(a)/403(a) taxation election described in paragraphs (c) and (d), the election may not be revoked. Accordingly, a subsequent and amended income tax return filed by the recipient that is inconsistent with the prior election will not be given effect for purposes of section 2039 and section 402 or 403.

(f) *Lump sum distribution to multiple recipients.* In the case of a lump sum distribution paid or payable under a qualified plan with respect to the decedent to more than one recipient, the exclusion under § 20.2039-2 applies to so much of the distribution as is paid or payable to a recipient who makes the section 402(a)/403(a) taxation election.

(g) *Distributions of annuity contracts included in multiple distributions.* Notwithstanding that a recipient makes the section 402(a)/403(a) taxation election with respect to a lump sum distribution that includes the distribution of an annuity contract, the distribution of the annuity contract is to be taken into account by the recipient for purposes of the multiple distribution rules under section 402(e).

§ 20.2039-5 Annuities under individual retirement plans.

(a) *Section 2039(e) exclusion*—(1) *In general.* In the case of a decedent dying after December 31, 1976, section 2039 (e) excludes from the decedent's gross estate, to the extent provided in paragraph (c) of this section, the value of a "qualifying annuity" receivable by a beneficiary under an individual retirement plan. The term "individual retirement plan" means—

(i) An individual retirement account described in section 408(a),

(ii) An individual retirement annuity described in section 408(b), or

(iii) A retirement bond described in section 409(a).

(2) *Limitations.* (i) Section 2039(e) applies only with respect to the gross estate of a decedent on whose behalf the individual retirement plan was established. Accordingly, section 2039(e) does not apply with respect to the estate of a decedent who was only a beneficiary under the plan.

(ii) Section 2039(e) does not apply to an annuity receivable by or for the benefit of the decedent's estate. For the meaning of the term "receivable by or for the benefit of the decedent's estate," see § 20.2042-1(b).

(b) *Qualifying annuity.* For purposes of this section, the term "qualifying annuity" means an annuity contract or other arrangement providing for a series of substantially equal periodic payments to be made to a beneficiary for the beneficiary's life or over a period ending at least 36 months after the decedent's death. The term "annuity contract" includes an annuity purchased for a beneficiary and distributed to the beneficiary, if under section 408 the contract is not included in the gross income of the beneficiary upon distribution. The term "other arrangement" includes any arrangement arising by reason of the decedent's participation in the program providing the individual retirement plan. Payments shall be considered "periodic" if under the arrangement or contract (including a distributed contract) payments are to be made to the beneficiary at regular intervals. If the contract or arrangement provides optional payment provisions, not all of which provide for periodic payments, payments shall be considered periodic only if an option providing periodic payments is elected not later than the date the estate tax return is filed (as determined under § 20.2039-3(d)). For this purpose, the right to surrender a contract (including a distributed contract) for a cash surrender value will not be considered an optional payment provision. Payments shall be considered "substantially equal" even though the amounts receivable by the beneficiary may vary. Payments shall not be considered substantially equal, however, if more than 40% of the total amount payable to the beneficiary under the individual retirement plan, determined as of the date of the decedent's death and excluding any postmortem increase, is payable to the beneficary in any 12-month period.

(c) *Amount excludible from gross estate*—(1) *In general.* Except as otherwise described in this paragraph (c), the amount excluded from the decedent's gross estate under section 2039 (e) is the entire value of the qualifying annuity (as determined under §§ 20.2031-1 and 20.2031-7 through 20.2031-10) payable under the individual retirement plan.

(2) *Excess contribution.* In any case in which there exists, on the date of the decedent's death, an excess contribution (as defined in section 4973(b)) with respect to the individual retirement plan, the amount excluded from the value of the decedent's gross estate is determined under the following formula:

$$E = A - A(X - C - R)$$

Where:

E = the amount excluded from the decedent's gross estate under section 2039(c),

A = the value of the qualifying annuity at the decedent's death (as determined under §§ 20.2031-1 and 20.2031-7 through § 20.2031-10),

X = the amount which is an excess contribution at the decedent's death (as determined under section 4973(b)),

C = the total amount contributed by or on behalf of the decedent to the individual retirement plan, and

R = the total of amounts paid or distributed from the individual retirement plan before the death of the decedent which were either includable in the gross income of the recipient under section 408(d)(1) and represented the payment of distribution of an excess contribution, or were payments or distributions described in section 408(d)(4) or (5) (relating to returned excess contributions).

(3) *Certain section 403(b)(8) rollover contributions.* This subparagraph (3) applies if the decedent made a rollover contribution to the individual retirement plan under section 403(b)(8), and the contribution was attributable to a distribution under an annuity contract other than an annuity contract described in § 20.2039-2(b)(3). If such a rollover contribution was the only contribution made to the plan, no part of the value of the qualifying annuity payable under the plan is excluded from the decedent's gross estate under section 2039(e). If a contribution other than such a rollover contribution was made to the plan, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2) of this paragraph, except that for purposes of that formula, X includes the amount that was a rollover contribution under section 403(b)(8) attributable to a distribution under an annuity contract not described in § 20.2039-2(b)(3).

(4) *Surviving spouse's rollover contribution.* This subparagraph (4) applies if the decedent made a rollover contribution to the individual retirement plan under section 402(a)(7), relating to rollovers by a surviving spouse. If the rollover contribution under section 402(a)(7) was the only contribution made by the decedent to the plan, no part of the value of the qualifying annuity payable under the plan is excluded from the decedent's gross estate under section 2039(e). If a contribution other than a rollover contribution under section 402(a)(7) was made by the decedent to the plan, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2) of this paragraph, except that for purposes of that formula, X includes the amount that was a rollover contribution under section 402(a)(7).

(5) *Election under § 1.408-2(b)(7)(ii).* This subparagraph (5) applies if the decedent at any time made the election described in § 1.408-2(b)(7)(ii) with respect to an amount in the individual retirement plan. If this subparagraph (5) applies, the amount excluded from the decedent's gross estate is determined under the formula described in subparagraph (2), except that for purposes of that formula, X and C include the amount with respect to which the election was made.

(6) *Plan-to-plan rollovers.* (i) This subparagraph (6) applies if the individual retirement plan is a transferee plan. A "transferee plan" is a plan that was the recipient of a contribution described in section 408(d)(3)(A)(i) or 409(b)(3)(C) (relating to rollovers from one individual retirement plan to another) made by the decedent. The amount of the contribution described in section 408(d)(3)(A)(i) or

409(b)(3)(C) is the "rollover amount." The plan from which the rollover amount was paid or distributed to the decedent is the "transferor plan."

(ii) If the decedent made a contribution described in subparagraph (3) or (4) to the transferor plan, the amount excluded from the decedent's gross estate with respect to the transferee plan is determined under the formula described in subparagraph (2), except that for purposes of that formula, X includes so much of the rollover amount as was attributable to the contribution to the transferor plan that was described in subparagraph (3) or (4). The extent to which a rollover amount is attributable to a contribution described in subparagraph (3) or (4) that was made to the transferor plan is determined by multiplying the rollover amount by a fraction, the numerator of which is the amount of such contribution, and the denominator of which is the sum of all amounts contributed by the decedent to the transferor plan (if not returned as described under R in subparagraph (2)), and any amount in the transferor plan to which the election described in subparagraph (5) applied.

(iii) If the decedent made the election described in subparagraph (5) with respect to an amount in the transferor plan, the amount excluded from the decedent's gross estate with respect to the transferee plan is determined under the formula described in subparagraph (2), except that for purposes of that formula, X includes so much of the rollover amount as was attributable to the amount in the transferor plan to which the election applied. The extent to which a rollover amount is attributable to an amount in the transferor plan to which the election applied is determined by multiplying the rollover amount by a fraction, the numerator of which is the amount to which the election applied, and the denominator of which is the sum of all amounts contributed by the decedent to the transferor plan (if not returned as described under R in subparagraph (2)), and the amount in the transferor plan to which the election applied.

(iv) If a transferor plan described in this subparagraph (6) was also a transferee plan, then the rules described in this subparagraph (6) are to be applied with respect to both the rollover amount paid to the plan and the rollover amount thereafter paid from the plan.

(d) *Examples.* The provisions of this section are illustrated by the following examples:

Example (1). (1) A establishes an individual retirement account described in section 408 (a) on January 1, 1976, when A is age 65. A's only contribution to the account is a rollover contribution described in section 402(a)(5). The trust agreement provides that A may at any time elect to have the balance in the account distributed in one of the following methods:

(i) A single sum payment of the account,

(ii) Equal or substantially equal semiannual payments over a period equal to A's life expectancy, or

(iii) Equal or substantially equal semiannual payments over a period equal to the life expectancy of A and A's spouse.

(2) The trust agreement further provides that although semiannual payments have commenced under option (ii) or (iii), A (or A's surviving spouse) may, by written notice to the trustee, receive all or a part of the balance remaining in the account. In addition, under option (ii), any balance remaining in the account at A's death is payable in a single sum to A's designated beneficiary. Under option (iii), any balance remaining in the account at the death of the survivor of A or A's spouse is payable in a single sum to a beneficiary designated by A or A's surviving spouse.

(3) A elects option (iii), and the first semiannual payment is made to A on July 1, 1976. On that date, A's life expectancy is 15 years, and that of A's spouse is 22 years. Under option (iii), the semiannual payments to A or A's surviving spouse will continue until July 1, 1998.

(4) A dies on November 20, 1978. On December 15, 1978, the trust agreement is modified so that A's surviving spouse no longer may elect to receive all or part of the balance remaining in the account. The value of the semiannual payments payable to A's spouse is excluded from A's gross estate under section 2039(e).

(5) A's spouse dies July 12, 1981, and the single sum payment payable on account of the death of A's spouse is paid to the designated beneficiary on August 1, 1981. Notwithstanding that the balance in the account was paid to the designated beneficiary within 36 months after A's death, the value of the semiannual payments payable to A's spouse are excluded from A's gross estate, since at A's death those semiannual payments were to be paid over a period extending beyond 36 months. Section 2039(e) does not apply to exclude any amount from the estate of A's spouse, because A's spouse was only a beneficiary and not the individual on whose behalf the account was established.

Example (2). Assume the same facts as in example (1), except that the trust agreement is not modified so that A's surviving spouse no longer may elect to receive all or part of the balance remaining in the account (see (2) and (4) in example (1)). Instead, the balance of the account is applied toward the purchase of a contract providing an immediate annuity, the contract is distributed to A's surviving spouse on December 15, 1978, and under section 408 the contract is not included in the gross income of the spouse upon its distribution. The value of the annuity contract is excluded from A's gross estate, if the contract provides for a series of substantially equal periodic payments (within the meaning of paragraph (b) of this section) to be made over the life of A's surviving spouse or over a period not ending before the date 36 months after A's death.

Example (3). (1) B establishes an individual retirement plan described in section 408(a) ("IRA B") on February 6, 1981, in order to receive a $220,000 rollover contribution from a qualified plan, as described in section 402(a)(5). B dies August 14, 1981. C, an individual, is the sole beneficiary under IRA B. The amount in IRA B ($238,000) is payable to C in whole or part as C may elect. Because the amount in IRA B is payable to C as other than a qualifying annuity, within the meaning of paragraph (b) of this section, no amount is excluded from B's gross estate under section 2039(e).

(2) On October 17, 1981, C contributes $1,500 on C's own behalf to IRA B. Under § 1.408–2(b)(7)(ii), C's contribution will cause IRA B to be treated as being maintained by and on behalf of C ("IRA C") and C's making the contribution constitutes an election to which paragraph (c)(5) of this section applies. The balance in IRA C immediately before C's contribution is $240,000. Accordingly, the amount with respect to which C made the election is $240,000.

(3) C dies January 19, 1982. E, an individual, is the sole beneficiary under the plan, and the amounts payable to E ($242,000) are payable as a qualifying annuity, within the meaning of paragraph (b) of this section.

(4) The rules described in section 2039(e) and this section are applied with respect to the gross estate of C without regard to whether amounts now payable under IRA C were or were not excluded from B's gross estate. Under paragraph (c) of this section, the amount not excluded from C's gross estate is the value of the qualifying annuity payable to E ($242,000), multiplied by the fraction $240,000/($240,000 + $1,500). Thus, the amount not excluded from C's gross estate is $240,497. [($242,000) ($240,000 ($240,000 + $1,500)) = $240,497.] The amount excluded is therefore $1,503 ($242,000 − $240,497).

Example (4). (1) F, an individual, establishes an individual retirement plan ("IRA F1") in 1977 and makes $1,250 annual contributions for 1977, 1978, 1979 and 1980 (4 × $1,250 = $5,000), each of which is deducted by F under section 219. In February 1980, F receives an $85,000 distribution on account of the death of G, F's spouse, from the qualified plan of G's former employer, and rolls it over into IRA F1, under section 402(a)(7). Because IRA F1 includes a rollover contribution under section 402(a)(7), paragraph (c)(4) of this section applies. In 1981, F's entire interest in IRA F1, $100,000, is paid to F and contributed to another individual retirement plan ("IRA F2") under section 408(d)(3)(A)(i). IRA F2 is a transferee plan to which paragraph (c)(6) of this section applies because of the rollover. F makes a $1,500 deductible contribution to IRA F2 for 1981.

(2) F dies in 1984. The balance in IRA F2 ($146,000) is payable to G, an individual, as a qualifying annuity, within the meaning of paragraph (b) of this section.

(3) Under paragraph (c) of this section, the amount *not* excluded from F's gross estate is the value of the qualifying annuity payable

under IRA F2 multiplied by the fraction $96,700/$101,500. Accordingly, the amount not excluded is $139,096. [($146,000) ($96,700/$101,500)=$139,096.] The amount excluded is $6,904 ($146,000−$139,096).

(4) The numerator of the fraction ($96,700) is determined by multiplying the amount rolled over from IRA F1 to IRA F2 ($100,000)) by a fraction, the numerator of which is the amount of the rollover contribution to IRA F1 ($85,000), and the denominator of which is the total contributions to IRA F1 ($85,000+$5,000=$90,000). [($100,000) ($85,000/$90,000)=$96,700.]

(5) The denominator of the fraction ($101,500) is the sum of the contributions to IRA F2 (the $100,000 rollover contribution from IRA F1, and the $1,500 annual contribution to IRA F2).

PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Par. 6. Section 25.2517–1 is amended by revising paragraph (b)(1)(iii) and (iv), by adding a new paragraph (b)(1)(v) and a new paragraph (b)(1)(vi) by revising the third sentence in paragraph (b)(2), by revising so much of paragraph (c)(1) as precedes Example (1), and by adding a new paragraph (d). These revised and added provisions read as follows:

§25.2517–1 Employees' annuities.

* * * * *

(b) *Annuities or other payments to which section 2517 applies.* (1) * * *

(iii) A retirement annuity contract purchased for an employee by an employer which is an organization referred to in section 170(b)(1)(A) (ii) or (vi) or which is a religious organization (other than a trust) and is exempt from tax under section 501(a);

(iv) With respect to calendar years after 1965, an annuity under chapter 73 of title 10 of the United States Code (10 U.S.C. 1431, et seq.);

(v) With respect to transfers made after December 31, 1976, an individual retirement account described in section 408(a), an individual retirement annuity described in section 408(b), or a retirement bond described in section 409(a) (an "individual retirement plan"); or

(vi) With respect to transfers made after December 31, 1962, a bond purchase plan described in section 405.

(2) * * * For purposes of this section, the term "employee" includes a former employee, and in the case of an individual retirement plan described in subparagraph (1)(v) of this paragraph, means the individual for whose benefit the plan was established or purchased. * * *

(c) *Limitation on amount excludable from gift.* (1) In the case of a plan or annuity contract described in paragraph (b)(1) (i), (ii), (iii) or (vi) of this section, if an annuity or other payment payable thereunder is attributable to payments or contributions made by both the employee and the employer, the exclusion is limited to that proportion of the value on the date of the gift (see paragraph (a)(1) of this section) of the annuity or other payment which the employer's contribution (or a contribution made on the employer's behalf) to the plan on the employee's account bears to the total contributions to the plan on the employee's account. In applying this fatio—

(i) Payments or contributions made by the employer toward the purchase of an annuity contract described in paragraph (b)(1)(iii) of this section are considered to be employee contributions to the extent that the contributions are not, or were not, excludable from the employee's gross income under section 403(b).

(ii) For transfers made before January 1, 1977, payments or contributions made to a plan described in paragraph (b)(1)(i), (ii) or (vi) of this section on behalf of an individual for a period for which the individual was self-employed, within the meaning of section 401(c)(1), with respect to the plan are considered payments or contributions made by the employee.

(iii) For transfers made after December 31, 1976, however, payments or contributions made under a plan described in paragraph (b)(1) (i), (ii) or (vi) of this section on behalf of such a self-employed individual are considered employer contributions to the extent that they are, or were, deductible under section 404 or 405(c), and are considered employee contributions to the extent that they are not, or were not, so deductible.

(iv) In the case of a plan described in paragraph (b)(1) (i) or (ii) of this section, a rollover contribution described in section 402(a)(5), 403(a)(4), 403(d)(3)(A)(ii) or 409(b)(3)(C) is considered an amount contributed by the employer.

(v) In the case of an annuity contract described in paragraph (b)(1)(iii) of this section, a rollover contribution described in section 403(b)(8) is considered an amount contributed by the employer.

(vi) In the case of a plan described in paragraph (b)(1) (i), (ii) or (vi) of this section, an amount includable in the gross income of an employee under section 1379(b) (relating to shareholder-beneficiaries under certain plans) is considered an amount paid or contributed by the employee.

(vii) In the case of an annuity described in paragraph (b)(1)(iv) of this section, amounts paid or contributed by the employee include only amounts deposited by the employee under section 1438 or 1452(d) of Title 10 of the United States Code.

The application of this paragraph may be illustrated by the following examples, none of which involves employees within the meaning of section 401(c)(1):

* * * * *

(d) *Exemption of annuity interest created by community property laws*—(1) *In general.* An employee's transfer of benefits attributable to either—

(i) Contributions or payments made by an employer or former employer on the employee's behalf to a trust, annuity contract or bond purchase plan described in paragraph (b)(1) (i), (ii), (iii) or (vi) of this section, or

(ii) Contributions or payments made by the employee to an individual retirement plan described in paragraph (b)(1)(v) of this section, will not be considered a transfer by the employee's spouse to the extent the spouse's interest in the transferred benefits is also attributable to such contributions or payments and arises solely by reason of the spouse's interest in community income under the community property laws of a State.

(2) *Limitation.* The exemption described in subparagraph (1) of this paragraph does not apply in the case of an employee's transfer of benefits payable under a trust, annuity contract or bond purchase plan described in paragraph (b)(1) (i), (ii), (iii) or (vi) of this section to the extent such benefits are attributable to contributions or payments made by the employee. For purposes of the limitation described in this subparagraph—

(i) Employer contributions toward the purchase of an annuity contract described in paragraph (b)(1)(iii) of this section, to the extent not excludable from the employee's gross income under section 403(b), are considered employee contributions.

(ii) In the case of a plan described in paragraph (b)(1) (i), (ii), or (vi) of this section, contributions or payments made on behalf of an individual while the individual was self-employed within the meaning of section 401(c)(1) with respect to the plan are considered employer contributions to the extent they are, or were, deductible under section 404 or 405(c) and are considered employee contributions to the extent they are not, or were not, so deductible.

(iii) In the case of a plan described in paragraph (b)(1) (i) or (ii) of this section, a rollover contribution described in section 402(a)(5), 403(a)(4), 408(d)(3)(A)(ii) or 409(b)(3)(C) is considered an employer contribution.

(iv) In the case of an annuity contract described in paragraph (b)(1)(iii) of this section, a rollover contribution described in section 403(b)(8) is considered an employer contribution.

(3) *Effective date.* Section 2517(c) and this paragraph apply to transfers made after December 31, 1976.

[FR Doc. 81-2543 Filed 1-21-81; 10:07 am]
BILLING CODE 4830-01-M

DEPARTMENT OF LABOR

Wage and Hour Division

29 CFR Part 778

Overtime Compensation

AGENCY: Wage and Hour Division, Labor.

ACTION: Amendment to Interpretative Bulletin.

SUMMARY: Part 778 explains the overtime provisions of the Fair Labor Standards Act and provides numerous examples of how these provisions apply to specific situations. It is now being revised in order to reflect amendments to the Act that have changed some of the overtime provisions. In addition, the wage rates specified in most of the examples have been increased to take account of increases in the statutory minimum wage rate. There has also been a change made to a section which deals with the effect on the overtime rate of pay of compensating for certain activities which the Act does not require an employer to pay for.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. James L. Valin, Director, Division of Minimum Wage and Hour Standards, Office of Fair Labor Standards, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue N.W. Rm. S-3508, Washington, D.C. 20210 Telephone: (202) 523-7043. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Part 778 of Title 29, Code of Federal Regulations, constitutes the official interpretations of the Department of Labor with respect to the meaning and application of the maximum hours and overtime compensation requirements contained in Section 7 of the Fair Labor Standards Act (29 U.S.C. 207). During the period since Part 778 was last revised, the Fair Labor Standards Act has been amended, not only to increase the statutory minimum wage rate, but also to repeal part of Section 7.

The statutory amendments have necessitated two types of changes in Part 778. First, the wage rates specified in nearly all of the examples have been increased, so that no pay practice described in any example results in an employee being paid less than the current minimum wage. However, the principle illustrated by the example remains unchanged.

Second, the discussion of Sections 7(c) and 7(d) of the FLSA has been deleted from § 778.602, because those provisions, which partially exempted certain employees from the overtime protections of the FLSA, were repealed effective December 31, 1976, as a result of the Fair Labor Standards Amendments of 1974. In a related change, § 778.603 has been deleted because its description of the partial overtime exemptions in Sections 13(b)(8) and 13(b)(19) of the FLSA has become obsolete as a result of the Fair Labor Standards Amendments of 1974.

In addition to these changes, another revision has been made to Part 778. This revision is to § 778.320, which deals with compensation for hours spent in certain types of activities which would regarded as working time under the Act if no compensation were provided.

Examples of such activities specifically referred to in old § 778.320 were certain preliminary and post-preliminary activities, time spent in travel outside the hours of the normal workday, and time spent in eating meals between working hours. The old section made clear that where payment for any of these activities converts them into hours worked, the payment must be added into the regular rate for purposes of determining proper overtime compensation. On the other hand, the section made clear that where payment for any of the specified activities does *not* convert them into hours worked, the payment can be excluded from the regular rate if the provisions of Section 7(e)(2) of the Act are satisfied. (Section 7(e)(2) excludes from the regular rate certain specified payments and "other similar payments to an employee which are not made as compensation for his hours of employment * * *.") Old § 778.320 very strongly implied that payment for time spent in the specified activities would almost invariably convert them into hours worked.

Although new § 778.320 retains the basic principles of the old version with regard to the effect of the extra payments on the regular rate, it makes two specific changes. The first change is to avoid the implication that payment for time devoted to the specified activities converts them, virtually without exception, into hours worked. The new language expressly states that whether or not payment converts the activities into hours worked depends on "whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked." This change recognizes the fact that many employers pay for certain otherwise noncompensable activities, particularly lunch periods, in circumstances where neither the employer nor the employees intend that the time is to be hours worked. The new position more clearly honors the intent of the parties than the old position did.

The second change is to omit from the specified examples the reference to time spent in travel outside the hours of the normal workday. The inclusion of this example in old § 778.320 made that section inconsistent with § 785.39 of the Interpretative Bulletin (29 CFR § 785.39), relating to travel away from the home community. Moreover, the Department is reassessing the position taken in § 785.39 about such travel. Section 785.39 states, in pertinent part:

> As an enforcement policy the Divisions will not consider as worktime that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Old § 778.320 was inconsistent with this position because, in referring to time spent in travel outside the hours of the normal workday, it implied that under the FLSA this time would not be considered hours worked if it was not paid for. However, § 785.39, in setting forth an enforcement position, reserves the question of whether or not such travel time is hours worked under the FLSA. The Department now has under study the issue of whether and under what circumstances the travel time referred to in § 785.39 is hours worked. Until that study has been concluded, it would not be appropriate to leave the reference to travel time in § 778.320.

Apart from the changes described above, there are also a few minor editorial changes.

As this amendment involves interpretative rules, it is unnecessary to publish it initially in proposed form, or to delay the effective date beyond the date of publication of this document in the **Federal Register.** Nor does the Regulatory Flexibility Act apply.

It has been determined that this document does not contain a major proposal requiring the preparation of a regulatory analysis under Executive Order 12044, Improving Government Regulations (43 FR 12661, March 24, 1978).

Part 778 in its totality is a lengthy document, because it explains how the FLSA's overtime provisions apply to virtually every pay plan that employers have devised over the years. Moreover,

in order to provide adequate guidance, Part 778 must be accurate and precise. The basic overtime principles, however, are quite simple, and the application of these principles to the most common types of pay plans—hourly wage, piece rate, salary, and commission—are set forth in a relatively short space (see §§ 778.107–.122).

This document was prepared under the direction and control of Herbert J. Cohen, Assistant Administrator, Wage and Hour Division.

Accordingly, the specified sections of Part 778 are amended to read as follows.

1. The table of contents to Part 778 is amended by removing the reference to § 778.603 and by revising the titles to § 778.601 and § 778.602 as follows:

Sec.

* * * * *

778.601 Special overtime provisions available for hospitals and residential care establishments under section 7(j).
778.602 Special overtime provisions under section 7(b).
778.603 [Removed]

2. Section 778.3 is revised as follows:

§ 778.3 Interpretations made, continued, and superseded by this part.

On and after publication of this part in the **Federal Register**, the interpretations contained therein shall be in effect and shall remain in effect until they are modified, rescinded or withdrawn. This part supersedes and replaces the interpretations previously published in the **Federal Register** and Code of Federal Regulations as Part 778 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 Fair Labor Standards 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 are rescinded and withdrawn. Questions on matters not fully covered by this part may be addressed to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210, or to any Regional Office of the Division.

3. Section 778.101 is revised as follows:

§ 778.101 Maximum nonovertime hours.

As a general standard, section 7(a) of the Act provides 40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime. Hours worked in excess of the statutory maximum in any workweek are overtime hours under the statute; a workweek no longer than the prescribed maximum is a nonovertime workweek under the Act, to which the pay requirements of section 6 (minimum wage and equal pay) but not those of section 7(a) are applicable.

4. Section 778.102 is revised as follows:

§ 778.102 Application of overtime provisions generally.

Since there is no absolute limitation in the Act (apart from the child labor provisions and regulations thereunder) on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit, so long as the required overtime compensation is paid him for hours worked in excess of the maximum workweek prescribed by section 7(a). The Act does not generally require, however, that an employee be paid overtime compensation for hours in excess of eight per day, or for work on Saturdays, Sundays, holidays or regular days of rest. If no more than the maximum number of hours prescribed in the Act are actually worked in the workweek, overtime compensation pursuant to section 7(a) need not be paid. Nothing in the Act, however, will relieve an employer of any obligation he may have assumed by contract or of any obligation imposed by other Federal or State law to limit overtime hours of work or to pay premium rates for work in excess of a daily standard or for work on Saturdays, Sundays, holidays, or other periods outside of or in excess of the normal or regular workweek or workday. (The effect of making such payments is discussed in §§ 778.201–207 and 778.219.)

5. Section 778.107 is revised as follows:

§ 778.107 General standard for overtime pay.

The general overtime pay standard in section 7(a) requires that overtime must be compensated at a rate not less than one and one-half times the regular rate at which the employee is actually employed. The regular rate of pay at which the employee is employed may in no event be less than the statutory minimum. (The statutory minimum is the specified minimum wage applicable under section 6 of the Act, except in the case of workers specially provided for in section 14 and workers in Puerto Rico, the Virgin Islands, and American Samoa who are covered by wage orders issued pursuant to section 8 of the Act.) If the employee's regular rate of pay is higher than the statutory minimum, his overtime compensation must be computed at a rate not less than one and one-half times such higher rate. Under certain conditions prescribed in section 7 (f), (g), and (j), the Act provides limited exceptions to the application of the general standard of section 7(a) for computing overtime pay based on the regular rate. With respect to these, see §§ 778.400 through 778.421 and 778.601 and Part 548 of this chapter. The Act also provides, in section 7(i), (b), (k) and (m) and in section 13, certain partial and total exemptions from the application of section 7(a) to certain employees and under certain conditions. Regulations and interpretations concerning these exemptions are outside the scope of this Part 778 and reference should be made to other applicable parts of this chapter.

6. Section 778.110 is revised as follows:

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is his "regular rate." For his overtime work he must be paid, in addition to his straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $6 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $294 (46 hours at $6 plus 6 at $3). In other words, the employee is entitled to be paid an amount equal to $6 an hour for 40 hours and $9 an hour for the 6 hours of overtime, or a total of $294.

(b) *Hourly rate and bonus.* If the employee receives, in addition to his earnings at the hourly rate, a production bonus of $9.20, the regular hourly rate of pay is $6.20 an hour (46 hours at $6 yields $276; the addition of the $9.20 bonus makes a total of $285.20; this total divided by 46 hours yields a rate of $6.20). The employee is then entitled to be paid a total wage of $303.80 for 46 hours (46 hours at $6.20 plus 6 hours at $3.10, or 40 hours at $6.20 plus 6 hours at $9.30).

7. Section 778.111 is revised as follows:

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, his regular hourly rate of pay is computed by adding together his total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions); This sum is then divided by the number of hours worked

in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For his overtime work the pieceworker is entitled to be paid, in addition to his total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, see § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, if the employee has worked 50 hours and has earned $245.50 at piece rates for 46 hours of productive work and in addition has been compensated at $5.00 an hour for 4 hours of waiting time, his total compensation, $265.50 must be divided by his total hours of work, 50, to arrive at his regular hourly rate of pay—$5.31. For the 10 hours of overtime the employee is entitled to additional compensation of $26.55 (10 hours at $2.655). For the week's work he is thus entitled to a total of $292.05 (which is equivalent to 40 hours at $5.31 plus 10 overtime hours at $7.965).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty which he was paid is his regular rate in that week. In the example just given, if the employee was guaranteed $5.50 an hour for productive working time, he would be paid $253 (46×$5.50) for the 46 hours of productive work (instead of the $245.50 earned at piece rates). In a week in which no waiting time was involved, he would be owed an additional $2.75 (half time) for each of the 6 overtime hours worked, to bring his total compensation up to $269.50 (46 hours at $5.50 plus 6 hours at $2.75 or 40 hours at $5.50 plus 6 hours at $8.25). If he is paid at a different rate for waiting time, his regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

8. Section 778.113 is revised as follows:

§ 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, his regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $182.70 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $182.70 divided by 35 hours, or $5.22 an hour, and when he works overtime he is entitled to receive $5.22 for each of the first 40 hours and $7.83 (one and one-half times $5.22) for each hour thereafter. If an employee is hired at a salary of $220.80 for a 40-hour week his regular rate is $5.52 an hour.

(b) *Salary for periods other than workweek.* Where the salary covers a period longer than a workweek, such as a month, it must be reduced to its workweek equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semimonthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular hourly rate of pay will be calculated as indicated above. The regular rate of an employee who is paid a regular monthly salary of $1,040, or a regular semimonthly salary of $520 for 40 hours a week, is thus found to be $6 per hour. Under regulations of the Administrator, pursuant to the authority given to him in section 7(g)(3) of the Act, the parties may provide that the regular rates shall be determined by dividing the monthly salary by the number of working days in the month and then by the number of hours of the normal or regular workday. Of course, the resultant rate in such a case must not be less than the statutory minimum wage.

9. Section 778.114, paragraph (b) is revised as follows:

§ 778.114 Fixed salary for fluctuating hours.

* * * * *

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose overtime work is never in excess of 50 hours in a workweek, and whose salary of $250 a week is paid with the understanding that it constitutes his compensation, except for overtime premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $250; for the second week $261.36 ($250 plus 4 hours at $2.84, or 40 hours at $5.68 plus 4 hours at $8.52); for the third week $275 ($250 plus 10 hours at $2.50, or 40 hours at $5 plus 10 hours at $7.50); for the fourth week approximately $270.88 ($250 plus 8 hours at $2.61 or 40 hours at $5.21 plus 8 hours at $7.82).

* * * * *

10. Section 778.116 is revised as follows:

§ 778.116 Payments other than cash.

Where payments are made to employees in the form of goods or facilities which are regarded as part of wages, the reasonable cost to the employer or the fair value of such goods or of furnishing such facilities must be included in the regular rate. (See Part 531 of this chapter for a discussion as to the inclusion of goods and facilities in wages and the method of determining reasonable cost.) Where, for example, an employer furnishes lodging to his employees in addition to cash wages the reasonable cost or the fair value of the lodging (per week) must be added to the cash wages before the regular rate is determined.

11. In § 778.120 examples (i) and (ii) of paragraph (a) and paragraph (b) are revised as follows:

§ 778.120 Deferred commission payments not identifiable as earned in particular workweeks.

* * * * *

(a) *Allocation of equal amounts to each week.* * * *

* * * * *

Examples

(i) If there is a monthly commission payment of $416, the amount of commission allocable to a single week is $96 ($416×12=$4,992÷52=$96). In a week in which an employee who is due overtime compensation after 40 hours works 48 hours, dividing $96 by 48 gives the increase to the regular rate of $2. Multiplying one-half of this figure by 8 overtime hours gives the additional overtime pay due of $8. The $96 may also be multiplied by 0.083 (the appropriate decimal shown on the coefficient table) to get the additional overtime pay due of $8.

(ii) An employee received $384 in commissions for a 4-week period. Dividing this by 4 gives him a weekly increase of $96. Assume that he is due overtime compensation after 40 hours and that in the 4-week period he worked 44, 40, 44 and 48 hours. He would be due additional compensation of $4.36 for the first and third week ($96÷44=$2.18÷2=$1.9×4 overtime

hours=$4.36), no extra compensation for the second week during which no overtime hours were worked, and $8 for the fourth week, computed in the same manner as weeks one and three. The additional overtime pay due may also be computed by multiplying the amount of the weekly increase by the appropriate decimal on the coefficient table, for each week in which overtime was worked.

(b) *Allocation of equal amounts to each hour worked.* Sometimes, there are facts which make it inappropriate to assume equal commission earnings for each workweek. For example, the number of hours worked each week may vary significantly. In such cases, rather than following the method outlined in paragraph (a) of this section, it is reasonable to assume that the employee earned an equal amount of commission in each hour that he worked during the commission computation period. The amount of the commission payment should be divided by the number of hours worked in the period in order to determine the amount of the increase in the regular rate allocable to the commission payment. One-half of this figure should be multiplied by the number of statutory overtime hours worked by the employee in the overtime workweeks of the commission computation period, to get the amount of additional overtime compensation due for this period.

Example: An employee received commissions of $192 for a commission computation period of 96 hours, including 16 overtime hours (i.e., two workweeks of 48 hours each). Dividing the $192 by 96 gives a $2 increase in the hourly rate. If the employee is entitled to overtime after 40 hours in a workweek, he is due an additional $16 for the commission computation period, representing an additional $1 for each of the 16 overtime hours.

12. Section 778.202 paragraphs (c) and (e) are revised as follows:

§ 778.202 Premium pay for hours in excess of a daily or weekly standard.

* * * * *

(c) *Premiums for excessive daily hours.* If an employee whose maximum hours standard is 40 hours is hired at the rate of $5.75 an hour and receives, as overtime compensation under his contract, $6.25 per hour for each hour actually worked in excess of 8 per day (or in excess of his normal or regular daily working hours), his employer may exclude the premium portion of the overtime rate from the employee's regular rate and credit the total of the extra 50-cent payments thus made for daily overtime hours against the overtime compensation which is due under the statute for hours in excess of 40 in that workweek. If the same contract further provided for the payment of $6.75 for hours in excess of 12 per day, the extra $1 payments could likewise be credited toward overtime compensation due under the Act. To qualify as overtime premiums under section 7(e)(5), the daily overtime premium payments must be made for hours in excess of 8 hours per day or the employee's normal or regular working hours. If the normal workday is artificially divided into a "straight time" period to which one rate is assigned, followed by a so-called "overtime" period for which a higher "rate" is specified, the arrangement will be regarded as a device to contravene the statutory purposes and the premiums will be considered part of the regular rate. For a fuller discussion of this problem, see § 778.501.

* * * * *

(e) *Premium pay for sixth or seventh day worked.* Under section 7(e)(6) and 7(h), extra premium compensation paid pursuant to contract or statute for work on the sixth or seventh day worked in the workweek is regarded in the same light as premiums paid for work in excess of the applicable maximum hours standard or the employee's normal or regular workweek.

13. Section 778.205 is revised as follows:

§ 778.205 Premiums for weekend and holiday work—example.

The application of section 7(e)(6) may be illustrated by the following example: Suppose an agreement of employment calls for the payment of $7.50 an hour for all hours worked on a holiday or on Sunday in the operation of machines by operators whose maximum hours standard is 40 hours and who are paid a bona fide hourly rate of $5 for like work performed during nonovertime hours on other days. Suppose further that the workweek of such an employee begins at 12:01 a.m. Sunday, and in a particular week he works a schedule of 8 hours on Sunday and on each day from Monday through Saturday, making a total of 56 hours worked in the workweek. Tuesday is a holiday. The payment of $320 to which the employee is entitled under the employment agreement will satisfy the requirements of the Act since the employer may properly exclude from the regular rate the extra $20 paid for work on Sunday and the extra $20 paid for holiday work and credit himself with such amount against the statutory overtime premium required to be paid for the 16 hours worked over 40.

14. Section 778.206 is revised as follows:

§ 778.206 Premiums for work outside basic workday or workweek—examples.

The effect of section 7(e)(7) where "clock pattern" premiums are paid may be illustrated by reference to provisions typical of the applicable collective bargaining agreements traditionally in effect between employers and employees in the longshore and stevedoring industries. These agreements specify straight time rates applicable during the hours established in good faith under the agreement as the basic, normal, or regular workday and workweek. Under one such agreement, for example, such workday and workweek are established as the first 6 hours of work, exclusive of mealtime, each day, Monday through Friday, between the hours of 8 a.m. and 5 p.m. Under another typical agreement, such workday and workweek are established as the hours between 8 a.m. and 12 noon and between 1 p.m. and 5 p.m., Monday through Friday. Work outside such workday and workweek is paid for at premium rates not less than one and one-half times the bona fide straight-time rates applicable to like work when performed during the basic, normal, or regular workday or workweek. The extra compensation provided by such premium rates will be excluded in computing the regular rate at which the employees so paid are employed and may be credited toward overtime compensation due under the Act. For example, if an employee is paid $5 an hour under such an agreement for handling general cargo during the basic, normal, or regular workday and $7.50 per hour for like work outside of such workday, the extra $2.50 will be excluded from the regular rate and may be credited to overtime pay due under the Act. Similarly, if the straight time rate established in good faith by the contract should be higher because of handling dangerous or obnoxious cargo, recognition of skill differentials, or similar reasons, so as to be $7.50 an hour during the hours established as the basic or normal or regular workday or workweek, and a premium rate of $11.25 an hour is paid for the same work performed during other hours of the day or week, the extra $3.75 may be excluded from the regular rate of pay and may be credited toward overtime pay due under the Act. Similar principles are applicable where agreements following this general pattern exist in other industries.

15. Section 778.215 paragraph (a)(4) is revised as follows:

§ 778.215 Conditions for exclusion of benefit-plan contributions under section 7(e)(4).

(a) *General rules.* * * *

* * * * *

(4) The employer's contributions must be paid irrevocably to a trustee or 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 employer be able to recapture any of the contributions paid in nor in any way divert the funds to his own use or benefit. (It should also be noted that in the case of joint employer-employee contributory plans, where the employee contributions are not paid over to a third person or to a trustee unaffiliated with the employer, violations of the Act may result if the employee contributions cut into the required minimum or overtime rates. See Part 531 of this chapter.) Although an employer's contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the employer of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of marking payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the employer. In such a case the return by the insurance company to the employer of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the employer, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan.

* * * * *

16. In § 778.219 paragraphs (a) (1) and (2) and (b) (1) and (2) are revised as follows:

§ 778.219 Pay for foregoing holidays and vacations.

(a) *Sums payable whether employee works or not.* * * *

* * * * *

(1) An employee whose rate of pay is $5 an hour and who usually works a 6-day 48-hour week is entitled, under his employment contract, to a week's paid vacation in the amount of his usual straight-time earnings—$240. He foregoes his vacation and works 50 hours in the week in question. He is owed $250 as his total straight-time earnings for the week, and $240 in addition as his vacation pay. Under the statute he is owed an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the payment of $240 vacation pay, but no part of the $240 may be offset against the statutory overtime compensation which is due. (Nothing in this example is intended to imply that the employee has a statutory right to $240 or any other sum as vacation pay. This is a matter of private contract between the parties who may agree that vacation pay will be measured by straight-time earnings for any agreed number of hours or days, or by total normal or expected take-home pay for the period or that no vacation pay at all will be paid. The example merely illustrates the proper method of computing overtime for an employee whose employment contract provides $240 vacation pay.)

(2) An employee who is entitled under his employment contract to 8 hours' pay at his rate of $5 an hour for the Christmas holiday, foregoes his holiday and works 9 hours on that day. During the entire week he works a total of 50 hours. He is paid under his contract, $250 as straight-time compensation for 50 hours plus $40 as idle holiday pay. He is owed, under the statute, an additional $25 as overtime premium (additional half-time) for the 10 hours in excess of 40. His regular rate of $5 per hour has not been increased by virtue of the holiday pay but no part of the $40 holiday pay may be credited toward statutory overtime compensation due.

(b) *Premiums for holiday work distinguished.* * * *

* * * * *

(1) The typical situation is one in which an employee is entitled by contract to 8 hours' pay at his rate of $5 an hour for certain named holidays when no work is performed. If, however, he is required to work on such days, he does not receive his idle holiday pay. Instead he receives a premium rate of $7.50 (time and one-half) for each hour worked on the holiday. If he worked 9 hours on the holiday and a total of 50 hours for the week, he would be owed, under his contract, $67.50 (9×$7.50) for the holiday work and $205 for the other 41 hours worked in the week, a total of $272.50. Under the statute (which does not require premium pay for a holiday) he is owed $275 for a workweek of 50 hours at a rate of $5 an hour. Since the holiday premium is one and one-half times the established rate for nonholiday work, it does not increase the regular rate because it qualifies as an overtime premium under section 7(e)(6), and the employer may credit it toward statutory overtime compensation due and need pay the employee only the additional sum of $2.50 to meet the statutory requirements. (For a discussion of holiday premiums see § 778.203.)

(2) If all other conditions remained the same but the contract called for the payment of $10 (double time) for each hour worked on the holiday, the employee would receive, under his contract $90 (9×$10) for the holiday work in addition to $205 for the other 41 hours worked, a total of $295. Since this holiday premium is also an overtime premium under section 7(e)(6), it is excludable from the regular rate and the employer may credit it toward statutory overtime compensation due. Because the total thus paid exceeds the statutory requirements, no additional compensation is due under the Act. In distinguishing this situation from that in the example in paragraph (a)(2) of this section, it should be noted that the contract provisions in the two situations are different and result in the payment of different amounts. In example (2) the employee received a total of $85 attributable to the holiday: 8 hours' idle holiday pay at $5 an hour, due him whether he worked or not, and $45 pay at the nonholiday rate for 9 hours' work on the holiday. In the situation discussed in this paragraph the employee received $90 pay for working on the holiday—double time for 9 hours of work. Thus, clearly, all of the pay in this situation is paid for and directly related to the number of hours worked on the holiday.

17. Section 778.220 is revised as follows:

§ 778.220 "Show-up" or "reporting" pay.

(a) *Applicable principles.* Under some employment agreements, an employee may be paid a minimum of a specified number of hours' pay at the applicable straight time or overtime rate on infrequent and sporadic occasions when, after reporting to work at his scheduled starting time on a regular work day or on another day on which he has been scheduled to work, he is not provided with the expected amount of work. The amounts that may be paid under such an agreement over and

above what the employee would receive if paid at his customary rate only for the number of hours worked are paid to compensate the employee for the time wasted by him in reporting for work and to prevent undue loss of pay resulting from the employer's failure to provide expected work during regular hours. One of the primary purposes of such an arrangement is to discourage employers from calling their employees in to work for only a fraction of a day when they might get full-time work elsewhere. Pay arrangements of this kind are commonly referred to as "show-up" or "reporting" pay. Under the principles and subject to the conditions set forth in Subpart B of this part and §§ 778.201 through 778.207, that portion of such payment which represents compensation at the applicable rates for the straight time or overtime hours actually worked, if any, during such period may be credited as straight time or overtime compensation, as the case may be, in computing overtime compensation due under the Act. The amount by which the specified number of hours' pay exceeds such compensation for the hours actually worked is considered as a payment that is not made for hours worked. As such, it may be excluded from the computation of the employee's regular rate and cannot be credited toward statutory overtime compensation due him.

(b) *Application illustrated.* To illustrate, assume that an employee entitled to overtime pay after 40 hours a week whose workweek begins on Monday and who is paid $5 an hour reports for work on Monday according to schedule and is sent home after being given only 2 hours of work. He then works 8 hours each day on Tuesday through Saturday, inclusive, making a total of 42 hours for the week. The employment agreement covering the employees in the plant, who normally work 8 hours a day, Monday through Friday, provides that an employee reporting for scheduled work on any day will receive a minimum of 4 hours' work or pay. The employee thus receives not only the $10 earned in the 2 hours of work on Monday but an extra 2 hours' "show-up" pay, or $10 by reason of this agreement. However, since this $10 in "show-up" pay is not regarded as compensation for hours worked, the employee's regular rate remains $5 and the overtime requirements of the Act are satisfied if he receives, in addition to the $210 straight-time pay for 42 hours and the $10 "show-up" payment, the sum of $5 as extra compensation for the 2 hours of overtime work on Saturday.

18. Section 778.221 paragraph (b) is revised as follows:

§ 778.221 "Call-back" pay.

* * * * *

(b) *Application illustrated.* The application of these principles to call-back payments may be illustrated as follows: An employment agreement provides a minimum of 3 hours' pay at time and one-half for any employee called back to work outside his scheduled hours. The employees covered by the agreement, who are entitled to overtime pay after 40 hours a week, normally work 8 hours each day, Monday through Friday, inclusive, in a workweek beginning on Monday, and are paid overtime compensation at time and one-half for all hours worked in excess of 8 in any day or 40 in any workweek. Assume that an employee covered by this agreement and paid at the rate of $5 an hour works 1 hour overtime or a total of 9 hours on Monday, and works 8 hours each on Tuesday through Friday, inclusive. After he has gone home on Friday evening he is called back to perform an emergency job. His hours worked on the call total 2 hours and he receives 3 hours' pay at time and one-half, or $22.50, under the call-back provision, in addition to $200 for working his regular schedule and $7.50 for overtime worked on Monday evening. In computing overtime compensation due this employee under the Act, the 43 actual hours (not 44) are counted as working time during the week. In addition to $215 pay at the $5 rate for all these hours, he has received under the agreement a premium of $2.50 for the 1 overtime hour on Monday and of $5 for the 2 hours of overtime work on the call, plus an extra sum of $7.50 paid by reason of the provision for minimum call-back pay. For purposes of the Act, the extra premiums paid for actual hours of overtime work on Monday and on the Friday call (a total of $7.50) may be excluded as true overtime premiums in computing his regular rate for the week and may be credited toward compensation due under the Act, but the extra $7.50 received under the call-back provision is not regarded as paid for hours worked; therefore, it may be excluded from the regular rate, but it cannot be credited toward overtime compensation due under the Act. The regular rate of the employee, therefore, remains $5, and he has received an overtime premium of $2.50 an hour for 3 overtime hours of work. This satisfies the requirements of section 7 of the Act. The same would be true, of course, if in the foregoing example, the employee was called back outside his scheduled hours for the 2-hour emergency job on another night of the week or on Saturday or Sunday, instead of on Friday night.

19. Section 778.223 is revised as follows:

§ 778.223 Pay for non-productive hours distinguished.

Under the Act an employee must be compensated for all hours worked. As a general rule the term "hours worked" will include (a) all time during which an employee is required to be on duty or to be on the employer's premises or at a prescribed workplace and (b) all time during which an employee is suffered or permitted to work whether or not he is required to do so. Thus, working time is not limited to the hours spent in active productive labor, but includes time given by the employee to the employer even though part of the time may be spent in idleness. Some of the hours spent by employees, under certain circumstances, in such activities as waiting for work, remaining "on call", traveling on the employer's business or to and from workplaces, and in meal periods and rest periods are regarded as working time and some are not. The governing principles are discussed in Part 785 of this chapter (interpretative bulletin on "hours worked") and Part 790 of this chapter (statement of effect of Portal-to-Portal Act of 1947). To the extent that these hours are regarded as working time, payment made as compensation for these hours obviously cannot be characterized as "payments not for hours worked." Such compensation is treated in the same manner as compensation for any other working time and is, of course, included in the regular rate of pay. Where payment is ostensibly made as compensation for such of these hours as are not regarded as working time under the Act, the payment is nevertheless included in the regular rate of pay unless it qualifies for exclusion from the regular rate as one of a type of "payments made for occasional periods when no work is performed due to * * * failure of the employer to provide sufficient work, or other similar cause" as discussed in § 778.218 or is excludable on some other basis under section 7(e)(2). For example, an employment contract may provide that employees who are assigned to take calls for specific periods will receive a payment of $5 for each 8-hour period during which they are "on call" in addition to pay at their regular (or overtime) rate for hours actually spent in making calls. If the employees who are thus on call are not confined to their homes or to any particular place, but may come and go as they please,

provided that they leave word where they may be reached, the hours spent "on call" are not considered as hours worked. Although the payment received by such employees for such "on call" time is, therefore, not allocable to any specific hours of work, it is clearly paid as compensation for performing a duty involved in the employee's job and is not of a type excludable under section 7(e)(2). The payment must therefore be included in the employee's regular rate in the same manner as any payment for services, such as an attendance bonus, which is not related to any specific hours of work.

20. Section 778.302 paragraph (b) is revised as follows:

§ 778.302 Computation of overtime due for overlapping workweeks.

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(b) *Application of rule illustrated.* Suppose that, in the example given in § 778.301, the employee, who receives $5 an hour and is subject to overtime pay after 40 hours a week, worked 5 hours on Sunday, March 7, 1965. Suppose also that his last "old" workweek commenced at 7 a.m. on Monday, March 1, and he worked 40 hours March 1 through March 5 so that for the workweek ending March 7 he would be owed straight time and overtime compensation for 45 hours. The proposal is to commence the "new" workweek at 7 a.m. on March 7. If in the "new" workweek of Sunday, March 7, through Saturday, March 13, the employee worked a total of 40 hours, including the 5 hours worked on Sunday, it is obvious that the allocation of the Sunday hours to the old workweek will result in higher total compensation to the employee for the 13-day period. He should, therefore, be paid $237.50 ($40\times\$5+5\times\$7.50$) for the period of March 1 through March 7, and $175 ($35\times\$5$) for the period of March 8 through March 13.

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21. Section 778.304 paragraph (b) is revised as follows:

§ 778.304 Amounts deducted from cash wages—general.

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(b) In general, where such deductions are made, the employee's "regular rate" is the same as it would have been if the occasion for the deduction had not arisen. Also, as explained in Part 531 of this chapter, the requirements of the Act place certain limitations on the making of some of the above deductions.

22. Section 778.306 paragraph (a) is revised as follows:

§ 778.306 Salary reductions in short workweeks.

(a) The reductions in pay described in subparagraph (4) of § 778.304(a) are not, properly speaking, "deductions" at all. If an employee is compensated at a fixed salary for a fixed workweek and if this salary is reduced by the amount of the average hourly earnings for each hour lost by the employee in a short workweek, the employee is, for all practical purposes, employed at an hourly rate of pay. This hourly rate is the quotient of the fixed salary divided by the fixed number of hours it is intended to compensate. If an employee is hired at a fixed salary of $200 for a 40-hour week, his hourly rate is $5. When he works only 36 hours he is therefore entitled to $180. The employer makes a "deduction" of $20 from his salary to achieve this result. The regular hourly rate is not altered.

* * * * *

23. Section 778.307 is revised as follows:

§ 778.307 Disciplinary deductions.

Where deductions as described in § 778.304(a)(5) are made for disciplinary reasons, the regular rate of an employee is computed before deductions are made, as in the case of deductions of the types in paragraphs (a) (1), (2), and (3) of § 778.304. Thus where disciplinary deductions are made from a piece-worker's earnings, the earnings at piece rates must be totaled and divided by the total hours worked to determine the regular rate before the deduction is applied. In no event may such deductions (or deductions of the type described in § 778.304(a)(2)) reduce the earnings to an average below the applicable minimum wage or cut into any part of the overtime compensation due the employee. For a full discussion of the limits placed on such deductions, see Part 531 of this chapter. The principles set forth therein with relation to deductions have no application, however, to situations involving refusal or failure to pay the full amount of wages due. See Part 531 of this chapter; also § 778.306. It should be noted that although an employer may penalize an employee for lateness subject to the limitations stated above by deducting a half hour's straight time pay from his wages, for example, for each half hour, or fraction thereof of his lateness, the employer must still count as hours worked all the time actually worked by the employee in determining the amount of overtime compensation due for the workweek.

24. Section 778.308 paragraph (b) is revised as follows:

§ 778.308 The overtime rate is an hourly rate.

* * * * *

(b) To qualify under section 7(e)(5), the overtime rate must be greater than the regular rate, either a fixed amount per hour or a multiple of the nonovertime rate, such as one and one-third, one and one-half or two times that rate. To qualify under section 7(e) (6) or (7), the overtime rate may not be less than one and one-half times the bonafide rate established in good faith for like work performed during nonovertime hours. Thus, it may not be less than time and one-half but it may be more. It may be a standard multiple greater than one and one-half (for example, double time); or it may be a fixed sum of money per hour which is, as an arithmetical fact, at least one and one-half times the nonovertime rate for example, if the nonovertime rate is $5 per hour, the overtime rate may not be less than $7.50 but may be set at a higher arbitrary figure such as $8 per hour.

25. Section 778.310 is revised as follows:

§ 778.310 Fixed sum for varying amounts of overtime.

A premium in the form of a lump sum which is paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money may be equal to or greater than the sum owed on a per hour basis. For example, an agreement that provides for the payment of a flat sum of $75 to employees who work on Sunday does not provide a premium which will qualify as an overtime premium, even though the employee's straight time rate is $5 an hour and the employee always works less than 10 hours on Sunday. Likewise, where an agreement provides for the payment for work on Sunday of either the flat sum of $75 or time and one-half the employee's regular rate for all hours worked on Sunday, whichever is greater, the $75 guaranteed payment is not an overtime premium. The reason for this is clear. If the rule were otherwise, an employer desiring to pay an employee a fixed salary regardless of the number of hours worked in excess of the applicable maximum hours standard could merely label as overtime pay a fixed portion of such salary sufficient to take care of compensation for the maximum number of hours that would be worked. The Congressional purpose to effectuate a maximum hours standard by placing a penalty upon the performance of excessive overtime work would thus be defeated. For this reason,

where extra compensation is paid in the form of a lump sum for work performed in overtime hours, it must be included in the regular rate and may not be credited against statutory overtime compensation due.

26. Section 778.311, paragraph (b) is revised as follows:

§ 778.311 Flat rate for special job performed in overtime hours.

* * * * *

(b) *Application of rule illustrated.* It may be helpful to give a specific example illustrating the result of paying an employee on the basis under discussion.

(1) An employment agreement calls for the payment of $5 per hour for work during the hours established in good faith as the basic workday or workweek; it provides for the payment of $7.50 per hour for work during hours outside the basic workday or workweek. It further provides that employees doing a special task outside the basic workday or workweek shall receive 6 hours' pay at the rate of $7.50 per hour (a total payment of $45) regardless of the time actually consumed in performance. The applicable maximum hours standard is 40 hours in a workweek.

(2) Suppose an employee under such an agreement works for following schedule:

	M	T	W	T	F	S	S
Hours within basic workday	8	8	7	8	8	0	0
Pay under contract	$40	$40	$35	$40	$40	0	0
Hours outside basic workday	2	2[1]	1	0	0	4	0
Pay under contract	$15	$45	$7.50	0	0	$30	0

[1] Hours spent in the performance of special work.

(3) To determine the regular rate, the total compensation (except statutory exclusions) must be divided by the total number of hours worked. The only sums to be excluded in this situation are the extra premiums provided by a premium rate (a rate per hour) for work outside the basic workday and workweek, which qualify for exlusion under section 7(e)(7) of the Act, as discussed in § 778.204. The $15 paid on Monday, the $7.50 paid on Wednesday and the $30 paid on Saturday are paid pursuant to rates which qualify as premium rates under section 7(e)(7) of the Act. The total extra compensation (over the straight time pay for these hours) provided by these premium rates is $17.50. The sum of $17.50 should be subtracted from the total of $292.50 due the employee under the employment agreement. No part of the $45 payment for the special work performed on Tuesday qualifies for exclusion. The remaining $275 must thus be divided by 48 hours to determine the regular rate—$5.73 per hour. The employee is owed an additional one-half this rate under the Act for each of 8 overtime hours worked—$22.92. The extra compensation in the amount of $17.50 payable pursuant to contract premium rates which qualify as overtime premiums may be credited toward the $22.92 owed as statutory overtime premiums. No part of the $45 payment may be so credited. The employer must pay the employee an additional $5.42 as statutory overtime pay—a total of $297.92 for the week.

27. Section 778.313 is revised as follows:

§ 778.313 Computing overtime pay under the Act for employees compensated on task basis.

(a) An example of the operation of a plan of the second type discussed in § 778.312 may serve to illustrate the effects on statutory overtime computations of payment on a task basis. Assume the following facts: The employment agreement establishes a basic hourly rate of $5 per hour, provides for the payment of $7.50 per hour for overtime work (in excess of the basic workday or workweek) and defines the basic workday as 8 hours, and the basic workweek as 40 hours, Monday through Friday. It further provides that the assembling of a machine constitutes a day's work. An employee who completes the assembling job in less than 8 hours will be paid 8 hours' pay at the established rate of $5 per hour and will receive pay at the "overtime" rate for hours worked after the completion of the task. An employee works the following hours in a particular week:

	M	T	W	T	F	S	S
Hours spent on task	6	7	7	9	8½	6	0
Day's pay under contract	$40	$40	$40	$40	$40	$60	0
Additional hours	2	0	2	0	½	0	0
Additional pay under contract	$15	0	$15	$7.50	$7.50	0	0

(b) In the example in paragraph (a) of this section the employee has actually worked a total of 48 hours and is owed under the contract a total of $305 for the week. The only sums which can be excluded as overtime premiums from this total before the regular rate is determined are the extra $2.50 payments for the extra hour on Thursday and Friday made because of work actually in excess of 8 hours. The payment of the other premium rates under the contract is either without regard to whether or not the hours they compensated were in excess of a bona fide daily or weekly standard or without regard to the number of overtime hours worked. Thus only the sum of $5 is excluded from the total. The remaining $300 is divided by 48 hours to determine the regular rate—$6.25 per hour. One-half this rate is due under the Act as extra compensation for each of the 8 overtime hours—$25. The $5 payment under the contract for actual excess hours may be credited and the balance—$20—is owed in addition to the $305 due under the contract.

28. Section 778.317 is revised as follows:

§ 778.317 Agreements not to pay for certain nonovertime hours.

An agreement not to compensate employees for certain nonovertime hours stands on no better footing since it would have the same effect of diminishing the employee's total overtime compensation. An agreement, for example, to pay an employee whose maximum hours standard for the particular workweek is 40 hours, $5 an hour for the first 35 hours, nothing for the hours between 35 and 40 and $7.50 an hour for the hours in excess of 40 would not meet the overtime requirements of the Act. Under the principles set forth in § 778.315, the employee would have to be paid $25 for the 5 hours worked between 35 and 40 before any sums ostensibly paid for overtime could be credited toward overtime compensation due under the Act. Unless the employee is first paid $5 for each nonovertime hour worked, the $7.50 per hour payment purportedly for overtime hours is not in fact an overtime payment.

21. Section 778.320 is revised as follows:

§ 778.320 Hours that would not be hours worked if not paid for.

In some cases an agreement provides for compensation for hours spent in certain types of activities which would not be regarded as working time under the Act if no compensation were provided. Preliminary and postliminary activities and time spent in eating meals between working hours fall in this category. The agreement of the parties to provide compensation for such hours may or may not convert them into hours worked, depending on whether or not it appears from all the pertinent facts that the parties have agreed to treat such time as hours worked. Except for certain activity governed by the Portal-to-Portal Act (see paragraph (b) of this section),

the agreement of the parties will be respected, if reasonable.

(a) *Parties have agreed to treat time as hours worked.* Where the parties have reasonably agreed to include as hours worked time devoted to activities of the type described above, payments for such hours will not have the mathematical effect of increasing or decreasing the regular rate of an employee if the hours are compensated at the same rate as other working hours. The requirements of section 7(a) of the Act will be considered to be met where overtime compensation at one and one-half times such rate is paid for the hours so compensated in the workweek which are in excess of the statutory maximum.

(b) *Parties have agreed not to treat time as hours worked.* Under the principles set forth in § 778.319, where the payments are made for time spent in an activity which, if compensable under contract, custom, or practice, is required to be counted as hours worked under the Act by virtue of Section 4 of the Portal-to-Portal Act of 1947 (see Parts 785 and 790 of this chapter), no agreement by the parties to exclude such compensable time from hours worked would be valid. On the other hand, in the case of time spent in activity which would not be hours worked under the Act if not compensated and would not become hours worked under the Portal-to-Portal Act even if made compensable by contract, custom, or practice, the parties may reasonably agree that the time will not be counted as hours worked. Activities of this type include eating meals between working hours. Where it appears from all the pertinent facts that the parties have agreed to exclude such activities from hours worked, payments for such time will be regarded as qualifying for exclusion from the regular rate under the provisions of section 7(e)(2), as explained in §§ 778.216 to 778.224. The payments for such hours cannot, of course, qualify as overtime premiums creditable toward overtime compensation under section 7(h) of the Act.

30. Section 778.322 is revised as follows:

§ 778.322 Reducing the fixed workweek for which a salary is paid.

If an employee whose maximum hours standard is 40 hours was hired at a salary of $200 for a fixed workweek of 40 hours, his regular rate at the time of hiring was $5 per hour. If his workweek is later reduced to a fixed workweek of 35 hours while his salary remains the same, it is the fact that it now takes him only 35 hours to earn $200, so that he earns his salary at the average rate of $5.71 per hour. His regular rate thus becomes $5.71 per hour; it is no longer $5 an hour. Overtime pay is due under the Act only for hours worked in excess of 40, not 35, but if the understanding of the parties is that the salary of $200 now covers 35 hours of work and no more, the employee would be owed $5.71 per hour under his employment contract for each hour worked between 35 and 40. He would be owed not less than one and one-half times $5.71 ($8.57) per hour, under the statute, for each hour worked in excess of 40 in the workweek. In weeks in which no overtime is worked only the provisions of section 6 of the Act, requiring the payment of not less than the applicable minimum wage for each hour worked, apply so that the employee's right to receive $5.71 per hour is enforceable only under his contract. However, in overtime weeks the Administrator has the duty to insure the payment of at least one and one-half times the employee's regular rate of pay for hours worked in excess of 40 and this overtime compensation cannot be said to have been paid until all straight time compensation due the employee under the statute or his employment contract has been paid. Thus if the employee works 41 hours in a particular week, he is owed his salary for 35 hours—$200, 5 hours' pay at $5.71 per hour for the 5 hours between 35 and 40—$28.55, and 1 hour's pay at $8.57 for the 1 hour in excess of 40—$8.57, or a total of $237.12 for the week.

31. Section 778.323 is revised as follows:

§ 778.323 Effect if salary is for variable workweek.

The discussion in the prior section sets forth one result of reducing the workweek from 40 to 35 hours. It is not either the necessary result or the only possible result. As in all cases of employees hired on a salary basis, the regular rate depends in part on the agreement of the parties as to what the salary is intended to compensate. In reducing the customary workweek schedule to 35 hours the parties may agree to change the basis of the employment arrangement by providing that the salary which formerly covered a fixed workweek of 40 hours now covers a variable workweek up to 40 hours. If this is the new agreement, the employee receives $200 for workweeks of varying lengths, such as 35, 36, 38, or 40 hours. His rate thus varies from week to week, but in weeks of 40 hours or over, it is $5 per hour (since the agreement of the parties is that the salary covers up to 40 hours and no more) and his overtime rate, for hours in excess of 40, thus remains $7.50 per hour. Such a salary arrangement presumably contemplates that the salary will be paid in full for any workweek of 40 hours or less. The employee would thus be entitled to his full salary if he worked only 25 or 30 hours. No deductions for hours not worked in short workweeks would be made. (For a discusison of the effect or deductions on the regular rate, see §§ 778.304 to 778.307.)

32. Section 778.325 is revised as follows:

§ 778.325 Effect on salary covering more than 40 hours' pay.

The same reasoning applies to salary covering straight time pay for a longer workweek. If an employee whose maximum hours standard is 40 hours was hired at a fixed salary of $275 for 55 hours of work, he was entitled to a statutory overtime premium for the 15 hours in excess of 40 at the rate of $2.50 per hour (half-time) in addition to his salary, and to statutory overtime pay of $7.50 per hour (time and one-half) for any hours worked in excess of 55. If the scheduled workweek is later reduced to 50 hours, with the understanding between the parties that the salary will be paid as the employee's nonovertime compensation for each workweek of 55 hours or less, his regular rate in any overtime week of 55 hours or less is determined by dividing the salary by the number of hours worked to earn it in that particular week, and additional half-time, based on that rate, is due for each hour in excess of 40. In weeks of 55 hours or more, his regular rate remains $5 per hour and he is due, in addition to his salary, extra compensation of $2.50 for each hour over 40 but not over 55 and full time and one-half, or $7.50, for each hour worked in excess of 55. If, however, the understanding of the parties is that the salary now covers a fixed workweek of 50 hours, his regular rate is $5.50 per hour in all weeks. This assumes that when an employee works less than 50 hours in a particular week, deductions are made at a rate of $5.50 per hour for the hours not worked.

33. Section 778.326 is revised as follows:

§ 778.326 Reduction of regular overtime workweek without reduction of take-home pay.

The reasoning applied in the foregoing sections does not, of course, apply to a situation in which the former earnings at both straight time and overtime are paid to the employee for the reduced workweek. Suppose an employee was hired at an hourly rate of $5 an hour and regularly worked 50 hours, earning $275 as his total straight time and overtime compensation, and the parties now

agree to reduce the workweek to 45 hours without any reduction in take-home pay. The parties in such a situation may agree to an increase in the hourly rate from $5 per hour to $6 so that for a workweek of 45 hours (the reduced schedule) the employee's straight time and overtime earnings will be $285. The parties cannot, however, agree that the employee is to receive exactly $285 as total compensation (including overtime pay) for a workweek varying, for example, up to 50 hours, unless he does so pursuant to contracts specifically permitted in section 7(f) of the Act, as discussed in §§ 778.402 through 778.414. An employer cannot otherwise discharge his statutory obligation to pay overtime compensation to an employee who does not work the same fixed hours each week by paying a fixed amount purporting to cover both straight time and overtime compensation for an "agreed" number of hours. To permit such a practice without proper statutory safeguards would result in sanctioning the circumvention of the provisions of the Act which require that an employee who works more than 40 hours in any workweek be compensated, in accordance with express congressional intent, at a rate not less than one and one-half times his regular rate of pay for the burden of working long hours. In arrangements of this type, no additional financial pressure would fall upon the employer and no additional compensation would be due to the employee under such a plan until the workweek exceeded 50 hours.

34. Section 778.327 is revised as follows:

§ 778.327 Temporary or sporadic reduction in schedule.

(a) The problem of reduction in the workweek is somewhat different where a temporary reduction is involved. Reductions for the period of a dead or slow season follow the rules announced above. However, reduction on a more temporary or sporadic basis presents a different problem. It is obvious that as a matter of simple arithmetic an employer might adopt a series of different rates for the same work, varying inversely with the number of overtime hours worked in such a way that the employee would earn no more than his straight time rate no matter how many hours he worked. If he set the rate at $6 per hour for all workweeks in which the employee worked 40 hours or less, approximately $5.93 per hour for workweeks of 41 hours, approximately $5.86 for workweeks of 42 hours, approximately $5.45 for workweeks of 50 hours, and so on, the employee would always receive (for straight time and overtime at these "rates") $6 an hour regardless of the number of overtime hours worked. This is an obvious bookkeeping device designed to avoid the payment of overtime compensation and is not in accord with the law. See Walling v. Green Head Bit & Supply Co., 138 F. 2d 453. The regular rate of pay of this employee for overtime purposes is, obviously, the rate he earns in the normal nonovertime week—in this case, $6 per hour.

(b) The situation is different in degree but not in principle where employees who have been at a bona fide $6 rate usually working 50 hours and taking home $330 as total straight time and overtime pay for the week are, during occasional weeks, cut back to 42 hours. If the employer raises their rate to $7.65 for such weeks so that their total compensation is $328.95 for a 42-hour week the question may properly be asked, when they return to the 50-hour week, the $2 rate and the gross pay of 110 whether the $6 rate is really their regular rate. Are they putting in 8 additional hours of work for that extra $7.65 or is their "regular" rate really now $7.65 an hour since this is what they earn in the short workweek? It seems clear that where different rates are paid from week to week for the same work and where the difference is justified by no factor other than the number of hours worked by the individual employee—the longer he works the lower the rate—the device is evasive and the rate actually paid in the shorter or nonovertime week is his regular rate for overtime purposes in all weeks.

35. Section 778.408 paragraph (c) is revised as follows:

§ 778.408 The specified regular rate.

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(c) The rate specified in the contract must also be a "regular" rate which is operative in determining the total amount of the employee's compensation. Suppose, for example, that the compensation of an employee is normally made up in part by regular bonuses, commissions, or the like. In the past he has been employed at an hourly rate of $5 per hour in addition to which he has received a cost-of-living bonus of $7 a week and a 2-percent commission on sales which averaged $70 per week. It is now proposed to employ him under a guaranteed pay contract which specifies a rate of $5 per hour and guarantees $200 per week, but he will continue to receive his cost-of-living bonus and commissions in addition to the guaranteed pay. Bonuses and commissions of this type are, of course, included in the "regular rate" as defined in section 7(e). It is also apparent that the $5 rate specified in the contract is not a "regular rate" under the requirements of section 7(f) since it never controls or determines the total compensation he receives. For this reason, it is not possible to enter into a guaranteed pay agreement of the type permitted under section 7(f) with an employee whose regular weekly earnings are made up in part by the payment of regular bonuses and commissions of this type. This is so because even in weeks in which the employee works sufficient hours to exceed, at his hourly rate, the sum guaranteed, his total compensation is controlled by the bonus and the amount of commissions earned as well as by the hourly rate.

* * * * *

36. Section 778.409 is revised as follows:

§ 778.409 Provision for overtime pay.

The section 7(f) contract must provide for compensation at not less than one and one-half times the specified regular rate for all hours worked in excess of the applicable maximum hours standard for the particular workweek. All excessive hours, not merely those covered by the guarantee, must be compensated at one and one-half times (or a higher multiple) of the specified regular rate. A contract which guaranteed a weekly salary of $169, specified a rate of $3.60 per hour, and provided that not less than one and one-half times such rate would be paid only for all hours up to and including 46⅔ hours would not qualify under this section. The contract must provide for payment at time and one-half (or more) for all hours in excess of the applicable maximum hours standard in any workweek. A contract may provide a specific overtime rate greater than one and one-half times the specified rate, for example, double time. If it does provide a specific overtime rate it must provide that such rate will be paid for all hours worked in excess of the applicable maximum hours standard.

37. Section 778.411 is revised as follows:

§ 778.411 Sixty-hour limit on pay guaranteed by contract.

The amount of weekly pay guaranteed may not exceed compensation due at the specified regular rate for the applicable maximum hours standard and at the specified overtime rate for the additional hours, not to exceed a total of 60 hours. Thus, if the maximum hours standard is 40 hours and the specified regular rate is $5 an hour the weekly guaranty cannot be greater than $350. This does not mean that an employee

employed pursuant to a guaranteed pay contract under this section may not work more than 60 hours in any week; it means merely that pay in an amount sufficient to compensate for a greater number of hours cannot be covered by the guaranteeed pay. If he works in excess of 60 hours he must be paid, for each hour worked in excess of 60, overtime compensation as provided in the contract, in addition to the guaranteed amount.

38. Section 778.413 is revised as follows:

§ 778.413 Guaranty must be based on rates specified in contract.

The guaranty of pay must be "based on the rate so specified," in the contract. If the contract specifies a regular rate of $5 and an overtime rate of $7.50 and guarantees pay for 50 hours and the maximum hours standard is 40 hours, the amount of the guaranty must be $275, if it is to be based on the rates so specified. A guaranty of $290 in such a situation would not, obviously, be based on the rates specified in the contract. Moreover, a contract which provides a variety of different rates for shift differentials, arduous or hazardous work, stand-by time, piece-rate incentive bonuses, commissions or the like in addition to a specified regular rate and a specified overtime rate with a guaranty of pay of, say, $290 from all sources would not qualify under this section, since the guaranty of pay in such a case is not based on the regular and overtime rates specified in the contract.

39. Section 778.414 paragraph (b) is revised as follows:

§ 778.414 "Approval" of contracts under section 7(f).

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(b) As a guide to employers, it may be helpful to describe a fact situation in which the making of a guaranteed salary contract would be appropriate and to set forth the terms of a contract which would comply, in the circumstances described, with the provisions of section 7(f).

Example: An employee is employed as an insurance claims adjuster; because of the fact that he must visit claimants and witnesses at their convenience, it is impossible for him or his employer to control the hours which he must work to perform his duties. During the past 6 months his weekly hours of work have varied from a low of 30 hours to a high of 58 hours. His average workweek for the period was 48 hours. In about 80 percent of the workweeks he worked less than 52 hours. It is expected that his hours of work will continue to follow this pattern. The parties agree upon a regular rate of $5 per hour. In order to provide for the employee the security of a regular weekly income the parties further agree to enter into a contract which provides a weekly guaranty of pay. If the applicable maximum hours standard is 40 hours, guaranty of pay for a workweek somewhere between 48 hours (his average week) and 52 would be reasonable. In the circumstances described the following contract would be appropriate.

The X Company hereby agrees to employ John Doe as a claims adjuster at a regular hourly rate of pay of $5 per hour for the first 40 hours in any workweek and at the rate of $7.50 per hour for all hours in excess of 40 in any workweek, with a guarantee that John Doe will receive, in any week in which he performs any work for the company, the sum of $275 as total compensation, for all work performed up to and including 50 hours in such workweek.

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40. Section 778.501 is revised as follows:

§ 778.501 The "split-day" plan.

(a) Another device designated to evade the overtime requirements of the Act was a plan known as the "Poxon" or "split-day" plan. Under this plan the normal or regular workday is artificially divided into two portions one of which is arbitrarily labeled the "straight time" portion of the day and the other the "overtime" portion. Under such a plan, an employee who would ordinarily command an hourly rate of pay well in excess of the minimum for his work is assigned a low hourly rate (often the minimum) for the first hour (or the first 2 or 4 hours) of each day. This rate is designated at the regular rate: "time and one-half" based on such rate is paid for each additional hour worked during the workday. Thus, for example, an employee is arbitrarily assigned an hourly rate of $5 per hour under a contract which provides for the payment of so-called "overtime" for all hours in excess of 4 per day. Thus, for the normal or regular 8-hour day the employee would receive $20 for the first 4 hours and $30 for the remaining 4 hours; and a total of $50 for 8 hours. (This is exactly what he would receive at the straight time rate of $6.25 per hour.) On the sixth 8-hour day the employee likewise receives $50 and the employer claims to owe no additional overtime pay under the statute since he has already compensated the employee at "overtime" rates for 20 hours of the workweek.

(b) Such a division of the normal 8-hour workday into 4 straight time hours and 4 overtime hours is purely fictitious. The employee is not paid at the rate of $5 an hour and the alleged overtime rate of $7.50 per hour is not paid for overtime work. It is not geared either to hours "in excess of the employee's normal working hours or regular working hours" (section 7(e)(5) or for work "outside of the hours established in good faith * * * as the basic, normal, or regular workday" (section 7(e) (7)) and it cannot therefore qualify as an overtime rate. The regular rate of pay of the employee in this situation is $6.25 per hour and he is owed additional overtime compensation, based on this rate, for all hours in excess of the applicable maximum hours standard. This rule was settled by the Supreme Court in the case of Walling v. Helmerich & Payne, 323 U.S. 37, and its validity has been reemphasized by the definition of the term "regular rate" in section 7(e) of the Act as amended.

41. Section 778.502 paragraphs (b) and (c) are revised as follows:

§ 778.502 Artificially labeling part of the regular wages a "bonus."

* * * * *

(b) For example, if an employer has agreed to pay an employee $300 a week without regard to the number of hours worked, the regular rate of pay of the employee is determined each week by dividing the $300 salary by the number of hours worked in the week. The situation is not altered if the employer continues to pay the employee, whose applicable maximum hours standard is 40 hours, the same $300 each week but arbitrarily breaks the sum down into wages for the first 40 hours at an hourly rate of $4.80 an hour, overtime compensation at $7.20 per hour and labels the balance a "bonus" (which will vary from week to week, becoming smaller as the hours increase and vanishing entirely in any week in which the employee works 55 hours or more). The situation is in no way bettered if the employer, standing by the logic of his labels, proceeds to compute and pay overtime compensation due on this "bonus" by prorating it back over the hours of the workweek. Overtime compensation has still not been properly computed for this employee at his regular rate.

(c) An illustration of how the plan works over a 3-week period may serve to illustrate this principle more clearly:

(1) In the first week the employee whose applicable maximum hours standard is 40 hours, works 40 hours and receives $300. The books show he has received $192 (40 hours×$480 an hour) as wages and $108 as bonus. No overtime has been worked so no overtime compensation is due.

(2) In the second week he works 45 hours and receives $300. The books show he has received $192 for the first 40 hours and $36 (5 hours×$720 an hour) for the 5 hours over 40, or a total of $228

as wages, and the balance as a bonus of $72. Overtime compensation is then computed by the employer by dividing $72 by 45 hours to discover the average hourly increase resulting from the bonus—$1.60 per hour—and half this rate is paid for the 5 overtime hours—$4. This is improper. The employee's regular rate in this week is $6.67 per hour. He is owed $316.85 not $304.

(3) In the third week the employee works 50 hours and is paid $300. The books show that the employee received $192 for the first 40 hours and $72 (10 hours × $7.20 per hour) for the 10 hours over 40, for a total of $264 and the balance as a bonus of $36. Overtime pay due on the "bonus" is found to be $3.60. This is improper. The employee's regular rate in this week is $6 and he is owed $330, not $303.60.

* * * * *

42. Section 778.503 is revised as follows:

§ 778.503 Pseudo "percentage bonuses."

As explained in § 778.210 of this part, a true bonus based on a percentage of total wages—both straight time and overtime wages—satisfies the Act's overtime requirements, if it is paid unconditionally. Such a bonus increases both straight time and overtime wages by the same percentage, and thereby includes proper overtime compensation as an arithmetic fact. Some bonuses, however, although expressed as a percentage of both straight time and overtime wages, are in fact a sham. Such bonuses, like the bonuses described in § 778.502 of this part, are generally separated out of a fixed weekly wage and usually decrease in amount in direct proportion to increases in the number of hours worked in a week in excess of 40. The hourly rate purportedly paid under such a scheme is artificially low, and the difference between the wages paid at the hourly rate and the fixed weekly compensation is labeled a percentage of wage "bonus."

Example: An employer's wage records show an hourly rate of $5.62 per hour, and an overtime rate of one and one-half times that amount, or $8.43 per hour. In addition, the employer pays an alleged percentage of wage bonus on which no additional overtime compensation is paid:

Week 1—40 hours worked:	
40 hours at $5.62 per hour	$224.80
Percentage of total earnings bonus at 33.45% of $224.80	75.20
Total	300.00
Week 2—43 hours worked:	
40 hours at $5.62 per hour	224.80
3 hours at $8.43 per hour	25.29
Subtotal	250.09
Percentage of total earnings bonus at 19.96% of $250.09	49.91
Total	300.00
Week 3—48 hours worked:	
40 hours at $5.62 per hour	224.80
8 hours at $8.43 per hour	67.44
Subtotal	292.24
Percentage of total earnings bonus at 2.66% of $292.24	7.76
Total	300.00

This employee is in fact being paid no overtime compensation at all. The records in fact reveal that the employer pays exactly $300 per week, no matter how many hours the employee works. The employee's regular rate is $300 divided by the number of hours worked in the particular week, and his overtime compensation due must be computed as shown in § 778.114.

* * * * *

43. Section 778.601 paragraphs (a), (c) and (e) are revised as follows:

§ 778.601 Special overtime provisions available for hospital and residential care establishments under section 7(j).

(a) *The statutory provision.* Section 7(j) of the Act provides, for hospital and residential care establishment employment, under prescribed conditions, an exemption from the general requirement of section 7(a) that overtime compensation be computed on a workweek basis. It permits a 14-day period to be established for the purpose by an agreement or understanding between an employer engaged in the operation of a hospital or residential care establishment, and any of his employees employed in connection therewith. The exemption provided by section 7(j) applies—

if, pursuant to an agreement or understanding arrived at between the employer and 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 purposes of overtime computation and if, for his employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(c) *The agreement or understanding.* The agreement or understanding between the employer and employee to use the 14-day period for computing overtime must be entered into before the work to which it is intended to apply is performed. It may be arrived at directly with the employee or through his representative. It need not be in writing, but if it is not, a special record concerning it must be kept as required by Part 516 of this chapter. The 14-day period may begin at any hour of any day of the week; it need not commence at the beginning of a calendar day. It consists of 14 consecutive 24-hour periods, at the end of which a new 14-day period begins. The election to use the 14-day period in lieu of the workweek must, like selection of an employee's workweek (§ 778.105) be with the intent to use such period permanently or for a substantial period of time. Changes from such period to the workweek and back again to take advantage of less onerous overtime pay liabilities with respect to particular work schedules under one system than under the other are not permissible.

* * * * *

(e) *Use of 14-day period in lieu of workweek.* Where the 14-day period is used as authorized in section 7(j), such period is used in lieu of the workweek in computing the regular rate of pay of employees to whom it applies (i.e., those of the hospital's or residential care establishment's employees with whom the employer has elected to enter into the necessary agreement or understanding as explained in paragraph (c) of this section). With this exception, the computation of the regular rate and the application of statutory exclusions therefrom is governed by the general principles set forth in this Part 778.

44. Section 778.602 is amended as follows:

§ 778.602 Special overtime provisions under section 7(b).

(a) *Daily and weekly overtime standards.* The general overtime pay requirements of the Act provide for such pay only when the number of hours worked exceeds the standard specified for the workweek; no overtime compensation on a daily basis is required. However, section 7 of the Act, in subsection (b), provides certain partial exemptions from the general overtime provisions, each of which is conditioned upon the payment to the employee of overtime compensation at a rate not less than one and one-half times his regular rate of pay for his hours worked in the workweek in excess of daily, as well as weekly, standards specified in the subsection. Under these provisions, when an employee works in excess of both the daily and weekly maximum hours standards in any workweek for which such an exemption is claimed, he must be paid at such overtime rate for all hours worked in the workweek in excess of the applicable daily maximum or in excess of the applicable weekly maximum, whichever number of hours is greater. Thus, if his total hours of work in the workweek

which are in excess of the daily maximum are 10, and his hours in excess of the weekly maximum are 8, overtime compensation is required for 10 hours, not 8.

(b) *Standards under section 7(b).* The partial exemptions provided by section 7(b) apply to an employee under the conditions specified in clause (1), (2), or (3) of the subsection "if such employee receives compensation for employment in excess of 12 hours in any workday, or for employment in excess of 56 hours in any workweek, as the case may be, at a rate not less than one and one-half times the regular rate at which he is employed." As an example, suppose an employee is employed under the other conditions specified for an exemption under section 7(b) at an hourly rate of $5.20 and works the following schedule:

Hours	M	T	W	T	F	S	S	Tot.
Worked	14	9	10	15	12	8	0	68

Number of overtime hours: Daily, 5 (hours over 12); weekly, 12 (hours over 56).

Since the weekly overtime hours are greater, the employee is entitled to pay for 12 hours at $7.80 an hour (1½×$5.20), a total of $93.60 for the overtime hours, and to pay at his regular rate for the remaining 56 hours (56×$5.20) in the amonut of $291.20 or a total of $384.80 for the week. If the employee had not worked the 8 hours on Saturday, his total hours worked in the week would have been 60, of which five were daily overtime hours, and there would have been no weekly overtime hours under the section 7(b) standard. For such a schedule the employee would be entitled to 5 hours of overtime pay at time and one-half (5×1½×$5.20=$9) plus the pay at his regular rate for the remaining 55 hours (55×$5.20=$286), making a total of $325 due him for the week.

§ 778.603 [Removed]

45. Section 778.603 is removed.

(52 Stat. 1060, as amended; 29 U.S.C. 201–217; Secretary's Order No. 16–75, 40 FR 55913, Dec. 2, 1975; Employment Standards Order No. 78–1, 43 FR 51469, Nov. 3, 1978.)

Signed at Washington, D.C., this 19th day of January 1981.

Donald Elisburg,

Assistant Secretray for Employment Standards.

Henry T. White, Jr.,

Deputy Administrator.

[FR Doc. 81–2371 Filed 1–19–81; 1:10 pm]

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Pension and Welfare Benefit Programs

29 CFR Part 2550

Regulations Relating to Certain Loans, Leases and Dispositions of Property Prior to June 30, 1984

AGENCY: Department of Labor.[1]

ACTION: Final Regulations.

SUMMARY: This document contains final regulations under the Employee Retirement Income Security Act of 1974 (the Act) relating to loans or other extensions of credit, leases or joint uses of property, and sales of leased or jointly used property where an employee benefit plan is involved in the transaction. These regulations clarify the scope of certain provisions of the Act which, in effect, allow such transactions to take place for a limited period of time and under specified circumstances. These regulations affect participants and beneficiaries of employee benefit plans, and employers and other persons engaged in loan, lease, joint use, or sale transactions with employee benefit plans.

EFFECTIVE DATE: Regulations 29 CFR 2550.414c–1 and 2550.414c–2 are effective January 1, 1975. Regulation 2550.414c–3 is effective February 23, 1981.

FOR FURTHER INFORMATION CONTACT: William J. Flanagan, Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, Washington, D.C. 20216, (202) 523–7931.

SUPPLEMENTARY INFORMATION: On April 27, 1979, notice was published in the **Federal Register** (44 FR 24876) that the Department had under consideration a proposal to adopt regulations 29 CFR 2550.414c–1, 2550.414c–2, and 2550.414c–3, under section 414(c) (1) through (3) of the Act, relating to transitional relief provided prior to June 30, 1984, for certain loans, leases and dispositions of property involving employee benefit plans.

The Department has determined that these regulations are "significant" within the meaning of Department of Labor guidelines (44 FR 5570, January 26, 1979) issued to implement Executive Order 12044 (44 FR 12661, March 23, 1978).

Section 414(c)(1) of the Act provides that the prohibitions and limitations of sections 406 and 407(a) will not apply until June 30, 1984, to a loan of money or other extension of credit between a plan and a party in interest, provided, among other things, that the loan or extension of credit is made pursuant to either a binding contract which was in effect on July 1, 1974, or renewals of such a contract. Section 414(c)(2) of the Act contains similar provisions with respect to leases or joint uses of property involving a plan and a party in interest; and, under section 414(c)(3), property described in section 414(c)(2) may, until June 30, 1984, be the subject of a sale, exchange, or other disposition between the plan and the party in interest provided that the plan receives no less than, or pays no more than, fair market value for the property.

The Department received a number of public comments on the proposals, some of which suggested revisions in the proposed regulations. The major comments are discussed below.

A. Regulation 414c–3(b)(2)—The "50 percent rule"

Proposed regulation section 414c–3(b)(2) provided that property will not be regarded as the subject of a lease or joint use between a plan and a party in interest to the extent that one or more unrelated persons leases or jointly uses any portion or portions of such property representing a total value equal to or greater than the value of the portion of the property leased to or jointly used by a party in interest and the plan. Some commentators suggested that this so-called "50-percent rule" be deleted because it is not specifically provided for in the legislative history and because the party in interest leasing or jointly using the less valuable portion of the property might still be the most interested prospective buyer of the property.

The Department does not find these comments persuasive. In the Department's view, the principal purpose of the transitional rule contained in section 414(c)(3) is to prevent undue hardship that might result if a plan could not sell property to the best available buyer because the property is subject to a lease or joint use between the plan and a party in interest.[2] In those cases where one or more unrelated parties lease or jointly use a portion of the property which is more valuable than the portion leased or

[1] Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to promulgate certain classes of regulations to the Secretary of Labor. Pursuant to that transfer of authority, the Department will adopt provisions for similar treatment under the Internal Revenue Code of 1954 of the transitional rules contained in section 2003(c)(2)(A)–(C) of ERISA. Those sections were formerly administered by the Secretary of the Treasury.

[2] See H.R. Rep. No. 93–1280, 93d Cong., 2d Sess. 325 (1974).

jointly used by a party in interest, it does not appear to the Department that there is a reasonable basis to expect, as a general matter, that a party in interest will be the best available buyer.[3] However, it should be noted that, in accordance with the statutory language, the regulation would permit the sale of that part of the property actually leased or jointly used by the plan or the party in interest.

One commentator suggested that Regulation 414c-3(b)(2) be modified to make clear that transitional relief under section 414(c)(3) of the Act is available for the sale of property which is leased to a party in interest who has subleased the property to a third party. The commentator indicated that the sublessee might be viewed as an unrelated person leasing a portion of the property equal in value to the portion of the property leased by the party in interest. The Department does not intend that the "50 percent rule" should operate in a manner which would limit the use to which a party in interest may put property leased from a plan. In order to eliminate any confusion, the final regulation has been revised to make clear that the transitional relief under section 414(c)(3) would not be unavailable merely because property leased or jointly used by a party in interest were subleased to, or jointly used by, an unrelated party.

B. Regulation 414c-3(b)(3)—Fair Market Value

Proposed Regulation 414c-3(b)(3) stated that the determination of fair market value for purposes of applying section 414(c)(3) to the sale between a plan and a party in interest of property leased or jointly used by a plan and a party in interest must be made without regard to any diminution in value resulting from the property being subject to such lease or joint use. Commentators recommended the elimination of or modifications of this section for a variety of reasons.

The purpose of the proposed definition of fair market value was to prevent a party in interest from profiting twice at the expense of a plan by enjoying favorable lease terms and then purchasing the leased property at a price depressed by the existence of the same lease. The Department recognizes, however, that the commentators have identified a number of legitimate problems with this particular approach to defining fair market value. In consideration of these concerns, the Department has decided to modify the definition of the term "fair market value" contained in section 414c-3(b)(3) so that, subject to the two limitations discussed below, the fair market value of property sold pursuant to section 414(c)(3) of the Act and regulation 414c-3 shall be determined in good faith by the plan trustee or named fiduciary in light of the facts and circumstances of the particular case.

One of the restrictions, contained in subparagraph (3)(B)(i), provides that the plan trustee or named fiduciary shall not take into account any diminution in value resulting from an encumbrance, arising out of a lease or joint use, which violates any provision of the Act. The Department does not believe that Congress, in granting transitional relief, intended such relief to be used as a vehicle for circumventing the other provisions of the Act.[4]

The other restriction, contained in subparagraph (3)(B)(ii), provides that the plan trustee or named fiduciary shall not take into account any diminution in value resulting from an encumbrance arising out of a lease or joint use to the extent such encumbrances would extend beyond June 30, 1984. This provision recognizes that Congress, in section 414(c)(3) of the Act, has provided a period of transitional relief for transactions which will become prohibited after the transitional period. Thus, for example, if a lease has a termination date after June 30, 1984, a plan trustee or named fiduciary must treat the lease as if it ended on June 30, 1984 when determining the effect of the lease on the property's fair market value. The plan trustee or named fiduciary may take into account the term of the lease beyond June 30, 1984 only if the lease is the subject of an administrative exemption issued pursuant to section 408(a) of the Act. The Department believes that this approach accommodates the need for flexibility identified by the commentators with the intent of Congress in providing this transitional period.

By adopting regulation section 414c-3(b)(3), the Department neither purports nor intends to establish a general formula for the determination of fair market value in all transactions covered by the Act. Rather, the Department has adopted this provision in response to the problems described by the commentators in valuing property which is subject to a lease or joint use and which is to be sold pursuant to section 414(c)(3) of the Act.

D. Certain Other Comments

One commentator requested that the regulations provide relief for employee benefit plans which had made mortgage loans to parties in interest in situations where such loans, though made before the enactment of the Act, would not be retired before June 30, 1984. The transitional relief provided by section 414(c)(1) of the Act (as well as that afforded under sections 414(c)(2) and (3)) expires on June 30, 1984. On that date, all prohibited loan or lease transactions covered by the transitional relief must have been terminated and all sale transactions pursuant to section 414(c)(3) of the Act must have been consummated, unless an administrative exemption granted by the Department in accordance with section 408(a) of the Act or another statutory exemption is available. The Department does not have the authority to adopt regulations under section 414 which would extend, beyond the above date, the application of the transition rules.

Another commentator requested that sections 414c-2 and 414c-3 of the regulation be revised to include a definition of the term "property" which would provide transitional relief for the disposition by a plan of a controlling interest in the stock of a corporation whose only significant assets are property subject to a lease or joint use between a plan and a party in interest. The Department is not persuaded that the class of transactions described would, in all cases, have the same economic effect as would the disposition of the property itself. Accordingly, the Department is not prepared to state, as a general matter, that the relief provided by section 414(c)(2) would be available in those situations.

F. Retroactivity

Several comments received by the Department suggested that these regulations be effective prospectively only, rather than retroactively to January 1, 1975, as originally proposed. The commentators argued that certain requirements of these regulations are not readily apparent from a reading of the Act and the legislative history. They especially noted that the Department's definition of the term "fair market value" in regulation 414c-3(b)(3) may cast doubt upon the validity of transactions previously entered in good faith by plan fiduciaries based on their

[3] The fact that transitional relief may not be available would not preclude the Department from granting an administrative exemption under section 408(a) of the Act if the criteria set forth in that section were satisfied.

[4] The subparagraph permits encumbrances to be taken into account only if they arise out of leases or joint uses, because section 414(c)(3) of the Act is available only for the sale of leased or jointly used property. The effect on fair market value of encumbrances not arising out of a lease or joint use are beyond the scope of section 414(c)(3) of the Act and these regulations.

interpretations of sections 414(c) (1), (2), and (3) of the Act in the absence of regulations.

In general, the Department believes that these regulations, as adopted, do not alter the impact of the provisions of section 414(c)(1), (2) and (3). However, upon consideration of the commentators' special concern regarding regulation 414c–3, the Department has decided to make regulation 414c–3 effective 30 days after the date of its publication in the **Federal Register.** Regulations 414c–1 and 414c–2 are effective, as proposed, as of January 1, 1975.

Statutory Authority: The regulations set forth below are adopted pursuant to the authority contained in section 505 of the Act (Pub. L. 93–406, 88 Stat. 894 (29 U.S.C. 1135)).

Final Regulation: The Department has considered all of the comments received on the proposed regulations, and has determined to adopt the modified regulations set forth below. Accordingly, Part 2550 of Chapter XXV of Title 29 of the Code of Federal Regulations is amended by adding in the appropriate places to read §§ 2550.414c–1, 2550.414c–2, and 2550.414c–3 as set forth below:

§ 2550.414c–1 Transitional rule relating to certain loans or other extensions of credit prior to June 30, 1984.

(a) Before June 30, 1984, sections 406 and 407(a) of the Employee Retirement Income Security Act of 1974 shall not apply with respect to a loan of money or other extension of credit between a plan and a party in interest under a binding contract in effect on July 1, 1974, or pursuant to renewals of such a contract, if such loan or other extension of credit remains at least as favorable to the plan as an arm's-length transaction with an unrelated party would be, and if the execution of the contract, the making of the loan, or the extension of credit was not, at the time of such execution, making, or extension, a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code of 1954 or the corresponding provisions of prior law.

(b) For purposes of this section,

(1) "Binding contract" means a contract which is binding under applicable state law;

(2) A loan or other extension of credit will not be considered to "remain at least as favorable to the plan as an arm's-length transaction with an unrelated party would be" unless:

(i) Such loan or extension of credit, at the time of the execution of the contract and any renewal, is on terms at least as favorable to the plan as those which reasonably would be expected to exist in the case of an otherwise identical transaction in a normal commercial setting between the plan and the party in interest if they were unrelated parties, and

(ii) The plan requires termination or modification of the contract at such time as, and in such manner and to such extent that, it reasonably would be expected to require such termination or modification in the case of an otherwise identical transaction in a normal commercial setting with the party in interest if they were unrelated parties; and

(3) "Renewal" of a contract means only a renewal which:

(i) The plan reasonably would be expected to agree to in the case of an otherwise identical transaction in a normal commercial setting with the party in interest if they were unrelated parties, and

(ii) Except to the extent required by paragraph (b)(2)(ii) of this section, does not result in any substantial change or modification of the terms of the existing contract.

§ 2550.414c–2 Transitional rule relating to certain leases or joint uses of property prior to June 30, 1984

(a) Before June 30, 1984, sections 406 and 407(a) of the Employee Retirement Income Security Act of 1974 shall not apply with respect to a lease or joint use of property involving the plan and a party in interest pursuant to a binding contract in effect on July 1, 1974, or pursuant to renewals of such a contract, if such lease or joint use remains at least as favorable to the plan as an arm's length transaction with an unrelated party would be and if the execution of the contract was not, at the time of such execution, a prohibited transaction within the meaning of section 503(b) of the Internal Revenue Code of 1954 or the corresponding provisions of prior law.

(b) For purposes of this section,

(1) "Binding contract" means a contract which is binding under applicable state law;

(2) A lease or joint use of property will not be considered to "remain at least as favorable to the plan as an arm's-length transaction with an unrelated party would be" unless:

(i) The contract for such lease or joint use of property, at the time of the execution and any renewal thereof, is on terms at least as favorable to the plan as those which reasonably would be expected to exist in the case of an otherwise identical transaction in a normal commercial setting between the plan and the party in interest if they were unrelated parties, and

(ii) The plan requires termination or modification of the contract at such time as, and in such manner and to such extent that, it reasonably would be expected to require such termination or modification in the case of an otherwise identical transaction in a normal commercial setting with the party in interest if they were unrelated parties; and

(3) "Renewal" of a contract means only a renewal which:

(i) The plan reasonably would be expected to agree to in the case of an otherwise identical transaction in a normal commercial setting with the party in interest if they were unrelated parties, and

(ii) Except to the extent required by paragraph (b)(2)(ii) of this section, does not result in any substantial change or modification of the terms of the existing contract.

§ 2550.414c–3 Transitional rule relating to certain sales, exchanges, or other dispositions of property prior to June 30, 1984.

(a) Before June 30, 1984, sections 406 and 407(a) of the Employee Retirement Income Security Act of 1974 shall not apply with respect to a sale, exchange, or other disposition of leased or jointly used property described in 29 CFR 2550.414c–2 between a plan and a party in interest: *Provided,* That:

(1) In the case of a sale, exchange, or other disposition of such property by the plan to the party in interest, the plan receives an amount which is not less than the fair market value of the property at the time of such disposition; and

(2) In the case of the acquisition of such property by the plan, the plan pays an amount which is not in excess of the fair market value of the property at the time of such acquisition.

(b) For purposes of this section:

(1) The term "property described in 29 CFR 2550.414c–2" means any property subject to a lease or joint use involving a plan and a party in interest under a binding contract in effect on July 1, 1974, or pursuant to renewals of such contracts;

(2) A property will not be regarded as the subject of a lease or joint use between a plan and a party in interest if one or more unrelated persons leases or jointly uses any portion or portions of such property representing a total value equal to or greater than the value of the portion of the property leased to or jointly used by one or more parties in interest. Property leased or jointly used by a party in interest which is subleased to or jointly used with an unrelated party shall not, solely because of such

sublease or use, be considered property leased to or jointly used by an unrelated party.

(3)(A) Subject to the provisions of subparagraph (B) of this paragraph, "fair market value" shall be determined by the plan trustee or named fiduciary in light of the facts and circumstances of the particular case.

(B) In determining the fair market value of leased or jointly used property pursuant to subparagraph (A) of this paragraph, the plan trustee or named fiduciary shall not take into account any diminution in value resulting from

(i) Any encumbrance arising out of a lease or joint use which violates any provision of the Act, and

(ii) Any encumbrance, arising out of a lease or joint use, to the extent such encumbrance extends beyond June 30, 1984.

(4) The term "property" means any property or part thereof.

Signed at Washington, D.C., this 19th day of January, 1981.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, Department of Labor.

[FR Doc. 81-2445 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-29-M

PENSION BENEFIT GUARANTY CORPORATION

29 CFR Part 2609

Limitation on Guaranteed Benefits

AGENCY: Pension Benefit Guaranty Corporation.

ACTION: Final rule.

SUMMARY: This amendment to the Limitation on Guaranteed Benefits regulation adds an appendix which sets forth by year, the maximum guaranteeable pension benefit that may be paid by the Pension Benefit Guaranty Corporation to a plan participant in a pension plan which terminated in that year. This amendment is necessary because of a change in the Social Security Act which created a special contribution and benefit base on which the maximum guaranteeable benefit is based. The public will be made aware of the maximum guaranteeable benefit for each year from 1974 to 1981 by this amendment.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Ms. Nina R. Hawes, Staff Attorney, Office of the General Counsel, Pension Benefit Guaranty Corporation, 2020 K Street, N.W., Washington, D.C. 20006, 202-254-3010.

SUPPLEMENTARY INFORMATION: On February 11, 1976, the Pension Benefit Guaranty Corporation ("PBGC") published a final rule on the Limitation on Guaranteed Benefits (29 CFR Part 2609). This rule sets forth the method of calculating the maximum guaranteeable benefit, as set forth in section 4022(b)(3)(B) of the Employee Retirement Income Security Act of 1974 (*as amended by* the Multiemployer Pension Plan Amendments Act of 1980) ("ERISA"). The maximum benefit is "$750 multiplied by the fraction x/$13,200, where 'x' is the Social Security contribution and benefit base determined under § 230 of the Social Security Act in effect on the date of termination of the plan." Section 2609.3(a)(2).

In the 1977 Amendments to the Social Security Act ("SSA"), special increases were added to the contribution and benefit base. However, the amended SSA specifically states that, for the purpose of section 4022(b)(3)(B) of ERISA, the contribution and benefit base for each year after 1976 would be the base that would have been determined for such year if the special increases had not been made. 42 U.S.C. 430(d) (1976 Ed., Supp. III).

It has come to PBGC's attention that since the 1977 amendments to the Social Security Act, members of the public cannot easily obtain the correct contribution and benefit base to compute the maximum benefit figure. Moreover, the public may confuse the generally publicized contribution and benefit base with the base used to compute the maximum benefit figure. Therefore, PBGC has decided to publish, as an appendix to the Limitation on Guaranteed Benefits regulation, a listing of the maximum guaranteeable benefit for plans that terminate each year since ERISA went into effect. It is intended that this appendix will be amended each year to show the maximum benefit for that year.

This appendix will be published in the Code of Federal Regulations and will provide the public with a record of all the maximum benefit amounts in one location. The PBGC feels this will be of benefit to the public.

This appendix does not amend or affect any existing portions of the text of this regulation, nor does it introduce any new requirements or restrictions. Its purpose is to notify the public of the maximum benefit for a pension plan that terminated in each year since ERISA became effective.

Because the maximum guaranteeable benefit is determined under ERISA, and this appendix makes no change in the amount or its method of calculation, but simply lists these amounts for the public's knowledge, the PBGC finds that notice of and public comment on this amendment are impracticable and unnecessary. Moreover, because the 1981 maximum benefit is effective when the Social Security contribution and benefit base is effective, *i.e.*, January 1, 1981, and the effective date of the maximum benefit is not affected by this publication, the PBGC finds that good cause exists for making this amendment effective immediately.

The PBGC has determined that this amendment to the Limitation on Guaranteed Benefits regulation is not "significant" under criteria prescribed by Executive Order 12044, "Improving Government Regulations", 42 FR 12661 (March 24, 1978), and the PBGC's Statement of Policy and Procedures implementing the Order, 43 FR 58237 (December 13, 1978). The reasons for this determination are that this amendment is not likely to engender substantial public interest or controversy, does not affect another Federal agency, and will not have a major economic impact.

In consideration of the foregoing, Part 2609 of Chapter XXVI, Code of Federal Regulations, is hereby amended by adding Appendix A to Part 2609 to read as follows:

Appendix A to Part 2609—Maximum Guaranteeable Monthly Benefit

The following table lists by year the maximum guaranteeable monthly benefit payable in the form of a life annuity commencing at age 65 as described by § 2609.3(a)(2) to a participant in a plan that terminated in that year:

Year	Maximum guaranteeable monthly benefit
1974	$750.00
1975	801.14
1976	869.32
1977	937.50
1978	1,005.68
1979	1,073.86
1980	1,159.09
1981	1,261.36

(Secs. 4002(b)(3), 4022(b), Pub. L. 93-406, 88 Stat. 1004, 1016-18, (1974), as amended by Secs. 403(1), 403(c), and 102, Pub. L. 96-364, 94 Stat. 1302, 1300, 1215 (1980))

Issued at Washington, D.C., on this 16th day of January 1981.

Robert E. Nagle,

Executive Director, Pension Benefit Guaranty Corporation.

[FR Doc. 81-2352 Filed 1-22-81; 8:45 am]

BILLING CODE 7708-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 948

Approval of the Abandoned Mine Reclamation Plan for State of West Virginia Under Surface Mining Control and Reclamation Act of 1977

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: On October 29, 1980, the State of West Virginia, Department of Natural Resources (DNR), submitted to OSM its proposed abandoned mine land reclamation plan under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The purpose of this submission is to demonstrate the State's intent and capability to assume responsibility for administering and conducting the Abandoned Mine Reclamation Program established by Title IV of SMCRA and regulations adopted by OSM (30 CFR Chapter VII, Subchapter R, 43 FR 49932–49952, October 25, 1978). After opportunity for public comment and review of the plan submission, the Director of the Office of Surface Mining has determined that the West Virginia Abandoned Mine Reclamation Plan meets the requirements of SMCRA and the Abandoned Mine Land Reclamation Program. Accordingly, The Director of the Office of Surface Mining has approved the West Virginia Plan.

EFFECTIVE DATE: This approval is effective February 23, 1981.

ADDRESSES: Copies of the full text of the West Virginia Plan are available for review during regular business hours at the following locations:

Office of Surface Mining Reclamation and Enforcement, Region I, 603 Morris Street, Charleston, West Virginia 25301

West Virginia Department of Natural Resources, 1800 Washington Street East, Charleston, West Virginia 25301

FOR FURTHER INFORMATION CONTACT: Charles A. Beasley, Assistant Director, Abandoned Mine Lands, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Interior Building, 1951 Constitution Avenue, N.W., Washington, D.C. 20240, Telephone (202) 343–4012.

SUPPLEMENTARY INFORMATION:

General Background of Abandoned Mine Lands Program

Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Public Law 95–87, 30 U.S.C. 1201 *et seq.*, establishes an abandoned mine land reclamation program for the purpose of reclaiming and restoring lands and water resources adversely affected by past mining. This program is funded by a reclamation fee imposed upon the production of coal. Lands and water eligible for reclamation under the program are those that were mined or affected by mining and abandoned or left in an inadequate reclamation status prior to August 3, 1977, and for which there is no continuing reclamation responsibility under State or Federal law.

Each State having within its borders coal mined lands eligible for reclamation under Title IV of SMCRA, may submit to the Secretary a State Reclamation Plan, demonstrating its capability for administering an abandoned mine reclamation program. Title IV provides that the Secretary may approve the plan once the State has an approved regulatory program under Title V of SMCRA. If the Secretary determines that a State has developed and submitted a program for reclamation and has the necessary State legislation to implement the provisions of Title IV, the Secretary shall grant the State exclusive responsibility and authority to implement the provisions of the approved plan. Section 405 of SMCRA (30 U.S.C. 1235) contains the requirements for State reclamation plans.

The Secretary has adopted regulations that specify the content requirements of a State reclamation plan and the criteria for plan approval (30 CFR Part 884, 43 FR 49932, 49947, October 25, 1978). Under those regulations, the Director is required to review the plan, solicit and consider comments of other Federal agencies and the public, and either approve or disapprove the plan. If the Director disapproves the State plan, the State may resubmit a revised reclamation plan at any time.

Upon approval of the State reclamation plan by the Director, the State may submit to the Director on an annual basis, an application for funds to be expended in such State on specific reclamation projects which are necessary to implement the State reclamation plan as approved. Such annual requests shall be made by the State and reviewed and approved by OSM in compliance with the requirements of 30 CFR Part 886.

To codify information applicable to individual States under SMCRA, including decisions on State reclamation plans, OSM has established a new Subchapter T of 30 CFR Chapter VII. Subchapter T consists of parts 900 through 950. Provisions relating to West Virginia are found in 30 CFR Part 948.

Background on the West Virginia Abandoned Mine Plan Submission

On August 17, 1979, a cooperative agreement between the West Virginia Department of Natural Resources and the Office of Surface Mining was approved. The purpose of this agreement was to assure that information required for the preparation of the West Virginia Abandoned Mine Reclamation Plan would be assembled.

The West Virginia Department of Natural Resources held public meetings on West Virginia's proposed Abandoned Mine Land Reclamation Plan at the following locations:

Charleston, October 16
Huntington, October 17
Princeton, October 20
Summersville, October 21
Fairmont, October 22
Buckhannon, October 23

On November 18, 21, 24 and 26, 1980, representatives of the DNR and OSM met to discuss amendments and modifications to the original plan.

On December 4, 1980, the Office of Surface Mining conducted a public hearing in Charleston, West Virginia. No comments were received.

On December 12, 1980, the DNR submitted revised pages to the West Virginia Abandoned Mine Lands Reclamation Plan.

The revised pages contain several amendments and modifications to the original plan as a result of the discussions between representatives of the DNR and OSM.

The necessary changes have been incorporated in the revised pages received on December 12, 1980, and therefore comply with the requirement that the policies and procedures to be followed by the agency be incorporated into the reclamation plan.

All of the documents mentioned above are available for public inspection at the office of OSM listed above under "Addresses" and at the Office of the Department of Natural Resources listed under "Addresses."

Notice of receipt of the submission initiating the Plan review was published November 5, 1980, (45 FR 73512–73514). The announcement requested public comments and scheduled a public hearing for December 4, 1980. The public hearing was held as scheduled and there were no public comments.

On January 14, 1981, the Regional Director and on January 15, 1981, the Assistant Director for Abandoned Mine Lands Reclamation recommended to the Director that the West Virginia Reclamation Plan be approved.

The administrative record on the West Virginia Plan is available for review during regular business hours at the Office of Surface Mining Reclamation and Enforcement, Region I, 603 Morris Street, Charleston, West Virginia 25301.

Director's Findings

1. In accordance with Section 405 of SMCRA the Director finds that West Virginia has submitted a plan for reclamation of abandoned mine lands and has the ability and necessary State legislation to implement the provisions of Title IV of SMCRA.

2. The Director has determined, pursuant to 30 CFR 884.14, that: (a) The Department of Natural Resources has the legal authority, policies and administrative structure necessary to carry out the proposed plan;

(b) the proposed plan meets all the requirements of 30 CFR Chapter VII Subchapter R;

(c) the State has an approved regulatory program; and

(d) the proposed plan is in compliance with all applicable State and Federal laws and regulations.

3. The Director has solicited and considered the views of other Federal Agencies having an interest in the plan as required by CFR 884.14(a)(2).

These agencies include the Bureau of Mines (BOM), Bureau of Land Management (BLM), Soil Conservation Service (SCS), U.S. Forest Service (USFS), U.S. Fish and Wildlife Service (FWS), and U.S. Geological Survey (USGS).

Disposition of Comments

The comments received on the West Virginia Abandoned Mine Lands Reclamation Plan during the public comment period raised the issues listed below, which were considered in the Director's evaluation of the West Virginia plan as indicated.

1. The BOM stated that "certain weaknesses exist in the area of public participation in Sections 884.13(c)(7) and 884.13(e)."

The State of West Virginia has amended Section 884.13(c)(7) to provide expanded opportunity for public input in the Abandoned Mine Lands Reclamation Program. In addition, OSM is satisfied that Section 884.13(e) was adequately addressed in the West Virginia Plan, the West Virginia DNR provided for ample public participation in the development of their reclamation plan consistent with the requirements set out in 30 CFR 884.13(e).

2. The BOM stated that in development of estimated costs for controlling subsidence the State used figures that will distort the cost estimate because they do not reflect areas which have already experienced subsidence and are not suitable as candidate sites for referenced technology. Remedial measures in such areas, BOM states, may be limited to surface restructuring for adequate protection or restoration.

The State of West Virginia has amended its plan to show that the subsidence acreage actually represents areas that "have been, will be or are presently affected by surface subsidence." The cost estimates are therefore reliable. It should be noted also that West Virginia policy in their plan is to address priority 1 and priority 2 projects in the first five years of the plan.

3. The BOM stated that the synopsis of mine fire control methods is misleading to the untrained and the estimated cost is optimistic.

The plan discussion on mine fires is considered adequate by OSM. The cost estimates in the plan were discussed with the State of West Virginia and a detailed evaluation and cost detail will be developed for specific projects.

4. The BLM stated the "Data Base" in Part B, the support data section of the plan, did not discuss soil types and distribution.

The State of West Virginia has amended the plan by including a section on "Soil Capability" and land limited in use. (Source: U.S. Department of Agriculture, Soil Conservation Service 1976).

5. The SCS stated that the Rural Abandoned Mine Program is not restricted to privately owned lands but also may be used to reclaim abandoned lands on all non-Federally owned or controlled public property.

The State of West Virginia recognizes this editorial error and has changed page 28 number three to read "prevention of erosion on eligible lands" rather than privately owned land.

6. SCS recommended the plan include the RAMP-OSM primary coordination procedures.

OSM is satisfied that coordination between SCS and DNR will occur. The West Virginia plan description provides "that the Administrator of the Abandoned Mine Lands Section has a permanent position on the State Reclamation Committee which is a part of the RAMP organization."

7. SCS recommended for situations involving the recovery of coal, that the State require the mineral owner to waive all rights to the coal prior to reclamation efforts being undertaken and that the State use the proceeds from the sale of the coal to offset their reclamation costs.

OSM is satisfied that West Virginia's plan adequately addresses the question of coal recovery. Though every effort will be made to obtain the voluntary release of the mineral rights, there will be situations where the State will have to acquire such rights prior to proceeding with the project. Additionally, in situations where monies are obtained from the sale of coal, such funds can be either placed in the Abandoned Mine Land Fund or alternatively, used to offset the cost of the specific reclamation projects.

8. The Appalachian Research and Defense Fund Inc. (ARDF) stated that West Virginia's criteria for air quality, water quality and aesthetics might be improved.

The State of West Virginia amended the plan to provide for additional criteria.

9. The ARDF commented the affected population category for specific reclamation projects was too broad since it covered an entire watershed.

This category is not too broad or vague since it refers to a site specific consideration and the population affected will be determined on a project by project basis.

10. The ARDF commented that West Virginia's discussion of potential flood hazards should include severe sedimentation problems.

The State of West Virginia amended the plan to include sedimentation as a consideration in potential flood hazards.

11. The ARDF commented that the Plan should state that all applicable and reasonable environmental standards will be enforced when DNR waives the requirement to obtain a permit for removal of coal incidental to AML reclamation.

OSM has already published guidelines (45 FR 14810, 1980) for reclamation programs and projects to assist States in interpreting and applying the general reclamation requirements for individual programs and projects funded under SMCRA.

Additionally, all State and Federal environmental controls will apply on all AML projects, regardless of coal removal. Accordingly, OSM is satisfied that the West Virginia Plan adequately addresses environmental concerns.

12. The ARDF commented that the West Virginia Reclamation Plan was unclear regarding how DNR will coordinate reclamation activities when

an active mining operation is involved in the reclamation effort.

OSM is satisfied that the State of West Virginia plan adequately addresses in its project selection process and purchasing and procurement procedures how projects and contracts will be developed, regardless of whether an active mining process is involved.

13. The ARDF states that West Virginia DNR may delay a necessary AML project if future mining activities will reclaim the area. The ARDF suggests, however, where no mine is actually in the planning stages, the State should undertake the reclamation and advertise for bids to recover the coal in order to off-set the reclamation costs.

OSM is satisfied that the West Virginia's ranking and selection procedures for AML projects in Sections 7 (A)(C) and (D) of their Plan and OSM Guidelines for Reclamation Programs and projects will adequately provide for all considerations where the possibility of future mining exists.

14. The ARDF stated that West Virginia's Reclamation Plan inplies that AML projects will only cover work at the abandoned mine sites. They suggest that offsite damages should also be addressed. Under Section 404 of SMCRA, lands and water eligible for reclamation or drainage abatement expenditures are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining process and abandoned or left in an inadequate reclamation status prior to August 3, 1977 and for which there is no continuing reclamation responsibilities under State or Federal laws. It is clear from such statutory authority that AML reclamation activities are not limited to mine site areas.

15. ARDF commented that due to the eligibility limitations contained in Section 404 of SMCRA, the pollution problems of certain up-drift mines which closed between 1978 and 1981 will not be addressed. Accordingly, they urge that the DNR reassess this problem in their plan and possibly consider enacting a small tax on each ton of coal mined to handle this problem. Based on the limitations concerning eligible lands and water contained in Section 404 of SMCRA and Section 12C.03 of the West Virginia statute, there is no authority to use AML funds to abate post 1977 reclamation problems, nor a requirement under 30 CFR 884.13 that such problems be addressed in their reclamation plan.

16. The ARDF stated that the State should develop procedures for undertaking high priority projects even though there may be some unresolved legal issue concerning the mine owner's continuing responsibility for reclamation.

The determination of eligibility is made on a case by case basis and depends upon the factual situations encountered. Prior to undertaking reclamation activities on lands and water adversely affected by past coal mining practices, the DNR must find that the lands in question meet the eligibility requirements set out in Chapter 20, Article 6c, Section 12(c), of West Virginia's Abandoned Mine Lands and Reclamation Act. One such requirement is that there be no continuing reclamation responsibility under state or Federal law. Accordingly, the determination of eligibility is made on a case by case basis and depends upon the factual situations encountered. Specific procedures for initiating projects prior to making these findings are therefore not required.

17. The ARDF suggested that problems posed by old structures such as tipples, along with their reclamation be discussed under the section entitled "Scope and Severity of the Problem".

The discussions under this section of the plan cover what the State classifies as the five generic types of AML problems and is not intended to cover specifics on structures such as tipples.

18. The ARDF commented that the Plan discussed only acid mine drainage.

The term "mine drainage" as used by West Virginia on page 22 of their plan is not restricted to acid drainage, but includes sediments, sulfates, iron and hardness and notes that acid is the most significant pollutant.

19. The ARDF stated that the basis for the 2.7 billion dollar cost of acid mine drainage abatement be discussed.

The basis for all costs in the "Scope and Severity of the Problem" Section of the plan is the U.S. Bureau of Mines 1979 estimates as stated on page 13 of the plan. Accordingly, no further discussion is required.

20. The ARDF and FWS stated that there seemed to be an error in the Environmental Problems Matrix table by an omission of an indicator of acid drainage in refuse piles.

This omission has been brought to the attention of DNR for correction.

21. The ARDF commented that West Virginia's plan does not specify individual AML projects will be determined. Specifically the project ranking system on page 25 reduces the priority of projects which leave the coal mining problem only partially abated, (i.e. where 75% acid reduction will restore stream quality and further abatement would be prohibitive). The ARDF stated, however, that for some projects partial abatement may be the only reasonable solution and therefore this type of project should not be penalized in the ranking system.

The State of West Virginia amended their ranking and selection procedures and eliminated the negative points for partial abatement of a problem.

22. The ARDF commented that the public is involved to only a very limited extent in the inventory and ranking of AML sites and that perhaps a media campaign to solicit letters from the public should be considered.

The OSM is satisfied that present inventory and ranking procedures, including researching records, aerial surveys, contacts with DNR inspectors, industry personnel and local residents will identify the majority of the AML sites.

It should be noted that the inventory is not a one time effort, but will continue to be updated as new information becomes available. In addition, OSM regulations (30 CFR 884.13 (c)(7) and (e) require the State to actively involve the public both in the development of their AML Plan (pg 50) and the annual grant application (pg 51). OSM therefore believes that opportunity for public participation is adequately provided.

23. The USFS questioned whether they were included as members of the State Reclamation Committee and suggested that if they were not included, the DNR should provide for close coordination with USFS on all projects involving lands which they administer. In addition they questioned whether the State Division of Forestry had had input into the development of West Virginia's Reclamation plan.

The USFS is not included as a member of the State Reclamation Committee. However, the DNR will maintain close coordination with the USFS on AML projects associated with or involving Forest Service Lands. Regarding development of the Reclamation Plan, the State Division of Forestry was consulted during the drafting stages as were other operating division of the DNR.

24. The USFS commented that West Virginia's Reclamation Plan should provide for cooperative agreements between DNR and the USFS which would include provisions for the pass through of funds to the USFS for design, administration and inspection of construction projects on USFS abandoned mine lands. Section 412(b) of SMCRA does not require such cooperative efforts as outlined by the USFS but rather leaves such reclamation decisions to the discretion of the Secretary or the State. The State will treat all projects on a case by case basis

and where feasible, will enter into cooperative agreements with other agencies to undertake reclamation activities.

25. The USFS, Monogahela National Forest requested that West Virginia make further improvements in their project ranking and selections procedures.

West Virginia has made major revisions to this section of their Plan after detailed coordination with OSM. Personnel who will be responsible for evaluating individual projects will be trained in the proper procedures and methodologies to achieve uniformity according to OSM's guidelines. This section is now in conformance with acceptable format.

26. The USGS has raised the need for certain technical corrections in West Virginia's "Supporting Data" section relative to the units of measurement and data on length of streams affected by acid mine drainage.

These inaccuracies have been pointed out for correction by the DNR.

27. The FWS commented that a third task under "Problem Abatement," page 10 of the Plan should be "Evaluation". The State of West Virginia in amending their Plan has deleted the tasks on page 10. West Virginia will provide evaluation as set out in the "Final guidelines for Reclamation programs and projects" published in the **Federal Register** on March 6, 1980, (45 FR 14810) and 30 CFR 886.23 of OSM's regulations.

Dated: January 16, 1981.

Walter N. Heine,

Director, Office of Surface Mining Reclamation and Enforcement.

Part 948 is amended by adding § 948.20 to read as follows:

PART 948—WEST VIRGINIA

§ 948.20 Approval of the West Virginia Abandoned Mine Reclamation Plan.

The West Virginia Abandoned Mine Reclamation Plan as submitted on October 29, 1980, and amended December 12, 1980, is approved, effective February 23, 1981. Copies of the approved program are available at the following locations:

Office of Surface Mining Reclamation and Enforcement, Region I, 603 Morris Street, Charleston, West Virginia 25301

West Virginia Department of Natural Resources, 1800 Washington Street East, Charleston, West Virginia 25301

Office of Surface Mining Reclamation and Enforcement, Room 153, 1951 Constitution Avenue, N.W., Washington, D.C. 20240

(30 U.S.C. 1211 (c)(2))

[FR Doc. 81-2339 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 219

National Forest System Land and Resource Management Planning

AGENCY: Forest Service, USDA.

ACTION: Final rule; amendment.

SUMMARY: This document amends the final regulations on land and resource management planning on the National Forest System, which were published in the **Federal Register** of September 17, 1979 (44 FR 53928), to establish the status of roadless area allocations within the Mount St. Helens planning unit on the Gifford Pinchot National Forest.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT: Charles R. Hartgraves, Director, Land Management Planning, P.O. Box 2417, Washington, D.C. 20013 202–447–6697.

SUPPLEMENTARY INFORMATION: Because of the special circumstances resulting from the May 18, 1980, eruption of Mount St. Helens, some of the earlier land management plans and allocations on the Gifford Pinchot National Forest are no longer valid. Early planning action is desirable within the Mount St. Helens area to provide fully for the protection and interpretation of the unique natural features and to facilitate resource recovery of the portion of the area within the Gifford Pinchot National Forest prior to the completion of the comprehensive forest land management planning directed by the National Forest Management Act. It is determined that the revisions do not constitute a major Federal action significantly affecting the environment and that no detailed environmental impact statement is required pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969 [42 USC 4332 (2)(c)].

Section 219.16 is amended by adding a new paragraph (c) to read as follows:

§ 219.16 Transition period.

* * * * *

(c) As a result of the eruption of Mount St. Helens, a land management plan for the Mount St. Helens area will be prepared substantially in accordance with the following procedures:

(1) Notwithstanding any other provisions in this subpart, the area included in the Mount St. Helens land management plan will not be subject to planning activities for the first generation Gifford Pinchot National Forest Plan unless the Regional Forester for the Pacific Northwest Region determines that additionalplanning activities are desirable.

(2) Lands which were inventoried as roadless and allocated to nonwilderness uses in the Roadless Area Review and Evaluation (RARE II) will be managed for uses other than wilderness. Except for a small part of the Mount Margaret roadless area (B 6071), the Mount St. Helens land management plan will not consider wilderness allocation for these lands.

(3) Lands which were inventoried as roadless and designated as further planning in the Roadless Area Review and Evaluation (RARE II) will be evaluated in the Mount St. Helens land management plan and will be managed in accordance with that plan.

Bob Bergland,

Secretary.

January 19, 1981.

[FR Doc. 81-2430 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[WH-FRL 1700-7]

State and Local Assistance; Grants for Construction of Treatment Works

Correction

In FR Doc. 80-39521, appearing in the **Federal Register** for Friday, December 19, 1980 on page 83497, the "EFFECTIVE DATE:" now reading "December 19, 1981" should have read "December 19, 1980."

BILLING CODE 1505-01-M

DEPARTMENT OF THE INTERIOR

Office of the Secretary

41 CFR Part 14-1

Small and Disadvantaged Business Program

AGENCY: Department of the Interior.

ACTION: Final rule.

SUMMARY: This rule revises the temporary rule which was published in the **Federal Register** on September 15, 1978, (43 FR 41207–41214; FR Doc. 78-26024) and establishes a final rule governing the policies and procedures of

the Department of the Interior's Small and Disadvantaged Business Program. This program is authorized and required pursuant to Public Law 95-507 and FPR Temporary Regulations 50, Supple-ment 2.

EFFECTIVE DATE: This rule is effective January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Kenneth T. Kelly, Division of Small Business Utilization, Office of Small and Disadvantaged Business Utilization, Department of the Interior, (202) 343-4907.

SUPPLEMENTARY INFORMATION: The principal author of this final rulemaking is Kenneth T. Kelly of the Office of Small and Disdvantaged Business Utilization, assisted by the Office of Acquisition and Property Management.

On September 15, 1978, the Department of the Interior published a temporary rule in the **Federal Register** (43 FR 41207, as amended at 44 FR 30095, May 24, 1979) which established a Department of the Interior program to increase the contracting and subcontracting participation of minority business enterprises in its procurement program and which further prescribed certain policies, procedures, and contract clauses to be used to that end.

On October 24, 1978, the President signed into law Public Law 95-507 (92 Stat. 1757; 15 U.S.C. 631) which amended the Small Business Act and the Small Business Investment Act of 1958 and which involved extensive revisions to these two acts.

On April, 29, 1980, the Office of Federal Procurement Policy (OFPP) issued Policy Letter 80-2 (45 FR 31028, May 9, 1980) containing the final regulatory guidance implementing Section 211 (subcontracting) of Public Law 95-507, except for data collection formats which will be prescribed later.

On May 23, 1980, the General Services Administration issued Federal Procurement Regulations (FPR) Temporary Regulation 50, Supplement 2 (45 FR 35809, May 18, 1980), implementing the OFPP regulatory guidance in the FPR.

On July 22, 1980, OFPP issued Policy Letter 80-6 (45 FR 50493, July 29, 1980) containing the final regulatory guidance on implementing Section 211 (Small Purchases) of Public Law 95-507.

On August, 13, 1980, the General Services Administration issued Amendment 206 to FPR Subpart 1-1.7 (45 FR 55721-3, August 21, 1980) implementing OFPP Policy Letter 80-6, which establishes OFPP regulatory guidance for all Government small purchase procurement.

Issuance of the above actions render the Department's temporary regulations as published on September 15, 1978 and amended on May 24, 1979, under 41 CFR Subpart 14-1.13, as obsolete.

Therefore, it is necessary for the Department to revise these regulations and adopt a final rule in conformance with the requirements of Public Law 95-507, OFPP Policy Letter Nos. 80-2 and 80-6, and FPR Temporary Regulations 50, Supplement 2. All Department of the Interior procuring activities and contracting officers shall comply with the policies and procedures prescribed in this final rule.

Waiver

It is the general policy of the Department of the Interior to allow time for interested parties to participate in the rulemaking process. However, the amendments contained herein are entirely administrative in nature and public participation would serve no useful purposes. Therefore, the public rulemaking process is waived in this instance in accordance with 5 U.S.C. 553.

Impact

The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

Accordingly, 41 CFR Subpart 14-1.13 is hereby revised pursuant to the authority of the Secretary of the Interior contained in 5 U.S.C. 301.

Dated: January 16, 1981.

Larry E. Meierotto,

Assistant Secretary of the Interior.

1. The table of contents for subpart 14-1.13 is revised to read as follows:

PART 14-1—GENERAL

Subpart 14-1.13 Small and Disadvantaged Business Program

Sec.
14-1.1300 Sope of subpart.
14-1.1301 Applicability.
14-1.1302 Agency programs.
14-1.1302-1 General
14-1.1302-2 Definitions.
14-1.1302-3 Office of Small and Disadvantaged Business Utilization.
14-1.1302-4 Office of Inspector General.
14-1.1302-5 Office of the Solicitor.
14-1.1302-6 Assistant Secretaries.
14-1.1302-7 Heads of procuring activities.
14-1.1302-8 Business utilization and development specialists.
14-1.1310 Subcontracting with small business and small disadvantaged business concerns.
14-1.1350 Small business and small disadvantaged business vendor sources.
14-1.1351 Reports.

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); and 5 U.S.C. 301.

PART 14-1—GENERAL

* * * * *

Subpart 14-1.13 Small and Disadvantaged Business Program

§ 14-1.1300 Scope of subpart.

This subpart prescribes the Department of the Interior revised policies and procedures which establish a small and disadvantaged business program.

§ 14-1.1301 Applicability.

These policies and procedures are applicable to all Interior procuring activities and contracting officers.

§ 14-1.1302 Agency programs.

§ 14-1.1302-1 General.

This section defines certain terms and establishes responsibilities, policies, and procedures that implement the Small and Disadvantaged Business Program.

§ 14-1.1302-2 Definitions.

(a) The term "small business concern" means a small business as defined pursuant to Section 3 of the Small Business Act and in relevant regulations promulgated pursuant thereto.

(b) The term "small business concern owned and controlled by socially and economically disadvantaged individuals" means a small business concern (1) which is at least 51 per centum owned and controlled by one or more socially and economically disadvantaged individuals; or in the case of any public owned business, at least 51 per centum of the stock of which is owned by one or more socially and economically disadvantaged individuals; and (2) whose management and daily business operations are controlled by one or more of such individuals.

(c) The term "socially disadvantaged individuals" means those individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

(d)(1) The term "economically disadvantaged individuals" means those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

(2) Business owners who certify that they are members of named groups (Black Americans, Hispanic Americans,

Native Americans, and Asian Pacific Americans) are to be considered socially and economically disadvantaged.

(e) The term "Native Americans" means American Indians, Eskimos, Aleuts, and native Hawaiians. The term "Asian-Pacific Americans" means United States citizens whose origins are from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the United States Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, and Taiwan. Other individuals may qualify as socially and economically disadvantaged on a case by case basis as determined by the Small Business Administration (see 13 CFR 124.1–1(3)(iii)).

(f) Subcontract. The term "subcontract" means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime contractor or subcontractor calling for supplies or services required for the performance of the original contract or subcontract.

§ 14–1.1302–3 Office of Small and Disadvantaged Business Utilization.

The Office of Small and Disadvantaged Business Utilization is responsible for the development and implementation of policies, procedures, and guidelines for the effective administration of the Department's Small and Disadvantaged Business and Labor Surplus Area Programs. This is in accordance with the requirements of Public Law 95–507 and Departmental Manual 111 DM 8.

§ 14–1.1302–4 Office of Inspector General.

The Office of Inspector General is responsible for ensuring compliance with the intent and purpose of these regulations at all Departmental levels and contractor tiers. The Office of Inspector General is also responsible for evaluating and documenting all findings with respect to the accomplishment of the goals, objectives, and policies of the Department's Small and Disadvantaged Business Program and for recommending those positive corrective actions needed to improve the program's effectiveness.

§ 14–1.1302–5 Office of the Solicitor.

The Office of the Solicitor is responsible for reviewing selected procurement actions for legal sufficiency in accordance with the provisions of § 14–1.352 of this chapter.

§ 14–1.1302–6 Assistant Secretaries.

Each Assistant Secretary within the Department is responsible for ensuring that all policies, procedures and regulations pertaining to the Department's Small and Disadvantaged Business Program are effectively implemented at all operational levels under his/her jurisdiction and for timely dissemination of all communications related to the Department's Small and Disadvantaged Business Program to the heads of procuring activities; and for fully endorsing and supporting recommended procurement seminars, conferences and special forums related to the Department's Small and Disadvantaged Business Program.

§ 14–1.1302–7 Heads of procuring activities.

(a) The head of each procuring activity (see § 14–1.206 of this chapter) is responsible for administering the Department's Small and Disadvantaged Business Program within that activity. This responsibility may be assigned to other qualified senior level official(s) designated by the head of the procuring activity.

(b) The head of each procuring activity, or designee, shall take immediate positive action to ensure maximum practicable participation of small and disadvantaged business concerns in the procurement opportunities of the organization. This action shall include, but not be limited to, the following:

(1) Establishment of aggressive small business and disadvantaged business goals based on the annual review of advance procurement plans (see § 14–1.5000 of this chapter). These goals shall be expressed as a percentage of planned procurement dollars and submitted in accordance with the requirements of § 14–1.1351 of this chapter.

(2) Full utilization of available Small Business and Disadvantaged Business vendor listings, directories, and query systems to ensure that eligible and qualified Small and Disadvantaged Business concerns are included on bidders mailing lists and source lists.

(3) Providing training opportunities for all personnel involved in carrying out the Department's Small and Disadvantaged Business Program so as to effectively assist such businesses seeking to do business with the government.

(4) Appointment of a qualified, full time Business Utilization and Development Specialist (BUDS) for each procurement office within a procuring activity which has annual contract dollar awards of $20 million or more. When volume of procurement and contract activity warrants it, a full-time BUDS may be appointed for procurement offices with annual contract dollar awards of less than $20 million. A qualified, part-time BUDS shall be appointed for each procurement office which has annual contract dollar awards of less than $20 million and in which the volume of procurement and contract activity does not justify a full time BUDS (see § 14–1.1302–8 of this chapter).

(5) Establishment and issuance of operating procedures which fully implement this subpart § 14–1.13 and which, as a minimum, are to be followed by all personnel involved in carrying out the Department's Small and Disadvantaged Business Program. Such procedures shall include, but not be limited to, the following actions:

(i) A review of each procurement requirement in excess of $10,000 to determine the opportunity for award to the Small Business Administration pursuant to Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) (see § 1–1.713 of this title). A search shall be made for small business and small disadvantaged business concerns including those located in rural areas for the inclusion of such concerns on the bidders mailing lists and source lists (see § 14–1.1350 of this chapter).

(ii) Regular consultations with the designated BUDS, other procuring activities of the Department, and other Federal agencies, to ensure that a sufficient number of small business and small disadvantaged business concerns are identified on the bidders mailing lists and other source lists, and to further ensure that such lists are periodically updated and fully utilized in the solicitation of bids and proposals.

(iii) With regard to small disadvantaged business concerns on existing bidders mailing lists and other source lists, maintain records showing the number of such concerns solicited and the total dollar amount of awards to each (See § 14–1.1351(b)(3) of this chapter).

(iv) Whenever practicable, recommend small business and labor surplus area set-asides for each procurement requirement that cannot be awarded to the Small Business Administration pursuant to Section 8(a) of the Small Business Act (15 U.S.C. 637(a)) (See §§ 1–1.706 and 1–1.804 of this title).

(v) Ensure to the maximum extent practicable, that procurement specifications and requirements are written in such a way as to enhance the possibility of participation by small and disadvantaged business concerns.

(vi) Assist in the counseling of small business and small disadvantaged business concerns on matters relating to future procurement opportunities and appropriate procedures for participating in the Department's procurement

requirements. However, this does not include the advance release of information regarding specific procurements in process (See §§ 1–1.1006 and 1–3.802(c)(4) of this title).

(vii) Review all proposed procurements to explore the possibility of dividing the work into components or subcomponents suitable for participation by small business or small disadvantaged business concerns. Ensure that the estimated dollar amount of a particular requirement is not used as a determining factor in soliciting small disadvantaged business concerns for participation in the award of contracts to the Small Business Administration under the Section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(viii) Ensure that all competitive procurements and procurements offering subcontracting opportunities are synopsized in the Commerce Business Daily in a timely fashion and that the maximum practicable response time is provided (See § 1–1.1003–6 of this title).

(ix) Facilitate participation of small business and small disadvantaged business enterprises concerns by providing them with counsel and advice on matters relating to preparation of bids and proposals, allowance for time for preparation of bids and proposals, quantities of articles or services required, specifications, delivery schedules, bonding requirements, level of effort estimates (when appropriate), and any other relevant procurement information that will aid and assist such concerns in competing for contract opportunities with the Department.

(x) Ensure that each solicitation which incorporates the clauses prescribed under § 14–1.1310–2 of this chapter contains a conspicuous notice of the requirements for submission of a small business and small disadvantaged business subcontracting plan. Ensure that a thorough review is made of subcontracting plans submitted by bidders/offerors, in consultation with the BUDS of the particular procuring activity.

(xi) Take full advantage of the services offered by the Small Business Administration's Field Procurement Center Representatives, and the local Office of the Minority Business Development Agency, Department of Commerce, in order to ensure that ample procurement opportunities are provided to small business and small disadvantaged business concerns.

(xii) Provide debriefings to unsuccessful small and small disadvantaged business concerns upon request. The debriefing should place special emphasis on the deficiencies of the proposal so that the small and small disadvantaged businesses will be able to enhance their future solicitation responses based on the knowledge gained (See § 1–3.103(c) of this title).

(xiii) Whenever practicable attend and participate in local procurement conferences, seminars, and meetings on matters relating to small and small disadvantaged business concerns. Apprise such concerns of procurement opportunities and obtain a working knowledge of their capabilities. Invite members of small business and small disadvantaged business trade and professional organizations, the Minority Business Development Agency, Department of Commerce, to speak at Department sponsored procurement conferences and to participate in small business and small disadvantaged business procurement workshops, seminars, and forums.

(xiv) By using Optional Form 61 (see §§ 1–1.16.804–5 and 1–16.902–OF–61 of this title) or, upon OMB approval, the Federal Quarterly Summary Subcontracting Report form, obtain data on subcontract awards to small business and small disadvantaged business concerns from all prime contractors having contracts which contain the clauses prescribed under § 14–1.1310–2 of this chapter. Negative reports are also required.

(xv) Maintain data on contract and subcontract awards to small business and small disadvantaged business concerns and make such data available to the procuring activity personnel responsible for submitting required reports (see § 14–1.1351 of this chapter.)

(xvi) In negotiating subcontracting plans, exercise sound judgment and flexibility in determining percentage goals for small business and small disadvantaged business subcontractors by considering known circumstances and market conditions, (e.g., cases where it is clearly known and established that an insufficient number of small or small disadvantaged business concerns are available within a reasonable geographical area); document all facts and circumstances.

(xvii) Ensure that each contract for the procurement of goods and services which has an anticipated value of less than $10,000 and which is subject to small purchase procedures be reserved exclusively for small business unless the Contracting Officer is unable to obtain offers or quotations from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods and services being purchased (See § 14–1.1310–3 of this chapter).

(xviii) Ensure that the practice of making awards under Section 8(a) of the Small Business Act prior to the actual identification of an 8(a) source is not used to prolong availability of annual funds and that no letter contracts are issued to SBA unless expressly required by mission urgency.

(xix) To the extent practicable, encourage utilization of the Commerce Business Daily's new "Numbered Note" system #100 in procurements of $500,000, or more, which offer substantial subcontracting opportunities for small and small disadvantaged business concerns.

§ 14–1.1302–8 Business utilization and development specialists.

The head of each procuring activity shall appoint full time and part-time Business Utilization and Development Specialists (BUDS) within each procurement office in accordance with the provisions set forth in § 14–1.1302–7(b)(4) of this chapter. Part-time BUDS positions shall be allocated a minimum of 50% of their time for performance of small business and small disadvantaged business functions. Persons designated as BUDS shall take positive actions that will result in the maximum practicable achievement of the small and disadvantaged business program objectives. The duties and responsibilities of BUDS shall include, but not be limited to the following:

(a) Participate in procurement planning and evaluation activities including the review of and written concurrence in advance procurement plans; participate in the determination on annual small and disadvantaged business goals; and coordinate with the Contracting Officer in the review and evaluation of all small and small disadvantaged business subcontracting plans submitted by potential prime contractors.

(b) Review of each procurement requirement in excess of $10,000 received in the procurement office to determine the potential for award to the Small Business Administration in accordance with Section 8(a) of the Small Business Act (15 U.S.C. 637(a)). Subsequent to each review, the BUDS shall advise the appropriate Contracting Officer in writing, of all recommendations citing rationale for same.

(c) Assist program and procurement personnel in the development of the technical proposal evaluation criteria to ensure that such criteria and their assigned weighting factors are realistic representation of the Government's actual need for requirements. For example, if the experience of the key or

principal individual(s) is significant to the successful performance of the procurement requirement, the BUDS shall ensure that the evaluation factor for "key personnel" is given greater weight than the factor for company experience.

(d) In concert and cooperation with the Contracting Officer, ensure that bonding requirements for nonconstruction contracts are not arbitrarily or capriciously imposed and that when such requirements are needed, the amount required does not exceed that absolutely necessary to protect the best interest of the Government.

(e) Ensure that the procuring activity is kept abreast of new and/or revised small and small disadvantaged business enterprise regulations, policies, procedures and other related information. Compile data and prepare all reports pertaining to small business and small disadvantaged business activities. Ensure that small and small disadvantaged business reporting data is current, accurate, and complete.

(f) Maintain all records and files necessary to demonstrate that maximum efforts have been taken to implement an aggressive, effective, and viable small and disadvantaged business program.

(g) Assist contracting personnel in the review of large complex procurements to explore the feasibility of the requirement being divided into reasonably small lots suitable for participation by small and small disadvantaged business concerns.

(h) Participate in debriefing sessions with unsuccessful small and small disadvantaged business bidders and offerors. The debriefing should place special emphasis on the deficiencies of the proposal or bid so that the small or small disadvantaged business concern will be able to enhance its further responses to solicitations based on the knowledge gained.

(i) Actively and aggressively seek out and contact small business and small disadvantaged business concerns having actual or potential capabilities to fulfill procurement requirements. In this regard, BUDS shall continuously coordinate with local and regional officials of the Minority Business Development Agency (MBDA), Department of Commerce, and the Small Business Administration (SBA) to advise them at the earliest possible date of projected or potential requirements for which small and small disadvantaged business concerns will be sought. To the extent practicable, make maximum use of SBA's Procurement Automated Source System (PASS) in searching out and identifying small and small disadvantaged business sources.

(j) Assist in the establishment and maintenance of current source lists of small and small disadvantaged business concerns. Ensure that all small and small disadvantaged business concerns seeking to do business with the Department's procuring activity are listed under all commodity and service classifications in which the firms have demonstrated capabilities.

(k) Advise and counsel small and disadvantaged business representatives on the various ways and means of enhancing their participation in Government procurement by: (1) explaining bid and proposal submission requirements; (2) serving as liaison person to ensure that small and disadvantaged business concerns are granted access to appropriate program and project personnel; and (3) directing small and disadvantaged business concerns to SBA or MBDA for certification of 8(a) eligibility, financial assistance, management assistance, and any other business or technical assistance offered by such organizations and their funded components in the private sector.

(l) Provide small and small disadvantaged business concerns with a source list of large business firms solicited for any proposed procurements that contain any of the small and small disadvantaged business subcontracting clauses specified in § 14–1.1310–2 of this chapter.

(m) Contact procuring activities of other Federal agencies which procure like or similar goods and services for the purpose of increasing and expanding the list of small and small disadvantaged business sources maintained by the procuring activity.

(n) Establish contact with local small and small disadvantaged business trade and professional associations and Indian tribal councils to apprise them of the procuring activity's needs and recurring procurement requirements.

(o) Actively participate in the programs and activities of the local Minority Business Opportunity Committees (MBOC) as well as other relevant small and small disadvantaged business activities on the local level.

(p) Periodically sponsor or participate in local procurement conferences, workshops, or trade fairs in order to attract potential small and small disadvantaged business contractors and to apprise them of current and projected contracting opportunities. Such conferences, workshops, or trade fairs should normally be held in conjunction with other Departmental activities, activities of other Federal agencies, or the activities of a responsible local SBA or MBDA funded organization.

(q) Invite members of small and small disadvantaged business trade, business and professional associations, MBOC Chairpersons, MBDA and SBA representatives to speak at conferences, workshops, seminars and other similar type forums to increase program and personnel awareness of small and small disadvantaged business concerns and capabilities.

(r) To the extent practicable, participate in all training opportunities related to the Department's Small and Disadvantaged Business Program.

(s) Encourage the establishment of local, regional and national small and small disadvantaged business Steering Committees or Councils, for the purpose of exploring new ways of increasing contract awards to such concerns. The committees or councils should be comprised of the BUDS and the appropriate procurement and program management officials responsible for the procurement placement of organizational resources and requirements. These groups should meet as often as necessary, preferably not less than quarterly, to review the progress of the organization's complete small and disadvantaged business program and make recommendations for improvement.

(t) To the extent practicable, actively participate in the negotiation process on all procurements generated through the Small Business Administration in accordance with Section 8(a) of the Small Business Act (15 U.S.C. 637(a)). Such participation shall be coordinated with the Contracting Officer and shall include all phases of the negotiation process. However, the degree of involvement should not adversely impact the effective performance of the other duties and responsibilities set forth in § 14–1.1302–6 of the chapter.

§ 14–1.1310 Subcontracting with small business and small disadvantaged business concerns.

The notices, clauses, policies, and procedures set forth in Federal Procurement Regulations (FPR) Temporary Regulation 50, Supplement 2, May 23, 1980, including Attachment A (OFPP Policy Letter No. 80–2, April 29, 1980), are prescribed for use in all solicitations and contracts as specified therein.

§ 14–1.1350 Small and small disadvantaged business vendor sources.

The head of each procuring activity shall ensure the availability of, or access to, all possible sources of small and small disadvantaged business concerns,

both locally and nationally. In this regard, procuring activities are encouraged to make maximum use of the following sources in addition to any other listings at their disposal.

(a) The Small Business Administration's publication "Firms in the 8(a) Business Development Program" should be used as an aid in locating eligible 8(a) firms. This publication is a nationwide listing, by State, and can be ordered from: Small Business Administration, Office of Reports, Room 503, 1441 L Street NW., Washington, D.C. 20416.

(b) The Small Business Administration's "Procurement Automated Source System" (PASS) which became operational in September 1978, has been adopted by the Department as the principle source system for locating and identifying small business and small disadvantaged business concerns. The PASS system represents a comprehensive data base of small business, minority business, and women-owned business firms. Company profiles are also available on research and development, manufacturing, service, and construction organizations. For additional information concerning the administrative and operational components of the PASS system, contact the: PASS Project Officer, Small Business Administration, 1441 L Street NW., Washington, D.C. 20416 (202) 653-6938.

(c) The National Minority Purchasing Council (NMPC) query system, "Vendor Information System (VIS)," is also a direct method of obtaining current, detailed listings of minority 8(a) and Non-8(a) firms. Requests can be made either by telephone or by completing and mailing the NMPC VIS Processing Form. Telephone request must include the desired VIS capability code(s) and, for regional requests, the VIS Geographic Regions. Calls should be made to the NMPC at (202) 466-7077. Mail order requests can be ordered from the NMPC at the following address: National Minority Purchasing Council, Inc., 1925 K Street NW., Suite 206, Washington, D.C. 20006.

§ 14-1.1351 Reports.

(a) The head of each procuring activity shall submit to the Office of Small and Disadvantaged Business Utilization, an annual report on the separate goals established for each of the Department's small and disadvantaged business programs no later than August 30 of each fiscal year (see §§ 14-1.1302-7(b)(1) and 14-1.5000 of this chapter). The Office of Small and Disadvantaged Business Utilization, after negotiations with bureaus/offices and upon acceptance of the goals submitted, will consolidate the goal reports of each procuring activity and submit a Departmental goal report to the Small Business Administration and the Minority Business Development Agency, Department of Commerce, as required.

(b) The head of each procuring activity shall submit to the Office of Small and Disadvantaged Business Utilization, within thirty (30) days after the end of each quarter, quarterly progress reports on the actual number and dollar amounts of contract and subcontract awards made during the quarter in each of the Department's small and disadvantaged business programs. The numbers and amounts of awards shall be reported on a non-cumulative basis for the preceding quarter. In compiling the quarterly progress report of actual awards, reporting activities may count one contract award for as many times as it is applicable to the Department's socioeconomic program goals (e.g., if an award is made to a small, woman-owned, socially and economically disadvantaged business concern under a labor surplus area set aside procurement, the award shall count as a goal achievement under the reporting activities' small business goal, woman-owned business goal, small socially and economically disadvantaged business goal, and labor surplus area goal). In the event a procuring activity fails to meet its established goals, an explanation shall be provided on the last quarterly report for the fiscal year including specific recommendations for meeting future goals. The following additional information shall also be submitted with each quarterly report:

(1) For each contract awarded to the Small Business Administration (SBA) under Section 8(a) of the Small Business Act (see § 1-1.713 of this title), list the name of the 8(a) firm; the date the requirement was offered to SBA; the dollar amount of the contract; the date of contract award; SBA office; a brief description of work under the contract; and the performance of the 8(a) firm to date (satisfactory/unsatisfactory).

(2) For each procurement requirement offered to SBA under Section 8(a) of the Small Business Act and rejected by SBA, list a brief description of the work required under the procurement; the date the requirement was offered to SBA; the estimated dollar amount of the requirement; location of SBA office and name of representative (if known); date of the SBA rejection; and reason(s) given by SBA for the rejection.

(3) For each contract awarded to a small disadvantaged business concern excluding section 8(a) contracts with SBA, list the name of the contractor, a description of the work under the contract, the dollar amount of the contract and the date of contract award.

(4) For contracts awarded which contain the clauses prescribed by § 14-1.1310-2 of this chapter, submit an Optional Form 61 (see §§ 1-16.804-5 and 1-16.902-OF-61 of this title) report or, upon OMB approval, the Federal Quarterly Summary Subcontracting Report form, which summarizes the number and dollar amounts of subcontract awards made to small business concerns and small disadvantaged business concerns. The head of each procuring activity shall ensure that sufficient supplies of the Optional Form 61 or any subsequent replacement form are available at each procurement office and that they are made available to contractors for their completion and quarterly submission to the Contracting Officer as required.

(c) Unless otherwise specified herein, the quarterly reporting requirements set forth in § 14-1.1351 of this chapter shall be submitted on the quarterly MBE-91 report with an attached supplement containing the required information not reflected on the MBE-91 form.

[FR Doc. 81-2347 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-10-M

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60-1, 60-2, 60-4, 60-20, 60-30, 60-50, 60-250, and 60-741

Government Contractors; Affirmative Action Requirements; Correction

AGENCY: Office of Federal Contract Compliance Programs, Department of Labor.

ACTION: Final rule, correction.

SUMMARY: On December 30, 1980, the Department of Labor published a final rule (45 FR 86216) which amended 41 CFR Chapter 60 by consolidating and integrating certain regulatory provisions pertaining to the three programs administered by OFCCP: Executive Order 11426, as amended; section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; and section 503 of the Rehabilitation Act of 1973, as amended. This notice makes corrections to the regulations published on December 30, 1980.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT:
James W. Cisco, Acting Director, Division of Program Policy, Office of Federal Contract Compliance Programs, Room C-3324, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Telephone (202) 523-9426.

SUPPLEMENTARY INFORMATION:

Background

On December 28, 1979, the Office of Federal Contract Compliance Programs (OFCCP) U.S. Department of Labor, published in the **Federal Register** (44 FR 77006) a proposed rule to amend, consolidate, and integrate certain regulatory provisions pertaining to the three programs administered by OFCCP: Executive Order 11246, as amended; section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; and section 503 of the Rehabilitation Act of 1973, as amended. The December 28 publication stated that comments would be received until February 26, 1980. That deadline was extended until March 24, 1980 by a notice published in the **Federal Register** on February 22, 1980 (45 FR 11856). On December 30, 1980, OFCCP published in the **Federal Register** (45 FR 86216) the final rule.

Need for Correction

Editorial review of the December 30, 1980 publication has revealed several errors in the preamble and text. This document corrects those errors.

In addition, the preamble to the December 30, 1980 publication stated that several new recordkeeping and reporting requirements imposed by the December 30 regulations would be held in abeyance until they are cleared by the Office of Management and Budget (OMB) under the Federal Reports Act. Those requirements held in abeyance are listed at 45 FR 86227.

The regulation published on December 30, 1980, extended the requirement to develop, implement and maintain an Affirmative Action Program (AAP) to those Government contractors with 50 employees and contracts which total $50,000 in a 12 month period and to construction contractors with regard to their noncraft employees if they have 50 such employees and a $50,000 contract or contracts which total $50,000 in a 12 month period. This correction notice clarifies that the new AAP requirements resulting from the December 30, 1980, publication are held in abeyance pending OMB clearance.

Signed at Washington, D.C., January 16, 1981.

Ray Marshall,

Secretary of Labor.

Donald Elisburg,

Assistant Secretary, Employment Standards Administration.

Weldon J. Rougeau,

Director, OFCCP.

Preamble

1. 45 FR 86222, first column, first full paragraph, first line, "OFFCCP" is corrected to "OFCCP".

2. 45 FR 86222, second column, item 14, second line, "consolidated" is corrected to "consolidate".

3. 45 FR 86225, second column, item 27-A, first line, "Section 60-2.3" is corrected to "Section 60-20.3".

4. 45 FR 86226, first column, item 32, fifth paragraph twelfth line, "althought" is corrected to "although".

5. 45 FR 86227, second column, item 3 is corrected to read as follows:

3. *Section 60-1.40.* (a) This section presently requires contractors with 50 employees and: (i) a contract of at least $50,000; or (ii) Government bills of lading which total $50,000 in a 12-month period, to develop and implement an affirmative action program. Certain recordkeeping and reporting requirements are associated with developing and implementing an AAP. The regulation adopted today would expand the written AAP requirement to those contractors with 50 employees and contracts, in addition to bills of lading, which total $50,000 in a 12-month period. This new requirement will be held in abeyance until OMB has cleared the recordkeeping and reporting requirements associated with developing and implementing an AAP and notice has been published in the **Federal Register.** However, contractors with Government bills of lading which total $50,000 in a 12-month period or which have a contract of at least $50,000 will continue to develop and implement the written AAP requirement and to keep records and report as in the past.

(b) The written AAP also is being required for the first time of construction contractors with regard to their noncraft employees if they have 50 such employees and: (i) a $50,000 contract; or (ii) contracts which total $50,000 in a 12-month period. This new requirement is held in abeyance until OMB has cleared the reporting and recordkeeping requirements and until further notice in the **Federal Register.**

PART 60-1—OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS

6. Citation of Authority on the eleventh line, "Development" is corrected to "Developmental" and "Amendment" is corrected to "Amendments."

7. In § 60-1.1 (b) on the thirty-fifth line, a semicolon is inserted between "contract" and "Neither" and "Neither", is corrected to "neither."

8. In § 60-1.3 in the eighth paragraph first line, "Assistance" is corrected to "Assistant."

9. In § 60-1.3 in the fifteenth paragraph second line, "entiltled" is corrected to "entitled."

10. In § 60-1.3 in the nineteenth paragraph twelfth line a comma is inserted between "grant" and "contract."

11. In § 60-1.3 in the twenty-first paragraph fifteenth line "pruchaser" is corrected to "purchaser."

12. In § 60-1.3 in the twenty-eighth paragraph, first line, quotation marks are inserted after "individual."

13. In § 60-1.4(a)(7) on the seventeenth line, "with litigation with a" is deleted and on the eighteenth line, "subcontractor" is deleted.

14. In § 60-1.4(b) on the second line, delete "(1)".

15. In § 60-1.4(b) on the twentieth line, insert a comma between "loan" and "insurance".

16. In § 60-1.4(b)(2) on the first line, "contract" is corrected to "contractor".

17. In § 60-1.4(b)(2) on the sixth line, "races" is corrected to "race."

18. In § 60-1.4(c) the first, second, third and fourth lines are regular size type.

19. In § 60-1.9(c)(2) on the second line, "effects" is corrected to "affects".

20. In § 60-1.9(c)(2) on the twelfth line, "in the collective bargaining agreement" is inserted after the word "changes".

21. In § 60-1.20(c) on the fourth line, "persuasion" is corrected to "persuassion."

22. In § 60-1.24(c)(2) on the fifth line, "recommended" is corrected to "referred."

23. In § 60-1.29(d) on the tenth line, "the" is corrected to "this".

24. In § 60-1.29(e) on the tenth line, "made" is corrected to "make".

25. In § 60-1.29(e) on the thirty-fourth line, "office" is corrected to "Office".

26. In § 60-1.29(f)(4) on the fifth line, "contract" is corrected to "contractual."

27. In § 60-1.29(f)(4) on the sixth line, insert "or of the regulations implementing sections 402 and 503" after "Order".

28. In § 60–1.29(f)(4) on the eleventh line, "contract" is corrected to "contractual".

29. In § 60–1.29(f)(4) on the twelfth line, insert "or of the regulations implementing sections 402 and 503" after "Order."

30. In § 60–1.29(g) on the eleventh line, "contractural" is corrected to "contractual."

31. In § 60–1.29(i) on the tenth line, "violations" is corrected to "violation."

32. In § 60–1.31(b) on the thirty-ninth line, "of" is corrected to "or".

PART 60–2—AFFIRMATIVE ACTION PROGRAMS

33. In § 60–2.25(b) on the third line, "schedule" is deleted.

PART 60–4—CONSTRUCTION CONTRACTORS—AFFIRMATIVE ACTION REQUIREMENTS

34. In § 60–4.2(a) on the twelfth line, "the" is corrected to "this".

35. In § 60–4.3(a)(7)(o) on the sixth line, "femal" is corrected to "female".

36. In § 60–4.5(b) on the fifth line, "provision" is corrected to "provisions."

PART 60–30—RULES OF PRACTICE FOR ADMINISTRATION PROCEEDINGS TO ENFORCE EQUAL OPPORTUNITY UNDER EXECUTIVE ORDER 11246, SECTION 402, AND SECTION 503

37. In the heading of PART 60–30 on the fourth line, "EXECTUVIE" is corrected to "EXECUTIVE."

38. In § 60–30.8(a) on the fourteenth line, "motion" is corrected to "motions."

39. In § a60–30.8(a) on the sixteenth line, "motions" is corrected to "motion".

40. In § 60–30.11(c) on the forty-first line, delete "the" and on the forty-second line, delete "answer."

41. In § 60–30.13(c)(1) on the third line, "or" is added after the semicolon.

42. In § 60–30.15(j)(4) on the first line, "Involking" is corrected to "Invoking".

43. In § 60–30.23(a) on the eighth line, "of" is corrected to "or".

44. In § 60–30.38(a) on the ninth line, a period is inserted after "sanctions" and "in" is corrected to "In."

45. In § 60–30.38(i) on the seventh line, "of" is corrected to "or".

46. In § 60–30.38(j) on the twenty-fourth line, "Provided" is corrected by placing it in italics.

47. In § 60–30.38(j) on the twenty-fifth line, a comma is inserted between "cancellation" and "termination".

PART 60–50—GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

48. A statement of authority is added as follows: Sec. 201, E.O. 11246, 30 FR 12319, and E.O. 11375, 32 FR 14303, as amended by E.O. 12086.

PART 60–250—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

49. In § 60–250.5(b) on the twenty-seventh line, "The" is deleted, "appendix" is corrected to "Appendix" and "B" is inserted after "Appendix".

PART 60–741—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

50. The citation of authority is corrected to read "Sec. 503 of the Rehabilitation Act of 1973, (29 U.S.C. 793), as amended by Sec. 111(a), Pub. L. 93–516, 88 Stat. 1619 (29 U.S.C. 706) and by Sections 119 and 122 of the Rehabilitation Comprehensive Services and Developmental Disabilities Amendments of 1978, Pub. L. 95–602, 92 Stat. 2955 and Executive Order 11758.

51. In § 60–741.2(a)(2), The first line is corrected by placing it in italics.

52. In § 60–741.2(a)(3), The first line is corrected by placing it in italics.

53. In § 60–741.2(a)(4), the first line is corrected by placing it in italics and the second line is corrected by placing "governments" in italics.

54. In § 60–741.2(a)(5), the first line is corrected by placing it in italics and the second line is corrected by placing "contracts" in italics.

55. In § 60–741.2(b)(1), the first line is corrected by placing "Specific contracts and" in italics and the second line is corrected by placing "classes of contracts" in italics.

56. In § 60–741.2(b)(2), the first line is corrected by placing "National security" in italics.

57. In § 60–741.5(f) on the nineteenth line, "practice" is corrected to "practices."

58. In § 60–741.6(c) on the fourth line, "§ 60–741.4(c)" is corrected to "§ 60.741.5(c)."

59. In § 60–741.21 on the first line, "(a) General responsibility" is deleted.

[FR Doc. 81–2160 Filed 1–23–81; 2:19 pm]

BILLING CODE 4510–27–M

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

43 CFR Part 4

Department Hearings and Appeals Procedures

AGENCY: Office of Hearings and Appeals, Department of the Interior.

ACTION: Final rule.

SUMMARY: This Office changes Subpart D of its procedural regulations in 43 CFR Part 4 to comply with Exec. Order No. 12044 "Improving Government Regulations" (43 FR 12661 (Mar. 24, 1978)) by adding new rules governing procedure before the Interior Board of Indian Appeals. The purpose of the revisions is to incorporate into Subpart D those procedural provisions of Subparts A and B that will be deleted as indicated in 45 FR 35351 (May 27, 1980). The rules relating to Indian probate proceedings before the Interior Board of Indian Appeals are revised to permit filing of appeals from orders by Administrative Law Judges with the Board. Appeals to the Board are limited to issues which were brought before the Administrative Law Judge in appropriate review requests, although the Board retains authority to correct any clear error or manifest injustice committed by an Administrative Law Judge. The present provision of 43 CFR 4.296 which stays the effectiveness of final Board decisions for a period of 60 days is deleted.

The rules governing appeals to the Board of Indian Appeals from Bureau of Indian Affairs' decisions are revised to conform to rules published at 25 CFR 2.19 permitting such appeals. The rule setting filing times is changed from 45 to 60 days to conform to 25 CFR 2.19(c)(2). The rule concerning the use of a stipulated record is limited, provisions covering record preparation and docketing are added, and the rules pertaining to hearings matters are deleted.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Franklin Arness, Administrative Judge, Office of Hearings and Appeals, (703) 557–1400.

SUPPLEMENTARY INFORMATION: Exec. Order No. 12044 directs each executive agency to adopt procedures to improve existing and future regulations. Additionally, agencies are required to review and revise existing regulations to make them as simple and clear as possible and to eliminate rules no longer necessary. To comply with this directive, a Rules Committee was

established within the Office of Hearings and Appeals to review and revise the Office's procedural regulations. Although the work of the committee continues, the following immediate changes to Subpart D of 43 CFR Part 4 are made. The addition of new procedural rules requires a renumbering of certain rules: §§ 4.290–4.297 (probate) and §§ 4.350–4.369 (administrative appeals) are deleted; the revised rules are published beginning at § 4.310.

Discussion of Comments. The public comment period, which ended November 17, 1980, produced several comments which were considered in connection with this final rulemaking.

1. The comment that a time limitation be imposed upon the Bureau of Indian Affairs within which to transmit the record of an administrative appeal under §§ 4.330–4.338 is rejected. The rule as changed at § 4.335 requires preparation of the record on appeal by the Bureau of Indian Affairs in accordance with prescribed standards. An additional time limitation is not regarded as necessary at present, since the Bureau has already begun to implement the new rule in timely fashion. Should the need for a time requirement within which to forward records on appeal develop, this suggestion may be considered in future rulemaking.

2. The comment that notices of appeal in Indian probate matters should be required within 60 days from the date of mailing the decision appealed, rather than 60 days from the date the decision is received by the appellant, is rejected for the reason that delays caused by use of addresses no longer current or for other reasons are common in Indian probate matters. While date of mailing is a certain date and most convenient for the Department, it may not afford adequate protection for all interested parties.

3. The provision of § 4.315(c) concerning finality is relaxed so as to permit the Board, in unusual cases, to suspend the final effect of a decision pending reconsideration.

4. A comment was received suggesting clarification of the jurisdiction of the Board of Indian Appeals over determinations involving mineral resource exploration and development on Indian land. The Board of Land Appeals has traditionally adjudicated appeals from decisions of the Commissioner of Indian Affairs in this subject area when the matter involves an underlying determination by an officer of the Conservation Division, Geological Survey. *See* 30 CFR Part 290. It was generally agreed by officials of the Board of Land Appeals and the Board of Indian Appeals that existing regulations in Titles 25, 30, and 43 CFR should not be interpreted as precluding the Board of Indian Appeals from adjudicating mineral rights decisions of the Commissioner of Indian Affairs which are either based on interpretation of Federal Indian law or do not depend upon specialized recommendations or determinations of the Conservation Division, Geological Survey.

5. A comment was received suggesting that decisions of the Office of Indian Education Programs, Bureau of Indian Affairs, should be expressly excluded from the review authority of the Board since Education Program decisions are presently reviewable by the Assistant Secretary—Indian Affairs. This suggestion is adopted. The principal author of these revisions is Franklin Arness, Administrative Judge, Office of Hearings and Appeals, Department of the Interior, (703) 557–1400.

Note.—The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Exec. Order No. 12044 and 43 CFR Part 14.

(Secs. 1, 2, 36 Stat. 855, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a, 373b.)

Dated: January 19, 1981.

James A. Joseph,

Under Secretary.

Accordingly, Subpart D of Part 4 of Title 43 of the *Code of Federal Regulations* is revised as follows:

The main Subpart heading, Subpart D, is revised to read as follows:

Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals

[Note: Hearings rules codified at 43 CFR 4.200–4.282 and to be codified as sections 4.300–4.308 of 43 CFR (45 FR 50329 (July 29, 1980)) appear between the foregoing heading and the rules governing appeals to IBIA, which begin with § 4.310.]

Former sections 4.290–4.297 and 4.350–4.369 are deleted. New sections 4.310–317; 4.320–4.323; and 4.330–4.340 are added.

General Rules Applicable to Proceedings on Appeal Before the Interior Board of Indian Appeals

§ 4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery.

(b) *Service.* Notices of appeal and pleadings shall be served on all parties in interest in any proceeding before the Interior Board of Indian Appeals by the party filing the notice or pleading with the Board. Service shall be accomplished upon personal delivery or mailing.

(c) Computation of time for filing and service. Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days shall be excluded in the computation.

(d) *Extensions of time.* (1) The time for filing or serving any document except a notice of appeal may be extended by the Board.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

§ 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receipt of the notice of docketing. Appellant shall serve copies of the opening brief filed upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel shall have 30 days from receipt of appellant's brief to file answer briefs, copies of which shall be served upon the appellant or counsel and all other parties in interest. A certificate showing service of the answer brief upon all parties or counsel shall be attached to the answer filed with the Board.

(b) Appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel shall be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) The Bureau of Indian Affairs shall be considered an interested party in any proceeding before the Board. The Board may request that the Bureau submit a brief in any case before the Board.

§ 4.312 Decisions.

Decisions of the Board will be made in writing. Distribution of decisions shall be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board which are final for the Department shall be given immediate effect.

§ 4.313 Amicus Curiae. Intervention. Joinder motions.

(a) Any interested person or Indian tribe desiring to intervene or to join other parties or to appear as amicus curiae or to obtain an order in an appeal before the Board shall apply in writing to the Board stating the grounds for the action sought. Permission to intervene, to join parties, to appear, or for other relief, may be granted for purposes and subject to limitations established by the Board. This section shall be liberally construed.

(b) Motions to intervene, to appear by amicus curiae brief or to join additional parties to an appeal pending before the Board shall be served in the same manner as appeal briefs.

§ 4.314 Exhaustion of administrative remedies.

(a) No decision of an Administrative Law Judge which at the time of its rendition is subject to appeal to the Board shall be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. § 704, unless made effective pending decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from receipt of the decision and shall contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition shall not stay the effect of any decision or order and shall not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any court to the Board for further proceedings, and to the extent the court's directive and time limitations will permit, the parties shall be allowed an opportunity to submit to the Board a report recommending procedures to be followed to comply with the court's order. The Board will review the reports and enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries with respect to any matter pending before the Board shall be made to the Chief Administrative Judge of the Board or to the member of the Board assigned the matter.

(b) *Ex parte communications.* There shall be no communication between any party and a member of the Board concerning the merits of an appeal unless such communication, if written, is also furnished to the other party, or, if oral, is made in the presence of the other party. The Board shall refuse to receive, except as part of the record on appeal, information having any bearing upon an appeal from persons who do not represent a party in the appeal, but who have an interest in the decision to be rendered.

(c) Disqualification. A Board member may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the member deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the Board member concerned does not withdraw, the Director of the Office of Hearings and Appeals shall determine the matter of disqualification.

Appeals to the Board of Indian Appeals in Probate Matters.

§ 4.320 Who may appeal; scope of review.

A party in interest shall have a right of appeal to the Board of Indian Appeals from an order of an Administrative Law Judge on a petition for rehearing, a petition for reopening, or regarding tribal interests in a deceased Indian's trust estate. An appeal shall be limited to those issues which were before the Administrative Law Judge upon the petition for rehearing, reopening or regarding tribal interests. However, the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

(a) *Notice of Appeal.* Within 60 days after receipt of decision, an appellant shall file a written notice of appeal signed by appellant, appellant's attorney, or other qualified representative as provided in 43 CFR 1.3, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. A statement of the errors of fact and law upon which the appeal is based shall be included in either the notice of appeal or in any brief filed. The notice of appeal shall include the names of parties served.

(b) *Service of copies of notice of appeal.* The appellant shall personally deliver or forward by United States mail to the Board of Indian Appeals the original notice of appeal. A copy shall be served upon the Administrative Law Judge whose decision is appealed as well as all interested parties.

(c) *Action by Administrative Law Judge; record inspection.* The Administrative Law Judge, upon receiving a copy of the notice of appeal, shall notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b) and 4.241(d), or under § 4.242(f), to the title plant designated under § 4.236(b). The duplicate record shall be conformed to the original by the title plant and shall thereafter be available for inspection either at the title plant or at the office of the Superintendent.

§ 4.321 Notice of transmittal of record on appeal.

The original record on appeal shall be forwarded by the title plant to the Board by certified mail. Any objection to the record as constituted shall be filed with the Board within 15 days of the date of docketing of the appeal by the Board.

§ 4.322 Docketing.

The appeal shall be docketed by the Board upon receipt of the administrative record from the title plant. All interested parties as shown by the record on appeal shall be notified of the docketing. The docketing notice shall specify the time within which briefs may be filed and shall cite the procedural regulations governing the appeal.

§ 4.323 Disposition of the record.

Subsequent to a decision of the Board, other than remands, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded by the Board to the title plant designated under § 4.236(b). Upon receipt of the record by the title plant, the duplicate record required by

§ 4.320(c) shall be conformed to the original and forwarded to the Superintendent concerned.

Appeals to the Board of Indian Appeals From Administrative Actions of Officials of the Bureau of Indian Affairs: Administrative Review in Other Indian Matters Not Relating to Probate Proceedings

§ 4.330 Scope.

(a) The definitions set forth in § 2.1 of Part 2, Title 25 of the Code of Federal Regulations, apply also to these special rules. These regulations apply to the practice and procedure for (1) appeal to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in Chapter 1 of 25 CFR, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant; and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary, the Assistant Secretary for Indian Affairs, or the Commissioner of Indian Affairs.

(b) Except as otherwise permitted by the Secretary, the Assistant Secretary for Indian Affairs or the Commissioner of Indian Affairs by special delegation or request, the Board shall not adjudicate: (1) tribal enrollment disputes; (2) matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; (3) appeals from decisions of the Commissioner of Indian Affairs pertaining to final recommendations or actions by officers of the Conservation Division, Geological Survey, unless the Commissioner's decision is based on an interpretation of Federal Indian law (Commissioner's decisions not so based which arise from determinations of the Geological Survey are appealable to the Board of Land Appeals in accordance with 43 CFR 4.410); or (4) decisions of the Office of Indian Education Programs for which Secretarial review is otherwise provided.

§ 4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations in a case involving a determination, finding, or order protested as a violation of a right or privilege of the appellant may appeal to the Board of Indian Appeals, except (a) to the extent that decisions of officials under the supervision of the Commissioner of the Bureau of Indian Affairs must first be appealed to the Commissioner under provisions in 25 CFR Part 2; (b) where such decision has been approved by the Secretary prior to promulgation; and (c) where otherwise provided by law or regulation.

§ 4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 4.1, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203, within 60 days after receipt by the appellant of the decision from which appeal is taken. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought;

(3) Any arguments the appellant wishes to make; and

(4) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) An appeal properly and timely filed with the Commissioner pursuant to 25 CFR 2.10 and referred to the Board pursuant to 25 CFR 2.19 without a decision may be docketed by the Board as timely filed.

(c) When the appellant is an Indian or Indian tribe, the officer who issued the decision appealed shall upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

§ 4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each interested party named, and upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal, as specified in § 4.332, which may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Upon receipt of a copy of a notice of appeal or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken, all original documents, petitions, or applications by which the proceeding was initiated and all supplemental documents which set forth claims of interested parties, as well as documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, as a minimum, inclusion of the following: (1) the decision appealed from; (2) the notice of appeal or copy thereof; and (3) certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

§ 4.336 Docketing.

An appeal shall be docketed by the Board upon receipt of the administrative record. All interested parties as shown by the record on appeal shall be notified of the docketing. The docketing notice shall specify the time within which briefs shall be filed and cite the procedural regulations governing the appeal.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an Administrative Law Judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it require the exercise of discretionary authority of the Commissioner, the Board shall refer

those issues to the Commissioner for resolution.

§ 4.338 Submission by Administrative Law Judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) is concluded, the Administrative Law Judge shall make proposed findings of fact and conclusions of law, in a recommended decision, stating the reasons for such recommendations. A copy of the recommended decision shall be sent by certified mail, return receipt requested, to each party to the proceeding, to the Bureau official involved, and to the Board. Simultaneously, the entire record of the proceedings including the transcript of the hearing before the Administrative Law Judge shall be forwarded to the Board.

(b) The Administrative Law Judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other comments regarding the recommended decision with the Board in accordance with § 4.339.

§ 4.339 Exceptions or comments regarding recommended decision by Administrative Law Judge.

Within 30 days after receipt of the recommended decision of the Administrative Law Judge, any party may file exceptions to the decision with the Board.

§ 4.340 Decision by the Board.

The Board shall issue a decision which shall set forth findings of fact and conclusions of law. The decision may adopt, modify, or set aside any proposed finding, conclusion or order of an Administrative Law Judge. The decision of the Board shall be the final administrative action by the Department. The decision shall be served by certified mail on the appropriate official of the Bureau of Indian Affairs and to all interested parties.

[FR Doc. 81-2549 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-10-M

Bureau of Land Management

43 CFR Public Land Order 5825

[Nev-044897; Nev-044898]

Nevada; Modification of Public Land Order No. 2013

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order provides for the modification of Public Land Order No. 2013 which withdrew and reserved lands for flood control projects (Mathews and Pine Canyon Dams) for use by the U.S. Army Corps of Engineers. The modification order is for a period of 20 years.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Vienna Wolder, Nevada State Office, 702-784-5703.

By virtue of the authority contained in Section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751, 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 2013 of October 22, 1959, which withdrew the public lands described in paragraphs 2 and 3 below for use as Mathews and Pine Canyon Dam flood control projects is hereby modified to continue in full force and effect for a period of 20 years from the date of this order.

2. The following described public lands remain segregated from all forms of appropriation under the general land laws, including the mining, and the mineral leasing laws and disposal of materials under the Act of July 31, 1947, as amended, 61 Stat. 681; 30 U.S.C. 601-604.

Mount Diablo Meridian

T. 5 S., R. 69 E.,
Sec. 24, E½SE¼SW¼;
Sec. 25, SE¼NE¼;
Sec. 29, W½SW¼SW¼;
Sec. 30, E½SW¼SE¼ and SE¼SE¼;
Sec. 31, NE¼NE¼, NE¼NW¼NE¼ and N½SE¼NE¼;
Sec. 32, NW¼NW¼NW¼ S½NW¼N¼ and SW¼NE¼
T. 5 S., R. 70 E.,
Sec. 19, SW¼SE¼SE¼;
Sec. 30, lot 2, W½E½NE¼, SE¼NW¼, N½NE¼SW¼ and N½N½SE¼.

The area described aggregates approximately 466.29 acres in Lincoln County, Nevada.

3. The following described public lands are segregated from all forms of appropriation under the public land laws including the mining laws, but not the mineral leasing laws nor disposal of materials under the Act of July 31, 1947, as amended (supra).

Mount Diablo Meridian

T. 5 S., R. 69 E.,
Sec. 32, SW¼SW¼NE¼, NW¼NW¼SE¼, NW¼NE¼SE¼, S½N½SE¼m S½SE¼, E½SE¼SW¼, NE¼SW¼, NE¼NW¼SW¼, SE¼NW¼, and SW¼NE¼NW¼;
Sec. 33, SW¼NW¼SW¼, NW¼SW¼SW¼, S½SW¼SW¼, and SW¼SE½SW¼.
T. 6 S., R. 69 E., (Unsurveyed)
Sec. 4, W½NE¼NW¼, NW¼NW¼, NE¼SW¼NW¼, and W½SE¼NW¼;
Sec. 5, E½NE¼NE¼, NW¼NE¼, NW¼SW¼NE¼, E½NE¼NW¼, and NE¼SE½NW¼.

The area described aggregates approximately 510 acres in Lincoln County, Nevada.

4. The jurisdiction of the Department of the Army over the lands described in paragraph 1(b) of PLO No. 2013 shall be limited to their use for flowage purposes. All leases and permits under the general land laws, including the mineral leasing laws, shall contain provisions (1) subordinating the rights granted thereunder to a right of intermittent flooding by the Government of the United States, its officers, agents or employees, including the right to accumulate and dispose of thereon such silt and debris as may be necessary in furtherance of the operation and maintenance of the project and (2) prohibiting human habitation upon the lands or the construction and maintenance of floatable structures thereon.

5. This withdrawal will be reviewed for continuation or termination one year prior to the expiration of this modification order.

Inquiries concerning the lands should be addressed to the Chief, Branch of Lands and Minerals Operation, Bureau of Land Management, P.O. Box 12000, Reno, Nevada 89520.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2493 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5826

[U-14415]

Utah; Power Site Restoration No. 725; Revocation of Power Site Reserve Nos. 7, 38, 246, and 370

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes 4 Power Site Reserves. It has been determined that these lands will not be developed for power purposes. The public lands will be restored to operation of the public land laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Ken Latimer, Utah State Office, 801-524-4245.

By virtue of the authority contained in Section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat.

2751, 43 U.S.C. 1714, and pursuant to the determination by the Federal Power Commission (now the Federal Energy Regulatory Commission) in DA–195 and DA–199–Utah, it is ordered as follows:

1. The Withdrawal Orders of July 2, 1910; February 15, 1912; and July 22, 1913, creating Power Site Reserve Nos. 7, 38, 246 and 370 are hereby revoked to the extent that they affect the following described lands:

Salt Lake Meridian

Power Site Reserve No. 7

T. 3 S., R. 20 E.,
Sec. 1, lot 2 (Formerly NW¼NE¼), SW¼NE¼, W½SE¼, SE¼SE¼;
Sec. 12, NE¼NE¼.
T. 3 S., R. 21 E.,
Sec. 18, lots 1, 2, 3, 4;
Sec. 19, lots 1, 8, 13, 14; (Formerly lots 1–4);
Sec. 30, lots 5–9, 15, NW¼NE¼, NE¼SW¼.

Power Site Reserve No. 38

T. 3 S., R. 20 E.,
Sec. 1, lot 3 (Formerly NE¼NW¼), SE¼NW¼, E½SW¼;
Sec. 12, NW¼NE¼, NE¼NW¼.

Power Site Reserve No. 246

T. 3 S., R. 21 E.,
Sec. 7, lots 5, 6 (Formerly lots 3, 4).

Power Site Reserve No. 370

T. 3 S., R. 21 E.,
Sec. 17, W½SW¼, SE¼SW¼;
Sec. 18, lots 1, 6 (Formerly SW¼NE¼), 7 (Formerly NW¼SE¼), E½NW¼, NE¼SE¼;
Sec. 20, lots 3 (Formerly SW¼NE¼), 5 (Formerly NW¼SE¼), 6 (Formerly NE¼SE¼), 8 (Formerly SE¼SE¼), E½NW¼;
Sec. 21, lot 11 (Formerly SW¼SW¼);
Sec. 27, lot 1 (Formerly NW¼SW¼), SW¼NW¼, E½SW¼, SW¼SE¼;
Sec. 28, lot 2 (Formerly SE¼NE¼), W½NE¼, N½NW¼;
Sec. 34, NE¼.

The total area described aggregates 2,302.91 acres in Uintah County.

The lands lie along Ashley Creek, a tributary of the Green River, 8 to 13 miles north of Vernal, Utah. The average flow of Ashley Creek in the area under consideration is about 100 cfs and the stream falls about 100 feet per mile.

Ashley Creek is a perennial stream, which furnishes most of the water for public, industrial and agricultural needs in Ashley Valley. Vegetation along the stream is riparian with such plants as willow, cottonwood, skunkbush, sumac, various grasses and sedges predominating. The lands not adjacent to the stream are typical of the semi-arid juniper and sage brush types.

2. The State of Utah has waived the right to select lands for highway rights-of-way or material sites as provided by the Federal Power Act of June 10, 1920, 16 U.S.C. 818.

3. At 10 a.m., on February 20, 1981, the public lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. The public lands have been open to applications and offers under the mineral leasing laws, and to location under the United States mining laws subject to the provisions of the Act of August 11, 1955 (69 Stat. 682; 30 U.S.C. 621) with the exception of Section 1, lots 2, 3, SW¼NE¼, SE¼NW¼, E½SW¼, W½SE¼, SE¼SE¼; Section 12, N½NE¼, T. 3 S., R. 20 E., which are closed to mining location and mineral leasing by a Water Supply Withdrawal for the City of Vernal, Utah, and SW¼NW¼, NW¼SW¼ Section 27, and the S½NE¼ Section 34, T. 3 S., R. 21 E., which are closed to mining location by a Bureau of Reclamation (now the Water and Power Resources Service) withdrawal.

Inquiries concerning the lands should be addressed to the Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, University Club Building, 136 East South Temple, Salt Lake City, Utah 84111.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81–2513 Filed 1–22–81; 8:45 am]

BILLING CODE 4310–84–M

43 CFR Public Land Order 5827

[NM–32915]

New Mexico; Revocation of Public Land Order No. 656 Sacramento Peak Upper Air Research Site

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a public land order which withdrew 53,654 acres of land in the Lincoln National Forest for the Air Force for the operation of the Sacramento Peak Upper Air Research Site. The lands will be restored to National Forest status.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Stella Gonzales, New Mexico State Office, 505–988–6211.

By virtue of the authority contained in Section 204 of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 656 of August 15, 1950, which withdrew the following described lands within the Lincoln National Forest for use of the Department of the Air Force in connection with a solar observatory is hereby revoked in its entirety:

New Mexico Principal Meridian

T. 17 S., R. 10 E., (unsurveyed),
Sec. 1, SE¼SE¼;
Sec. 11, SE¼SE¼;
Sec. 12, E½, SE¼NW¼, and SW¼;
Sec. 13;
Sec. 14, E½, and E½SW¼;
Sec. 22, SE¼SE¼;
Secs. 23, 24, 25 and 26;
Sec. 27, E½E½;
Sec. 34, E½E½;
Secs. 35 and 36.
T. 18 S., R. 10 E., (unsurveyed),
Secs. 1 and 2;
Sec. 3, E½NE¼;
Sec. 11, E½, E½NW¼ and NW¼NW¼;
Sec. 12;
Sec. 13, N½, N½SW¼, SE¼SW¼ and SE¼;
Sec. 14, E½NE¼;
Sec. 24, N½NE¼.
T. 17 S., R. 11 E., (partly unsurveyed),
Sec. 1, lots 7, 8, 9, 10, W½SE¼ and SW¼;
Sec. 2, lot 4, S½N½ and S½;
Secs. 3 and 4;
Sec. 5, lots 1, 2, S½NE¼, S½NW¼ and S½;
Sec. 6, NE¼NE¼, NE¼SW¼, S½SW¼ and SE¼;
Secs. 7 to 36, inclusive.
T. 18 S., R. 11 E.,
Secs. 1 to 15, inclusive;
Secs. 17 and 18;
Sec. 19, N½ and N½SE¼;
Secs. 20, 21 and 22;
Sec. 23, N½, N½S½, S½SW¼ and SW¼SE¼;
Sec. 24, N½NE¼, SW¼NE¼, NW¼ and NW¼SW¼;
Sec. 27, NW¼NE¼ and N½NW¼;
Sec. 28, N½N½.
T. 17 S., R. 12 E.,
Sec. 7, lots 1, 2, 3, 4, SE¼NW¼, E½SW¼, W½SE¼ and SE¼SE¼;
Sec. 17, SW¼NW¼ and SW¼;
Secs. 18 and 19;
Sec. 20, W½NE¼, W½, W½SE¼ and SE¼SE¼;
Secs. 29, 30, 31 and 32.
T. 18 S., R. 12 E.,
Sec. 5, lots 1, 2, 3, 4, W½SE¼ and SW¼;
Secs. 6 and 7;
Sec. 8, NW¼ and W½SW¼;
Sec. 18, lots 1 to 11, inclusive, NE¼NE¼ and W½NE¼.

The areas described aggregate approximately 53,654 acres in Otero County.

2. This order shall take precedence over but not otherwise affect (1) Executive Order No. 2633 of June 6, 1917, transferring the lands of the Alamo

National Forest to the Lincoln National Forest: (2) The order of the Secretary of the Interior of December 9, 1918, withdrawing certain lands for stock driveway purposes, so far as such orders affect any of the above-described lands: (3) Public Land Order 4187 of April 6, 1967, which added the following described 440 acres in Otero County to the Lincoln National Forest:

New Mexico Principal Meridian

T. 18 S., R. 11 E.,
Sec. 8, E½SW¼ and N½SE¼;
Sec. 21, N½SE¼ and SW¼SE¼;
Sec. 27, W½SE¼ and SE¼SE¼;
Sec. 34, NE¼NE¼.

(4) Public Land Order 4573 of January 16, 1969, which added the following described 1,928.49 acres in Otero County to the Lincoln National Forest:

New Mexico Principal Meridian

T. 18 S., R. 11 E.,
Sec. 7, lots 3 and 4, E½SW¼ and SE¼;
Sec. 9, S½;
Sec. 36.
T. 19 S., R. 11 E.,
Sec. 4, lots 1 and 2, S½NE¼ and SE¼;
Sec. 9, N½.

(5) Public Land Order 4577 of January 17, 1969, which added the following described 160 acres in Otero County to the Lincoln National Forest:

New Mexico Principal Meridian

T. 17 S., R. 11 E.,
Sec. 21, S½NE¼ and N½SE¼.

3. At 10 a.m., on February 20, 1981, the lands shall be open to such forms of disposition as may by law be made of national forest lands. The lands revert to national forest status and management as established by the Proclamations of November 6, 1906, and April 16, 1908, withdrawing lands for national forest purposes.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87501.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2496 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

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43 CFR Public Land Order 5828

[CA-3367]

California; Power Site Restoration No. 753, Partial Revocation of Power Site Reserve No. 329; Power Site Cancellation No. 339, Partial Cancellation of Power Site Classification No. 178

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order will partially revoke Power Site Reserve No. 329 and partially cancel Power Site Classification No. 178 as to lands in the Rubicon River and South Fork American River Basin in El Dorado County, California. This action is required in order to permit an exchange between the Forest Service and the Michigan-California Lumber Company.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Marie Getsman, California State Office, 916-484-4431.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, and Section 24 of the Federal Power Act of June 10, 1920, as amended, 41 Stat. 1075, 16 U.S.C. 818, and pursuant to the determination of the Federal Power Commission (now the Federal Energy Regulatory Commission) in DA-1123, California, it is ordered as follows:

1. The Executive Order of December 31, 1912, creating Power Site Reserve No. 329, is hereby revoked so far as it affects the following described land:

El Dorado National Forest

Mount Diablo Meridian

T. 13 N., R. 14 E.,
Sec. 28, SW¼NE¼.

The area described contains 40 acres in El Dorado County.

2. The Departmental Order of May 6, 1927, creating Power Site Classification No. 178 is hereby canceled and revoked insofar as it affects the following described lands:

Mount Diablo Meridian

T. 13 N., R. 14 E.,
Sec. 23, NE¼SE¼ and S½SE¼;
Sec. 24, S½;
Sec. 25, NW¼NE¼ and N½NW¼;
Sec. 26, NW¼SW¼, NE¼, and E½NW¼;
Sec. 28, N½NE¼ and E½NW¼.

The area described aggregates 1,000 acres in El Dorado County.

3. The State of California has waived its preference right of application for highway rights-of-way or material sites as provided by Section 24 of the Federal Power Act of June 10, 1920, as amended, 16 U.S.C. 818.

4. Effective immediately, the following described national forest lands included in Power Site Classification No. 178 shall be open to applications for the disposal of the lands under the General Exchange Act of March 20, 1922, 42 Stat. 465, as amended, 16 U.S.C. 485, subject to valid existing rights, the provisions of existing withdrawals and the requirements of applicable law:

Mount Diablo Meridian

T. 13 N., R. 14 E.,
Sec. 25, NW¼NE¼ and N½NW¼;
Sec. 26, NW¼SW¼.

5. At 10 a.m., on February 20, 1981, the following described lands, included in Power Site Classification No. 178 and embraced within the Eldorado National Forest, shall be open to such forms of disposition as may be made of national forest lands:

Mount Diablo Meridian

T. 13 N., R. 14 E.,
Sec. 23, NE¼SE¼ and S½SE¼;
Sec. 24, S½;
Sec. 26, NE¼ and E½NW¼;
Sec. 28, N½NE¼ and E½NW¼.

6. The lands in Power Site Classification No. 178 have been open to applications and offers under the mineral leasing laws, and to location under the United States mining laws, subject to provisions of the Act of August 11, 1955 (69 Stat. 682; 30 U.S.C. 621).

7. The land in Power Site Reserve No. 329 identified in Paragraph 1 is privately owned and not subject to disposition under the public land laws.

Inquiries concerning the lands should be addressed to the Bureau of Land Management, Room E-2841 Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2496 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

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43 CFR Public Land Order 5829

[ORE-06587]

Oregon; Revocation of Public Land Order No. 2964

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a public land order which withdrew 140 acres of lands for protection of recreational values. This action permits restoration of the lands to operation of the mining laws provided appropriate rules and regulations are issued to allow mineral location on lands conveyed pursuant to the Recreation and Public Purposes Act.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

By virtue of the authority contained in Section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat.

2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 2964 of March 18, 1963, which withdrew the following described lands for protection of recreational values, is hereby revoked:

Willamette Meridian

T. 2 N., R. 41 E.,
Sec. 19, NE¼SE¼, E½NW¼SE¼, NE¼SW¼SE¼, and S½SW¼SE¼;
Sec. 20, W½NW¼SW¼;
Sec. 30, N½NW¼NE¼ and SE¼NW¼NE¼.

The area described contains 140 acres in Wallowa County.

2. The surface estate of the land has been conveyed from United States ownership pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended (43 U.S.C. 869; 869–4); therefore, unless and until appropriate rules and regulations are issued, the lands will not be open to location under the United States mining laws. The lands have been and continue to be open to applications and offers under the mineral leasing laws.

Inquiries concerning the land should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2505 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5830

[CA-7030]

California; Revocation of Townsite Withdrawal

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This action revokes an order which withdrew public lands for townsite purposes. The lands will be restored to the operation of the public land laws generally and to location under the United States mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Stephen D. Padula, California State Office, 914—484–4431.

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

1. Executive order No. 4516 of September 28, 1926, which reserved the following described lands for townsite purposes, is hereby revoked:

San Bernardino Meridian

T. 16 S., R. 11 E.,
Sec. 8, N½NE¼.

The area described contains 80.00 acres in Imperial County, California.

2. At 10 a.m., on February 20, 1981, the lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10 a.m., on February 20, 1981, the lands will open to location under the United States mining laws. They have been open to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the Bureau of Land Management, Room E–2841 Federal Office Building, 2800 Cottage Way, Sacramento, California 95825.

Guy R. Martin,

Assistant Secretary of the Interior

January 15, 1981.

[FR Doc. 81-2487 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5831

[ORE-03497]

Oregon; Revocation of Public Land Order No. 1165

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a public land order which withdrew 120 acres of lands as a material site for use by the Bureau of Land Management. This action will restore the lands to operation of the public land laws generally, including the mining and mineral leasing laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughn, Jr., Oregon State Office, 503–231–6905.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 1165 of June 13, 1955, which withdrew the following described public lands for use by the Bureau of Land Management as a material site is hereby revoked:

Willamette Meridian

Revested Oregon and California Railroad Grant Land

T. 15 S., R. 7 W.,
Sec. 18, SE¼NE¼ and N½SE¼

The area described contains 120 acres in Lane County.

2. At 10 a.m., on February 20, 1981, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law, the lands will be open to such forms of disposition as may by law be made of revested Oregon and California Railroad Grant Land.

3. At 10 a.m., on February 20, 1981, the lands will open to location under the United States mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior

January 15, 1981.

[FR Doc. 81-2504 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5832

[Nev-051793]

Nevada; Partial Revocation and Modification of Public Land Order No. 1175

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes 80 acres of a 120-acre withdrawal of lands used as part of the Nellis Air Force Base in Nevada. The lands will be open to operation of the public land laws including the mining and mineral leasing laws. Public Land Order No. 1175 is modified to continue withdrawal of the remaining 40 acres for a period of 20 years.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Vienna Wolder, Nevada State Office, 702–784–5703.

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

1. Public Land Order No. 1175 of June 24, 1955, which withdrew 120 acres of public land for use of the Department of the Air Force, is hereby revoked so far as it affects the following described lands:

T. 20 S., R. 62 E.,
Sec. 14, W½NW¼.

The area described contains 80 acres in Clark County.

2. At 10 a.m. on February 20, 1981, the lands described above shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10 a.m. on February 20, 1981, the lands described above will be open to location and entry under the United States mining laws and to applications and offers under the mineral leasing laws.

4. Public Land Order No. 1175 of June 24, 1955, which withdrew the public lands described below is hereby modified to continue in full force and effect for a period of 20 years from the date of this order.

Mount Diablo Meridian

T. 19 S., R. 62 E.,
Sec. 35, SE¼SW¼.

The area described contains 40 acres in Clark County.

Inquiries concerning the land should be addressed to Chief, Division of Technical Services, Nevada State Office, Branch of Lands and Minerals Operations, 300 Booth Street, P.O. Box 12000, Reno, Nevada 89520.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2494 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5833

[OR-598]

Oregon; Partial Revocation of Public Land Order No. 4319

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a public land order in part as to 46.53 acres of lands withdrawn as a seed production area for use by the Forest Service. This action will restore the lands to operation of the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

By virtue of the authority contained in Section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751, 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 4319 of November 14, 1967, which withdrew certain lands for use by the Forest Service as a seed production area is hereby revoked so far as it affects the following described lands:

Willamette Meridian

Siskiyou National Forest

Waldo Seed Production Area

T. 41 S., R. 8 W.,
Sec. 4, S½ of Lot 4 and N½SW¼NW¼;
Sec. 5, E½NE¼SE¼NE¼.

The area described contains 46.53 acres in Josephine County, Oregon.

2. At 10 a.m., on February 20, 1981, the lands will be open to location under the United States mining laws. The lands have been and continue to be open to applications and offers under the mineral leasing laws and to such forms of disposition as may by law be made of national forest lands.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2499 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5834

[OR-18994-A]

Oregon; Partial Revocation of Public Water Reserve No. 118

AGENCY: Bureau of Land Mangement, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive Order in part as to 160 acres of lands withdrawn as a public water reserve. This action will restore the lands to operation of the public land laws generally, including nonmetalliferous mineral location under the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan Jr., Oregon State Office, 503-231-6905.

By virture of the authority contained in Section 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. The Executive Order of February 13, 1929, which withdrew certain lands for public water reserve purposes is hereby revoked so far as it affects the following described lands:

Willamette Meridian

Public Water Reserve No. 118

T. 18 S., R. 37 E.,
Sec. 29, W½NE¼, SW¼SW¼ and SW¼SE¼.

The area described contains 160 acres in Malheur County.

2. At 10 a.m., on February 20, 1981, the public lands described above shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10 a.m., on February 20, 1981, the public lands described above will be open to nonmetalliferous mineral location under the United States mining laws. The lands have been and continue to be open to metalliferous mineral location under the United States mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2501 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5835

[A-9275]

Arizona; Withdrawal of Forest Lands for Research Area

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws 355 acres of forest lands from operation of the mining laws for a period of twenty years.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mario L. Lopez, Arizona State Office, (602) 261-4774.

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

1. Subject to valid existing rights, the following described national forest land is hereby withdrawn from appropriation under the mining laws (30 U.S.C., Ch. 2), but not from leasing under the mineral

leasing laws, and reserved as a research natural area:

Gila and Salt River Meridian

Coronado National Forest

Elgin Research Natural Area.

T. 21 S., R. 18 E.
Sec. 26, W½W½E¼NE¼, W½NE¼, E½W½, E½SE¼SW¼SW¼, W½W½NE¼SE¼, and W½SE¼.

The areas described aggregate 355 acres in Santa Cruz County.

2. The withdrawal made by this order does not alter the applicability of those public laws governing the use of the national forest lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal shall remain in effect for a period of 20 years from the date of this order.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2485 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5836

[M-41683]

Montana; Partial Revocation of Air Navigation Site Withdrawal

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order restores 40 acres of public land to operation of the public land laws, including the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Dan Stark, Montana State Office 406-657-6291.

By virtue of the authority contained in Sec. 204 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751 (43 U.S.C. 1714), it is ordered as follows:

1. Air Navigation Site Withdrawal No. 103 of January 31, 1936, is hereby revoked as to the following described land:

Principal Meridian

T. 9 N., R. 3 W.
Sec. 25, SW¼NW¼

The area described contains 40 acres in Jefferson County.

2. At 10 a.m. on February 20, 1981, the land shall be open to operation of the public land laws generally, subject to valid existing rights, the privisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter, shall be considered in the order of filing.

3. The land will be open to location under the United States mining laws at 10 a.m. on February 20, 1981. They have been open to applications and offers under the mineral leasing laws.

Inquiries concerning the land should be addressed to the Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, P.O. Box 30157, Billings, Montana 59107.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2490 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5837

[M 057841; formerly M 028853]

Montana; Revocation of Public Land Order No. 3040

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order will revoke Public Land Order 3040 which withdrew 320 acres of national forest lands from the operation of the mineral leasing laws for protection of a proposed airport.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Dan Stark, Montana State Office, 406-657-6291.

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

1. Public Land Order 3040 dated April 26, 1963, withdrawing the following described land from leasing under the provisions of the Mineral Leasing Act of 1920, as amended and supplemented, is hereby revoked in its entirety:

Principal Meridian

Gallatin National Forest

T. 13 S., R. 5 E.,
Sec. 16: E½

The area described contains 320 acres in Gallatin County.

2. At 10 a.m. on February 20, 1981, the land shall be open to applications and offers under the mineral leasing laws. The lands remain open to such forms of disposition as may by law be made of national forest lands.

Inquiries concerning the land should be addressed to the Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, P.O. Box 30157, Billings, Montana 59107.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2492 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5838

[ORE-02896]

Oregon; Revocation of Public Land Order No. 1009

AGENCY: Bureau of Land Management, Interior.

ACTION: Public land order.

SUMMARY: This order revokes a public land order which withdrew 320 acres of lands as a material site for use by the Bureau of Land Management. This action will restore the lands to operation of the public land laws generally, including the mining and mineral leasing laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 1009 of September 14, 1954, which withdrew the following described public lands for use by the Bureau of Land Management as a material site is hereby revoked:

Willamette Meridian

Revested Oregon and California Railroad Grant Land

T. 19 S., R. 9 W.,
Sec. 23, N½.

The area described contains 320 acres in Douglas County, Oregon.

2. At 10 a.m., on February 20, 1981, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law, the lands will be open to such forms of disposition as may by law be made of revested Oregon and California Railroad Grant Land.

3. At 10 a.m., on February 20, 1981, the lands will be open to location under the United States mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director,

Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2503 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5839

[ORE 03568-B]

Oregon; Partial Revocation of Public Land Order No. 1867

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes a public land order as to 1,635 acres of land withdrawn as a road and streamside zone for use by the Forest Service. This action will restore the lands to such forms of disposition as may by law be made of national forest lands.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 1867 of May 28, 1959, which withdrew certain lands for use by the Forest Service as a road and streamside zone, is hereby revoked so far as it affects the following described lands:

Willamette Meridian

Umpqua National Forest

Steamboat Creek Road and Streamside Zone

T. 25 S., R. 1 E.,
- Sec. 24, E½SE¼NE¼, S½S½, and NE¼SE¼;
- Sec. 25, Lots 1 and 2, and NE¼NW¼; (formerly N½NW¼, and SW¼NW¼)
- Sec. 26, S½N½N½ and N½S½N½;
- Sec. 27, S½SW¼NE¼, SE¼NE¼, N½S½, and N½S½SW¼;
- Sec. 28, SE¼SE¼SW¼ and S½SE¼;
- Sec. 31, NE¼SE¼ and S½SE¼;
- Sec. 32, S½S½N½ and N½S½;
- Sec. 33, NW¼NE¼, NE¼NW¼, S½NW¼, and N½N½SW¼.

Except those portions of land described as follows: (1) A strip of land of variable width located between 200 feet north and west of the centerline of Steamboat Creek Road No. 232 and 330 feet south and east of the centerline of Steamboat Creek through the preceding identified subdivisions, and (2) those strips of land located within 330 feet on either side of the centerlines of Deep Creek, Singe Creek, and Canton Creek through the preceding identified subdivisions.

T. 24 S., R. 2 E.,
- Sec. 8, S½SE¼NE¼, SE¼SW¼, N½SE¼, and SW¼SE¼;
- Sec. 17, SW¼NE¼, NE¼NW¼, W½E½SW¼, W½SW¼, and S½NW¼;
- Sec. 20, W½E½NW¼, E½W½NW¼, E½SW¼, and W½SW¼SE¼;
- Sec. 29, W½W½E½ and E½E½W½;
- Sec. 32, NW¼NE¼, S½NE¼, and E½SE¼.

Except those portions of land described as follows: (1) A strip of land of variable width located between 200 feet north and west or south and west of the centerline of Steamboat Creek Road No. 232 and 330 feet north and east or south and east of the centerline of Steamboat Creek through the preceding identified subdivisions, and (2) those strips of land located within 330 feet on either side of the centerlines of Cedar Creek, Buster Creek, Longs Creek, Little Rock Creek, and City Creek through the preceding identified subdivisions.

T. 25 S., R. 2 E.,
- Sec. 5, E½ of Lot 8, S½SW¼NE¼, SE¼NE¼, E½SW¼, and NW¼SE¼;
- Sec. 7, SE¼;
- Sec. 8, W½NE¼NW¼, W½NW¼, and NW¼SW¼;
- Sec. 18, E½;
- Sec. 19, S½ of Lot 1, N½ of Lot 2, and NW¼NE¼.

Except those portions of land described as follows: (1) A strip of land of variable width located between 200 feet north and west or south and east of the centerline of Steamboat Creek Road No. 232 and 330 feet south and east or north and west of the centerline of Steamboat Creek through the preceding identified subdivisions, and (2) those strips of land located within 330 feet on either side of the centerlines of Reynolds Creek, Johnson Creek, and Big Bend Creek through the preceding identified subdivisions.

The areas described aggregate, after making the aforesaid exceptions, approximately 1,635 acres in Douglas and Lane Counties, Oregon.

2. At 10 a.m., on February 20, 1981, the lands will be open to such forms of disposition as may by law be made of national forest lands.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2498 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5840

[New Mexico 39656]

New Mexico; Partial Cancellation of Power Site Classification No. 228

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes Power Site Classification No. 228 insofar as it affects 1,200 acres of public and nonpublic lands in Dona Ana County. The public lands will be restored to operation of the public land laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Stella Gonzales, New Mexico State Office, 505-988-6211.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, and pursuant to the determination by the Federal Energy Regulatory Commission in DA-89-New Mexico, it is ordered as follows:

1. Power Site Classification No. 228 dated May 16, 1929, is hereby cancelled insofar as it pertains to the following described lands:

New Mexico Principal Meridian

T. 25 S., R. 3 E.,
- Sec. 21, NW¼NW¼, S½NW¼, NE¼SW¼, NE¼SE¼ and SW¼SE¼;
- Sec. 28, SE¼NE¼ and E½SE¼;
- Sec. 34, NW¼, NE¼SW¼ and W½SE¼.

T. 26 S., R. 3 E.,
- Sec. 3, N½NE¼ and SE¼NE¼;
- Sec. 11, N½NW¼, SE¼NW¼, NE¼SW¼ and W½SE¼;
- Sec. 14, W½E½;
- Sec. 23, NW¼NE¼.

The areas described contain 1,200 acres of public and nonpublic lands in Dona Ana County.

2. The State of New Mexico has waived its preference right for highway rights-of-way or material sites as provided by the Federal Power Act of June 10, 1920, 16 U.S.C. 818.

3. At 10 a.m., on February 20, 1981, the public lands shall be open to operation of the public land law generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

The lands have been open to applications and offers under the mineral leasing laws, and to location under the United States mining laws subject to the provisions of the Act of August 11, 1955, 69 Stat. 682; 30 U.S.C. 621.

Inquiries concerning the lands should be addressed to the Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87501.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2505 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5841

[NM 35710]

New Mexico; Revocation of Public Land Order No. 1438

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order will restore 1,360 acres of land to national forest status and open them to such forms of disposition as may by law be made of national forest lands.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Stella Gonzales, New Mexico State Office 505–988–6211.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 1438 of June 28, 1957, reserving lands within the Lincoln National Forest for use of the Department of the Air Force in the development of a solar furnace for experimental purposes is hereby revoked in its entirety:

New Mexico Principal Meridian

T. 15 S., R. 12 E.,
Sec. 23, SE¼,
Sec. 24, S½;
Sec. 25, W½, NE¼, and N½SE¼;
Sec. 26, E½.

The areas described aggregate 1,360 acres in Otero County.

Their lands revert to national forest status and management as established by the Proclamation of April 24, 1907.

2. At 10 a.m., on February 20, 1981, the lands shall be open to such forms of disposition as may by law be made of national forest lands.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2497 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5842

[I-15235]

Idaho; Powersite Restoration No. 759; Partial Revocation of Powersite Reserve No. 241

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes an Executive Order which withdrew lands for powersite purposes. It has been determined that these lands will not be developed for power purposes. Eighty acres of public land will be restored to operation of the public land laws. The remaining 760 acres are privately owned lands.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Larry Lievsay, Idaho State Office 208–334–1735.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, and pursuant to the determination of the Federal Energy Regulatory Commission in DA–623–Idaho, it is ordered as follows:

1. The Executive Order of January 23, 1912, creating Powersite Reserve No. 241 is hereby revoked so far as it affects the following described lands:

Boise Meridian

T. 7 S., R. 42 E.
Sec. 11, SE¼SE¼;
Sec. 12, SW¼SW¼;
Sec. 13, NW¼NE¼, SE¼NE¼, N½NW¼;
Sec. 14, NE¼NE¼, SW¼NE¼, S½NW¼, N½SW¼ and NW¼SE¼;
Sec. 15, E½SE¼;
Sec. 22, NE¼;
Sec. 23, W½NW¼.

The area described contains 840 acres of public and nonpublic lands in Caribou County. The 80 acres of public land is described as Section 14, SW¼NE¼ and SW¼NW¼.

2. The State of Idaho has waived its right to select lands for highway rights-of-way or material sites as provided by the Federal Power Act of June 10, 1920, 16 U.S.C. 818.

3. At 10 a.m. on February 20, 1981, the public lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

The lands continue to be open to applications and offers under the mineral leasing laws, and to location under the U.S. mining laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, Federal Building, Box 042, 550 W. Fort Street, Boise, Idaho 83724.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2489 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5843

[OR 20415]

Oregon; Revocation of Recreational Withdrawal No. 39

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a Secretarial order which withdrew 200 acres of lands for protection of recreational values. This action permits restoration of the lands to operation of the mining laws provided appropriate rules and regulations are issued to allow mineral location on lands conveyed pursuant to the Recreation and Public Purposes Act.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office 503–231–6905.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of October 21, 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. The Secretarial Order of October 4, 1930, which withdrew the following described lands for protection of recreational values is hereby revoked:

Willamette Meridian

T. 8 S., R. 1 E.,
Sec. 11, W½W½, NE¼SE¼.

The areas described aggregate 200 acres in Marion County, Oregon.

2. The surface estate of the lands has been conveyed from United States ownership pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended (43 U.S.C. 869; 869–4); therefore, unless and until appropriate rules and regulations are issued, the lands will not be open to location under the United States mining laws. The lands have been and continue to be open to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2506 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5844

[I-12546]

Idaho; Partial Powersite Cancellation No. 351; Revocation of Powersite Classification No. 390

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order will revoke Powersite Classification No. 390. It has been determined that these lands will not be developed for power purposes but will be restored to the operation of the public land laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Larry R. Lievsay, 208-334-1735.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, and pursuant to the determination of the Federal Energy Regulatory Commission in DA-619-Idaho, it is ordered as follows:

1. The Executive Order of July 26, 1948, creating Powersite Classification No. 390, is hereby revoked so far as it affects the following described lands:

Boise Meridian

T. 8 S., R. 13 E.,
Sec. 12, W½NW¼.

The area described contains 80 acres in Twin Falls County.

2. The State of Idaho has waived its right to select lands for highway rights-of-way or material sites as provided by the Federal Power Act of June 10, 1920, 16 U.S.C. 818.

3. At 10 a.m. on February 20, 1981, the above described public lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable laws. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

4. The public lands in this order have been and continue to be open to applications and offers under the mineral leasing laws, and to location under the U.S. mining laws.

Inquiries concerning the public lands should be addressed to the State Director, Idaho State Office, Box 042, Federal Building, 550 W. Fort Street, Boise, Idaho 83724.

Guy R. Martin,
Assistant Secretary of the Interior.
January 15, 1981.

[FR Doc. 81-2488 Filed 1-22-81; 8:45 am]
BILLING CODE 4310-84-M

43 CFR Public Land Order 5845

[OR 20231-A]

Oregon; Partial Revocation of Public Water Reserve No. 84

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive Order in part as to 40 acres of lands withdrawn as a public water reserve. This action will restore the lands to operation of the public land laws generally, including nonmetalliferous location under the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office 503-231-6905.

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

1. The Executive Order of June 7, 1922, which withdrew certain lands for public water reserve purposes is hereby revoked so far as it affects the following described lands.

Willamette Meridian

T. 21 S., R. 22 E.,
Sec. 14, E½NE¼NW¼, W½NW¼NW¼.

The area described contains 40 acres in Crook County.

2. At 10 a.m., on February 20, 1981, the lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10 a.m., on February 20, 1981, the lands will be open to nonmetalliferous mineral location under the United States mining laws. The lands have been and continue to be open to metalliferous mineral location under the mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the land should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,
Assistant Secretary of the Interior.
January 15, 1981.

[FR Doc. 81-2500 Filed 1-22-81; 8:45 am]
BILLING CODE 4310-84-M

43 CFR Public Land Order 5846

[OR 20695]

Oregon; Revocation of Executive Order No. 4096

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes an Executive order which withdrew 123.56 acres for classification in aid of legislation. This action will restore the lands to operation of the public land laws generally, including nonmetalliferous mineral location under the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

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

1. Executive Order No. 4096 of October 29, 1924, which withdrew the following described public lands for classification in aid of legislation, is hereby revoked:

Willamette Meridian

Revested Oregon and California Railroad Grant Land

T. 16 S., R. 3 E.,
Sec. 31, lots 7, 8, 10, and 14 (formerly lot 9).

The area described contains 123.56 acres in Lane County.

2. At 10 a.m., on February 20, 1981, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law, including Section 24 of the Federal Power Act, the lands will be open to such forms of disposition as may by law be made of revested Oregon and California Railroad Grant Land.

3. At 10 a.m., on February 20, 1981, the lands will be open to nonmetalliferous mineral location under the United States mining laws. The lands have been and continue to be open to metalliferous mineral location under the United States mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director,

Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2502 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5847

[OR 20413]

Oregon; Revocation of Recreational Withdrawal No. 55

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a Secretarial Order affecting 200 acres of land withdrawn for recreational purposes. The lands remain segregated from the public land laws generally, including the mining and mineral leasing laws by another existing withdrawal.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

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

1. The Secretarial Order of November 18, 1933, which withdrew the following described lands for recreational purposes is hereby revoked:

Willamette Meridian

Recreational Withdrawal No. 55

T. 11 S., R. 26 E.,
Sec. 20, SE¼SW¼ and S½SE¼;
Sec. 29, N½NE¼.

The area described contains 200 acres in Grant County.

2. The lands described above remain segregated from the public land laws generally, including the mining laws and mineral leasing laws by the John Day Fossil Beds National Monument withdrawal, OR 13939.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2507 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5848

[M-35197]

Montana; Revocation of Public Land Order No. 1258

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This document revokes Public Land Order No. 1258 of November 29, 1955, which withdrew 75 acres of public land for use of the Forest Service, Department of Agriculture. This action will restore the public lands to operation of the public land laws generally, including the mining laws and the mineral leasing laws. They have been open to applications and offers for oil and gas under the mineral leasing laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Dan Stark, Montana State Office 406-657-6291.

By virtue of the authority contained in Section 204(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. Public Land Order No. 1258 dated November 29, 1955, which withdrew and reserved the following described public lands for use of the Forest Service, Department of Agriculture, as the Sheep Creek Administrative Site is hereby revoked:

Principal Meridian, Montana

T. 15 S., R. 10 W.,
Sec. 9, NE¼SE¼NW¼, W½SE¼NW¼, W½SE¼SE¼NW¼, and NE¼SW¼.

The area described contains 75 acres in Beaverhead County.

2. At 10 a.m. on February 20, 1981, the lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. The lands will be open to location under the United States mining laws and to the mineral leasing laws, except for oil and gas, at 10 a.m. on February 20, 1981. They have been and continue to be open to applications and offers for oil and gas under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, Granite Tower, 222 N. 32nd St., P.O. Box 30157, Billings, Montana 59107.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2491 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5849

[U-47671]

Utah; Revocation of Public Land Order No. 1109

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes Public Land Order No. 1109 which withdrew lands for protection of the Salt Lake City Watershed. The lands will be open to operation of the public land laws generally, including the mining and mineral leasing laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Ken Latimer, Utah State Office, 801-524-4245.

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

1. Public Land Order No. 1109 of March 31, 1955, which withdrew lands for protection of the Salt Lake City Watershed is hereby revoked:

Salt Lake Meridian

Sec. 10, NE¼.

Containing 160 acres in Salt Lake and Summit Counties.

2. At 10 a.m., on February 20, 1981, the public lands described above shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m. on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. The public lands described above will be open to applications and offers under the mineral leasing laws and to location under the United States mining laws at 10 a.m. on February 20, 1981.

Inquiries concerning the lands should be addressed to the Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, University Club

Building, 136 East South Temple, Salt Lake City, Utah 84111.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2511 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5850

[U-13501]

Utah; Partial Revocation of Reclamation Project Withdrawals

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order will revoke a reclamation withdrawal as to approximately 34,265 acres. The public lands within the Dinosaur National Monument will not be affected by this order. Approximately 8,360 acres are situated outside the National Monument. These lands will be restored to the operation of the public land laws including the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Ken Latimer, 801-524-4245.

By virtue of the authority contained in Section 204(a) of the Act of October 21, 1976, 90 Stat. 2751; 43 U.S.C. 1714, it is ordered as follows:

1. The Secretary of the Interior's First Form Reclamation Withdrawal Order, dated May 6, 1942, and the Secretary's two First Form Reclamation Withdrawal Orders dated July 13, 1943, for the Split Mountain Reservoir Site, Colorado River Storage Project, are hereby revoked so far as they affect the following described lands:

Salt Lake Meridian

T. 4 S., R. 23 E.,
Secs. 24, 25, and 26;
Sec. 27, lot 2, NE¼, E½NW¼, N½S½;
Sec. 28, lot 1, S½N½, N½S½, S½SW¼, SW¼SE¼;
Sec. 33, lots 2, 7, 8, W½NE¼, NW¼, N½SW¼, NW¼SE¼;
Sec. 34, lots 5, 6, and 7;
Sec. 35, lot 7, SE¼NE¼.
T. 5 S., R. 23 E.,
Sec. 1, lots 1, 2, 3, 5, 6, 7, SW¼NE¼, SE¼NW¼, E½SW¼, W½SE¼ (formerly lots 1, 2, 3, S½NE¼, SE¼NW¼, E½SW¼, SE¼;
Sec. 3, lots 1, 2, 3, S½NE¼, SE¼NW¼, SE¼;
Sec. 4, lots 4, 5, 6, SW¼NW¼, NW¼SW¼ (formerly lot 4, SW¼NW¼, NW¼SW¼, SE¼SE¼);
Sec. 10, NE¼SW¼, NW¼SE¼;
Sec. 11, lot 1, S½NE¼, NW¼NE¼, NW¼, N½SW¼, SE¼SW¼, SE¼ (formerly N½, N½S½, SE¼SW¼, S½SE¼);
Secs. 12, 13, and 14;
Sec. 15, E½NE¼, SE¼SW¼, SE¼.
T. 3 S., R. 24 E.,
Sec. 25 and 35.
T. 4 S., R. 24 E.,
Sec. 1, lots 3, 4, 7, 8, 10, 11, SW¼NW¼, S½SE¼;
Sec. 2, lot 5, SW¼, N½SE¼, SW¼SE¼;
Sec. 3, lots 1 and 4, S½N½, S½;
Secs. 10 to 23 inclusive, 29, 30, 31, 33.
T. 5 S., R. 24 E.,
Sec. 4;
Sec. 5, lots, 4, 5, 6, 9 to 12 inclusive, NW¼SW¼, SE¼SW¼;
Secs. 6 to 9 inclusive, and 18.
T. 3 S., R. 25 E.,
Sec. 22, S½NE¼, W½, SE¼;
Secs. 23 to 29 inclusive;
Sec. 30, lots 1 to 8 inclusive, E½NE¼, W½NW¼, N½SE¼;
Sec. 31, lots 1 to 8, 12 to 16, inclusive, SE¼NE¼, S½SW¼;
Secs. 32 to 35 inclusive.
T. 4 S., R. 25 E.,
Secs. 4, 5, and 6.

The areas described aggregate 34,264.87 acres in Uintah County.

2. The above described lands are mainly within the exterior boundaries of the Dinosaur National Monument as established by Presidential Proclamation No. 1313 of October 14, 1915, as enlarged by Presidential Proclamation No. 2290 of July 14, 1938, and as revised by the Act of September 8, 1960, 74 Stat. 857, and, therefore, are withdrawn from all forms of appropriation under the public land laws, including the mining laws and the mineral leasing laws.

3. The public lands described below, which are outside of the exterior boundaries of the Dinosaur National Monument, will be open to the operation of the public laws generally, including the U.S. mining laws, 30 U.S.C., Ch. 2, at 10 a.m., on February 20, 1981, subject to valid existing rights, existing withdrawals and segregation orders, and the requirements of applicable law. The lands have been and continue to be open to the filing of applications and offers under the mineral leasing laws.

Salt Lake Meridian

T. 4 S., R. 23 E.,
Sec. 28, S½NW¼, SW¼;
Sec. 33, lots 7, 8, NW¼, N½SW¼, NW¼SE¼;
Sec. 34, lots 5, 6, and 7.
T. 5 S., R. 23 E.,
Sec. 3, lots 1, 2, 3, S½NE¼, SE¼NW¼, SE¼;
Sec. 4, lots 4, 5, 6, SW¼NW¼, NW¼SW¼ (formerly lot 4, SW¼NW¼, NW¼SW¼, SE¼SE¼);
Sec. 10, NE¼SW¼, NW¼SE¼;
Sec. 11, lot 1, S½NE¼, NW¼NE¼, NW¼, N½SW¼, SE¼SW¼, SE¼ (formerly N½, N½S½, SE¼SW¼, S½SE¼);
Sec. 12, lots 3, 10, 11, 12, 13, 16, SW¼SW¼;
Secs. 13 and 14;
Sec. 15, E½NE¼, SE¼SW¼, SE¼.
T. 3 S., R. 24 E.,
Sec. 25, W½;
Sec. 35, N½.
T. 4 S., R. 24 E.,
Sec. 33, excluding that portion in the S½S½ within the Dinosaur National Monument.
T. 5 S., R. 24 E.,
Sec. 4, excluding that portion in the W½W½ within the Dinosaur National Monument;
Sec. 5, lot 12, excluding that portion within the Dinosaur National Monument;
Sec. 6, lots 3, 4, 8, 9, 12 to 15, incl., SE¼NW¼, E½SW¼;
Sec. 7;
Sec. 8, lots 1, 3, 5, 7, S½N½, S½;
Secs. 9 and 18.

The lands described aggregate approximately 8,359.69 acres in Uintah County.

Inquiries concerning the lands should be addressed to the State Director, Utah State Office, Bureau of Land Management, 136 East South Temple, Salt Lake City, Utah 84111.

Guy R. Martin,

Assistant Secretary of the Interior.

January 15, 1981.

[FR Doc. 81-2509 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

43 CFR Public Land Order 5851

[U-018045]

Utah; Revocation of Reclamation Project Withdrawal

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order partially revokes an order which withdrew lands for the Pack Creek Project. This action will restore 4,273.73 acres of public lands to operation of the public land laws, including the mining laws.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Ken Latimer, Utah State Office, 801-524-4245.

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

1. The Order of the Bureau of Reclamation (now Water Power and Resources Service) dated February 3, 1956, concurred in by the Bureau of Land Management on March 12, 1956, which withdrew lands for the Pack Creek Project, is hereby revoked in its entirety:

Salt Lake Meridian

T. 26 S., R. 21 E.,
Sec. 11, Lot 1;
Sec. 12, Lots 2, 3, 4, 6 and 12.
T. 26 S., R. 22 E.,

Sec. 3, S½N½, and S½;
Sec. 4, Lots 6 and 7, SE¼NE¼, and E½SE¼;
Sec. 5, Lots 10 and 11, and W½SE¼;
Sec. 8, Lots 1, 2, 3, and 5, and SW¼NE¼;
Sec. 9, Lots 1, 2, and 3, E½E½ (includes Lots 21 and 22 in SE¼SE¼);
Sec. 10, All;
Sec. 20, Lots 1, 2, 3, 4, 8, 9 and 89, W½NW¼, and SW¼SE¼.
T. 27 S., R. 23 E.,
Sec. 4, SW¼NE¼, S½NW¼, SW¼, and N½SE¼;
Sec. 5, Lots 5, 6, and 7, SW¼NE¼, SW¼, and W½SE¼;
Sec. 6, E½SW¼, and SE¼;
Sec. 9, NW¼NE¼, and N½NW¼;
Sec. 10, NW¼NW¼;
Sec. 14, All.

The areas described aggregates 4,273.73 acres in Grand and San Juan Counties.

2. At 10 a.m., on February 20, 1981, the public lands described above shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered in order of filing.

3. The public lands described above will be open to location under the United States mining laws at 10 a.m., on February 20, 1981. They have been and continue to be open to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the Chief, Branch of Lands and Minerals Operations, Bureau of Land Management, University Club Building, 136 East South Temple, Salt Lake City, Utah 84111.

Guy R. Martin,
Assistant Secretary of the Interior.
January 15, 1981.

[FR Doc. 81-2512 Filed 1-22-81; 8:45 am]
BILLING CODE 4310-84-M

43 CFR Public Land Order 5852

[OR-04919]

Oregon; Revocation of Stock Driveway Withdrawal

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order revokes a Bureau of Land Management order which withdrew public lands for use as a stock driveway. This action will restore the lands to operation of the public land laws generally.

EFFECTIVE DATE: February 20, 1981.

FOR FURTHER INFORMATION CONTACT: Champ C. Vaughan, Jr., Oregon State Office, 503-231-6905.

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

1. The Bureau of Land Management Order of August 21, 1956, which withdrew the following described public lands for a stock driveway is hereby revoked:

Willamette Meridian

T. 14 S., R. 14 E.,
Sec. 30, lots 3 and 4, and E½SW¼.
T. 15 S., R. 13 E.,
Sec. 1, lots 1 to 4, inclusive, S½N½, and S½;
Sec. 12, all;
Sec. 13, all;
Sec. 23, E½SE¼;
Sec. 24, NW¼, and NW¼SW¼;
Sec. 26, E½NE¼NW¼NE¼, SE¼NW¼NE¼, S½SW¼NW¼NE¼, SW¼NE¼, and SW¼;
Sec. 34, E½;
Sec. 35, W½W½.
T. 16 S., R. 13 E.,
Sec. 3, lots 1 to 4, inclusive, E½NE¼SW¼, and S½SW¼;
Sec. 4, lots 1 and 2, and SE¼;
Sec. 9, all;
Sec. 10, W½SW¼;
Sec. 15, W½;
Sec. 21, all;
Sec. 22, NW¼, and W½SW¼
Sec. 28, W½NE¼, NW¼, and S½;
Sec. 29, all;
Sec. 30, lots 1 to 4, inclusive, E½, and E½W½;
Sec. 31, lots 1 to 4, inclusive, E½, and E½W½;
Sec. 32, N½, and SW¼.
T. 17 S., R. 13 E.,
Sec. 6, lots 1 to 5, inclusive, S½NE¼, SE¼NW¼; and SE¼;
Sec. 7, NE¼NE¼;
Sec. 8, all.

The areas described aggregate 9,398.92 acres in Crook and Deschutes Counties.

2. At 10 a.m., on February 20, 1981, the lands shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 20, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. The lands have been and continue to be open to location under the United States mining laws and to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the State Director, Bureau of Land Management, P.O. Box 2965, Portland, Oregon 97208.

Guy R. Martin,
Assistant Secretary of the Interior.
January 15, 1981.

[FR Doc. 81-2508 Filed 1-22-81; 8:45 am]
BILLING CODE 4310-84-M

43 CFR Public Land Order 5853

[U-45066]

Utah; Partial Revocation of Reclamation Withdrawal

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This document will revoke the Secretarial Order of April 11, 1889, withdrawing approximately 142.21 acres of land and will simultaneously restore and open 22.2 acres to the operation of the general land laws including the mining laws. The remaining 120.01 acres will be opened to proposals under Section 206 of the Act of October 21, 1976.

EFFECTIVE DATE: February 21, 1981.

FOR FURTHER INFORMATION CONTACT: Ken Latimer, Utah State Office 801-524-4245.

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

1. Secretary's Order of April 11, 1889, which withdrew public lands for the Utah Lake Reservoir and features of the Bonneville Unit of the Central Utah Project from all forms of appropriation under the public land laws, including the mining laws for use by the Bureau of Reclamation, now the Water and Power Resources Service, is hereby revoked as to the following described lands:

Salt Lake Base and Meridian

Parcel A

An irregular parcel of land in the W½ and lot 2, of Section 19, T. 7 S., R. 3 E., being more particularly described as follows:

Beginning at a point which lies W. 1,496.4 feet along the section line and S. 1,082.5 feet from the north quarter corner of said section 19; said point also being on the east right-of-way line of Highway I-15; thence along the Utah Lake Meander Line the following courses: thence S. 72°00' E. 1,312.6 feet; thence S. 85°00' E. 567.6 feet; thence S. 41°00' E. 145.2 feet; thence S. 35°00' W. 369.6 feet; thence S. 75°00' W. 442.4 feet; thence S. 85°00' W. 627.8 feet, more or less, to a point on the easterly right-of-way line of said Highway I-15; thence N. 31°52' W. 1,220.6 feet along said Highway I-15 right-of-way line to point of beginning containing 22.2 acres, more or less.

Parcel B

An irregular parcel of land in the S½ of Section 18 and the N½ of Section 19, T. 7 S., R. 3 E., being more particularly described as follows:

Beginning at a point which lies S. 01°20' W. 4,547.5 feet along the section line from the northwest corner of said section 18; thence N. 69°30' E. 2,824.6 feet; thence along the Utah Lake Meander Line the following courses: S. 75°00' E. 462 feet; thence S. 46°30' E. 528 feet; thence S. 02°30' E. 231 feet; thence S. 85°00' W. 283.8 feet; thence N. 86°30' W. 719.4 feet; thence S. 77°00' W. 1,214.4 feet; thence S. 20°00' W. 396 feet; thence S. 03°00' E. 100.8 feet, more or less, to a point on the easterly right-of-way of Highway I–15; thence N. 31°52' W. 1,069.4 feet, more or less, along the easterly line of said Highway I–15, to point of beginning containing 45.8 acres, more or less.

Parcel C

An irregular parcel of land in the E½ of Section 13, T. 7 S., R. 2 E., and the W½ of Section 18, T. 7 S., R. 3 E., containing 74.21 acres, more or less, and being more particularly described as follows:

Beginning at a point which lies S. 2,392.4 feet along the section line and W. 898.2 feet from the northeast corner of said section 13; said point being on the east right-of-way line of Highway I–15; thence along the Utah Lake Meander Line the following courses: N. 87°30' E. 110.6 feet; thence S. 85°00' E. 679.8 feet; thence S. 66°00' E. 2,065.8 feet; thence S. 75°00' E. 792 feet; thence S. 69°30' W. 2,824.6 feet, more or less, to a point on the east right-of-way line of said Highway I–15; thence along the east right-of-way line of said Highway I–15 the following courses: N. 31°52' W. 504.2 feet; thence N. 29°44' W. 404.1 feet; thence N. 27°06' W. 287.5 feet to point of tangency of a regular curve to the right having a radius of 1,859.9 feet; thence along the arc of the said curve 886.2 feet; thence N. 02°12' E. 200.2 feet, more or less, to the point of beginning, containing 83.85 acres, more or less, excepting therefrom a parcel of land containing 9.64 acres, more or less, leaving a net "Parcel C" area of 74.21 acres, more or less, said excepted area being described as follows:

Exception (to be used for Water and Power Resources Services project purposes)

A parcel of land in the SW¼ of Section 18, T. 7 S., R. 3 E., containing 9.64 acres, more or less, and being more particularly described as: Beginning at a point which lies N. 89°22' E. 398 feet along the section line and S. 00°38' E. 3,130.1 feet from the northwest corner of said section 18; said point has U.S.C. and G.S. plane grid coordinates N. 683,103.99 and E. 1,957,054.81; thence S. 89°38' E. 700 feet; to a point which lies S. 01°05' W. 38.1 feet from found monument; thence S. 01°05' W. 600 feet; thence N. 89°38' W. 700 feet; thence N. 01°05' E. 600 feet, more or less, to the point of beginning. (The foregoing bearings are based on the Utah Coordinate System, Central Zone.) Based on the Utah Coordinate System, the northwest corner of said section 18 has plane grid coordinates N. 686,230.47 and E. 1,956,622.41 and north quarter corner of said section 18 has plane grid coordinates N. 686,264.17 and E. 1,959,297.92.

The total net area of Parcels A, B, and C is 142.21 acres, more or less, in Utah County.

2. At 10 a.m., on February 21, 1981, the lands in Parcel A shall be open to operation of the public land laws generally, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law. All valid applications received at or prior to 10 a.m., on February 21, 1981, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

3. At 10 a.m., on February 21, 1981, the lands in Parcel A will be open to location under the United States mining laws. The lands have been and continue to be open to applications and offers under the mineral leasing laws.

4. Effective the date of this publication, the lands in Parcels B and C shall be open to proposals under Section 206 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2756; 43 U.S.C. 1716, subject to valid existing rights, the provisions of existing withdrawals, and the requirements of applicable law.

Inquiries concerning the land should be addressed to the State Director, Bureau of Land Management, University Club Building, 136 East South Temple, Salt Lake City, Utah 84111.

Guy R. Martin,

Assistant Secretary of the Interior.

January 16, 1981.

[FR Doc. 81-2510 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

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43 CFR Part 4100

Grazing Administration and Trespass on Public Lands; Amendments to Grazing Regulations

AGENCY: Bureau of Land Management, Interior.

ACTION: Final rule; correction.

SUMMARY: This notice gives the justification for making effective upon publication the amendments to the Grazing Administration and Trespass regulations. The amendments were published as a final rulemaking in the Federal Register of January 19, 1981 (46 FR 5784). This justification was inadvertently omitted from the preamble to those amendments.

EFFECTIVE DATE: January 19, 1981.

ADDRESS: Any suggestions or inquiries should be addressed to: Director (220), Bureau of Land Management, 1800 C Street, N.W., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Paul Leonard, (202) 343–5841.

SUPPLEMENTARY INFORMATION: The amendments were the result of intensive public involvement in the refinement of a policy for adjusting livestock use on the public rangelands. The amendments are designed to ensure that future decisions on livestock use are made in a manner that is fair and equitable to all users of the public rangelands, that ensures a maximum degree of public involvement and review, that provides for decisions to be based on the best scientific information available at the time of each decision and that furthers the Nation's overall objective of increasing the productivity of the public rangelands. The changes made by the amendments also bring the grazing administration procedures of the Bureau of Land Management more in line with those of the U.S. Forest Service.

It is in the national interest that the benefits to be derived from the implementation of these amendments be realized as soon as possible. At present, hundreds of proposed grazing decisions based on environmental impact statements completed during the last two years are written to be effective on March 1, 1981—the beginning of the 1981–1982 grazing season. If the effective date of these amendments is delayed, it will be impossible to implement these final grazing decisions with a five-year phase-in period, including needed livestock use adjustments and construction of rangeland improvements, during the 1981–1982 grazing season. Actual implementation of the amendments through grazing decisions would be unnecessarily postponed until March 1, 1982—the beginning of the 1982–1983 grazing season.

Therefore, it is in the national interest that these amendments be effective January 23, 1981.

January 19, 1981.

Guy R. Martin,

Assistant Secretary of the Interior.

[FR Doc. 81-2397 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 64

[Docket No. FEMA 5972]

List of Communities Eligible for the Sale of Insurance Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain flood plain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATES: The date listed in the fifth column of the table.

ADDRESSES: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: P.O. Box 34294, Bethesda, Maryland 20034, Phone: (800) 638–6620.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Krimm, National Flood Insurance Program, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, SW., Washington, DC 20410.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local flood plain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Federal Insurance Administrator has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the sixth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Federal Insurance Administrator finds that delayed effective dates would be contrary to the public interest. The Administrator also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance." This program is subject to procedures set out in OMB Circular A–95.

In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

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

§ 64.6 List of eligible communities.

State	County	Location	Community No.	Effective dates of authorization/ cancellation of sale of flood insurance in community	Special flood hazard area identified
California	Alameda	Pleasanton, city of	060012B	Dec. 16, 1980, suspension withdrawn.	June 28, 1974 and Oct. 29, 1976.
Do	Yolo	Unincorporated areas	060423B	do	Oct. 18, 1977.
Colorado	Summit	do	080290B	do	Sept. 13, 1977.
Connecticut	Hartford	Hartland, town of	090146B	do	June 28, 1974 and Dec. 10, 1976.
Florida	Polk	Bartow, city of	120263B	do	Jan. 23, 1974 and Sept. 12, 1975.
Illinois	Cook	Glencoe, village of	170095B	do	Nov. 2, 1973 and Aug. 6, 1976.
Do	Lake	Gurnee, village of	170365B	do	May 24, 1974 and May 14, 1976.
Do	Cook	River Grove, village of	170152B	do	Feb. 1, 1974 and June 4, 1976.
Do	do	Riverside, village of	170153B	do	Feb. 1, 1974 and Apr. 9, 1976.
Iowa	Pottawattamie	Avoca, city of	190233B	do	Jan. 23, 1974 and Jan. 9, 1976.
Do	Tama	Chelsea, city of	190261B	do	Aug. 16, 1974 and Jan. 2, 1976.
Louisiana	Terrebonne	Unincorporated areas	225206B	do	July 1, 1974 and Nov. 19, 1976.
Maine	Kennebec	Readfield, town of	230245B	do	Feb. 1, 1975 and Sept. 3, 1976.
Mississippi	Simpson	D'Lo, town of	280157B	do	June 7, 1974 and July 23, 1976.
Do	Madison	Madison, town of	280229B	do	Dec. 13, 1974 and Dec. 12, 1975.
New Jersey	Somerset	Rocky Hill, borough of	340443B	do	June 28, 1974 and Apr. 16, 1976.
Pennsylvania	Lancaster	Akron, borough of	422461A	do	Jan. 31, 1975, Dec. 28, 1973, and Apr. 30, 1976.
Do	Lancaster	Clay, township of	421764B	do	May 3, 1974 and May 21, 1976.
Do	do	Earl, township of	421767B	do	Sept. 20, 1974 and July 16, 1976.
Do	do	East Lampeter, township of	421771B	do	Sept. 6, 1974 and Sept. 3, 1976.
Do	Lebanon	South Annville, township of	420580B	do	Nov. 19, 1973 and Dec. 24, 1976.
Do	Berks	Windsor, township of	421125B	do	Jan. 23, 1974 and June 4, 1976.
Rhode Island	Providence	Cumberland, town of	440016A	do	Jan 3, 1975.
South Carolina	Anderson	Anderson, city of	450014B	do	May 14, 1974 and Dec. 13, 1974.
South Dakota	Fall River	Edgemont, city of	460026B	do	Aug. 2, 1974 and Jan. 16, 1976.
Texas	Titus	Mount Pleasant, city of	480621B	do	Feb. 1, 1974 and May 14, 1976.
Virginia	Albemarle	Unincorporated areas	510006B	do	Aug. 25, 1978.
Wisconsin	Dane	Marshall, village of	550084B	do	Dec. 17, 1973 and May 28, 1976.
Do	Ozaukee	Saukville, village of	550317B	do	Jan. 16, 1974 and June 4, 1976.
Kentucky	Campbell	Newport, city of	210039B	Mar. 26, 1975, emergency, Nov. 5, 1980, regular, Nov. 5, 1980, suspended, Dec. 22, 1980, reinstated.	Feb. 1, 1974.
Georgia	Rabun and Habersham	Tallulah Falls, town of	130380	Dec. 29, 1980, emergency	Apr. 25, 1975.
New York	Warren	Stony Creek, town of	360880A	do	Aug. 30, 1974 and Dec. 17, 1976.
Tennessee	Wilson	Watertown, city of	470380A	do	Sept. 15, 1978.
Texas	Fayette	Carmine, city of	481505A	do	Apr. 3, 1979.
Do	Trinity	Groveton, city of	481032	do	Nov. 5, 1976.
Do	Wood	Yantis, city of	481167	do	July 9, 1976.
Alabama	Tuscaloosa	Northport, city of	010202C	June 13, 1973, emergency, Sept. 5, 1979, regular, Mar. 4, 1980, suspended, Dec. 19, 1980, reinstated.	Dec. 28, 1973 and July 9, 1976.

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 5, 1981.

Francis V. Reilly,

Acting Federal Insurance Administrator.

[FR Doc. 81–2294 Filed 1–22–81; 8:45 am]

BILLING CODE 6718–03–M

44 CFR Part 64

[Docket No. FEMA 5977]

List of Communities Eligible for the Sale of Insurance Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final Rule.

SUMMARY: This rule lists communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain flood plain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

EFFECTIVE DATES: The date listed in the fifth column of the table.

ADDRESSES: Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program (NFIP) at: P.O. Box 34294, Bethesda, Maryland 20034, Phone: (800) 638–6620.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line 800–424–8872, Room 5150, 451 Seventh Street SW., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local flood plain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Federal Insurance Administrator has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the sixth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard area shown on the map.

The Federal Insurance Administrator finds that delayed effective dates would be contrary to the public interest. The Administrator also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance." This program is subject to procedures set out in OMB Circular A–95.

In each entry, a complete chronology of effective dates appears for each listed community. The entry reads as follows:

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

§ 64.6 List of eligible communities.

State	County	Location	Community No.	Effective date of authorization of sale of flood insurance for area	Hazard area identified
California	Contra Costa County	Antioch, city of	060026	750501 emerg., 801202 reg	740628
Arkansas	Jefferson County	Wabbaseka, city of	050111	750626 emerg., 801202 reg	740510
California	Los Angeles County	Los Angeles County [1]	065043	700710 emerg., 801202 reg	781024
California	San Bernardino County	Ontario, city of	060278	750627 emerg., 801202 reg	740809
California	Orange County	Brea, city of	060214	740826 emerg., 801202 reg	740524
California	Los Angeles County	Los Angeles, city of	060137	700619 emerg., 801202 reg	771213
Kentucky	Boyd County	Boyd County [1]	210016	751212 emerg., 801202 reg	741213
Iowa	Cerro Gordo County	Mason City, city of	190060	750321 emerg., 801202 reg	740301
Illinois	Lake County	Winthrop Harbor, village of	170398	750710 emerg., 801202 reg	750321
Illinois	Cook County	Hazel Crest, village of	170102	721020 emerg., 801202 reg	740628
Idaho	Clearwater County	Orofino, city of	160047	750321 emerg., 801202 reg	731123
Georgia	Ware County	Ware County [1]	130184	750505 emerg., 801202 reg	751217
Florida	Polk County	Davenport, town of	120410	760301 emerg., 801202 reg	770304
West Virginia	Mingo County	Mingo County [1]	540133	750609 emerg., 801202 reg	741229
Washington	King County	Pacific, city of	530086	750706 emerg., 801202 reg	740628
Vermont	Orleans County	Troy, town of	500089	751114 emerg., 801202 reg	740726
Vermont	Franklin County	Montgomery, town of	500056	750904 emerg., 801202 reg	740621
Texas	Harris County	Piney Point Village, city of	480306	740701 emerg., 801202 reg	740628
South Carolina	Greenville County	Greenville County [1]	450089	740212 emerg., 801202 reg	761119
Pennsylvania	Luzerne County	Wilkes-Barre, township of	421823	740813 emerg., 801202 reg	761022
Pennsylvania	Luzerne County	Newport, township of	421822	751217 emerg., 801202 reg	741227
Pennsylvania	Luzerne County	Laflin, borough of	420995	731004 emerg., 801202 reg	761119
Pennsylvania	Lycoming County	Wolf, township of	420663	730330 emerg., 801202 reg	770701
Pennsylvania	Luzerne County	Lehman, township of	420615	730710 emerg., 801202 reg	740308
Pennsylvania	Luzerne County	Harveys Lake, borough of	420609	730316 emerg., 801202 reg	731228
Oklahoma	Logan County	Guthrie, city of	400099	750627 emerg., 801202 reg	731228
Oklahoma	Cleveland County	Moore, city of	400044	740418 emerg., 801202 reg	740607
Oklahoma	Cleveland County	Lexington, city of	400043	750926 emerg., 801202 reg	740628
Oklahoma	Alfalfa County	Cherokee, city of	400006	750505 emerg., 801202 reg	740614
New York	St. Lawrence County	Morristown, village of	361557	751212 emerg., 801202 reg	740531
Nebraska	Wayne County	Wayne, city of	310231	740530 emerg., 801202 reg	740322
Missouri	St. Louis County	Northwoods, city of	290372	740412 emerg., 801202 reg	740405
Missouri	Grundy County	Trenton, city of	290153	750801 emerg., 801202 reg	740215
Michigan	Genesee County	Genesee, township of	260078	730511 emerg., 801202 reg	740524
Maine	Cumberland County	Pownal, town of	230204	760209 emerg., 801202 reg	750131
Louisiana	St. Tammany Parish	Madisonville, town of	220201	740917 emerg., 801202 reg	760206

State	County	Location	Community No.	Effective date of authorization of sale of flood insurance for area	Hazard area identified
Kentucky	Hardin County	Elizabethtown, city of	210095	750523 emerg., 801202 reg	740823
Pennsylvania	Luzerne County	Penn Lake Park, borough of	422645	760712 emerg., 801205 reg	0
Illinois	Lake County	North Chicago, city of	170384	740703 emerg., 801205 reg	740405
California	Alameda County	Pleasanton, city of	060012	710507 emerg., 801216 reg	740628
Connecticut	Middlesex County	Middletown, city of	090068	740816 emerg., 801216 reg	740816
Colorado	Summit County	Summit County [1]	080290	761126 emerg., 801216 reg	770913
California	Yolo County	Yolo County [1]	060423	730315 emerg., 801216 reg	771018
Illinois	Cook County	River Grove, village of	170152	740401 emerg., 801216 reg	740201
Illinois	Cook County	North Riverside, village of	170135	750324 emerg., 801216 reg	740201
Illinois	Cook County	Glencoe, village of	170095	730410 emerg., 801216 reg	731102
Illinois	Cook County	Brookfield, village of	170066	741030 emerg., 801216 reg	740412
Florida	Polk County	Bartow, city of	120263	750618 emerg., 801216 reg	740123
Connecticut	Hartford County	Hartland, town of	090146	750114 emerg., 801216 reg	740628
Wisconsin	Ozaukee County	Saukville, village of	550317	740419 emerg., 801216 reg	740116
Wisconsin	Dane County	Marshall, village of	550084	750715 emerg., 801216 reg	731217
Washington	Pierce County	Sumner, city of Pierce Co.	530147	741004 emerg., 801216 reg	740726
Virginia	Albemarle County	Albemarle County [1]	510006	730509 emerg., 801216 reg	780625
Vermont	Chittenden County	Shelburne, town of	500193	751216 emerg., 801216 reg	741213
Utah	Utah County	Mapleton, city of	490156	750507 emerg., 801216 reg	740628
Texas	Titus County	Mount Pleasant, city of	480621	750730 emerg., 801216 reg	740201
South Dakota	Fall River County	Edgemont, city of	460026	800306 emerg., 801216 reg	740802
South Carolina	Anderson County	Anderson, city of	450014	731102 emerg., 801216 reg	740517
Rhode Island	Providence County	Cumberland, town of	440016	750715 emerg., 801216 reg	750103
Pennsylvania	Lancaster County	Akron, borough of	422461	751231 emerg., 801216 reg	750131
Pennsylvania	Lancaster County	East Lampeter, township of	421771	740906 emerg., 801216 reg	740906
Pennsylvania	Lancaster County	Earl, township of	421767	750113 emerg., 801216 reg	740920
Pennsylvania	Lancaster County	Clay, township of	421764	750429 emerg., 801216 reg	740503
Pennsylvania	Berks County	Windsor, township of	421125	750417 emerg., 801216 reg	740123
Pennsylvania	Berks County	Centre, township of	421056	771004 emerg., 801216 reg	741101
Pennsylvania	Luzerne County	Butler, township of	420599	730816 emerg., 801216 reg	740531
Pennsylvania	Lebanon County	South Annville, township of	420580	730511 emerg., 801216 reg	731109
Pennsylvania	Berks County	St. Lawrence, borough of	420151	750613 emerg., 801216 reg	760730
Oklahoma	Oklahoma County	Warr Acres, city of	400449	750127 emerg., 801216 reg	741220
Oklahoma	Woodward County	Woodward, city of	400232	740430 emerg., 801216 reg	740614
Oklahoma	Ottawa County	Miami, city of	400157	741129 emerg., 801216 rg	740201
New Jersey	Somerset County	Rocky Hill, borough of	340443	750715 emerg., 801216 reg	740628
Montana	Lincoln County	Troy, town of	300132	760511 emerg., 801216 reg	750711
Missouri	Atchison County	Rock Port, city of	290012	740801 emerg., 801216 reg	740524
Mississippi	Madison County	Madison, town of	280229	741017 emerg., 801216 reg	741213
Mississippi	Simpson County	D'Lo, town of	280157	750602 emerg., 801216 reg	740607
Maine	Kennebec County	Readfield, town of	230245	751024 emerg., 801216 reg	750221
Louisiana	St. Tammany Parish	Slidell, city of	220204	731123 emerg., 801216 reg	731116
Louisiana	St. Martin Parish	St. Martinville, city of	220191	730508 emerg., 801216 reg	731005
Louisiana	Morehouse Parish	Bastrop, city of	220127	750702 emerg., 801216 reg	740315
Iowa	Tama County	Chelsea, city of	190261	750715 emerg., 801216 reg	740816
Iowa	Pottawattamie County	Avoca, city of	190233	740520 emerg., 801216 reg	740123
Illinois	Lake County	Gurnee, village of	170365	740809 emerg., 801216 reg	740524
Illinois	Cook County	Riverside, village of	170153	740719 emerg., 801216 reg	740201
Maryland	Dorchester County	Secretary, town of	2140123	750613 emerg., 801219 reg	741101
Ohio	Stark County	Beach City, village of	390509	750801 emerg., 801219 reg	760730
Pennsylvania	Allegheny County	Crafton, borough of	420026	740415 emerg., 801219 reg	740201
Pennsylvania	Allegheny County	Frazer, township of	421268	760503 emerg., 801219 reg	761105
Pennsylvania	York County	Dover, borough of	422569	751208 emerg., 801219 reg	750131
Pennsylvania	Mercer County	Jackson, township of	422480	750728 emerg., 801219 reg	750117
Alabama	Jefferson County	Pleasant Grove, city of	010268	760106 emerg., 801219 reg	741220
California	San Joaquin County	Tracy, city of	060303	730629 emerg., 801222 reg	0
Florida	Volusia County	Deland, city of	120307	750219 emerg., 801222 reg	0
Washington	Yakima County	Granger, town of	530219	750616 emerg., 801222 reg	731228
Illinois	Pulaski County	Mounds, city of	170564	740619 emerg., 801222 reg	0
Florida	Sumter County	Wildwood, city of	120299	751031 emerg., 801226 reg	740123

Total is: 96.

[1] Unincorporated areas.

[National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator]

Issued: January 13, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2295 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

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44 CFR Part 64

[Docket No. FEMA 5971]

Suspension of Community Eligibility Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: This rule lists communities where the sale of flood insurance, as authorized under the National Flood Insurance Program (NFIP), will be suspended because of noncompliance with the flood plain management requirements of the program.

EFFECTIVE DATES: The third date ("Susp.") listed in the fifth column.

FOR FURTHER INFORMATION CONTACT:

Mr. Richard Krimm, National flood Insurance Program, (202) 755–5581 or Toll Free Line 800–424–8872, Room 5270, 451 Seventh Street, SW., Washington, DC 20410.

SUPPLEMENTARY INFORMATION: The National Flood Insurance Program (NFIP), enables property owners to purchase flood insurance at rates made reasonable through a Federal subsidy. In return, communities agree to adopt and administer local flood plain management measures aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended (42 U.S.C. 4022) prohibits flood insurance coverage as authorized under the National Flood Insurance Program (42 U.S.C. 4001–4128) unless an appropriate public body shall have adopted adequate flood plain management measures with effective enforcement measures. The communities listed in this notice no longer meet that statutory requirement for compliance with program regulations (44 CFR Part 59 et seq.). Accordingly, the communities are suspended on the effective date in the fifth column, so that as of that date subsidized flood insurance is no longer available in the community.

In addition, the Federal Insurance Administrator has identified the special flood hazard areas in these communities by publishing a Flood Hazard Boundary Map. The date of the flood map, if one has been published, is indicated in the sixth of column of the table. Section 202(a) of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), as amended, provides that no direct Federal financial assistance (except assistance pursuant to the Disaster Relief Act of 1974 not in connection with a flood) may legally be provided for construction or acquisition of buildings in the identified special flood hazard area of communities not participating in the NFIP, with respect to which a year has elapsed since identification of the community as having flood prone areas, as shown on the Office of Federal Insurance and Hazard Mitigation's initial flood insurance map of the community. This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column.

The Federal Insurance Administrator finds that delayed effective dates would be contrary to the public interest. The Administrator also finds that notice and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

The Catalog of Domestic Assistance Number for this program is 83.100 "Flood Insurance." This program is subject to procedures set out in OMB Circular A–95.

In each entry, a complete chronology of effective dates appears for each listed community.

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

§ 64.6 List of eligible communities.

State	County	Location	Community No.	Effective dates of authorization/ cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Alabama	Jefferson	Hoover, city of	010123B	Apr. 11, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 3, 1978	Feb. 4, 1981.
Do	do	Irondale, city of	010124B	Aug. 28, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 7, 1974 Jan. 9, 1978	Do.
Do	Lauderdale	Unincorporated areas	010323B	June 14, 1979, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 31, 1978	Do.
Do	Mobile	Prichard, city of	010170B	Apr. 22, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 28, 1974 Aug. 13, 1976	Do.
Alaska		Juneau, city and borough	020009B	May 22, 1970, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 9, 1970 May 20, 1977	Do.
Arkansas	Jackson	Tuckerman, city of	050105B	May 9, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 16, 1973 Feb. 27, 1976	Do.
California	San Mateo	Menlo Park, city of	060321C	Apr. 2, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 14, 1974 Aug. 8, 1975 Feb. 13, 1979	Do.
Connecticut	New London	Waterford, town of	090107B	Aug. 23, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	July 26, 1974 Nov. 19, 1976	Do.
Florida	Glade	Moore Haven, city of	120097A	Mar. 9, 1976, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 11, 1975	Do.
Do	Polk	Mulberry, city of	120268B	July 19, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Feb. 6, 1976	Do.
Do	Okeechobee	Unincorporated areas	120177B	May 1, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Aug. 4, 1978	Do.
Illinois	St. Clair	Dupo, village of	170629B	May 28, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 3, 1974 July 2, 1976	Do.
Do	Du Page	Elmhurst, city of	170205B	Jan. 14, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 3, 1974 Mar. 28, 1975	Do.
Do	Calhoun	Hardin, village of	170738C	Feb. 1, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 28, 1974 Jan. 23, 1976 Mar. 23, 1979	Do.
Do	Will	Joliet, city of	170702B	Apr. 13, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 31, 1974 Oct. 10, 1975	Do.
Do	Calhoun	Kampsville, village of	170735B	Jan. 30, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Jan. 9, 1974 June 4, 1976	Do.
Do	Cook	Orland Park, village of	170140C	Apr. 15, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 22, 1974 Aug. 20, 1976 May 12, 1978	Do.
Do	Du Page	Villa Park, village of	170217B	Apr. 23, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 8, 1974 Feb. 7, 1975	Do.

State	County	Location	Community No.	Effective dates of authorization/ cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Do	Lake	Wadsworth, village of	170395B	Aug. 1, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 1, 1974 Nov. 21, 1975	Do.
Iowa	Polk	Des Moines, city of	190227B	Sept. 6, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Sept. 6, 1974 Aug. 29, 1975	Do.
Kentucky	Scott	Georgetown, city of	210208B	June 25, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 24, 1974	Do.
Louisiana	Acadia	Estherwood, village of	220004A	June 12, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 5, 1976	Do.
Maine	Androscoggin	Auburn, city of	230001B	Aug. 27, 1971, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 31, 1974 July 2, 1976	Do.
Michigan	Macomb	Macomb, township of	260445B	Dec. 16, 1977, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar 18, 1977	Do.
Do	Genesee	Mount Morris, township of	260400A	June 13, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981 suspended.	Sept. 19, 1975	Do.
Minnesota	Hennepin	Golden Valley, city of	270162B	Apr. 23, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 8, 1974 Apr. 30, 1976	Do.
Do	Kittson	Unincorporated areas	270224B	Feb. 11, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 4, 1977	Do.
Do	McLeod	Unincorporated areas	270616B	Mar. 4, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 3, 1977	Do.
Do	Rice	Unincorporated areas	270646B	May 30, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Oct. 21, 1977	Do.
Do	Olmstead	Rochester, city of	275246B	Mar. 26, 1971, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 27, 1971 July 1, 1974 Feb. 13, 1976	Do.
Missouri	St. Louis	Florissant, city of	290352B	June 11, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 8, 1973 Sept. 5, 1975	Do.
Do	Adair	Kirksville, city of	290002B	Dec. 2, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 17, 1974 Oct. 24, 1975	Do.
Do	Lawrence	Mt. Vernon, city of	290202B	Apr. 14, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 24, 1974 Dec. 26, 1975	Do.
New Jersey	Middlesex	Milltown, borough of	340268B	Feb. 1, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981. suspended.	May 3, 1974 July 2, 1976	Do.
Do	Bergen	Westwood, borough of	340061C	Dec. 17, 1971, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 11, 1973 Mar. 22, 1974 Apr. 23, 1976	Do.
New Mexico	Eddy	Artesia, city of	350016B	Apr. 4, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Jan. 16, 1974 June 18, 1976	Do.
Do	Debaca	Fort Sumner, city of	350011B	Nov. 2, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 31, 1974 Mar. 19, 1976	Do.
New York	Onondaga	Liverpool, village of	360562B	Dec. 26, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	July 26, 1974 June 11, 1976	Do.
Do	Niagara	Lockport, city of	360503B	Dec. 17, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Oct. 22, 1976	Do.
Ohio	Clermont	Batavia, village of	390066D	Mar. 3, 1976, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 30, 1973 May 7, 1976 Feb. 11, 1977 Aug. 31, 1979	Do.
Do	Summit	Macedonia, city of	390750A	Nov. 11, 1976, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 18, 1975	Do.
Do	Butler	Millville, village of	390041B	Mar. 28, 1979, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	June 7, 1974 May 7, 1976	Do.
Do	Cuyahoga	Solon, city of	390130B	July 28, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 5, 1974 July 2, 1976	Do.
Do	Summit	Twinsburg, city of	390534C	Sept. 18, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Mar. 15, 1974 June 18, 1976 May 18, 1979	Do.
Oklahoma	Okmulgee	Okmulgee, city of	400145B	Apr. 29, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Feb. 1, 1974 Dec. 26, 1975	Do.
Do	Kay	Tonkawa, city of	400079B	June 30, 1976, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 23, 1973 Feb. 20, 1976	Do.

State	County	Location	Community No.	Effective dates of authorization/ cancellation of sale of flood insurance in community	Special flood hazard area identified	Date[1]
Pennsylvania	Blair	Antis, township of	421385B	July 30, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Dec. 27, 1974 July 16, 1976	Do.
Do	Clinton	Bald Eagle, township of	420319B	May 22, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Oct. 23, 1973 July 30, 1976	Do.
Do	Westmoreland	Irwin, borough of	420881B	June 18, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 12, 1974 May 28, 1976	Do.
Do	Erie	North East, borough of	421359B	April 29, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 8, 1974 Aug. 6, 1976	Do.
Do	Westmoreland	Penn, borough of	420895B	Mar. 19, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 12, 1974 Aug. 6, 1976	Do.
Do	Lancaster	Strasburg, township of	421784B	May 27, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 31, 1974 June 25, 1976	Do.
Texas	Walker	Huntsville, city of	480639B	Jan. 20, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	May 24, 1974 Feb 6, 1976	Do.
Do	Scurry	Snyder, city of	481001B	Sept. 5, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Feb. 1, 1974 Apr. 9, 1976	Do.
Virginia	Henrico	Unincorporated areas	510077B	Dec. 30, 1971, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Nov. 22, 1974 May 14, 1976	Do.
Washington	Chelan	Unincorporated areas	530015A	Jan. 12, 1973, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Jan. 12, 1973 Jan. 10, 1975	Do.
Do	do	Wenatchee, city of	530020A	Nov. 7, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Feb. 1, 1974 Aug. 9, 1974	Do.
Wisconsin	Jackson	Black River Falls, city of	550186B	Apr. 7, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Dec. 17, 1973 May 21, 1976	Do.
Do	Vernon	Coon Valley, village of	550452B	Apr. 7, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Apr. 12, 1974 Oct. 31, 1975	Do.
Do	Douglas	Unincorporated areas	550539B	Apr. 28, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Dec. 22, 1978	Do.
Do	Jackson	Unincorporated areas	550583A	Sept. 30, 1975, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.		Do.
Do	Winnebago	Unincorporated areas	550537B	Apr. 15, 1974, emergency, Feb. 4, 1981, regular, Feb. 4, 1981, suspended.	Feb. 18, 1977	Do.

[1] Date certain Federal assistance no longer available in special flood hazard area.

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 FR 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81–2292 Filed 1–22–81; 8:45 am]

BILLING CODE 6718–03–M

44 CFR Part 65

[Docket No. FEMA 5976]

List of Communities With Special Hazard Areas Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final Rule.

SUMMARY: This rule identifies communities with areas of special flood, mudslide, or erosion hazards as authorized by the National Flood Insurance Program. The identification of such areas is to provide guidance to communities on the reduction of property losses by the adoption of appropriate flood plain management or other measures to minimize damage. It will enable communities to guide future construction, where practicable, away from locations which are threatened by flood or other hazards.

EFFECTIVE DATES: The effective date shown at the top right of the table or 30 days after the date of the **Federal Register** publication, whichever is later.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line 800–424–8872, Room 5150, 451 Seventh Steet, SW., Washington, DC 20410.

SUPPLEMENTARY INFORMATION: The Flood Disaster Protection Act of 1973 (Pub. L. 93–234) requires the purchase of flood insurance on and after March 2, 1974, as a condition of receiving any form of Federal or federally related financial assistance for acquisition or construction purposes in an identified flood plain area having special flood hazards that is located within any community participating in the National Flood Insurance Program.

One year after the identification of the community as flood prone, the requirement applies to all identified special flood hazard areas within the United States, so that, after that date, no such financial assistance can legally be provided for acquisition and construction in these areas unless the community has entered the program. The prohibition, however, does not

apply in respect to conventional mortage loans by federally regulated, insured, supervised, or approved lending institutions.

This 30 day period does not supersede the statutory requirement that a community, whether or not participating in the program, be given the opportunity for a period of six months to establish that it is not seriously flood prone or that such flood hazards as may have existed have been corrected by floodworks or other flood control methods. The six months period shall be considered to begin 30 days after the date of publication in the **Federal Register** or the effective date of the Flood Hazard Boundary Map, whichever is later. Similarly, the one year period a community has to enter the program under section 201(d) of the Flood Disaster Protection Act of 1973 shall be considered to begin 30 days after publication in the **Federal Register** or the effective date of the Flood Hazard Boundary Map, whichever is later.

This identification is made in accordance with Part 64 of Title 44 of the Code of Federal Regulations as authorized by the National Flood Insurance Program (42 U.S.C. 4001–4128)

Section 65.3 is amended by adding in alphabetical sequence a new entry to the table:

§ 65.3 List of communities with special hazard areas (FHBMs in effect).

BILLING CODE 6718-03-M

EFFECTIVE DATE January 2, 1981

1 State	2 Ident. Number	3 Community Name County Name	4 Panels Printed (& appl. Suffix)	5 Inland/ Coastal	6 Hazard	7 60.3 Code	8 Program Status	9 Status of		10 Previous Map Dates		11 Revision Code (s)	12 Rescission	13 Floodways Panels Printed	14 Location of Map Repository
								FIRM	FHM	FBRM	FISM				
IN	180477	Benton Co. (Uninc. Area)	Index 0001A 0002A 0003A 0004A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Benton County Auditor's Office County Courthouse Fowler, IN 47944 Phone: 317-884-0930
IN	180478	Blackford Co. (Uninc. Area)	Index 0001A 0002A 0003A 0004A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Blackford County Clerk's Office County Courthouse Hartford City, IN 47348 Phone: 317-348-1130
PA	421879	Township of Armagh (Mifflin Co.)	Index 0002A 0004A 0005A 0007A	I	FL	B	1	3	1	1/10/75	N/A	9 10 16	N/A	N/A	Frank Houser, Chairman Twp. Board of Supervisors Second Floor Central Counties Bank Bldg. P.O. Box 396 Milroy, PA 17063 Twp. Phone: 717-667-6260 Home Phone: 717-667-3187
PA	422088	Township of Middletown (Susquehanna Co.)	Index 0001A 0002A	I	FL	B	1	3	1	4/11/75	N/A	9 10 16	N/A	N/A	Thomas Young, Chairman Twp. Board of Supervisors R.D. 1, Box 8 Friendsville, PA 18818 Phone: 717-744-2304
IL	170999	McDonough Co. (Uninc. Area)	Index 0001A thru 0006A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	McDonough County Clerk's Office County Courthouse Macomb, IL 61455 Phone: 309-833-2474

EFFECTIVE DATE January 2, 1981 4

1 STATE	2 IDENT. NUMBER	3 COMMUNITY NAME & COUNTY NAME	4 PANELS PRINTED (# AND SUFFIX)	5 INLAND/ COASTAL	6 HAZARD	7 60.3 CODE	8 PROGRAM STATUS	9 STATUS OF FHBM	9 STATUS OF FIRM	10 PREVIOUS MAP DATES FHBM	10 PREVIOUS MAP DATES FIRM	11 REVISION CODE(S)	12 RESCISSION	13 FLOODWAYS PANELS PRINTED	14 LOCATION OF MAP REPOSITORY
TL	170910	Hamilton County (Uninc. Area)	Index 0001A Thru 0006A	I	FL	B	1	2	1	N/A	N/A	N/A	N/A	N/A	Supervisor of Assessments Office Hamilton County Courthouse McLeansboro, IL 62859 Phone: 618-643-3971
IL	170467	Massac County (Uninc. Areas)	Index 0001A Thru 0004A	I	FL	B	1	2	1	N/A	N/A	N/A	N/A	N/A	Massac County Clerk's Office P. O. Box 429 Metropolis, IL 62960 Phone: 618-524-9632
								EFFECTIVE DATE: January 6, 1981						
OK	400501	Adair County (Unincorporated Areas)	Index 0001A Thru 0006A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Mr. Carl Pettigrew Chairman of County Commissioners Adair County Commissioners Box 169 Stilwell, OK 74960 (918) 774-7198
								EFFECTIVE DATE: January 9, 1981						
IL	170992	Montgomery County (Uninc. Areas)	Index 0001A Thru 0009A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Montgomery Co. Clerk's Office County Courthouse Hillsboro, IL 62049 Phone: 217-532-2552
IL	171003	Wayne County (Uninc. Areas)	Index 0001A Thru 0009A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Mr. Layton Atwood Chairman of Co. Board Route 1 - Mt. Erie, IL 62446 Phone: 618-854-2251
IN	180482	Pulaski County (Uninc. Areas)	Index 0002A Thru 0004A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	County Auditor's Office Pulaski Co. Courthouse Winimac, IN 46996 Phone: 219-946-3653

EFFECTIVE DATE January 9, 1981

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1 State	2 Ident. Number	3 Community Name County Name	4 Panels Printed (& Suffix Code)	5 Inland/ Coastal	6 Hazard	7 60.3 Code	8 Program Status	9 Status of FHBM	9 Status of FIRM	10 Previous Map Dates FHBM	10 Previous Map Dates FIRM	11 Revision Code (s)	12 Rescission	13 Floodways Panels Printed	14 Location of Map Repository
OH	390553	Vinton County (Uninc. Area)	Index 0001A Thru 0007A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	President of the County Com. Vinton County Courthouse McArthur, Ohio 45615 Phone: 614-596-4571
PA	422072	Twp. of Apolacon (Susquehanna Co.)	Index 0001A	I	FL	B	1	3	1	11/29/74	N/A	9 10 16	N/A	N/A	Gerald Thorne, Chairman Twp. Board of Supervisors R.D. 1, Box 278 Brackney, PA 18812 Phone: 717-623-2595
VA	510197	Carroll County (Uninc. Area)	Index 0001A Thru 0007A	I	FL	B	1	3	1	4/25/75	N/A	9 10 16	N/A	N/A	County Administrator's Office P.O. Box 515 County Courthouse Hillsville, VA 24343 Phone: 703-729-3331
WI	550606	Washburn County (Uninc. Area)	Index 0001A Thru 0006A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Washburn County Clerk's Office County Courthouse Shell Lake, WI 54871 Phone: 715-468-7808
NY	361108	T. of Dunkirk (Chautaqua Co.)	0005B	I	FL	B	1	3	1	11/29/74 7/30/76	N/A	9 10	N/A	N/A	Mr. Ronald J. Stuczynski Town Supervisor Town of Dunkirk 11171 Urban Road Dunkirk, New York 14048
EFFECTIVE DATE: January 13, 1981															
NM	350001	Bernalillo Co. Uninc. Areas	0008C	I	FL	B	1	3	1	12/20/74 9/6/77 7/10/79	N/A	9	N/A	N/A	Mr. Alex Abeyta, JR Bernalillo Co. Manager 620 Lomas, N.W. (505) 766-4000

EFFECTIVE DATE January 16, 1981

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1 State	2 Ident. Number	3 Community Name County Name	4 Panels Printed (Index and Suffix)	5 Inland/ Coastal	6 Hazard	7 60.3 Code	8 Program Status	9 Status of FHBM	9 Status of FIRM	10 Previous Map Dates FHBM	10 Previous Map Dates FIRM	11 Revision Code(s)	12 Rescission	13 Floodways Panels Printed	14 Location of Map Repository
IL	170940	Clark County (Unincorporated Areas)	Index 0001A thru 0006A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	County Clerk's Office County Courthouse Marshall, IL 62441 Phone: 217-826-8311
IL	170873A	Village of East Brooklyn (Grundy Co.)	Index 01	I	FL	B	4	3	1	3/21/75	N/A	10	N/A	N/A	John Hakey, Village President 600 Bremer East Brooklyn, IL 60474 Phone: 815-237-8268
MI	260579	Village of Clifford (Lapeer Co.)	0001A	I	FL	B	4	3	1	10/24/75	N/A	9	N/A	N/A	Raymond R. Miller, Jr. Village Presiden: Village Hall 4549 Madison Street Clifford, MI 48727 Phone: 517-761-7003
PA	422342	Township of Cherry (Butler Co.)	Index 0001A 0002A	I	FL	B	1	3	1	1/10/75	N/A	9 10 16	N/A	N/A	Leonard Hildebrandt, Chm. Twp. Board of Supervisors Municipal Building R.D. 1 Hilliards, PA 16040 Phone: 412-637-2124
PA	422431	Twp. of Dunkard (Greene Co.)	Index 0002A 0003A	I	FL	B	4	3	1	1/10/75	N/A	9 10	N/A	N/A	Thomas Orban, Chm. Twp. Board of Supervisors Bobtown, PA 15315 Phone: 412-839-7231
PA	422551	Twp. of Watson (Warren Co.)	Index 0001A 0002A 0003A 0004A 0005A	I	FL	B	1	3	1	1/10/75	N/A	9 10 16	N/A	N/A	Ray M. Mickelson, Chm. Twp. Board of Supervisors R.D. 1 Tidioute, PA 16351 Phone: 814-484-3818

EFFECTIVE DATE January 20, 1981

1 STATE	2 IDENT. NUMBER	3 COMMUNITY NAME & COUNTY NAME	4 PANELS PRINTED (# AND SUFFIX)	5 INLAND/ COASTAL	6 HAZARD	7 60.3 CODE	8 PROGRAM STATUS	9 STATUS OF FHBM	9 STATUS OF FIRM	10 PREVIOUS MAP DATES FHBM	10 PREVIOUS MAP DATES FIRM	11 REVISION CODE(S)	12 RESCISSION	13 FLOODWAYS PANELS PRINTED	14 LOCATION OF MAP REPOSITORY
CA	060649	City of Weed (Siskiyou County)	0001A	I	FL	B	4	2	1	N/A	N/A	N/A	N/A	N/A	Mr. Lyle W. Larson City Administrator City Hall 780 South Davis Avenue Weed, CA 96094 (916) 938-4842
KS	200487	City of Delphos (Ottawa County)	0001A	I	FL	B	1	3	1	8-15-75	N/A	9	N/A	N/A	Mrs. Dean Smith Delphos City Clerk City Hall Delphos, KS 67436 (913) 523-4361
EFFECTIVE DATE: January 23, 1981															
MN	270619	Cook County (Unincorporated Areas)	Index 0001A Thru 0021A	I	FL	B	1	2	1	N/A	N/A	N/A	N/A	N/A	Cook County Zoning Admr. Cook County Courthouse Grand Marais, MN 55604 Phone 218-387-1335
NJ	340062	B. of Paramus (Bergen Co.)	0001B 0002B 0003B	I	FL	B	1	3	1	8/31/73 2/22/80	N/A	9	N/A	N/A	Manu K. Patel Jockish Square Paramus, N.J. 07652 (201)265-2100
ME	230277	T. Castine (Hancock Co.)	0005A 0010A	C	FL	B	1	3	1	1/31/75	N/A	9	N/A	N/A	Mr. Andrew Patterson Town Manager, Town of Castine Castine, Maine 04421
NY	361351	V. Laurens (Otsego Co.)	0001B	I	FL	B	1	3	1	11/15/74 5/21/76	N/A	8 10	N/A	N/A	Honorable Clarence Upright Mayor, Village of Laurens R.D. #1, Box 1B Laurens, N.Y. 13796
NY	361229	T. Savannah (Wayne)	0005B 0010B 0015B 0020B	I	FL	B	1	3	1	12/20/74 6/25/76	N/A	6	N/A	N/A	Donald Colvin Town Supervisor 1564 N. Main St. Savannah, N.Y. 13146 (315)365-2811

EFFECTIVE DATE January 23, 1981

1 State	2 Ident. Number	3 Community Name County Name	4 Panels Printed (Index and Suffix)	5 Inland/ Coastal	6 Hazard	7 60.3 Code	8 Program Status	9 Status of FHBM	9 Status of FIRM	10 Previous Map Dates FHBM	10 Previous Map Dates FIRM	11 Revision Code(s)	12 Rescission	13 Floodways Panels Pripted	14 Location of Map Repository
PA	422058	Twp. of Cherry (Sullivan Co.)	Index 0001A 0002A 0004A	I	FL	B	1	3	1	12/20/74	N/A	9 10 16	N/A	N/A	Arthur Rohe, Chairman Twp. Board of Supervisors R.D. 1 Dushore, PA 18614 Phone: 717-928-8301
PA	421627	Twp. of German (Fayette Co.)	Index 0001A 0002A 0003A 0004A	I	FL	B	1	3	1	1/ 3/75	N/A	9 10 16	N/A	N/A	Robert Sterbutzel, Jr., Chm. Twp. Board of Supervisors Municipal Building R.D. 1, Box 287 McClellandtown, PA 15458 Home Phone: 412-737-5229 Twp. Phone: 412-737-5130
PA	422567	Twp. of Lebanon (Wayne Co.)	Index 0001A 0002A 0003A	I	FL	B	1	3	1	1/ 3/75	N/A	9 10 16	N/A	N/A	Louis Pykus, Chairman Twp. Board of Supervisors R.D. 1 Honesdale, PA 18431 Phone: 717-448-2870
PA	422153	Twp. of Smith (Washington Co.)	Index 0001A 0002A 0003A	I	FL	B	1	3	1	12/13/74	N/A	9 10 16	N/A	N/A	Vincent Gi'Anfrancesco, Chm. Twp. Board of Supervisors Box 94 Municipal Building Slovan, PA 15078 Home Phone: 412-947-2072 Twp. Phone: 412-947-9492
PA	421705	Twp. of Warriors Mark (Huntingdon Co.)	Index 0002A 0003A	I	FL	B	1	3	1	1/17/75	N/A	9 10 16	N/A	N/A	Jesse Marshall, Chairman Twp. Board of Supervisors R.D. 4 Tyrone, PA 16686 Phone: 814-632-7589
PA	421498	Twp of West Nantmeal (Chester Co.)	Index 0001A 0002A	I	FL	B	1	3	1	12/13/74	N/A	9 10 16	N/A	N/A	Omar Beam, Chairman Twp. Board of Supervisors R.D. 2 Elverson, PA 19520 Phone: 215-286-9465

EFFECTIVE DATE January 27, 1981

1 STATE	2 IDENT. NUMBER	3 COMMUNITY NAME & COUNTY NAME	4 PANELS PRINTED (# AND SUFFIX)	5 INLAND/ COASTAL	6 HAZARD	7 60.3 CODE	8 PROGRAM STATUS	9 STATUS OF FHBM	9 STATUS OF FIRM	10 PREVIOUS MAP DATES FHBM	10 PREVIOUS MAP DATES FIRM	11 REVISION CODE(S)	12 RESCISSION	13 FLOODWAYS PANELS PRINTED	14 LOCATION OF MAP REPOSITORY
AR	050054	City of Earle (Crittenden County)	0001B	I	FL	B	1	3	1	10-12-73 12-26-75	N/A	8 9 10	N/A	N/A	The Honorable James H. King Mayor, City of Earle City Hall Earle, AR 72331 (501) 792-8909
													EFFECTIVE DATE: January 30, 1981		
VT	500127	Town of Dover (Windham County)	0005B 0010B	I	FL	B	1	3	1	5/2/74 10/22/76	N/A	9 10	N/A	N/A	Mr. Herbert C. Childs Town Hall Town of Dover West Dover, VT 05456
IL	170810	Cass County (Uninc. Area)	Index 0001A 0002A 0003A 0004A 0005A	I	FL	B	1	2	1	N/A	N/A	N/A	N/A	N/A	County Clerk's Office Cass County Courthouse Virginia, IL 62691 Phone: 217-452-7525
OH	390766	Cuyahoga County (Uninc. Area)	Index 0003A 0006A	I	FL	B	1	2	1	N/A	N/A	N/A	N/A	N/A	County Administration Building 1219 Ontario Street Cleveland, OH 49113 Phone: 216-622-7180
PA	422147	Twp. of East Finley (Washington Co.)	Index 0001A 0002A 0003A	I	FL	B	1	3	1	11/29/74	N/A	9 10 16	N/A	N/A	Vance Dorsey, Chairman Twp. Board of Supervisors R.D. 2 West Finley PA 15377 Phone: 412-222-6858
PA	421646	Twp. of Hickory (Forest Co.)	Index 0001A 0003A	I	FL	B	1	3	1	12/20/74	N/A	9 10 16	N/A	N/A	Charles Kiffer, Chairman Twp. Board of Supervisors Endeavor, PA 16322 Phone: 814-463-7366

BILLING CODE 6718-03-C

Community Map Actions

(Codes: Where no entry is necessary use N/A)

Column Code:
1. Two letter state designator.
2. FIA Community 6-digit identity number.
3. Community name; county(ies) name
4. Four digit number and suffix of each FIRM or FHBM panel printed.
5. INL/Coast
   I=Inland
   C=Coastal
6. Hazard
   FL=Flood
   MS=Mudslide
   ER=Erosion
   NF=Non Flood Prone
   MF=Minimally flood prone
7. 60.3 Code
   A=Special Hazard not defined, no elevation data (No FHBM)
   B=Special Hazard Designated, no elevation data (FHBM)
   C=FIRM, No Floodway or Coastal High Hazard
   *D=FIRM, Regulatory Floodway Designated
   *E=FIRM, Coastal High Hazard
   *Dual entry is available.
8. Program status
   1=Emergency
   2=Regular
   3=Not participating, no map
   4=Not participating, with map
   5=Withdrew
   6=Suspended
9. FHBM status
   1=Never mapped
   2=Original
   3=Revised
   4=Rescinded
   5=Superseded by firm

FIRM status
   1=Never mapped
   2=Original
   3=Revised
   4=Rescinded
   5=All zone C—no published firm
   6=All Zone A and C—no elevations determined
10. Dates of all previous maps
11. Revision codes
   1. 1916 BFE (Base Flood Elevation) Decrease
   2. 1916 BFE Increase
   3. 1916 SFHA (Special Flood Hazard Area) Change
   4. Change of Zone Desgination; revised FIRM
   5. Curvilinear
   6. 1914 Incorporation
   7. 1914 Discorporation
   8. 1914 Annexation
   9. SFHA Reduction
   10. Non-1916 SFHA Increase Without Numbered Zones
   11. Non-1916 SHFA Increase with Numbered Zones
   12. Drafting Correction; Printing Errors
   13. Suffix Change ONLY
   14. Change to Uniform Zone Designations (7/1/74)
   15. Revisions Withdrawn
   16. Refunds Possible
   17. Letter of Map Amendment (1916)
   18. Letter of Map Amendment (1916 without **Federal Register** publication)
   19. **Federal Register** Omission
   20. Attention. A previous map (or maps) has been rescinded or withdrawn for this community. This may have affected the sequence of suffixes.
   21. Miscellaneous
13. List of Numbered Floodway Panels Printed
14. Address of Community Map Repository

(44 CFR § 65.3)

(National Flood Insurance Act of 1968 (title XIII of the Housing and Urban Development Act of 1968); effective Jan. 28, 1969 (33 F.R. 17804, Nov. 28, 1968), as amended, 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 13, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-3293 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

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44 CFR Part 65

[Docket No. FEMA-5975]

Communities With Minimal Flood Hazard Areas; National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: The Federal Insurance Administrator, after consultation with local officials of the communities listed below, has determined, based upon analysis of existing conditions in the communities, that these communities' Special Flood Hazard Areas are small in size, with minimal flooding problems. Because existing conditions indicate that the area is unlikely to be developed in the foreseeable future, there is no immediate need to use the existing detailed study methodology to determine the base flood elevations for the Special Flood Hazard Areas.

Therefore, the Administrator is converting the communities listed below to the Regular Program of the National Flood Insurance Program (NFIP) without determining base flood elevations.

EFFECTIVE DATE: Date listed in fourth column of List of Communities with Minimal Flood Hazard Areas.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line 800–424–8872, Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: In these communities, the full limits of flood insurance coverage are available at actuarial, non-subsidized rates. The rates will vary according to the zone designation of the particular area of the community.

Flood insurance for contents, as well as structures, is available. The maximum coverage available under the Regular Program is significantly greater than that available under the Emergency Program.

Flood insurance coverage for property located in the communities listed can be purchased from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program. The effective date of conversion to the Regular Program will not appear in the Code of Federal Regulations except for the page number of this entry in the **Federal Register.**

The entry reads as follows:

§ 65.7 List of communities with minimal flood hazard areas.

State	County	Community name	Date of conversion to regular program
Iowa	Unincorporated area	Shelby County	Feb. 10, 1981.
Massachusetts	Worcester	Town of Paxton	Feb. 18, 1981.
Pennsylvania	Bradford	Borough of Le Raysville	Feb. 20, 1981.
Kansas	Sherman	City of Goodland	Feb. 24, 1981.
West Virginia	Greenbrier	Town of Quinwood	Feb. 27, 1981.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to the Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2288 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 65

[Docket No. FEMA-5974]

Communities With No Special Hazard Areas; National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: The Federal Insurance Administrator, after consultation with local officials of the communities listed below, has determined, based upon analysis of existing conditions in the communities, that these communities would not be inundated by 100-year flood. Therefore, the Administrator is converting the communities listed below to the Regular Program of the National Flood Insurance Program (NFIP) without determining base flood elevations.

EFFECTIVE DATE: Date listed in fourth column of List of Communities with No Special Flood Hazards.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426-1460 or Toll Free Line 800-424-8872, Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: In these communities, there is no reason not to make full limits of coverage available. The entire community is now classified as zone C. In a zone C, insurance coverage is available on a voluntary basis at low actuarial nonsubsidized rates. For example, under the Emergency Program in which your community has been participating the rate for a one-story 1-4 family dwelling is $.25 per $100 of coverage. Under the Regular Program, to which your community has been converted, the equivalent rate is $.01 per $100 coverage. Contents insurance is also available under the Regular Program at low actuarial rates. For example, when all contents are located on the first floor of a residential structure, the premium rate is $.05 per $100 of coverage.

In addition to the less expensive rates, the maximum coverage available under the Regular Program is significantly greater than that available under the Emergency Program. For example, a single family residential dwelling now can be insured up to a maximum of $185,000 coverage for the structure and $60,000 coverage for contents.

Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the National Flood Insurance Program.

The effective date of conversion to the Regular Program would not appear in the Code of Federal Regulations except for the page number of this entry in the Federal Register.

The entry reads as follows:

§ 65.8 List of communities with no special flood hazard areas.

State	County	Community name	Date of conversion to regular program
California	San Joaquin	City of Tracy	Dec. 22, 1980.
Washington	Yakima	Town of Granger	Dec. 22, 1980.
Florida	Volusia	City of DeLand	Dec. 22, 1980.
Illinois	Pulaski	City of Mounds	Dec. 22, 1980.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001-4128; Executive Order 12127, 44 FR 19367; and delegation of authority to the Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2289 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

National Flood Insurance Program; Final Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Final rule.

SUMMARY: Final base (100-year) flood elevations are listed below for selected locations in the nation.

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required either to adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

EFFECTIVE DATE: The date of issuance of the Flood Insurance Rate Map (FIRM), showing base (100-year) flood elevations, for the community.

ADDRESSES: See table below.

FOR FURTHER INFORMATION CONTACT: Mr. R. Gregg Chappell, National Flood Insurance Program, (202) 426-1460 or Toll Free Line (800) 424-8872 (In Alaska and Hawaii Call Toll Free (800) 424-9080), Room 5150, 451 Seventh Street, S.W., Washington, D.C. 20410.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the final determination of flood elevations for each community listed.

This final rule is issued in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93-234), 87 Stat. 980, which added Section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90-448), 42 U.S.C. 4001-4128, and 44 CFR Part 60.4(a)). An opportunity for the community or individuals to appeal this determination to or through the community for a period of ninety (90) days has been provided, and the Administrator has resolved the appeals presented by the community.

The Administrator has developed criteria for flood plain management in flood-prone areas in accordance with 44 CFR Part 60.

The final base (100-year) flood elevations for selected locations are:

Final Base (100-Year) Flood Elevations

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
Missouri	(V), Peerless Park, St. Louis County (Docket No. FI-4960).	Meramec River	Downstream corporate limit	*431
			Upstream corporate limit	*433
	Maps available for inspection at the Village Hall, Peerless Park, Missouri 63068.			
New Jersey	Montvale (Borough), Bergen County (FEMA-5773).	Bear Brook	At center of Van Riper Road crossing of Bear Brook	*315
		Cherry Brook	150 feet upstream from center of Middletown Road crossing of Cherry Brook.	*190
		Echo Glen Brook	30 feet upstream from center of Akers Avenue crossing of Echo Glen Brook.	*298
		Fieldstone Brook	160 feet north of the intersection of Dogwood Lane and Valemont Road.	*188
		Laurel Brook	At Limit of Detailed Study (approximately 3,025 feet above mouth)	*341
		Mill Brook	30 feet upstream from center of Grand Avenue West crossing of Mill Brook.	*279
			At center of Summit Avenue crossing of Mill Brook	*363
		Muddy Creek	50 feet upstream from center of Kinderkamack Road crossing of Muddy Creek.	*158
		Pascack Brook	100 feet upstream from center of Grand Avenue crossing of Pascack Brook.	*144
			At center of Magnolia Avenue crossing of Pascack Brook	*193
		Stateline Brook	At Corporate Limits	*210
	Maps available for inspection at Municipal Building, Memorial Drive, Montvale, New Jersey.			
Texas	City of Seagoville, Dallas and Kaufman Counties (FEMA-5748).	Stream 2A1	Approximately 100 feet upstream of Willis Drive	*379
			Just upstream of Water Street	*401
			Just upstream of Malloy Bridge Road	*417
		Stream 2A2	Just upstream of Malloy Bridge Road	*397
			Just upstream of Smith Lane	*402
			Just upstream of Reeves Street	*425
		Stream 4C1	Approximately 100 feet upstream of Cloverhill Road	*400
		Stream 4C3	Approximately 200 feet downstream of South Frontage Road of U.S. Highway 175.	*423
		Trinity River	Just Northwest of the Intersection of Malloy Bridge Road and the Southwestern Corporate Limits.	*370
	Maps available for inspection at City Manager, 704 N. Highway 175, Seagoville, Texas 75159.			

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended (42 U.S.C. 4001–4128); Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2284 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

[Docket No. FEMA-5845]

National Flood Insurance Program; Final Flood Elevation Determination; Kansas

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Deletion of final rule for the unincorporated areas of Sedgwick County, Kansas.

SUMMARY: The Federal Insurance Administration has erroneously published the final flood elevation determination for the unincorporated areas of Sedgwick County, Kansas. This notice will serve to delete that publication. Following an engineering analysis and review, a revised notice of proposed flood elevation determination will be issued.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872, (In Alaska and Hawaii call Toll Free Line (800) 424–9080), Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: As a result of a recent engineering analysis, the Federal Insurance Administration has determined that the notice of final flood elevation determination for the unincorporated areas of Sedgwick County, Kansas, published at 45 FR 82936, on December 17, 1980, should be deleted. After a technical evaluation, a revised notice of proposed flood elevations will be issued, with a ninety-day period specified for comments and appeals.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2282 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

[Docket No. FEMA-5825]

National Flood Insurance Program; Final Flood Elevation Determination; Michigan

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Deletion of final rule for the City of Sterling Heights, Macomb County, Michigan.

SUMMARY: The Federal Insurance Administration has erroneously published the final flood elevation determination for the City of Sterling Heights, Macomb County, Michigan. This notice will serve to delete that publication. Following an engineering analysis and review, a revised notice of proposed flood elevation determination will be issued.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872 (In Alaska and Hawaii call Toll Free Line, (800) 424–9080), Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: As a result of a recent engineering analysis, the Federal Insurance Administration has determined that the notice of final flood elevation determination for the City of Sterling Heights, Macomb County, Michigan, published at 45 FR 62830, on September 22, 1980, should be deleted. After a technical evaluation, a revised notice of proposed flood elevations will be issued, with a ninety-day period specified for comments and appeals.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2283 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

[Docket No. FEMA-5845]

National Flood Insurance Program; Final Flood Elevation Determination; Wisconsin

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Deletion of final rule for the Village of Ettrick, Trempealeau County, Wisconsin.

SUMMARY: The Federal Insurance Administration has erroneously published the final flood elevation determination for the Village of Ettrick, Trempealeau County, Wisconsin. This notice will serve to delete that publication. Following an engineering analysis and review, a revised notice of proposed flood elevation determination will be issued.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872. (In Alaska and Hawaii call Toll Free Line, (800) 424–9080), Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: As a result of a recent engineering analysis, the Federal Insurance Administration has determined that the notice of final flood elevation determination for the Village of Ettrick, Trempealeau County, Wisconsin, published at 45 FR 73680, on November 6, 1980, should be deleted. After a technical evaluation, a revised notice of proposed flood elevations will be issued, with a ninety-day period specified for comments and appeals.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2281 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

45 CFR Part 73

Standards of Conduct

AGENCY: Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: These regulations are a revision of the Department of Health and Human Services (HHS) standards of conduct. They are issued to tell HHS employees and special Government employees what standards of conduct are expected of them in performing their duties and what activities are permitted or prohibited both while they are employed and after their employment with HHS ends.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Timothy M. White, Office of the General Counsel (202) 245–7767 or Mrs. Florence Perman, Office of Personnel Policy and Communications (202) 245–1984.

SUPPLEMENTARY INFORMATION: The Department's conduct regulations were first issued in 1966. Changes have been made since that time; but no complete revision of the regulations has, up to now, been undertaken. Because of the need to include new requirements of law or policy, clarify existing provisions, and give examples to help officials who must apply the regulations, the decision was made to revise the complete text. The Office of the General Counsel and the Office of the Assistant Secretary for Personnel Administration worked together on the revision. A draft of the proposed regulations was widely circulated within the Department for review, and comments received were used in preparing the final regulations. Additions to or changes in the regulations include the following:

Subpart B has been added to show responsibilities within the Department with respect to standards of conduct, including requirements under the Ethics in Government Act. Employees are basically responsible for maintaining a high standard of ethical behavior, but the Department recognizes its obligation to help employees know what is expected of them in various situations and to advise and assist employees and supervisors. Officials responsible for carrying out this obligation are identified in Subpart B.

Under Subpart C, "Conduct on the Job," sections on courtesy and sexual harassment have been added.

The subpart on "Gifts, Entertainment, and Favors," Subpart E, has been expanded to include more detail on Department policy and to provide examples of what is permitted and prohibited.

Subpart F on "Political Activity" has been added to include in the regulations information on permissible and prohibited political activities. While this information is found in regulations and publications of the Office of Personnel Management, it is repeated in these regulations as a convenience to Department employees.

Under Subpart G, "Outside Activities" a section on the acceptance of honoraria has been added, and the legal restriction on the amount of an honorarium has

been reflected. Approval requirements for certain kinds of outside activities have been included in this subpart for ease of administration.

The subparts on financial interests and reporting financial interests, Subparts H and I respectively, have been expanded to include provisions on negotiating for future employment, to add requirements of the Ethics in Government Act of 1978, and to provide clarifying information on the various provisions related to conflicts of interest.

Subpart M has been added to cover the reporting of violations and to state the prohibition of reprisal against an employee who reports a violation of law or regulations.

Subpart N incorporates the regulations of the Office of Government Ethics on post employment conflicts of interest.

The Secretary has determined that these regulations relate solely to Department management and personnel and are exempt from the requirement for publication as proposed rules 5 U.S.C. 553(a)(2).

Thomas S. McFee,

Assistant Secretary for Personnel Administration.

January 15, 1981.

Approved: January 16, 1981.

Patricia Roberts Harris,

Secretary.

45 CFR Part 73 is revised to read as follows:

SUBTITLE A—DEPARTMENT OF HEALTH AND HUMAN SERVICES, GENERAL ADMINISTRATION

PART 73—STANDARDS OF CONDUCT

Subpart A—General Provisions

Sec.

73.735–101 Purpose.
73.735–102 Definitions.
73.735–103 Applicability.

Subpart B—Responsibilities

73.735–201 Employees and supervisors.
73.735–202 Management officials.

Subpart C—Conduct on the Job

73.735–301 Courtesy and consideration for others.
73.735–302 Support of department programs.
73.735–303 Use of government funds.
73.735–304 Use of government property.
73.735–305 Conduct in Federal buildings.
73.735–306 Sexual harassment.
73.735–307 Use of official information.

Subpart D—Financial Obligations

73.735–401 General provisions.

Subpart E—Gifts, Entertainment, and Favors

73.735–501 Prohibited acceptance of gifts, entertainment, and favors.
73.735–502 Permissible acceptance of gifts, entertainment, and favors.
73.735–503 Criminal provisions relating to gifts, entertainment, and favors.
73.735–504 Gifts to official superiors.
73.735–505 Acceptance of awards and prizes.
73.735–506 Gifts and decorations from foreign governments.
73.735–507 Acceptance of travel and subsistence.
73.735–508 Other prohibitions.

Subpart F—Political Activity

73.735–601 Applicability.
73.735–602 Permissible activities.
73.735–603 Prohibited activities.

Subpart G—Outside activities

73.735–701 General provisions.
73.735–702 Criminal prohibitions on outside activities.
73.735–703 Statutory prohibitions related to employment by a foreign government.
73.735–704 Professional and consultative services.
73.735–705 Writing and editing.
73.735–706 Teaching, lecturing, and speechmaking.
73.735–707 Holding office in professional societies.
73.735–708 Administrative approval of certain outside activities.
73.735–709 Annual reporting of outside activities.
73.735–710 Maintenance of records.

Subpart H—Financial Interest

73.735–801 Participation in matters affecting a personal financial interest.
73.735–802 Executive order prohibitions.
73.735–803 Prohibition against involvement in financial transactions based on information obtained through Federal employment.
73.735–804 Waiver of the prohibitions in this subpart.
73.735–805 Advice and guidance or conflicts matters.
73.735–806 Documentation and publication of opinions.

Subpart I—Reporting Financial Interests

73.735–901 Reporting requirement of the ethics in Government Act of 1978.
73.735–902 Reporting requirements for certain employees not covered by the Ethics in Government Act of 1978.
73.735–903 Action if conflicts of interest or possible conflicts are noted.
73.735–904 Resolution of apparent or actual conflicts of interest.

Subpart J—Provisions Relating to Experts, Consultants and Advisory Committee Members

73.735–1001 Coverage.
73.735–1002 Ethical standards of conduct.
73.735–1003 Conflicts of interest statutes.
73.735–1004 Requesting waivers or exemptions.
73.735–1005 Salary from two sources.
73.735–1006 Reporting financial interests.
73.735–1007 Political activity.

Subpart K—Special Government Employees Other Than Consultants

73.735–1101 General provision.

Subpart L—Disciplinary Action

73.735–1201 General provisions.

Subpart M—Reporting Violations

73.735–1301 Responsibility for reporting possible criminal violations.
73.735–1302 Responsibility for reporting allegations of misconduct.
73.735–1303 Prohibition of reprisals.
73.735–1304 Referral of Matters arising under the standards of this part.

Subpart N—Conduct and Responsibilities of Former Employees

73.735–1401 Prohibitions against post-employment conflicts of interest.

Authority: 5 USC 7301; E.O. 11222, May 8, 1965; 5 CFR 735.104.

Subpart A—General Provisions

§ 73.735–101 Purpose.

To assure that the business of the Department of Health and Human Services (HHS) is conducted effectively, objectively, and without improper influence or the appearance of improper influence, employees and special Government employees must be persons of integrity and must observe high standards of honesty, impartiality, and behavior. They must not engage in any conduct prejudicial to the Government and must avoid conflicts of private interests with public duties and responsibilities. In accord with these principles, the regulations in this Part are issued to inform HHS employees and special Government employees what standards of conduct are expected of them in performing their duties and what activities are permitted or prohibited both while they are employed and after their employment with the Department is ended.

§ 73.735–102 Definitions.

In this part:

(a) "Employee" means an officer or employee of HHS other than a special Government employee and includes Commissioned Officers of the Public Health Service who are on active duty, and individuals on assignment or detail to HHS pursuant to the Intergovernmental Personnel Act (5 U.S.C. 3371–3376). The term also includes HHS employees who are detailed to non-Federal or other Federal organizations. At times the term "regular employee" is used in place of "employee" to make a clear distinction between special Government employees and others employed by the Federal government.

(b) "Special Government employee" means an individual who is retained,

designated, appointed, or employed to perform temporary duties either on a full-time or intermittent basis, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days.

(c) "Person" means an individual, a corporation, a company, an association, a firm, a partnership or any other organization.

(d) "Former employee" means a former employee of HHS or former special Government employee as defined in paragraph (b) of this section.

(e) "Principal Operating Component" has the meaning given to that term in the Department's General Administration Manual. In addition, when used in these regulations, it includes the Office of the Secretary.

(f) "Department" means the Department of Health and Human Services.

§ 73.735-103 Applicability.

(a) The regulations in this Part apply to all employees of the Department and to special Government employees to the extent indicated in Subparts J and K. They apply whether an employee is on leave, including leave without pay, or on duty.

(b) These regulations may be supplemented by regulations governing principal operating components, or sub-units of principal operating components, provided the clearance and publication requirements for standards of conduct regulations are met and approval is obtained from the Department Ethics Counselor and the Assistant Secretary for Personnel Administration.

Subpart B—Responsibilities

§ 73.735 Employees and supervisors.

(a) Employees and special Government employees shall be responsible for observing all generally accepted rules of conduct and the specific provisions of law and the regulations of this Part that apply to them. They are required to become familiar with these regulations and to exercise informed judgments to avoid misconduct or conflicts of interest. They shall secure approvals when required and file financial disclosure reports or statements in accordance with the provisions of this Part. Failure to observe any of these regulations may be cause for disciplinary action. Some of the provisions are required by law and carry criminal penalties which are in addition to any disciplinary action which could be taken. When employees have doubts about any provision, they should consult their supervisor, personnel office, or the Department Ethics Counselor or a deputy counselor.

(b) Supervisors, because of their day-to-day relationships with employees, are responsible to a large degree for making sure high standards of conduct are maintained. They must become familiar with the Department's standards of conduct regulations and apply the standards to the work they do and supervise. Supervisors shall take suitable action, including disciplinary action in accordance with Subpart L of these regulations, when violations occur.

§ 73.735-202 Management officials.

(a) The Department has an obligation to enforce the requirements of this Part in all respects and to help employees, special Government employees, and supervisors carry out their responsibilities to maintain high standards of ethical conduct. This includes an obligation for managers to provide information and training concerning the HHS conduct regulations, to provide advice and guidance with respect to them, and to review for possible conflicts of interest certain outside activities and financial interests of employees. The officials responsible for discharging the Department's oligations in this regard are identified in paragraphs (b) through (f) of this section.

(b) Department Ethics Counselor. The Assistant General Counsel, Business and Administrative Law Division, shall be the Department Ethics Counselor and shall serve as the Designated Agency Official for matters arising under the Ethics in Government Act of 1978, (Pub. Law 95-521). The responsibilities of the Department Ethics Counselor shall include:

(1) Rendering authoritative advice and guidance on matters of general applicability under the standards of this Part and all other laws and regulations governing employee conduct, with particular reference to conflicts of interest matters.

(2) Coordinating the Department's counselling and training services regarding conflicts of interest and assuring that employees of the Department are kept informed of developments in conflict of interest laws and other related matters of ethics.

(3) Receiving information on conflicts of interest and appearances of conflicts of interest involving employees of the Department and forwarding this information to the appropriate management official, or the Inspector General, as necessary, with his or her legal evaluation of the matters addressed.

(4) Reviewing the financial disclosure reports, requests for approval of outside activities, and similar reports filed by Executive level officers, non-career executives, deputy ethics counselors, and Schedule C employees in the Office of the Secretary for the purpose of identifying and resolving possible and actual conflicts of interest.

(5) Maintaining liaison with the Office of Government Ethics.

(6) Advising management officials on the resolution of conflicts of interest by any of the remedies set forth in 73.735-904 of this Part.

(7) Maintaining accurate and complete documentation of all formal guidance and advice regarding conflict of interest matters subject to the provisions of this Part, except for routine or repetitious cases where the guidance given is not precedential.

(8) Maintaining and publishing from time to time a list of those circumstances or situations which have resulted or may result in noncompliance with conflict of interest laws or regulations. [Section 206(b)(7), Pub. L. 95-521].

(9) Designating and training an appropriate number of reviewing officials to assist him or her in carrying out the duties of the Designated Agency Offical under the Ethics in Government Act.

(10) Maintaining effective lines of communication with deputy ethics counselors on all matters regarding employee conduct and ethics.

(c) Deputy Ethics Counselors. Assistant General Counsels and Regional Attorneys are designated deputy ethics counselors to assist the Department's Counselor in carrying out his or her responsibilities, particularly with respect to employees in the organization in which the deputy counselor serves. Regional Attorneys shall provide such assistance for all employees of the Department in organizations for which the Principal Regional Official provides personnel services.

(d) The Assistant Secretary for Personnel Administration shall be responsible for developing and issuing procedures and requirements for the implementation of these regulations and for monitoring the application of such procedures and requirements throughout the Department.

(e) Heads of Principal Operating Components and the Assistant Secretary for Management and Budget for the Office of the Secretary shall be ultimately responsible for assuring that persons who work for their respective organizations comply with the standards

of this Part. Their responsibilities shall include:

(1) Designating officials to review and approve outside activity requests in accordance with § 73.735–708 of this Part or statements of employment or financial interests under § 73.735–902. A list of the officials designated for these purposes shall be provided to the Department Ethics Counselor and to the Assistant Secretary for Personnel Administration and shall be updated in January and July of each year.

(2) Designating for the components of his or her organization, other than those for which a principal regional official provides personnel services, one or more individuals to oversee and coordinate the administrative aspects of these regulations. Responsibilities of such a person include making sure each employee or special government employee is provided a copy of these regulations, or an appropriate summary thereof; ensuring that training in the requirements of the regulations is provided to supervisors and to new employees; providing for the distribution, receipt, review and retention of financial interest reports and statements as directed by the Department Ethics Counselor and the Assistant Secretary for Personnel Administration; sending annual reminders as required; providing for a file of outside work requests; giving information and assistance to employees on a day-to-day basis; and making available to employees the names and addresses of the Department's Ethics Counselor and deputy ethics counselors.

(f) Principal Regional Officials (PROs) shall designate one or more regional employees to perform, for components for which personnel services are provided by the PROs, the responsibilities in (e)(2) of this section.

Subpart C—Conduct on the Job

§ 73.735–301 Courtesy and consideration for others.

(a) An employee's conduct on the job is, in all respects, of concern to the Federal government. Courtesy, consideration, and promptness in dealing with the public must be shown in carrying out official responsibilities, and actions which deny the dignity of individuals or conduct which is disrespectful to others must be avoided. Employees must recognize that inattention to matters of common courtesy can adversely affect the quality of service the Department is responsible for providing. Where appropriate, courtesy to the public should be included in the standards for employee performance.

(b) Of equal importance is the requirement that courtesy be shown in day-by-day interaction with co-workers. Employees shall be polite to and considerate of other employees, and shall respect their needs and concerns in the work environment.

§ 73.735–302 Support of department programs.

(a) When a Department program is based on law, Executive Order or regulation, every employee has a positive obligation to make it function as efficiently and economically as possible and to support it as long as it is a part of recognized public policy. An employee may, therefore, properly make an address explaining and interpreting such a program, citing its achievements, defending it against uninformed or unjust criticism, or soliciting views for improving it.

(b) An employee shall not, either directly or indirectly, use appropriated funds to influence, or attempt to influence, a Member of Congress to favor or oppose legislation. However, when authorized by his or her supervisor, an employee is not prohibited from:

(1) Testifying, on request, as a representative of the Department on pending legislation or proposals before Congressional Committees; or

(2) Assisting Congressional Committees in drafting bills or reports on request, when it is clear that the employee is serving solely as a technical expert under the direction of committee leadership.

(c) All employees shall be familiar with regulations and published instructions that relate to their official duties and responsibilities and shall comply with those directives. This includes carrying out proper orders from officials authorized to give them.

(d) Employees are required to assist the Inspector General and other investigative officials in the performance of their duties or functions. This requirement includes the giving of statements or evidence to investigators of the Inspector General's office or other HHS investigators authorized to conduct investigations into potential violations.

§ 73.735–303 Use of government funds.

(a) An employee shall not:

(1) Improperly use official travel;

(2) Improperly use payroll and other vouchers and documents on which Government payments are based;

(3) Take or fail to account for funds with which the employee is entrusted in his or her official position; or

(4) Take other Government funds for personal use. Violation of these prohibitions carry criminal penalties.

(b) In addition, employees shall avoid wasteful actions or behavior in the performance of their assigned duties.

§ 73.735–304 Use of Government property.

(a) An employee shall not directly or indirectly use, or allow the use of, Government property of any kind, including property leased to the Government, for other than officially approved activities. An Employee has a positive duty to protect and conserve Government property, including equipment, supplies, and other property entrusted or issued to him or her. For example:

(1) Only official documents and materials may be processed on Government reproduction facilities. Both supervisors and employees must assure that this rule is strictly followed. (Exception for employee welfare and recreation associations is stated in Chapter 25–10, General Administration Manual. Exception for labor organizations is stated in Personnel Instruction 711–1.)

(2) Employees may drive or use Government automobiles or aircraft only on official business. Use of a Government owned, leased, or rented vehicle or aircraft for non-official purposes may result in suspension for at least 30 days or removal from the Federal service. 31 U.S.C. 638a.

Example: Normally, use of a Government automobile by travel between home and place of duty would not be considered official business and could not be authorized. An exception to this rule might be appropriate in a situation where an employee is required to leave early in the morning to attend a meeting in a distant city, or to return late in the day from such a meeting. Allowing the employee to drive a government car to his or her home the night before in order to leave from home, or to return to his or her home in the evening upon completion of the trip is permissible, provided the employee does not use the car for any personal reason.

§ 73.735–305 Conduct in Federal buildings.

(a) An employee shall not participate while on Government-owned or leased property or while on duty for the Government, in any gambling activity including the operation of a gambling device, in conducting a lottery or pool, in a game for money or property, or in selling or purchasing a numbers slip or ticket.

(b) An employee shall not while in or on Government-owned or leased property or while on duty for the Government solicit alms and contributions, engage in commercial

soliciting and vending, display or distribute commercial advertisements, or collect private debts.

(c) The prohibitions in (a) and (b) of this section do not preclude:

(1) Activities necessitated by an employee's law enforcement duties;

(2) Participation in Federally sponsored fund-raising activities conducted pursuant to Executive Order 10927, or similar HHS-approved activities; or

(3) Buying a lottery ticket at an authorized State lottery outlet for a lottery authorized by State law and conducted by an agency of a State within that State.

(d) General Services Administration regulations on "Conduct on Federal Property" apply to all property under the control of the General Services Administration, and they are also applicable to all buildings and space under the control of this Department. These regulations prohibit, among other things, gambling, being intoxicated, and possession, distribution, or use of narcotic or dangerous drugs on the premises. The GSA regulations are found in Subpart 101-20.3 of the GSA Regulations, 41 CFR 101-20.3.

§ 73.735-306 Sexual harassment.

Sexual harassment is deliberate unsolicited verbal comments, gestures, or physical contact of a sexual nature which are unwelcome. Sexual harassment is unacceptable conduct and is expressly prohibited. In addition, supervisors and managers are prohibited from taking or promising personnel actions in exchange for sexual favors, or failing to take an action because an employee or applicant for employment, refuses to engage in sexual conduct. This same prohibition applies to relationships between Department personnel who take or recommend action on a grant or contract and the grantee or contractor. Those employees who wish to file a complaint of sexual harassment should contact the Office of Equal Employment Opportunity (EEO) within their respective agencies for guidance. (Timeframes for pursuing a charge alleging sexual harassment are the same as for any other complaint based on allegations of sex discrimination.)

§ 73.735-307 Use of official information.

(a) The public interest requires that certain information in the possession of the Government be kept confidential, and released only with general or specific authority under Department or operating component regulations. Such information may involve the national security or be private, personal, or business information which has been furnished to the Government in confidence. In addition, information in the possession of the Government and not generally available may not be used for private gain. The following paragraphs set forth the rules to be followed by Department employees in handling information in official files or documents:

(1) *Classified information.* Employees who have access to information which is classified for security reasons in accordance with Executive Order 12065 are responsible for its custody and safekeeping, and for assuring that it is not disclosed to unauthorized persons. See the Department's Security Manual, Part 3 for details.

(2) *Security and investigative information.* Security and investigative data received from Government agencies or other sources for official use only within the Department or developed under a pledge of confidence is not to be divulged to unauthorized persons or agencies.

(3) *Information obtained in confidence.* Certain Department units (e.g., Food and Drug Administration, and the Social Security Administration) obtain in the course of their program activities certain information from businesses or individuals which they are forbidden by law from disclosing. These statutory prohibitions are found in 21 U.S.C. 331j, and 18 U.S.C. 1905. Each employee is responsible for observing these laws.

(4) *Use of information for private gain.* Government employees are sometimes able to obtain information about some action the Government is about to take or some other matter which is not generally known. Information of this kind shall not be used by the employee to further his or her or someone else's private financial or other interests. Such a use of official information is clearly a violation of a public trust. Employees shall not, directly or indirectly, make use of, or permit others to make use of, for the purpose of furthering any private interest, official information not made available to the general public.

(b) The Privacy Act provides criminal penalties for an employee who willfully discloses individually identifiable information from records, disclosure of which is prohibited by that Act. 5 U.S.C. 552a(i).

Subpart D—Financial Obligations

§ 73.735-401 General provisions.

(a) The Department considers the indebtedness of its employees to be a matter of their own concern. However, employees shall not by failure to meet their just financial obligations reflect adversely on the Government as their employer. Employees are expected to pay each just financial obligation in a proper and timely manner. A "just financial obligation" is one acknowledged by the employee or reduced to judgment by a court, or one imposed by law such as Federal, State, or local taxes. "In a proper and timely manner" is a manner which the Department determines does not, under the circumstances, reflect adversely on the part of an employee in meeting his or her financial obligations, particularly those that relate to support of the employee's family, to payment of Federal, State, or local taxes, or to payments to tax-supported institutions such as a city or state hospital, or educational institution. If for some reason an employee is unable to pay these obligations promptly, he or she is expected to make satisfactory arrangements for payment and abide by these arrangements.

(b) Disciplinary action may be considered when an employee has handled his or her financial affairs in such a way that:

(1) Action on complaints received from creditors requires the use of a considerable amount of official time, or

(2) It appears that financial difficulties are impairing the employee's efficiency on the job, or

(3) Because of the employee's financial irresponsibility, the attitude of the general public toward the Department may be adversely affected; and the employee after counseling does not make arrangements to meet his or her financial obligations.

Subpart E—Gifts, Entertainment, and Favors

§ 73.735-501 Prohibited acceptance of gifts, entertainment, and favors.

(a) Except as provided in 73.735-502 and 73.735-506, an employee shall not directly or indirectly solicit or accept anything of monetary value, including gifts, gratuities, favors, entertainment or loans from a person who the employee knows, or should know because of the nature of the employee's work:

(1) Has, or is seeking to obtain, contractual or other business or financial relations with the employee's principal operating component, or subunit thereof; or with a component of the Department with respect to which the employee has official duties;

(2) Conducts operations or activities that are regulated by the employee's principal operating component, or subunit thereof or by a component of the

Department with respect to which the employee has official duties; or

(3) Has interests that may be substantially affected by the performance or non-performance of the employee's official duties.

(b) Employees may not designate a person or an organization, including charitable or non-profit organizations, to accept any gift which an employee is prohibited from accepting directly.

§ 73.735-502 Permissible acceptance of gifts, entertainment and favors.

(a) An employee may accept a gift, gratuity, favor, entertainment, loan or similar favor of monetary value which stems from a family relationship such as that between the employee and his or her parents, spouse or children, if it is clear that the relationship is the motivating factor.

(b) Loans from banks or other financial institutions may be accepted on customary terms.

(c) Unsolicited advertising or promotional material such as pens, note pads, calendars and similar items of nominal intrinsic value may be accepted.

(d) An employee may accept food or refreshment of nominal value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or on an inspection tour only if the employee is properly in attendance and there is not a reasonable opportunity to pay.

Example 1: Employee is on the premises of Company participating in a meeting at a normal mealtime. A representative of Company provides a meal for all meeting participants from a Company facility and there is no established method for payment. Employee may accept.

Example 2: Employee is on the premises of Company and he or she goes outside for lunch with a representative of the Company. The representative offers to pay the bill. Since it is practical for the employee to pay for his or her own meal, the employee may not accept.

(e) An employee may also accept food or refreshment of nominal value on infrequent occasions if the food and/or refreshment is offered to all participants or attendees of a meeting or convention.

Example 1: During the course of a convention of a professional organization a luncheon open to all attendees is sponsored by a corporation which conducts business with the Department and the employee has official dealings with representatives of the corporation. The employee may attend the luncheon.

§ 73.735-503 Criminal provisions relating to gifts, entertainment, and favors.

(a) The law provides criminal penalties for whoever, directly or indirectly:

(1) Receives or accepts anything of value for or because of any official act the employee has performed or will perform; or

(2) Gives, offers or promises anything of value for the performance of an official act or to influence the performance of an official act. 18 USC 201.

(b) The law prohibits an employee from receiving any salary or any contribution to, or supplementation of, his or her salary as compensation for services as an officer or employee of the Government from any source other than the United States or any state, county or municipality. This law does not prohibit an employee from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus or other employee welfare or benefit plan maintained by a former employer. 18 U.S.C. 209.

Example 1: A corporate executive is asked to accept a position in the Department. The corporation offers to continue to pay the executive the difference between his or her salary as a Government employee and that received by an employee of the corporation. Such payment would be considered to be "compensation for" the employee's Government service and is prohibited.

Example 2: A corporate executive is asked to accept a position in the Department. The corporation proposes to pay him or her a special severance payment in anticipation of this or her serving in the Government. This proposal would be prohibited because there is no distinction between the proposed lump-sum payment and the prohibited continuation of salary payments described in the example above.

Example 3: A corporate executive is asked to accept a position in the Department. The corporation has an established policy which provides for an amount of severance pay to be paid any departing executive and proposes to make payment based on that policy when the executive leaves. The executive may accept the payment. Under these circumstances it is clear that the severance pay is in payment for past services not in anticipation of the future services for the Government.

§ 73.735-504 Gifts to official superiors.

An employee shall not solicit a contribution from another employee for a gift to an official superior, make a donation as a gift to an official superior, or accept a gift from an employee receiving less pay than himself or herself. 5 U.S.C. 7351. This section does not prohibit a voluntary gift of nominal value or donation in nominal amount made on a special occasion such as marriage, illness or retirement.

§ 73.735-505 Acceptance of awards and prizes.

(a) Employees may accept awards, including cash awards, given in recognition of a meritorious public contribution or achievement. However, if there is any indication that the award may improperly influence the employee in the performance of his or her offical duties, advice about the acceptance of it should be sought from a deputy ethics counselor. Also, an employee may not accept an award from an organization which the employee knows, or should know, has a contractual or other business arrangement with, or is regulated by, the principal operating component, or a sub-unit, in which he or she is employed or with respect to which the employee has official duties, unless acceptance is approved by the head of the employee's principal operating component. The head of the component may not approve acceptance unless he or she is satisfied that no actual conflict of interest would result.

(b) Employees may generally accept trophies, entertainment, rewards, and prizes given to competitors in contests or events which are open to the public.

(c) Employees may not accept gifts, awards, decorations or other things of value from a foreign government except as provided in § 73.735-506.

§ 73.735-506 Gifts and decorations from foreign governments.

(a) An employee may not request or otherwise encourage the tender of a gift or decorations from a foreign government or official thereof.

(b) An employee may accept from a foreign government:

(1) A gift which is in the nature of medical treatment or an educational scholarship;

(2) A tangible gift of minimal value tendered or received as a mark of courtesy; ("Minimal value" means a retail value in the United States at the time of acceptance of not more than one hundred dollars, unless the Administrator of the General Services Administration adjusts the value by regulation.) or

(3) A tangible gift of more than minimal value when it appears that to refuse the gift would be likely to cause offense or embarrassment or otherwise adversely affect the foreign relations of the United States. However, the acceptance of such a gift would be on behalf of the United States and the gift would become the property of the United States. See the Department's General Administration Manual,

Chapter 20–25 for information regarding the disposition of a gift accepted under these circumstances.

(c) An employee may also accept from a foreign government gifts of travel or expenses for travel (such as transportation, food and lodging) that take place entirely outside the United States and are of more than minimal value, if such acceptance is consistent with the interests of the United States and is approved by the travel approving authority in accordance with the Department's Travel Manual. See General Administration Manual, Chapter 20–25 for a requirement to report such travel.

(d) An employee may accept, retain, and wear a decoration tendered in recognition of active field service in time of combat operations or awarded for other outstanding or unusually meritorious performance, subject to the approval of the Secretary or his or her designee.

(e) Members of an employee's family and household are also subject to the regulations in this section. A member of an employee's family and household is a relative by blood, marriage or adoption who is a resident of the household. However, if a member of an employee's family and household is employed by another agency of the Government, the offer or acceptance of a gift shall be treated under the regulations of that agency.

(f) For purposes of this section "foreign government" means:

(1) Any unit of foreign government authority including any foreign national, state, local and municipal government;

(2) Any international or multinational organization whose membership is composed of any unit of foreign government described in subparagraph (1); or

(3) Any agent or representative of any such unit or organization when acting as such agent or representative. (5 U.S.C. 7342)

§ 73.735—507 Acceptance of travel and subsistence

(a) Except as provided in (b) of this section, employees may accept accommodations, subsistence, and travel in cash or in kind in connection with official travel for attendance at meetings, conferences, training in non-Governmental facilities or for performing advisory services, if approved in accordance with the provisions of the HHS Travel Manual. (5 U.S.C. 4111; 42 U.S.C. 3506)

(b) Employees may not accept accommodations, subsistence, or travel in cash or in kind in connection with official travel from a non-Governmental source with which they have official dealings unless Government or commercial travel and/or accommodations are not available. If travel and/or subsistence is accepted for official travel under these circumstances, such acceptance and the basis for it must be reported in writing to the Head of the Principal Operating Component or Assistant Secretary for Management and Budget for the Office of the Secretary.

§ 73.735—508 Other prohibitions.

Employees shall avoid any action whether or not specifically prohibited by this Part, which might result in or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any person;

(c) Impeding Government efficiency or economy;

(d) Losing complete independence or impartiality in the performance of their Government duties;

(e) Making a Government decision outside official channels; or

(f) Affecting adversely the confidence of the public in the integrity of the Government.

Subpart F—Political Activity

§ 73.735–601 Applicability.

(a) All employees in the Executive Branch of the Federal Government, including non-career employees, are subject to basic political activity restrictions in subchapter III of Chapter 73 of title 5, United States Code (the former Hatch Act) and Civil Service Rule IV. Employees are individually responsible for refraining from prohibited political activity. Ignorance of a prohibition does not excuse a violation. This subpart summarizes provisions of law and regulation concerning political activity of employees. The Federal Personnel Manual and other publications of the Office of Personnel Management contain more detailed information on this subject. These may be reviewed in Department personnel offices, or will be made available by the Ethics Counselor, or the deputy counselor for the employee's organizational component.

(b) The Secretary and Under Secretary are exempt from the prohibitions concerning active participation in political management and political campaigns. Also exempt are other officials of the Department, except the Inspector General and Deputy Inspector General, who are appointed by the President by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in the nationwide administration of Federal laws.

(c) Intermittent employees are subject to the restrictions when in active duty status only and for the entire 24 hours of any day of actual employment.

(d) Employees on leave, on leave without pay, or on furlough even though an employee's resignation has been accepted, are subject to the restrictions. Separated employees who have received a lump-sum payment for annual leave are not subject to the restriction during the period covered by the lump-sum payment or thereafter, provided they do not return to Federal employment during that period. Employees are not permitted to take a leave of absence to work with a political candidate, committee, or organization or to become a candidate for office with the understanding that they will resign their position if nominated or elected.

(e) Employees are accountable for political activity by another person acting as their agent or under the employee's direction or control, if they are thus accomplishing indirectly what they may not lawfully do directly and openly.

(f) Though officers in the Public Health Service Commissioned Corps are not subject to the restrictions in subchapter III of Chapter 73 of title 5, United States Code, the provisions of this subpart apply to them.

§ 73.735–602 Permissible activities.

(a) Section 7324 of title 5, U.S.C. provides that employees have the right to vote as they please and to express their opinions on political subjects and candidates. Generally, however, employees are prohibited from taking an active part in political management or political campaigns or using official authority or influence to interfere with an election or affect its results. There are some exemptions from the restrictions of the statute:

(1) Employees may engage in political activity in connection with any question not specifically identified with a national or State political party. They also may engage in political activity in connection with an election, if none of the candidates represents a party any of whose candidates for presidential elector received votes at the last preceding election at which presidential electors were selected.

(2) An exception relates to political campaigns within, or in communities adjacent to, the District of Columbia, or in communities the majority of whose voters are employees of the Federal government. Communities to which the exception applies are specifically

designated by the Office of Personnel Management. Information regarding the localities and the conditions under which the exceptions are granted may be obtained from personnel offices or the Department Counselor or deputy counselors.

(b) A covered employee is permitted to:

(1) Register and vote in any election;

(2) Express his or her opinion as an individual citizen privately and publicly on political subjects and candidates;

(3) Display a political picture, sticker, badge or button;

(4) Participate in the nonpartisan activities of a civic, community, social, labor, or professional organization, or of a similar organization;

(5) Be a member of a political party or other political organization and participate in its activities to the extent consistent with law;

(6) Attend a political convention, rally, fund raising function; or other political gathering;

(7) Sign a political petition as an individual citizen;

(8) Make a financial contribution to a political party organization;

(9) Take an active part, as an independent candidate, or support of an independent candidate, in a partisan election in localities identified as permissible for such activities by the Office of Personnel Management;

(10) Take an active part, as a candidate or in support of a candidate, in a nonpartisan election;

(11) Be politically active in connection with a question which is not specifically identified with a political party, such as a constitutional amendment, referendum, approval of a municipal ordinance or any other question or issue of a similar character;

(12) Serve as an election judge or clerk, or in a similar position to perform nonpartisan duties as prescribed by State or local law; and

(13) Otherwise participate fully in public affairs, except as prohibited by law, in a manner which does not materially compromise his or her efficiency or integrity as an employee or the neutrality, efficiency, or integrity of his or her agency.

(c) The head of a principal operating component may prohibit or limit the participation of an employee or class of employees of his or her component in an activity permitted by paragraph (b) of this section, if participation in the activity would interfere with the efficient performance of official duties, or create a conflict or apparent conflict of interest.

§ 73.735-603 Prohibited activities.

(a) The following are prohibited activities:

(1) Serving as an officer of a political party, a member of a national, State or local committee of a political party, an officer or member of a committee of a partisan political club, or being a candidate for any of these positions;

(2) Organizing or reorganizing a political party organization or political club;

(3) Directly or indirectly soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political purpose or in connection with a partisan election;

(4) Organizing, selling tickets to, seeking support for, or actively participating in a fund-raising activity of, a political party or political club;

(5) Taking an active part in managing the political party campaign of a candidate for public office or political office;

(6) Being a candidate for, or campaigning for, an elective public office, except as permitted in section 73.735-602(b)(9);

(7) Taking an active part in an organized solicitation of votes in support of or in opposition to a candidate for public office or political party office;

(8) Acting as recorder, watcher, challenger, or similar officer at the polls on behalf of a political party or candidate in a partisan election;

(9) Driving voters to the polls on behalf of a political paty or a candidate in a partisan election;

(10) Endorsing or opposing a candidate in a partisan election in a political advertisement, a broadcast, campaign literature, or similar material;

(11) Serving as a delegate, alternate, or proxy to a political party convention;

(12) Addressing a State or national convention or caucus, or a rally or similar gathering of a political party, in support of or in opposition to a candidate for public or political party office, or on a partisan political question; and

(13) Initiating or circulating a nominating petition for a candidate in a partisan election.

(b) In addition, certain political activities are prohibited by Federal criminal law:

(1) Officers and employees may not directly or indirectly solicit or receive, or be in any way involved in soliciting or receiving, any assessment, subscription or contribution for any political purpose whatever from another officer or employee. This prohibition extends to one who acts as a mere agent or messenger for the purpose of turning the contribution over to a political organization. 18 U.S.C. 602.

(2) All persons, whether employees or not, are prohibited from soliciting in any manner, or receiving a contribution of, money or a thing of value, in any room or building occupied in the discharge of official duties by any officer or employee of the United States. 18 U.S.C. 603. This prohibition extends to the sending of a letter soliciting political contributions for delivery in a Government building.

(3) No officer or employee may directly or indirectly give to any other officer, employee or person in the service of the United States, any money or other thing of value to be applied to the promotion of any political objective. 18 U.S.C. 607.

(4) Discrimination for giving or withholding any contribution for any political purpose and discrimination based on political influence or recommendations is prohibited.

(c) Various other laws prohibit certain activities in connection with political campaigns and elections. They include:

(1) Intimidating, threatening, or coercing voters in Federal elections (18 U.S.C. 594).

(2) Using official authority in interfering with a Federal election by a person employed in any administrative position by the United States or by any department, independent establishment, or agency of the United States or by any State, agency, or political subdivision thereof in connection with any activity financed in whole or in part by Federal funds (18 U.S.C. 595).

(3) Promising Federal employment, compensation, or any benefit from Federal funds, in return for political activity or support (18 U.S.C. 600).

(4) Depriving anyone of employment, compensation, or any benefit derived from Federal relief or work relief funds on account of race, creed, color, or political activity (18 U.S.C. 601).

(5) Soliciting, assessing, or receiving subscriptions or contributions for political purpose from anyone on Federal relief or work relief (18 U.S.C. 604).

Subpart G—Outside Activities

§ 73.735-701. General provisions.

(a) Outside employment may be appropriate when it will not adversely affect performance of an employee's official duties and will not reflect discredit on the Government or the Department. Such work may include civic, charitable, religious, and community undertakings. There are certain types of outside work, however, which give rise to a real or apparent

conflict of interest. Some of these are prohibited by law. Others are prohibited by regulation, as discussed in paragraph (b) of this section, or by criteria developed by heads of operating components for application within a particular component. All of these provisions are binding, but they do not necessarily include all possible conflicts of interest. In all instances, good judgment must be used to avoid a conflict between an employee's Federal responsibilities and outside activities.

(b) An employee shall not engage in outside employment or other outside activity not compatible with the full and proper discharge of the duties and responsibilities of his or her Government employment whether or not in violation of any specific provision of law. Incompatible activities include, but are not limited to:

(1) Acceptance of a fee, compensation, gift, payment of expense, or any other thing of monetary value in any circumstances in which acceptance may result in, or create the appearance of, conflicts of interest;

(2) Outside employment which tends to impair the employee's mental or physical capacity to perform Government duties and responsibilities in an acceptable manner;

(3) Work which identifies the Department or any employee in his or her official capacity with any organization commercializing products relating to work conducted by the Department, or with any commercial advertising matter, or work performed under such circumstances as to give the impression that it is an official act of the Department or represents an official point of view;

(4) Outside work or activity that takes the employee's time and attention during his official work hours.

(c) An employee shall not receive any salary or anything of monetary value from a private source as compensation for services to the Government. For example, a Department employee may be called upon, as a part of his or her official duties, to participate in a professional meeting sponsored by a non-Government organization, or to contribute a paper or other writing prepared on official time for publication under non-Government auspices. The employee must not accept an honorarium or fee for such services, even though the organization accepting the service customarily makes such a payment to those who participate. Nor may the employee accept a contribution to some charity, educational institution, or the like, in appreciation of the services furnished by the Department employee who cannot accept the usual payment. All offers to make such a contribution must be refused. Any employee with whom such a question is raised shall explain that the service involved was provided as an official action of the Department and is authorized by law. Under these circumstances, it is inappropriate for any payment to be made, even indirectly and to a third party, for services which are furnished without charge by the Government.

(d) Other than as provided in (c) of this section, employees may receive compensation or other things of monetary value for any lecture, discussion, writing or appearance the subject matter of which is in part devoted to the responsibility, programs or operations of the Department so long as the activity is undertaken in a personal capacity, is not performed as official duty, is not done while on official time, and does not create a conflict of interest or appearance of conflict of interest. However, such activities are considered outside employment and may be undertaken only as provided in this subpart.

(e) This section does not restrict the acceptance of compensation or other things of monetary value for any lecture, discussion, writing or appearance, the subject matter of which is not devoted to the responsibilities, programs, or operations of the Department and which are undertaken in a private capacity and in accordance with §§ 73.735.704, 705, or 706.

(f) Federal law limits the amount of honorarium that may be paid any employee for any one speech, writing or appearance to $2,000.00 (not to include amounts for actual travel and subsistence expenses for the employee and his or her spouse) and an aggregate of $25,000.00 in any calendar year. This limitation applies to such activities whether or not the subject matter is related to the responsibilities, programs or operations of the Department. (2 U.S.C. 441i) The term "honorarium" means payment of money or other thing of value whether made gratuitously or as a fee for an appearance, speech or article but does not include salary or compensation made for services rendered on a continuing basis, such as for teaching, or as proceeds from the sale of a book or similar undertaking.

(g) An employee who is a Presidential appointee covered by section 401(a) of Executive Order 11222 shall not receive compensation or anything of monetary value for any consultation, lecture, discussion, writing or appearance, the subject matter of which is devoted substantially to the responsibilities, programs, or operations of his or her component, or which draws substantially on official data or ideas which have not or will not on request become public information.

(h) Application of these general provisions to some specific activities is discussed below.

§ 73.735-702. Criminal prohibitions on outside activities.

(a) An employee may not, with or without compensation, represent another before any Government agency, court or commission in connection with any proceeding, application, request for a ruling, contract, claim or other particular matter in which the United States is a party or has a direct and substantial interest. (18 U.S.C. 203 and 205)

(b) An employee may not act as agent or attorney for anyone else in prosecuting any claim against the United States (18 U.S.C. 205).

(c) As an exception to the above, if it is not inconsistent with the performance of his or her duties, an employee may act without compensation as an agent or attorney for another employee, or a person under active consideration for Federal employment, who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings at the administrative level. For example, an employee may represent another employee who is the subject of disciplinary action, or the complainant in a discrimination proceeding, at all stages within the Department and before the Merit Systems Protection Board or Equal Employment Opportunity Commission but not in Federal Court. It would be inconsistent with the performance of official duties for a supervisor to represent subordinate employees.

(d) The law and these regulations do not prohibit an employee from acting, with or without compensation, as agent or attorney for his or her parents, spouse, child or any person for whom, or estate for which, he or she is acting as fiduciary provided that the head of the principal operating component or his or her designee approve. Such approval, if granted, must be granted in accordance with the procedures for approval of outside activity. However, the employee may not do so if the particular matter is one in which he or she has participated personally and substantially or which is his or her official responsibility. (18 U.S.C. 205).

§ 73.735–703 Statutory prohibitions related to employment by a foreign government.

Employees, including officers in the Public Health Service (PHS) Commissioned Corps and retired officers of the Regular Commissioned Corps of the PHS, may not, without the consent of Congress, be employed by a foreign government or agency of a foreign government (Art. I, Sec. 9, U.S. Const.). Congress has consented to such employment by Reserve Commissioned Officers of the PHS not on active duty and by Retired Regular Commissioned Officers (37 U.S.C. 801, note) if approved under regulations of the Department of State. 22 CFR Part 3a.

§ 73.735–704 Professional and consultative services.

(a) Employees may engage in outside professional or consultative work only after meeting certain conditions. Except as provided in §§ 73.735–705 and 73.735–706 for activities discussed in those sections, the conditions which must be met are:

(1) The work is not to be rendered, with or without compensation, to organizations, institutions, or state or local governments with which the official duties of the employee are directly related, or indirectly related if the indirect relationship is significant enough to cause the existence of conflict or apparent conflict of interest; or

(2) The work is not to be rendered for compensation to help a person, institution, or government unit prepare or aid in the preparation of grant applications, contract proposals, program reports, and other material which are designed to become the subject of dealings between the institutions or government units and the Federal Government. All requests to perform consultative services, either compensated or uncompensated, for institutions or government units which have recently negotiated or may in the near future seek a contract or grant from this Department must be carefully appraised to avoid any conflict or apparent conflict of interest.

(b) Advance administrative approval in accordance with § 73.735–708 of this subpart must be obtained. Such approval is required whether or not the services are for compensation, and whether or not related to the employee's official duties.

(c) For the purpose of this section, "professional and consultative work" is performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a course of specialized instruction and study in an institution of higher education, or hospital which requires the exercise of judgment and discretion in its performance and is primarily intellectual in nature as opposed to manual, mechanical or physical work.

(d) Membership on a Board of Directors, Board of Regents, Board of Trustees, Planning Commission, Advisory Council or Committee, or on any similar body which provides advice, counsel, or consultation, shall be considered outside consultative services for which advance administrative approval is required.

§ 73.735–705 Writing and editing.

(a) Employees are encouraged to engage in outside writing and editing whether or not done for compensation, when such activity is not otherwise prohibited. Such writing and editing, though not a part of official duties, may be on a directly related subject or entirely unrelated. Certain conditions must be met in either case, however, and certain clearances or approvals are prescribed according to the content of the material as set forth in paragraphs (b) through (e) of this section.

(b) Conditions applying to writing and editing done not as a part of official duties.

(1) The following conditions shall apply to all writing and editing whether related or unrelated to the employee's official duties:

(i) Government-financed time or supplies shall not be used by the author or by other Government employees in connection with the activity; and

(ii) Official support must not be expressed or implied in the material itself or advertising or promotional material, including book jackets and covers, relating to the employee and his or her contribution to the publication.

(2) If the writing or editing activity is unrelated to the employee's official duties or other responsibilities and programs of the Federal government, the employee must:

(i) Make no mention of his or her official title or affiliation with the Department, or

(ii) Use his or her official title or affiliation with the Department in a way that will not suggest or convey official endorsement of the work.

(3) If the writing or editing activity is related to the employee's official duties or other responsibilities and programs of the Federal government, the employee must:

(i) Make no mention of his or her official title or affiliation with the Department, or

(ii) Use his or her official title or affiliation with the Department and a disclaimer as provided in paragraph (c) of this section, or

(iii) Submit the material for clearance within the operating component, under procedures established by the component. When clearance is denied at any lower level, the employee shall have recourse for review up to the head of the principal operating component. This clearance will show there are no official objections to the activity and the employee may then use his or her official title or affiliation with the Department usually without a disclaimer.

(c) *Disclaimers.* (1) Except where the requirement for disclaimer is waived as a result of official clearance, disclaimers shall be used in all writing and editing related to the employee's official duties or other responsibilities and programs of the Federal government:

(i) In which the employee identifies himself or herself by official title or affiliation with the Department, or

(ii) When the prominence of the employee or the employee's position might lead the public to associate him or her with the Department, even without identification other than name.

(2) Disclaimers shall read as follows unless a different wording is approved by the Assistant General Counsel, Business and Administrative Law Division, Office of the General Counsel: "This (article, book, etc.) was (written, edited) by (employee's name) in (his or her) private capacity. No official suport or endorsement by (name of operating component or of Department) is intended or should be inferred."

(d) Advance approval. Advance approval is required in accordance with § 73.735–708 of this subpart when one or more of the following conditions apply:

(1) Any Government information is used which is not available on request to persons outside the Government;

(2) Material is written or edited which pertains to subject matter directly related to an employee's official duties; (This includes editing for scientific or professional journals which is related to his or her official duties.)

(3) Material is written or edited which pertains to any Government-sponsored research or other studies for which clinical case records or other material of a confidential nature are used or to which access is limited for persons outside the Government. Such use will not be permitted unless made under safeguards established by the operating component to retain the confidentiality of the material, and such use is determined to be in the public interest.

§ 73.735–706 Teaching, lecturing, and speechmaking.

(a) Employees are encouraged to engage in teaching and lecturing activities which are not part of their official duties when certain conditions are met. These conditions, which apply to outside teaching and lecturing (including giving single addresses such as commencement and Memorial Day speeches) whether or not done for compensation, are:

(1) No Government-financed time, or Government supplies not otherwise available to the public, are used in connection with such activity;

(2) Government travel or per diem funds are not used for the sole purpose of obtaining or performing such teaching or lecturing;

(3) Such teaching or lecturing is not dependent on specific information which would not otherwise be available to the public;

(4) Teaching, lecturing, or writing may not be for the purpose of the special preparation of a person or class of persons for an examination of the Office of Personnel Management or Board of Examiners for the Foreign Service, that depends on information obtained as a result of the employee's Government employment, except when that information has been made available to the general public or will be made available on request;

(5) Such activities do not involve knowingly instructing persons on dealing with particular matters pending before Government organizations with which the employee is associated in an official capacity;

(6) Advance approval is obtained when required by paragraph (b) of this section.

(b) Advance approval. Advance approval must be obtained in accordance with § 73.735–708 of this subpart before an employee may:

(1) Teach or lecture for an institution which has or is likely to have official dealings with the bureau or comparable organizational unit in which he or she is employed;

(2) Use, for teaching or lecturing purposes, clinical case records or other material of a confidential nature or to which access is limited for persons outside the Government. Such use will not be permitted unless made under safeguards established by the operating component to retain the confidentiality of the material, and such use is determined to be in the public interest.

§ 73.735–707 Holding office in professional societies.

(a) Employees may be members of professional societies and be elected or appointed to office in such a society. Activity in professional associations is generally desirable from the point of view of both the Department and the employee. Employees shall avoid, however, any real or apparent conflict of interest in connection with such membership. For example, they must not:

(1) Directly or indirectly commit the Department or any portion of it on any matter unless such action is taken in an official capacity;

(2) Permit their names to be attached to documents the distribution of which would be likely to embarrass the Department; or

(3) Serve in capacities involving them as representatives of non-Government organizations in dealing with the Government.

(b) In undertaking any office or function beyond ordinary membership in a professional association, a Department employee must obtain advance approval in accordance with § 73.735–708 of this subpart in any situation in which his or her responsibilities as an officer would relate to his or her official duties or would create a real or apparent conflict of interest with responsibilities as a Department employee. For example, advance administrative approval must be obtained:

(1) Before an employee who is responsible for review and approval of grants or contracts, or is in a supervisory position over those who conduct review and approval, may hold office, or be a trustee or member of the governing board, or the chairman or member of a committee, in any organization which has or is seeking a grant or contract with the bureau or comparable organizational unit in which he or she is employed;

(2) Before an employee may hold office in an organization which customarily expresses publicly views on matters of legislative or administrative policy within the specific areas of concern to the Department.

§ 73.735–708 Administrative approval of certain outside activities.

(a) *Scope.* As specified in § 73.735–704 through 707, an employee is required to obtain advance administrative approval to engage in the following outside activities:

(1) Certain writing or editing activities;

(2) Certain types of teaching and lecturing;

(3) All professional and consultative services;

(4) Any other outside activity for which the head of a principal operating component or the head of a sub-unit of a principal operating component imposes internal requirements for administrative approval; and

(5) Certain office-holding activities in professional societies.

(b) *Requests for Administrative Approval.* An employee seeking to engage in any of the activities for which advance approval is required shall make a written request for administrative approval a reasonable time before beginning the activity. (See § 73.735–202(e)(1)). This request should be directed to the employee's supervisor who will forward it to the official authorized to approve outside work requests for the employee's component. The request should include the following information:

(1) Employee's name, position title, grade or rank;

(2) Nature of the activity, fully describing the specific duties or services for which approval is requested;

(3) Name and business of person or organization for which work will be done, or statement that work will be self-employment. If self-employment, employee must state whether activity will be conducted alone or with partners;

(4) Place where work will be performed;

(5) Estimated total time to be devoted to activity. If on a continuing basis, indicate estimated time per year and the anticipated termination date;

(6) Whether services can be performed entirely outside of usual duty hours. If not, the estimated number of hours absent from work should be indicated;

(7) Method or basis of compensation if any (e.g., fee, per diem, per annum, or other).

(8) Where an employee seeks approval to provide consultative or professional services to organizations including governments which have been awarded or may apply for a Federal grant or contract, the request shall also include full details on any aspect of the professional and consultative services which could relate in any way, either directly or indirectly, to grant applications, contract proposals, program reports, and other material which are designed to become the subject of dealings between the grantee or contractor and the Government. (See § 73.735–704(a)(2))

(c) The Department Ethics Counselor will review and approve outside work requests for Executive level officers, non-career executives, deputy ethics counselors, and Schedule C employees in the Office of the Secretary.

(d) *Granting Approval of Certain Activities.* The approving official shall review each request submitted under (b) of this section, and appraise each request on the basis of the standards of this Part and all other applicable laws, regulations or internal rules of the principal operating component or sub-unit thereof. He or she should consult with a deputy ethics counselor or the Department Ethics Counselor in all cases that raise a difficult or novel question of law or fact. The approving official shall approve or disapprove each request and communicate his or her decision in writing to the employee.

§ 73.735-709 Annual reporting of outside activities.

By September 10 of each year the approving official shall require a report from each person for whom outside work has been approved during the past year. The report shall show:

(a) For the 12 months just past (ending August 31):

(1) Whether the anticipated work was actually performed for the person or organization named in the request for approval;

(2) Actual amount of time spent on the activity.

(b) For the forthcoming 12 months (ending August 31):

(1) Whether it is anticipated that the outside work will continue;

(2) Whether any change is anticipated with respect to information supplied in accordance with the original request on which approval was based.

§ 73.735-710 Maintenance of records.

The official responsible for the administrative aspects of these regulations (§ 73.735-202) shall make provisions for the retention and filing of requests for approval of outside work (or copies of such requests), a copy of the notification of approval or disapproval, and the annual report.

Subpart H—Financial Interests

§ 73.735-801 Participation in matters affecting a personal financial interest.

(a) An employee shall not participate personally and substantially as a Government employee in a matter in which any of the following individuals or organizations has a financial interest:

(1) The employee;

(2) The employee's spouse;

(3) The employee's minor child;

(4) An organization in which the employee serves as an officer, director, trustee, partner, or employee; or

(5) A person or organization with which the employee is negotiating for prospective employment or has an arrangement for prospective employment. Criminal penalties may be imposed under 18 U.S.C. 208 for violations of the prohibition.

(b) Applying the provision of 18 U.S.C. 208:

(1) A "financial interest" is any interest of monetary value which may be directly and predictably affected by the official action of an employee. There is no minimum amount of value or control that constitutes a financial interest.

Example 1: An employee owns a single share of stock in a widely-held corporation. If the corporation is likely to be affected by a matter in which the employee participates as a Government official, the employee may violate 18 U.S.C. 208.

Example 2: An employee has a paid part-time position with a non-federal organization. If the organization is likely to be affected by a matter in which the employee participates as a Government official, the employee would violate 18 U.S.C. 208.

(2) The prohibition of 18 U.S.C. 208 applies to personal and substantial involvement by an employee in a matter, exercised through decision, approval, disapproval, recommendation, investigation, giving advice, or other significant effort regarding the matter.

Example 1: An employee is a member of a panel that evaluates proposals for contracts and makes recommendations as to their award. If the employee's spouse owns stock in a company which submits a proposal that is reviewed by the panel, the employee would violate 18 U.S.C. 208 even though the panel recommendation may be rejected by the contracting officer.

Example 2: An employee is on a leave of absence from a university. He or she would violate 18 U.S.C. 208 by participating in the drafting of regulations which would have a "direct and predictable effect" upon universities in general and, therefore, upon the employee's university.

(3) An employee must know that the financial interest exists in order to violate 18 U.S.C. 208.

Example: An employee inherited a beneficial interest in a trust. He or she does not, however, have actual knowledge of the specific property held by the trustee. If the trust contains stock in a corporation which may be affected by the employee's official actions, he or she would not violate 18 U.S.C. 208 in taking official action affecting the corporation.

(4) Negotiation for prospective employment includes both an indication of interest on the part of the employee in working for an organization and an affirmative action on the part of the organization to show consideration of the employee.

Example 1: An employee of the Department sends resumes and cover letters to fifty prospective employers, all of whom regularly have dealings with HHS. Forty employers do not respond; however, ten respond with cordial form letters stating that the employee's resume will be retained for future reference. For purposes of the 18 U.S.C. 208 prohibition, the employee is negotiating for prospective employment at the time he or she sends resumes.

Example 2: At a site visit to a grantee institution, an employee who is officially responsible for a grant to that institution informs an officer of the institution that he or she is seeking a new position outside HHS. The grantee subsequently makes a conditional offer of employment to the employee who promptly responds by asking for an opportunity to discuss salary and related matters. Under these circumstances, a negotiation for prospective employment is underway.

(c) An employee may obtain approval to participate in his or her official capacity in a matter in which he or she has a direct or indirect financial interest, if the interest is not so substantial as to affect the integrity of his or her official duties. An employee who believes that such participation is warranted should follow the procedures in § 73.735-804.

(d) An employee convicted of violating 18 U.S.C. 208 may be fined up to $10,000, or imprisoned up to two years, or both.

§ 73.735-802 Executive order prohibitions.

(a) *Basic prohibition of Executive Order 11222.* (1) An employee shall not have a direct or indirect financial interest that conflicts substantially, or appears to conflict substantially, with his or her duties as a Federal employee.

(2) An employee need not have a financial interest that actually conflicts with his or her duties to violate the prohibition of E.O. 11222. Any financial interest that could reasonably be viewed as an interest which might compromise the employee's integrity, whether or not this is in fact true, is subject to this prohibition.

(3) Except as provided in § 73.735-802 (b) and (c), an employee who has an indirect financial interest in a business entity through the ownership of shares in a widely-held mutual fund or other regulated investment company will not violate E.O. 11222. Stocks in business entities held by an intermediary such as a mutual fund are generally too remote or inconsequential to affect the integrity of an employee's services.

(b) *Employees in regulatory activities.* (1) An employee who is working in a regulatory activity shall not have a financial interest in any company whose business activities are subject to the regulations of the particular activity with which the employee is associated, unless the regulated activities of the company are an insignificant part of its total business operations.

(2) An employee working in a regulatory activity may not hold shares in a mutual fund or other regulated investment company which specializes in holdings in industries that are regulated by the particular activity in which he or she is employed.

Example: An employee working for the Bureau of Laboratories, Center for Disease Control, may not hold shares in a regulated investment company which specializes in holdings that include medical testing laboratories.

(c) Employees having procurement or contracting responsibilities.

(1) An employee who serves as a procurement or contracting officer shall not have a financial interest in a company or companies with which he or she in the course of his or her official duties would be likely to have procurement or contracting relationships.

(2) A procurement or contracting officer may not hold shares in a mutual fund or other regulated investment company that specializes in holdings in industries with which such officer would be likely to have procurement or contracting relationships.

Example: A contracting officer in the Social Security Administration owns shares in the XYZ Mutual Fund which specializes in stock in firms manufacturing electronic data processing equipment. Ownership of XYZ Mutual Fund shares would be prohibited in this instance. On the other hand, a contracting officer for a Public Health Service hospital, who is not likely to have responsibility for major contracts relating to electronic data processing, could hold such shares.

§ 73.735–803 Prohibition against involvement in financial transactions based on information obtained through federal employment.

An employee shall not engage in, directly or indirectly, a financial transaction as a result of, or in primary reliance upon, any information gained through his or her official duties. Information gained through official duties are those facts and other data that relate to the employee's official duties or to the functions of the employing component and would not be available to the employee were he or she not an officer of the Federal government.

Example 1: An employee working part-time for a consulting firm that does no busines with the employee's principal operating component, in the area of health care planning advises it, based upon his or her knowledge of a new health care planning program about to be initiated by the Public Health Service. The employee's knowledge of the program was acquired solely through reading policy statements and other PHS literature available to the public under the Freedom of Information Act. In such case, the employee would not violate this regulation if the outside activity was otherwise approvable under Subpart G.

Example 2: A contracting officer with detailed knowledge of a negotiated procurement contract invests in a corporation that is likely to indirectly profit from the award of that contract. The officer's decision to invest is based upon technical details of the successful contract proposal that would not otherwise be available to a private citizen. The officer would violate this regulation in such a situation.

§ 73.735–804 Waiver of the prohibitions in this subpart.

(a) An employee may request approval to participate in his or her official capacity in a matter in which he or she has a direct or indirect financial interest if the employee believes the interest is so remote and inconsequential that it would not affect the integrity of his or her official duties. Also an employee who has a financial interest that would otherwise be prohibited under these regulations may request an exemption from the prohibition for the reason stated in the preceding sentence.

(b) The request shall be in writing and shall include the following information:

(1) Employee's name, occupational title, grade or rank and Federal salary;

(2) Full description of financial interest: including whether ownership, service as officer, partner, etc.;

(3) Business or activity in which financial interest exists;

(4) Description of official matter in which employee is requesting approval to participate;

(5) Basis for requesting determination that the interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect." (If based on a small total value of investment, supply appropriate information on total value, such as total shares held and latest quoted market price. If other basis, explain fully.)

The request should be sent through usual administrative channels to the official responsible for reviewing financial disclosure reports or statements for the employee's organization (Subpart I). That official, after conferring with a deputy ethics counselor or with the Department Ethics Counselor as appropriate, will make a decision about the exemption or exception and inform the employee in writing.

§ 73.735—805 Advice and guidance on conflicts matters.

(a) Whenever an employee has a question about the appropriate course of conduct to be followed in a matter that may involve an actual or apparent conflict of interest, he or she should immediately consult with his or her supervisor or a deputy ethics counselor, or both. If a supervisor who is consulted determines that the matter warrants further consideration, he or she may, in conjunction with the employee, submit the details of the matter, in writing, to the appropriate deputy ethics counselor. These details should include a description of:

(1) The activity, relationship, or interest giving rise to the question posed by the employee;

(2) The duties or official responsibilities of the employee(s) involved;

(3) The nature of the actual or apparent conflict of interest; and

(4) Any other information that may be helpful in reviewing the problem.

(b) Upon receiving the submission of an employee or a supervisor, the deputy ethics counselor will develop any additional information about the matter as necessary, and will confer with the Department Ethics Counselor as appropriate. The Department Ethics Counselor and the head of the principal operating component or his or her designee will be informed of any serious violation of the standards of this subpart or any other conflict of interest law. Questions of first impression or other unusual matters shall be brought to the attention of the Department Ethics Counselor and the head of the principal operating component or his or her designee.

(c) On the basis of all information gathered including, where appropriate, the advice of the Department Ethics Counselor, the deputy ethics counselor will:

(1) Decide that there is no violation or potential violation of the standards of this subpart or any other law and so notify the employee and his or her supervisor in writing; or

(2) Decide that a violation or potential violation of the standards of this subpart or other law has occurred or may occur, and that the employee involved shall take one or more of the steps set forth in § 731.735–904 to resolve the problem and notify the employee and his or her supervisor in writing; or

(3) Decide that, although no violation of this subpart or other law has occurred, the nature of the matter is such that the employee should periodically report any additional information that would require reconsideration of the initial submission.

§ 73.735—806 Documentation and publication of opinions.

(a) The Department Ethics Counselor, deputy ethics counselors, and any other individuals required to be involved in the review and resolution of violations or potential violations of this subpart shall maintain full and accurate documentation of the formal advice and guidance given.

(b) From time to time, the Department Ethics Counselor shall publish summaries of advisory opinions issued by his or her office, deleting, as necessary, any personal identifiers or other information which may give rise to an unwarranted invasion of personal privacy. These summaries shall be distributed to all deputy ethics counselors, heads of principal operating components, and principal regional officials.

(c) From time to time, the Department Ethics Counselor shall publish an index of all summaries issued in accordance with paragraph (b) above and shall distribute these indexes to all deputy ethics counselors and heads of principal operating components who shall in turn make them available for review by supervisors and interested employees.

Subpart I—Reporting Financial Interests

§ 73.735-901 Reporting requirement of the Ethics in Government Act of 1978.

(a) *Applicability.* The following employees and special Government employees shall submit public financial disclosure reports in accordance with the provisions of Title II of the Ethics in Government Act of 1978, Pub. L. 95-521, as amended:

(1) Officers and employees (including consultants who will work more than 60 days in a calendar year) whose positions are classified at GS-16 or above of the General Schedule, or whose basic rate of pay (excluding "step" increases) under other pay schedules is equal to, or greater than, the rate for GS-16 (step 1);

(2) Members of the uniformed services whose pay grade is 0-7 or above;

(3) Officers and employees in any other positions determined by the Director of the Office of Government Ethics to be of equal classification to GS-16;

(4) Administrative Law Judges;

(5) Employees in the excepted service in positions which are of a confidential or policy-making character, unless their position has been excluded by the Director of the Office of Government Ethics;

(6) Department Ethics Counselor; and

(7) Deputy Ethics Counselors.

An employee who thinks that his or her position has been improperly included under the reporting requirements of this Part may obtain a review of that determination by writing to the Department Ethics Counselor.

(b) *Filing Dates.* Employees listed in § 73.735-901 (a) of this subpart shall file a financial disclosure report:

(1) Within 5 days after the transmittal by the President to the Senate of their nomination to a position requiring Senate confirmation, or

(2) Within 30 days after assuming a covered position not requiring Senate confirmation unless the employee has left another covered position listed in § 73.735-901 (a) of this subpart, or

(3) Within 30 days after terminating Federal employment or assuming a position which is not listed in § 73.735-901 (a) of this subpart; and

(4) By May 15 of each calendar year, unless the employee has in that calendar year already submitted a financial disclosure report covering the preceding calendar year.

(c) *Submission of reports.* (1) Executive level officers, non-career executives, deputy ethics counselors and Schedule C employees in the Office of the Secretary who are required to report in accordance with § 73.735-901 (a) of this subpart shall submit their reports to the Department Ethics Counselor.

(2) All other employees required to report in accordance with § 73.735-901 (a) of this subpart shall submit their reports to the reviewing official for their organizational component under procedures described in the Department's Personnel Manual. Personnel offices will keep a list of reviewing officials and will give each covered employee the name of the official to whom his or her report should be sent.

(d) *Review and certification of reports.* (1) Each report submitted in accordance with this section shall be reviewed by the appropriate reviewing official within 60 days of its receipt. Upon reviewing a report and finding that the information contained therein reveals no conflict of interest or other violation of any provision of this Part or applicable law, the reviewing officer shall certify the report with his or her signature.

(2) The certification of a report filed in accordance with this section shall have the concurrence of the Office of the General Counsel.

(3) Action to be taken by the reviewing official if the individual is not in compliance with applicable laws and regulations is discussed in § 73.735-903 and § 73.735-904.

§ 73.735-902 Reporting requirements for certain employees not covered by the Ethics in Government Act of 1978.

(a) *Applicability.* The following employees and special Government employees shall submit confidential statements of employment and financial interests in accordance with the provisions of this subpart, provided they are not required to submit financial disclosure reports under § 73.735-901. A list of the positions in this Department whose incumbents are required to file financial interest statements as prescribed by this subpart is available for review in all of the Departments servicing personnel offices.

(1) Officers and employees in positions classified at GS-13 or above (or comparable pay level) who have decision-making responsibility for the following matters:

(i) Contracting or procurement,

(ii) Administering or monitoring grants or subsidies,

(iii) Regulating or auditing private or other non-Federal enterprises, or

(iv) Other activities where the decision or action would have an economic impact on the interest of any non-Federal enterprise.

(2) Incumbents of any other positions designated by the head of the principal operating component, or by the Assistant Secretary for Management and Budget for the Office of the Secretary, to report employment and financial interests in order to protect the integrity of the Government and to avoid possible conflicts of interest. The designation of any such positions below the GS-13 grade must be approved by the Office of Personnel Management.

(3) All experts, consultants, or advisory committee members who are not required to submit a public financial disclosure report in accordance with the Ethics in Government Act except:

(i) Doctors, dentists and allied medical specialists performing services for, or consulted as to the diagnosis or treatment of, individual patients; or

(ii) Veterinarians performing services for or consulted as to care and service to animals.

(b) *Filing dates.* (1) Experts, consultants, and advisory committee members shall file a confidential Statement of Employment and Financial Interest no later than the date employment commences and shall file supplemental statements as necessary to keep all information submitted current and accurate.

(2) Other individuals covered by § 73.735-902 (a) of this subpart shall:

(i) File a confidential statement no later than 30 days after assuming a covered position unless the employee,

within 30 days before assuming the position, left another covered position in HHS that is included in § 73.735–901(a) or § 73.735–902(a) of this subpart; and

(ii) Report changes in or additions to the information in the statement as of June 30 of each calendar year, or a different date set by employee's component with authorization by the Office of Personnel Management.

(c) *Submission and review of financial statements.* (1) Heads of principal operating components, the Assistant Secretary for Management and Budget, and principal regional officials for employees under their appointing authority shall establish procedures to ensure that financial statements from covered employees are received and updated on a timely basis and are referred to the appropriate reviewing officials for review and certification. (See § 73.735–202 (e)(1)).

(2) The reviewing official shall review statements to determine whether conflicts of interest or apparent conflicts might arise from the activities reported thereon. If the review discloses no conflict or apparent conflict, the reviewing official shall certify the statement with his or her signature. Action to take if the individual is not in compliance with applicable laws and regulations is discussed in § 73.735–903 and § 73.735–904.

§ 73.735–903. Action if conflicts of interest or possible conflicts are noted.

(a) If after reviewing a financial disclosure report or a financial interest statement, a reviewing official believes that additional information is needed, he or she shall tell the individual submitting such report what additional information is required and the time by which it must be submitted.

(b) If the reviewing official is of the opinion that, on the basis of information submitted, the reporting individual is not in compliance with applicable laws and regulations, he or she shall notify the individual, afford him or her a reasonable opportunity for a written or oral response, and after consideration of such response, determine whether or not the individual is in compliance.

(c) If the reviewing official determines that an individual is not in compliance with applicable laws and regulations, he or she shall notify the individual of that determination in writing and, after an opportunity for personal consultation, determine and notify the individual of the action, including those actions set forth in § 73.735–904, that would be appropriate to assure compliance with such laws and regulations, and the date by which such action should be taken. The action required and the date for taking it shall be determined by the nature of the financial interest or other relationship, the particular circumstances of the reporting individual (including his or her ability to resolve the problem), and other factors which the reviewing official deems relevant. In no case, however, should the date be later than 90 days after the reporting individual is notified of the reviewing official's opinion.

(d) If steps for assuring compliance with applicable laws and regulations are not taken by the date set in paragraph (c), the matter shall be referred to the Department Ethics Counselor.

§ 73.735–904. Resolution of apparent or actual conflicts of interest.

(a) Disqualification from participating in a particular matter or category of matters is an appropriate method for resolving apparent or actual conflicts of interest when the interest or activity giving rise to the problem:

(1) Bears a direct or indirect relationship to particular, identifiable duties of the employee involved; and

(2) Is not so substantial as to affect or give the appearance of affecting the integrity of the services which the Government may expect of the employee. Whenever disqualification is employed to resolve an apparent or actual conflict of interest, the disqualified employee shall sign a written statement reflecting the scope of the disqualification and the precise nature of the conflicting interest or activity. The reviewing official shall keep a file of all such disqualification statements and shall monitor compliance with these statements on a regular basis.

(b) *Change of assignment* is an appropriate method for resolving apparent or actual conflicts of interest when the interest giving rise to the problem bears a direct or indirect relationship to particular, identifiable duties of the employee involved, and those duties constitute a significant portion of the employee's position.

(c) *Waiver* under 18 U.S.C. 208(b) is an appropriate method for resolving apparent or actual conflicts of interest when:

(1) The employee seeking the waiver reported the financial interest that bears some relationship to his or her official duties, and the reviewing official, in consultation with a deputy ethics counselor or the Department Ethics Counselor, determines that the financial interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such employee; or

(2) By general rule or regulation published in the **Federal Register**, the Department has exempted the financial interest from the requirements of 18 U.S.C. 208 and this Part as being too remote or too inconsequential to affect the integrity of the Government officers' service.

(d) A *trust* containing a financial interest which may give rise to an apparent or actual conflict of interest is an appropriate method of resolving such conflicts when:

(1) The trust is qualified under Sec. 202(f) of the Ethics in Government Act of 1978 (Pub. L. 95–521), as amended, and subject to the regulations of the Office of Government Ethics; or

(2) In the opinion of the Department's Ethics Counselor, it is sufficiently independent of the employee involved so that the integrity of the employee's services to the Government are not compromised.

(e) *Divestiture* is an appropriate method for resolving actual conflicts of interest when the nature of the financial interest is such that the conflict of interest cannot be adequately resolved by any of the methods set forth in paragraphs (a), (b), (c), and (d) of this section.

(f) *Terminating* an appointment as a method for resolving an actual conflict of interest should be used only when it is clear that no other remedy can be found which would be acceptable to both the Department and the employee. Generally, this method will be employed only in the most extreme cases. Such a termination would be subject to adverse action.

Subpart J—Provisions Relating to Experts, Consultants and Advisory Committee Members

§ 73.735–1001 Coverage.

(a) For purposes of this subpart the title "consultant" will be used to include those who are appointed to serve as experts, consultants or members of advisory committees. All persons who serve as an employee of the Government in the capacity of a consultant are covered by the provisions of this subpart irrespective of:

(1) The title by which designated;

(2) The statutory authority under which services are obtained;

(3) The duration of the period for which services are obtained;

(4) Whether services are obtained by appointment or invitation and acceptance;

(5) Whether services are compensated or rendered without compensation;

(6) Whether or not services are obtained pursuant to a statute excepting

employees or special Government employees from conflict of interest statutes.

(b) When the service is for less than 130 days in a service year, experts, consultants, and advisory committee members are included in the group of employees designated by law (18 U.S.C. 202) as "Special Government employees."

§ 73.735–1002 Ethical standards of conduct.

(a) Like other Federal employees, an individual serving in a consultant capacity must conduct himself or herself according to ethical behavior standards of the highest order. In particular, such an individual must:

(1) Refrain from any use of office which is, or appears to be, motivated by a private gain for himself or herself or other persons, particularly those with whom he or she has family, business, or financial ties. The fact that desired gain, if it materializes, will not take place at the expense of the Government makes his or her actions no less improper.

(2) Conduct himself or herself in a manner devoid of any suggestion that he or she is exploiting Government employment for private advantage. A consultant must not, on the basis of any inside information, enter into any speculation or recommend speculation to members of his or her family or business associates, in commodities, land, or the securities of any private company. This injunction applies even though the consultant's duties have no connection whatever with the Government programs or activities which may affect the value of such commodities, land, or securities. He or she should be careful in all personal financial activities to avoid any appearance of acting on the basis of information obtained in the course of his or her Government work.

(3) Refrain from using information not generally available to those outside the Government for the special benefit of a business or other entity by which the consultant is employed or retained or in which he or she has a financial interest. Information not available to private industry should remain confidential in the consultant's hands and not be divulged to his or her private employer or clients. In cases of doubt whether information is generally available to the public, the consultant should confer with the person for whom he or she provides services, with the office having functional responsibility for a specific type of information, or, as appropriate, with the officials designated in § 73.735–202 to give interpretive and advisory service.

(4) Where requested by a private enterprise to act for it in a consultant or advisory capacity and the request appears motivated by the desire for inside information, make a choice between acceptance of the tendered private employment and continuation of his or her Government consultancy. He or she may not engage in both.

(5) Not use his or her position in any way to coerce, or give the appearance of coercing, anyone to provide a financial benefit to him or her or another person, particularly one with whom the consultant has family, business, or financial ties.

(6) Not receive or solicit anything of value as a gift, gratuity, loan, entertainment, or favor for himself or herself or another person, particularly one with whom he or she has family, business, or financial ties if the acceptance would result in loss of complete independence or impartiality in serving the Government. All consultants are subject to the restrictions in § 73.735–506 of this Part concerning gifts and decorations from foreign governments.

(b) Consultants may engage in other employment so long as there is no real or apparent conflict between the consultant's private employment and his or her official duties. See § 73.735 Subpart G. The regular employment of a consultant who is a special Government employee is not considered outside work for purposes of Subpart G. Also, the limitation in § 73.735–701(f) regarding the amount of an honorarium that may be received does not apply to special Government employees.

(c) A consultant who has questions about conflicts of interest or the application of the regulations in this Part to him or her or to his or her assigned work should make inquiry of the person for whom services are provided. That person may direct the consultant to the Department Ethics Counselor or a deputy ethics counselor for interpretative and advisory services as provided in § 73.735–202.

§ 73.735–1003 Conflicts of interest statutes.

(a) Each consultant should acquaint himself or herself with sections 203, 205, 207 and 208 of title 18, United States Code, all of which carry criminal penalties related to conflicts of interest. The restraints imposed by the four criminal sections are summarized in paragraphs (b) and (c) of this section.

(b) 18 U.S.C. 203 and 205.

(1) These two sections in general operate to preclude a person who works for the Government, except in the discharge of his or her official duties, from representing anyone else before a court or Government agency in a matter in which the United States is a party or has a direct and substantial interest. The prohibition applies whether or not compensation is received for the representation. However, if the individual is a special Government employee, this restriction applies only if:

(i) The representation involves a matter in which the individual has at any time participated personally and substantially in the course of his or her Government employment; or

(ii) The individual has served the Department for more than 60 days in the immediately preceding period of 365 days, and the matter is one which is pending before the Department. This second restraint applies whether or not the matter is one in which the individual participated personally and substantially in his or her Government employment. These two provisions apply to a special Government employee on days when he or she does not serve the Government as well as on the days when services are rendered, and they apply to both paid and unpaid representation.

(2) To a considerable extent the prohibitions of sections 203 and 205 are aimed at the sale of influence to gain special favors for private businesses and other organizations and at the misuse of governmental position or information. In accordance with these aims, a consultant, even when not compelled to do so by sections 203 and 205, should make every effort in his or her private work to avoid any personal contact with respect to negotiations for contracts or grants with the component of the department in which he or she is serving, if the subject matter is related to the subject matter of his or her consultancy or other service. This will not always be possible to achieve where, for example, a consultant has an executive position with his or her regular employer which requires him or her to participate personally in contract negotiations with the department or agency he or she is advising. Whenever this is the case, the consultant should participate in the negotiations for his or her employer only after advising the responsible Government official of his or her involvement in other matters in the Department. In other instances an occasional consultant may have technical knowledge which is indispensable to his or her regular employer in his efforts to formulate a research and development contract or a research grant, and for the same reason, it is in the interest of the Government that the consultant should take part in

negotiations for his or her private employer. Again, the individual should participate only after advising the responsible Government official of the relevant facts.

(3) Section 205 permits both the Government and the private employer of a special Government employee to benefit, in certain cases, from his or her performance of work under a grant or contract for which he or she would otherwise be disqualified because of having participated in the matter for the Government or because it is pending in a component in which the consultant had served more than 60 days in the past year. This provision gives the head of a department the authority, notwithstanding any prohibition in either section 203 or 205, to allow a special Governement employee to represent before such department or agency either his or her regular employer or another person or organization in the performance of work under a grant or contract. As a basis for this action, the Secretary must first makes a certification in writing, published in the Federal Register, that it is required by the national interest.

(4) Section 205 contains two other exemptive provisions, which apply to both special and regular Government employees. See § 73.735–702.

(c) 18 U.S.C. 207 applies to individuals who have left Government service. See Subpart N of these regulations.

(d) 18 U.S.C. 208 bears on the activities of Government personnel, including special Government employees, in the course of their official duties. In general, it prevents a Government employee from participating as such in a particular matter in which, to his or her knowledge, he or she, his or her spouse, minor child, partner, or a profit or non-profit enterprise with which he or she is connected has a financial interest. However, the section permits an employee's agency to grant him or her an ad hoc exemption if the interest is not so substantial as to affect the integrity of his or her services. Insignificant interests may also be waived by a general rule or regulation. The matters in which special Government employees are disqualified by section 208 are not limited to those involving a specific party or parties in which the United States is a party or has an interest, as in the case of sections 203, 205 and 207. Section 208 therefore extends to matters in addition to contracts, grants, judicial and quasi-judicial proceedings, and other matters of an adversary nature. Accordingly, a special Government employee, like all government employees, should in general be disqualified from participating as such in a matter of any type the outcome of which will have a direct and predictable effect upon the financial interests covered by the section.

However, the power of exemption may be exercised in this situation if the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization. The power of exemption may also be exercised where the financial interests involved are minimal in value.

§ 73.735–1004. Requesting waivers or exemptions.

(a) A consultant may present in writing to the official for whom he or she provides services requests for the waivers or exemptions specified in § 73.735–1003. That official will take, or refer the request for, action as appropriate, and will see that the employee receives advice or decision on his or her request.

(b) A file of all waivers or exemptions granted shall be maintained in such manner that information can be given promptly on individual cases or statistics provided upon request. Generally, these records, together with written advice given in connection with less formal requests concerning questions of ethical standards, are kept with the employee's statement of employment and financial interests or financial disclosure report (§ 73.735–1006).

§ 73.735–1005. Salary from two sources.

Special government employees are not subject to 18 U.S.C. 209 which prohibits other employees from receiving any salary, or supplementation of Government salary, from a private source as a compensation for services to the Government. This Department will not knowingly pay per diem to a consultant who also receives per diem pay for the same day from another Government agency (in or outside the Department). Erroneous payments in contravention of this provision will be subject to collection, and any consultant who willfully collects double payments may be barred from further employment.

§ 73.735–1006. Reporting financial interests.

(a) Consultants who will work more than 60 days in a calendar year are subject to the provisions of title II of the Ethics in Government Act of 1978 when their rate of pay is equal to or greater than the basic rate for GS–16, Step 1. Such consultants are covered by the reporting requirements of § 73.735–901 of these regulations.

(b) Consultants not subject to the Ethics in Government Act shall file statements of financial interests as provided by § 73.735–902 of these regulations.

§ 73.735–1007. Political activity.

Consultants who serve intermittently are subject to the political activity restrictions of subchapter III of Chapter 73 of title 5 U.S.C. and Civil Service Rule IV only on days on which service is rendered and then for the entire 24 hours of such service day. Other consultants are subject to these restrictions at all times.

Subpart K—Special Government Employees Other Than Consultants

§ 73.735–1101. General provision.

Individuals who are designated as special Government employees because of the nature of their services but who are not serving as a consultant, expert, or advisory committee member are subject to the provisions of Subparts B through I of these regulations. However, the provisions of 18 U.S.C. 205, 206, 207, and 208 apply to them only as described in Subpart J. Also, the limitation in § 73.735–701(f) on the amount of an honorarium that may be received does not apply.

Subpart L—Disciplinary Action

§ 73.735–1201 General provisions.

(a) Violation of the regulations contained in this Part may be cause for disciplinary action which could be in addition to any penalty prescribed by law.

(b) The type of disciplinary action to be taken must be determined in relation to the specific violation. Those responsible for recommending and for taking disciplinary action must apply judgment to each case, taking into account the general objectives of meeting any requirements of law, deterring similar offenses by the employee and other employees, and maintaining high standards of employee conduct and public confidence. Some types of disciplinary action which may be considered are:

(1) Admonishment
(2) Written reprimand
(3) Reassignment
(4) Suspension
(5) Demotion
(6) Removal

(c) Suspension, demotion, and removal are adverse actions; and when such actions are taken, applicable laws, regulations, and policies must be followed.

Subpart M—Reporting Violations

§ 73.735–1301 Responsibility for reporting possible criminal violations.

An employee who has information which he or she reasonably believes indicates a possible offense against the United States by an employee of the Department, or any other individual working on behalf of the Department, shall immediately report such information to his or her supervisor, any management official, or directly to the Office of the Inspector General. Offenses covered by the preceding sentence include, but are not limited to, bribery, fraud, perjury, conflict of interest, misuse of funds, equipment, or facilities, and other conduct by a government officer or employee, grantee, contractor or other person which is prohibited by title 18 of the United States Code. Employees and supervisors should refer to chapter 5–10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information.

§ 73.735–1302 Responsibility for reporting allegations of misconduct.

An employee who has information which he or she reasonably believes indicates the existence of an activity constituting (1) a possible violation of a rule or regulation of the Department; or (2) mismanagement, a gross waste of funds, or abuse of authority; or (3) a substantial and specific danger to the public health and safety, shall immediately report such information to his or her supervisor, any management official of the Department, or directly to the Office of the Inspector General. Employees and supervisors should refer to chapter 5–10 of the Department's General Administration Manual for procedures regarding the reporting and handling of such information. This subsection does not cover employee grievances, equal employment opportunity complaints, classification appeals, or other matters for which a formal government-wide review system has been established by the Federal government.

§ 73.735–1303 Prohibition of reprisals.

(a) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority, take or threaten to take any action against any employee as a reprisal for making a complaint or providing any information pursuant to § 73.735–1301 and 1302. If the complaint was made or the information was disclosed with the knowledge that it was false, or with willful disregard of its truth or falsity, any personnel action taken against the employee based on those reasons would not constitute a reprisal action.

(b) An employee who believes that he or she has been threatened with a personnel action, any other action, or harassment or has been harmed by any action as a reprisal for having made a complaint or providing information pursuant to § 73.735–1301 or 1302 may request the Office of the Inspector General to review his or her allegations. Whenever the Inspector General has reason to believe that the allegations may be true, he or she will refer the matter to the Assistant Secretary for Personnel Administration for appropriate action. The Assistant Secretary for Personnel Administration may order a stay of any personnel action if he or she determines that there are reasonable grounds to believe that the personnel action is being taken as a reprisal for making a complaint or providing information pursuant to § 73.735–1301 or 1302.

§ 73.735–1304 Referral of matters arising under the standards of this part.

(a) The Department Ethics Counselor may refer to the Inspector General for investigation and/or further action any matter arising under the standards of this Part.

(b) The Department Ethics Counselor may refer to the Office of Government Ethics, or the Inspector General may refer to the Department of Justice, suspected violations of the criminal laws regarding employee standards of conduct and conflicts of interest.

Subpart N—Conduct and Responsibilities of Former Employees

§ 73.735–1401 Prohibitions against post-employment conflicts of interest.

(a) The purpose of criminal prohibition in 18 U.S.C. 207 is to prevent the unfair use of inside knowledge or influence that results from Federal service. 18 U.S.C. 207 generally prohibits a former employee from acting as another person's representative to the Government in particular matters involving a specific party or parties in which the employee had been involved while in Federal service. This prohibition does not require a former employee to decline employment with any organization regardless of his or her dealings with that organization while employed by the Government. It applies solely to activities, not the mere existence of an employment arrangement.

(b) The Office of Government Ethics, Office of Personnel Management, has issued Government-wide regulations covering post-employment conflict of interest (5 CFR Part 737). Those regulations are incorporated herein by reference, and they are available for review in personnel offices throughout the Department.

[FR Doc. 81–2342 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–12–M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1331

[Ex Parte No. 297 (Sub-No. 5)]

Motor Carrier Rate Bureaus; Implementation of Pub. L. 96–296

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Extension of Effective Date of Final Standards.

SUMMARY: By notice of decision published in the **Federal Register** on December 31, 1980, (45 FR 86736), the Commission issued standards for motor carrier rate bureau activities. These standards were effective on **Federal Register** publication. The Commission is extending the effective date of these standards to February 2, 1981.
In the **Federal Register** of January 22, 1981, the Commission is extending the date for filing new or amended agreements and the effective date of the final rules.

DATE: The effective date of the final standards is now February 2, 1981.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder or Jane F. Mackall, (202) 275–7656.

Decided: January 14, 1981.

By the Commission, Darius W. Gaskins, Jr., Chairman.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81–2340 Filed 1–22–81; 8:45 am]

BILLING CODE 7035–01–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 611

Foreign Fishing: Reports and Recordkeeping

AGENCY: National Oceanic and Atmospheric Administration (NOAA)/ Commerce.

ACTION: Final rules; correction.

SUMMARY: This document corrects the table of species codes to include a code for "non-specified species" in the Gulf of Alaska, published November 5, 1980 (45 FR 73486).

FOR FURTHER INFORMATION CONTACT: Robert McVey, Director, Alaska Region, National Marine Fisheries Service, P.O. Box 1668, Juneau, Alaska 99802, Telephone: (907) 586–7221.

Signed this day of January, 1981.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

Authority: 16 U.S.C. 1801 *et seq.*

Accordingly, 50 CFR 611.9 is corrected by adding the following entry:

§ 611.9 Reports and recordkeeping.

* * * * *

Appendix I.—Species Code

* * * * *

B. Pacific Ocean Fishes—Finfishes

Code, Common English Name, and Scientific Name

500, nonspecified species, see § 611.92(b)(4)

* * * * *

(16 U.S.C. 1801 *et seq.*)

[FR Doc. 81–2546 Filed 1–22–81; 8:45 am]

BILLING CODE 3510–22–M

50 CFR Part 611

Seamount Groundfish Fishery Resources

AGENCY: National Oceanic and Atmospheric Administation (NOAA) / Commerce.

ACTION: Final rulemaking.

SUMMARY: This notice implements final regulations for the preliminary fishery management plan (PMP) for seamount groundfish fishery resources. The regulations establish annual specifications of zero for domestic harvest, domestic processing, joint venture processing, and reserve. The specifications are effective for 1981 and beyond.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT: Alan W. Ford, southwest Region Director, National Marine Fisheries Service, 300 S. Ferry Street, Terminal Island CA 90731, Telephone 213–548–2575.

SUPPLEMENTARY INFORMATION: The proposed rulemaking was published on December 2, 1980 (45 FR 79846) for a 30 day comment period ending January 2, 1981. No comments were received. The preamble to the proposed regulations explained how the specifications were derived. The Assistant Administrator has determined this amendment to the PMP is necessary and appropriate to the conservation and management of seamount groundfish resources, and that the amendment is consistent with provisions of the Magnuson Fishery Conservation & Management Act of 1976, as amended, and other applicable laws. The Assistant Administrator also has determined that this action does not require the preparation of an environmental assessment or an environmental impact statement under the National Environmental Policy Act of 1969; and that it does not constitute a significant regulation requiring the preparation of a regulatory analysis under Executive Order 12044.

Signed in Washington, D.C., this 19th day of January, 1981.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

Authority: 16 U.S.C. 1801 *et seq.*

50 CFR Part 611 is amended as follows:

1. 50 CFR Part 611 is amended by revising § 611.80(b)(2) to read as follows:

§ 611.80 Seamount groundfish fishery.

* * * * *

(b)* * *

(2) TALFF, DAH, DAP, JVP, Reserve. The total allowable level of foreign fishing (TALFF), domestic annual harvest (DAH), joint venture processing (JVP), and reserve for seamount groundfish are listed in Appendix 1 to Section 611.20. These specifications are valid for each calendar year unless amended.

* * * * *

2. 50 CFR Part 611 is amended by revising Section 3.A of Appendix 1 of § 611.20 as follows:

§ 611.20 Total allowable level of foreign fishing.

* * * * *

Appendix 1. Optimum yield (OY), domestic allowable harvest (DAH), domestic allowable processing (DAP), joint venture processing (JVP), domestic non-processed fish (DNP), reserve, and total allowable level of foreign fishing (TALFF), all in metric tons.

* * * * *

Species	Species areas code	OY	DAH	DAP	JVP	DNP	Reserve	TALFF
*	*	*	*	*	*	*	*	*
3. Western Pacific Ocean fisheries:								
A. Seamount groundfish fishery:								
Armorheads	200							
Alfonsins	201							
Other groundfish	499	2,000	0	0	0		0	2,000
*	*	*	*	*	*	*	*	*

[FR Doc. 81–2547 Filed 1–22–81; 8:45 am]

BILLING CODE 3510–22–M

Proposed Rules

Federal Register
Vol. 46, No. 15
Friday, January 23, 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.

DEPARTMENT OF AGRICULTURE

Rural Electrification Administration

7 CFR Part 1701

Remanufactured Distribution Transformers; Proposed Revision of REA Specification D-17

AGENCY: Rural Electrification Administration, USDA.

ACTION: Proposed rule.

SUMMARY: The Rural Electrification Administration (REA) proposes to issue a revision of REA Specification D-17, "Remanufactured Distribution Transformers." This proposed revision would provide means of ensuring that remanufactured distribution transformers are fully equivalent to new transformers of modern designs.

DATE: Public comments must be received by REA no later than March 27, 1981.

ADDRESS: Submit written comments to the Director, Engineering Standards Division, Rural Electrification Administration, Room 1268, South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: J. C. Arnold, Jr., telephone (202) 447-3541. A Draft Impact Analysis has been prepared and is available from the Director, Engineering Standards Division, at the above address.

SUPPLEMENTARY INFORMATION: Pursuant to the Rural Electrification Act, as amended (7 U.S.C. 901 et seq.), REA proposes to issue a revision of REA Specification D-17, "Remanufactured Distribution Transformers."

The proposed changes in REA policy update recommended requirements for remanufactured distribution transformers to those standards generally followed in new distribution transformers of current manufacturers. Copies of the draft supplement are available from the Director, Engineering Standards Division, at the above address.

This program is listed in the Catalog of Federal Domestic Assistance as 10.850—Rural Electrification Loans and Loan Guarantees.

This proposal has been reviewed under the USDA criteria established to implement Executive Order 12044, "Improving Government Regulations." A determination has been made that this action should not be classified "significant" under those criteria.

Dated: January 15, 1981.

Joe S. Zoller,

Assistant Administrator—Electric.

[FR Doc. 81-2476 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-15-M

Farmers Home Administration

7 CFR Part 1804

Planning and Performing Site Development Work

AGENCY: Farmers Home Administration, USDA.

ACTION: Advanced Notice of Proposed Rule Making.

SUMMARY: The Farmers Home Administration (FmHA) plans to revise and redesignate its regulations pertaining to Planning and Performing Site Development Work. The intent of this action will be to improve existing regulations in order that FmHA can better meet the needs of the applicants and provide increased guidance to field personnel in program administration.

FOR FURTHER INFORMATION CONTACT: Mr. Glendon D. Deal, Environmental and Technology Staff, Room 6305, S. Agriculture Building, 14th and Independence Avenue, SW, Washington, D.C. 20250. Telephone: (202) 447-3394.

SUPPLEMENTARY INFORMATION: In 1973 FmHA developed the existing regulations now contained in 7 CFR 1804, Subpart D to establish policies, methods and responsibilities with respect to planning and performing site development work in connection with all types of loans and grants authorized by Title V of the Housing Act of 1949. As a result of Executive Order 12044, these regulations will be redesignated as a new Subpart C of Part 1924, Chapter XVIII, Title 7 of the Code of Federal Regulations. In addition, portions of the regulations will be amended to recognize recent social, economic and technical changes in the housing industry, to more clearly communicate FmHA policies to our field offices and to reflect a reassignment of responsibilities within the Agency. In the interim period until this task can be accomplished, FmHA in response to housing needs in hilly terrain is modifying the Hillside Development Standards section of the booklet entitled, "Site Development Design Standards" referred to in 7 CFR 1804.63(b)(2). This booklet will be published for public comment along with the program regulations in the forthcoming proposed rule making process. The amended booklet will be available for viewing in all FmHA offices within 60 days after the date of this publication.

The FmHA programs and projects which are affected by this intended action are subject to state and local clearinghouse review in the manner delineated in Part 1901, Subpart H of this Chapter.

Authorities: 42 USC 1480; 7 CFR 2.23, 7 CFR 2.70.

Dated: January 8, 1981.

Gordon Cavanaugh,

Administrator, Farmers Home Administration.

[FR Doc. 81-2528 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-07-M

Food Safety and Quality Service

9 CFR Parts 317 and 381

Prior Label Approval Program, Reopening of Comment Period

AGENCY: Food Safety and Quality Service, USDA.

ACTION: Advance notice of proposed rulemaking; reopening of comment period.

SUMMARY: On October 31, 1980, the Food Safety and Quality Service (FSQS) published in the Federal Register a documnent announcing its efforts to streamline its regulatory procedures by delegating certain labeling authority to inspectors in charge in the field. A pilot program began December 1, 1980, in three selected meat and poultry inspection areas. In response to a request for additional time to comment on the pilot program procedures, the Agency is reopening the comment period for an additional 30 days.

DATE: Comments must be received on or before: February 23, 1981.

ADDRESS: Written comments to: Regulations Coordination Division, Attn: Annie Johnson, Food Safety and Quality Service, Compliance Program, U.S. Department of Agriculture, Room 2637, South Agriculture Building, Washington, DC 20250. Oral comments to Ms. Joan Moyer Schwing, (202) 447–4293.

FOR FURTHER INFORMATION CONTACT: Ms. Joan Moyer Schwing, Deputy Director, Meat and Poultry Standards and Labeling Division, Compliance Program, Food Safety and Quality Service, U.S. Department of Agriculture, Washington, DC 20250, (202) 447–4293.

SUPPLEMENTARY INFORMATION:

Background

On October 31, 1980 (45 FR 72197), the Food Safety and Quality Service published an advance notice of proposed rulemaking in which it announced that it would test the feasibility of the recommendation of a joint Compliance/Meat and Poultry Inspection Programf (MPI) Task Force to:

1. Allow the Inspector-in-Charge to approve final labeling which is identical to a sketch previously approved by the Washington Office;
2. Separate labeling into two distinct classes—"simple" and "nonsimple" labeling, as described in that Notice and;
3. Delegate the labeling approval authority for simple labeling to the Inspector-in-Charge at the field level.

The Agency is particularly interested in learning whether such field delegation will adequately serve industry's needs for prompt review and approval of labeling modifications, and suggestions as to how the labeling approval procedure can otherwise be improved.

Three areas were selected for the pilot program. These areas include: Missouri (Southwestern Region), Kentucky (Southeastern Region), and the Hyattsville area, which includes Maryland, Delaware and the District of Columbia (Northeastern Region). The pilot program commenced December 1, 1980, and will last for 120 days. The period for receiving comments on the advance notice ended December 31, 1980.

The Agency has been requested to extend the period of time within which data, views, or arguments may be submitted. The request stated that additional time was needed in order to more fully review the experience under the pilot study and comment thereon.

The Agency has determined that additional time for comment is justified and therefore is reopening the comment period until February 23, 1981.

Done at Washington, DC, on: January 19, 1981.

Donald L. Houston,

Administrator, Food Safety and Quality Service.

[FR Doc. 81-2480 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-DM-M

NUCLEAR REGULATORY COMMISSION

10 CFR Ch. I

Periodic and Systematic Review of Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of Comprehensive Review of Regulations and Request for Comments.

SUMMARY: The Nuclear Regulatory Commission is undertaking a comprehensive review of its regulations (10 CFR Chapter I) in order to ensure (1) that the regulations, both individually and collectively, achieve the substantive goals set forth in the several statutes which direct the activities of the Commission, including the Atomic Energy Act of 1954, as amended, the Administrative Procedure Act, and the National Environmental Policy Act; and (2) that, in accordance with Executive Order 12044 and the Regulatory Flexibility Act (Pub. L. 96–354), the regulations are as simple and clear as possible, that they achieve legislative goals effectively and efficiently, and that they do not impose unnecessary burdens on the economy, on individuals, on public or private organizations, on small entities, or on state and local governments. Public comment is invited upon the approach to be used by the Commission in conducting this review, the structure and organization of 10 CFR Chapter I, and the interrelationship between and among parts within 10 CFR Chapter I.

DATE: Comments period expires March 24, 1981.

ADDRESSES: All interested persons who desire to submit written comments or suggestions for consideration should send them to the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, Attention: Docketing and Service Branch. Copies of all comments received may be examined in the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: I. Craig Roberts, Office of Standards Development, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone: (301) 443–5985.

SUPPLEMENTARY INFORMATION: On July 30, 1980, the Commission published for public comment (45 FR 50613) the NRC Action Plan (NUREG–0660), a comprehensive and integrated approach for the correction and improvement of the regulation and operation of nuclear facilities based on the experience gained from the Three Mile Island Unit No. 2 accident. The Commission is now reviewing the comments. Task IV.G.2. of the NRC Action Plan requires a periodic and systematic reevaluation of existing NRC regulations and sets forth the Commission's commitment to comply with Executive Order 12044, "Improving Government Regulations" (3 CFR 152 (1978)). This task, which is to be completed within five years, calls for a detailed review of the entire body of NRC regulations in order to ensure that (1) the regulations, both individually and collectively, achieve the substantive goals set forth in the several statutes which direct the activities of the Commission, including the Atomic Energy Act of 1954, as amended (42 U.S.C. § 2011, *et seq.*), the Energy Reorganization Act of 1974, as amended (42 U.S.C. § 5801, *et seq.*), the Administrative Procedure Act (5 U.S.C. § 500, *et seq.*) and the National Environmental Policy Act (42 U.S.C. 4321, *et seq.*); and (2) that, in accordance with Executive Order 12044 and the Regulatory Flexibility Act (Pub. L. 96–354), the regulations are as simple and clear as possible, that they achieve legislative goals effectively and efficiently, and that they do not impose unnecessary burdens on the economy, on individuals, on public or private organizations, on small entities or on state and local governments.

In conducting this review the NRC will ensure that each regulation has been evaluated for conformance with the following criteria, set forth in Executive Order 12044:

1. The regulation is needed.
2. Direct and indirect effects of the regulation have been adequately considered.
3. Alternative approaches have been considered and the least burdensome of the acceptable alternatives has been chosen.
4. Public comments have been considered and adequate responses have been prepared.
5. The regulation is written in plain English and is understandable to those who must comply with it.
6. An estimate has been made of the reporting burdens or record keeping requirements necessary for compliance with the regulation and submitted to GAO in accordance with the Federal Reports Acts for approval.

7. The name, address, and telephone number of a knowledgeable agency official has been provided for each regulation.

8. A plan for evaluating the regulation has been developed.

In addition, all regulations which have or will have a significant economic impact upon a substantial number of small entities will be reviewed in order to determine whether such rules should be continued without change, or should be amended or rescinded to minimize any significant economic impact of the rules upon small entities. As required by the Regulatory Flexibility Act, this part of the review will focus on:

1. The continued need for the rule;

2. The nature of complaints or comments received concerning the rule from the public;

3. The complexity of the rule;

4. The extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and

5. The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

The NRC will undertake a study of the overall organization of 10 CFR Chapter I, with an eye toward developing options to remedy any organizational problems in the NRC's regulations.

In soliciting public comment on the approach to be used in conducting this review, the NRC wishes to emphasize that interested persons should focus their comments on the structure and organization of 10 CFR Chapter I, including the interrelationship between and among parts within Chapter I. Opportunity to comment on specific provisions within 10 CFR will be provided at a later date. The NRC is particularly interested in any comments the public may have with respect to possible approaches to restructuring the regulations. The range of options available for consideration is wide, running the gamut from retaining the current structure to undertaking a major revision of the entire structure of 10 CFR Chapter I. Each of these options, as well as the entire midrange, is open for comment.

It should be further noted that in conducting this review, the Commission has assigned highest priority to those areas identified in the TMI Action Plan as most directly affected by the TMI accident. These include regulations involving operator training, emergency planning, environmental monitoring, radiation protection, and consistent treatment of fission product release from fuel cladding failure. Recognizing that these areas are of most immediate concern, the NRC has developed a preliminary schedule for conducting this review over the next five years, which includes estimated start and completion dates for individual parts and subparts. This schedule is set forth in an attachment to this notice.

Dated at Bethesda, Maryland, this 30th day of December, 1980.

For the Nuclear Regulatory Commission.

William J. Dircks,

Executive Director for Operations, U.S. Nuclear Regulatory Commission.

Schedule for Review of NRC Regulations

10 CFR Part and title	Start review (fiscal year)	Complete preliminary review [1]	Publish proposed rule	Publish final rule	Remarks
0 Conduct of Employees	1982		None required	9/82	
1 Statement of Organization and General Information	1981		None required	3/81	
2 Rules of Practice for Domestic Licensing Proceedings	1984		9/84	9/85	
4 Nondiscrimination in Federally Assisted Commission Programs.	Ongoing		12/81	6/82	
7 Advisory Committees	1981	12/81	[1]	[1]	
9 Public Records	Ongoing		7/81	2/82	
10 Criteria and Procedures for Determining Eligibility for Access to Restricted Data or National Security Information.	Ongoing		1/82	8/82	
11 Criteria and Procedures for Determining Eligibility for Access to or Control Over Special Nuclear Material (proposed).	1985	9/85	[1]	[1]	Rule Recently published (11/21/80).
14 Administrative Claims Under Federal Tort Claims Act	1981		10/82	12/82	
19 Notices, Instructions, and Reports to Workers; Inspections.	1983	1/83	[1]	[1]	
20 Standards for Protection Against Radiation	Ongoing		12/81	12/82	Advance Notice of Rulemaking published March 20, 1980 (45 FR 18023).
21 Reporting of Defects and Noncompliance	1982	4/82	[2]	[2]	
25 Access Authorization for License Personnel	1983		1/84	9/84	
30 Rules of General Applicability to Domestic Licensing of Byproduct Material.	Ongoing		1/83	6/83	Marketing of new products leads to ongoing consideration of revisions to this part. In addition, the review schedule is set to be consistent with planned studies of byproduct and source material in consumer products, general licensing uses, and specific licenses.
31 General Domestic Licenses for Byproduct Material	Ongoing		9/84	9/85	Do.
32 Specific Domestic Licenses to Manufacture or Transfer Certain Items Containing Byproduct Material.	Ongoing		9/84	9/85	Do.
33 Specific Domestic Licenses of Broad Scope for Byproduct Material.	Ongoing	6/83	[1]	[1]	
34 Licenses for Radiography and Radiation Safety Requirements for Radiographic Operations.	Ongoing		12/82	6/84	
35 Human Uses of Byproduct Material	Ongoing		6/82	6/83	
40 Domestic Licensing of Source Material	Ongoing		9/84	9/85	Results of ongoing studies will affect scheduling of this review. In addition, significant amendments to this part were recently made effective 11/17/80.
50 Domestic Licensing of Production and Utilization Facilities.	Ongoing		See remarks		Revision of Part 50 will involve numerous rulemaking actions over the period 1980–1985.
51 Licensing and Regulatory Policy and Procedures for Environmental Protection.	Ongoing		3/80	1/81	Notice of proposed rulemaking published March 3, 1980 (45 FR 13739).
55 Operators' Licenses	Ongoing	3/82	[1]	[1]	
60 Disposal of High-Level Radioactive Wastes in Geologic Repositories.	Ongoing		12/79, 3/81	1/81, 12/81	Part 60 is a proposed new part. It involves two separate rulemaking actions. See notice of proposed rulemaking on licensing Procedures published December 6, 1979 (44 FR 70408) and advanced noticed of rulemaking on technical criteria published May 13, 1979 (45 FR 31393).
61 Management and Disposal of Low-Level Wastes by Shallow Land Burial and Alternative Disposal Methods (proposed).	Ongoing		4/81	9/82	Part 61 would be a new part. See Advance Notice of Rulemaking published October 25, 1978 (43 FR 49811).

Schedule for Review of NRC Regulations—Continued

10 CFR Part and title	Start review (fiscal year)	Complete preliminary review [1]	Publish proposed rule	Publish final rule	Remarks
70 Domestic Licensing of Special Nuclear Material	Ongoing		4/81–6/84	6/85	This part will be reviewed and revised in subparts over the period 4/81–6/84; to be completed by 6/84.
71 Packaging of Radioactive Material for Transport and Transportation of Radioactive Material Under Certain Conditions.	Ongoing		8/79	4/81	Proposed revision published August 17, 1979 (44 FR 48234).
72 Licensing Requirements for the Storage of Spent Fuel in an Independent Spent Fuel Storage Installation.	Ongoing	11/83	(2)	(2)	
73 Physical Protection of Plants and Material	1981		4/81–6/84	6/85	This part will be reviewed and revised in subparts over the period 4/81–6/84; to be completed by 6/84.
75 Safeguards on Nuclear Material—Implementation of US/IAEA Agreement.	1985	9/85	(2)	(2)	Rule recently issued (12/80).
81 Standard Specifications for the Granting of Patent Licenses.	1981		9/81	9/82	
95 Security Facility Approval and Safeguarding of National Security Information and Restricted Data.	1983		1/84	9/84	
100 Reactor Site Criteria	Ongoing		3/81	6/82	Advance Notice of Rulemaking published July 29, 1980 (45 FR 50350).
110 Export and Import of Nuclear Facilities and Materials	1981		1/81	10/81	
140 Financial Protection Requirements and Indemnity Agreements.	Ongoing		3/84	12/84	
150 Exemptions and Continued Regulatory Authority in Agreement States Under Section 274.	Ongoing	3/83	(2)	(2)	
160 Trespassing on Commission Property	1981		2/81	8/81	
170 Fees for Facilities and Materials	1981		12/81	6/82	

[1] For certain parts, the need and schedule for revisions will be determined by the preliminary review. [2] Not yet scheduled.

[FR Doc. 81-2085 Filed 1-22-81; 8:45 am]

BILLING CODE 7590-01-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[File No. 9136]

Gould Inc.; Proposed Consent Agreement With Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent order, accepted subject to final commission approval, would require, among other things, a Rolling Meadow, Ill. manufacturer and seller of various electrical products to cease having on its board any director who simultaneously serves as a director of a competing company, if the revenues of either corporation derived from the competing "product or service market" exceed the lesser of ten million dollars or one percent of the corporation's total sales; or any individual who fails to provide the statement required under the terms of the order. The order would further require that the company institute an annual monitoring program for the next five years, designed to detect unlawful interlocks.

DATE: Comments must be received on or before March 24, 1981.

ADDRESS: Comments should be directed to: Office of the Secretary, Federal Trade Commission, 6th St. and Pennsylvania Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: FTC/C, E. Perry Johnson, Washington, D.C. 20580. (202) 523-3601.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 3.25(f) of the Commission's Rules of Practice (16 CFR 3.25(f)), notice is hereby given that the following consent agreement containing a consent order to cease and desist and an explanation thereof, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(14) of the Commission's Rules of Practice (16 CFR 4.9(b)(14)).

United States of America

Before Federal Trade Commission

In the matter of Gould Inc., a corporation; Docket No. 9136, agreement containing consent order to cease and desist.

The Agreement herein, by and between Gould Inc., a corporation (sometimes referred to as "respondent"), by its duly authorized officer and its attorney, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Gould Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 10 Gould Center, Rolling Meadows, Illinois 60008.

2. Respondent has been served with a copy of the complaint issued by the Federal Trade Commission on May 9, 1980, charging respondent with violation of Section 8 of the Clayton Act, 15 U.S.C. § 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

3. Respondent admits all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

4. Respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challege or contest the validity of the order entered pursuant to this agreement.

5. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the respondent, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the said copy of the complaint issued by the Commission.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may without further notice to respondent, (1) issue its decision containing

the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the decision containing the agreed-to order to respondent's address as stated in this agreement shall constitute service. Respondent waives any right it might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order.

8. Respondent has read the complaint and the order contemplated hereby. It understands that once the order has been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Respondent further understands that it may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

Order

I

The following definitions shall apply in this order:

"Subsidiary" of a corporation means any company of which 50 percent of more of the issued and outstanding voting stock is owned or controlled, directly or indirectly, by such corporation.

"Parent" of a corporation means any company which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting stock of such corporation.

"Sister" of a corporation means any subsidiary of a parent of that corporation.

"Product or service market" means any line of commerce in which Gould's (including its subsidiaries and divisions) annual revenues exceed the lesser of:

(1) Five millions dollars; or

(2) One-half of one percent of Gould's total annual revenues.

II

It is ordered that respondent Gould Inc. ("Gould"), its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on its board of directors any person who either:

(a) serves at the same time as a director of any other corporation if Gould and such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

(1) Ten million dollars; or

(2) One percent of the total sales of that corporation; or

(b) fails to submit to Gould any statement required to be obtained by Gould under Paragraph III of this order.

III

It is further ordered that within thirty (30) days of the effective date of this order, and prior to each election of directors or prior to the solicitation of proxies for such election, whichever is earlier, Gould shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of such director or nominee; and

(b) the name and principal office mailing address of, and a listing of each product or service produced, offered or sold by, each corporation which the director or nominee then serves as a director, or has been nominated to serve as director at the time of the statement.

The requirements of this Paragraph shall not apply to elections of directors occurring after five years from the effective date of this order, nor shall directors or nominees be required to list products or services of subsidiaries, sisters, or parents of Gould.

Nothing in this Paragraph shall be construed to relieve Gould of its obligation under Paragraph II(a) of this order due to any error or omission contained in any written statement received pursuant to this Paragraph.

If competition arises in any product or service market between Gould and any other corporation with which Gould shares a common director, by virtue of action taken by such other corporation subsequent to a submission of information by such director pursuant to this paragraph, then Gould shall not be liable under Paragraph II until the date for the next submission of information.

IV

It is further ordered that within forty-five (45) days of the effective date of this order and annually for a period of ten (10) years thereafter, Gould shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph III of this order shall be submitted to the Commission as part of the reports of compliance required by this Paragraph during the first five (5) years. Nothing in this Paragraph shall relieve Gould of its obligation to comply with Paragraph II and V of this order once it is no longer required to submit reports of compliance to the Commission.

V

It is further ordered that Gould shall notify the Commission not more than thirty (30) days after any change in the corporation, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Gould Inc.

[Docket No. 9136]

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement to a proposed consent order from Gould Inc. ("Gould"). The complaint in this matter, which was issued on May 9, 1980, alleges that Gould has violated Section 8 of the Clayton Act, 15 U.S.C. § 19, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by maintaining interlocking directorates with Midland-Ross Corporation and Narco Scientific, Inc.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

Paragraph I of the proposed order contains difinitions of several terms used throughout the agreement.

Paragraph II of the proposed order prohibits Gould from having any director who is also a director of a competing corporation if the revenues of either corporation derived from the competing "product or service markets" exceed the lesser of (a) ten milion dollars, or (b) one percent of that corporation's total sales. The phrase "product or service market" is defined in Paragraph I as any line of commerce in which Gould's annual revenues exceed the lesser of (a) five million dollars, or (b) one-half of one percent of Gould's total annual revenues. Therefore, in determining whether the competition between Gould and an interlocked corporation falls within the terms of Paragraph II, all lines of commerce that come within the definition of "product or service market" are taken into consideration. This paragraph further provides that gould shall not permit any person to serve as a director who has failed to submit to Gould any statement required by Paragraph III.

Paragraph III of the proposed order: (1) requires that Gould institute an annual monitoring program for the next five years to detect unlawful interlocks, and further requires that as part of this program Gould shall obtain from each of its directors and nominees for directorships a listing of each product or service produced, offered or sold by each other corporation on whose board the director also serves or has been

nominated to serve; (2) provides that Gould shall not be relieved of its responsibilities under Paragraph II due to any error or omission contained in any statement submitted pursuant to this paragraph; and (3) provides a temporary exemption for liability under Paragraph II in cases in which competition arises between Gould and an interlocked company during the period between annual monitoring programs by virtue of action taken by the other company (*e.g.*, an acquisition or entry into a new product line) until the date for the next annual monitoring program.

Paragraph IV of the proposed order requires that Gould submit reports to the Commission for the next ten years to enable the Commission to assess Gould's compliance under the order.

Paragraph V of the proposed order requires that Gould notify the Commission not more than thirty (30) days after any change in the company that may affect Gould's compliance obligations arising under the order.

This order furthers competition by preventing interlocking directorates between Gould and its competitors that could lead to collusive conduct, the exchange of competitively sensitive information, or other anticompetitive activity.

The purpose of this analysis is to facilitate public comment on the proposed order. It is not intended to constitute an offical interpretation of the agreement and proposed order or to modify in any way its terms.

Carol M. Thomas,

Secretary.

[FR Doc. 81-2556 Filed 1-22-81; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF LABOR

Office of the Secretary

Office of Workers' Compensation Programs

Occupational Safety and Health Administration

20 CFR Part 10

29 CFR Parts 2 and 1906

Subpoenas Served Upon Departmental Employees; Procedure To Be Followed; Rulemaking

AGENCY: Office of the Secretary, Office of Workers' Compensation Programs, and Occupational Safety and Health Administration, Labor.

ACTION: Proposed rule.

SUMMARY: Because an increasing number of subpoenas are being served on Labor Department employees, and because of the lack of a uniform Departmental policy for responding to such subpoenas, it is proposed below to establish one procedure to be followed by all Labor Department employees who have received subpoenas calling for the production of records or other materials, or the disclosure of information. A uniform procedure should result in more equitable treatment for the general public and place the responsibility for determining the response to subpoenas on the appropriate Department officials.

DATES: Comments must be received on or before March 24, 1981.

ADDRESS: Comments must be in writing and should be sent to Ronald Whiting, Associate Solicitor, Division of General Legal Services, Office of the Solicitor, U.S. Department of Labor, Room N-2464, 200 Constitution Avenue NW., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Sofia Petters, Counsel for Administrative Legal Services, Office of the Solicitor, U.S. Department of Labor, Room N-2464, 200 Constitution Avenue NW., Washington, D.C. 20210, Telephone: (202) 523-6807.

SUPPLEMENTARY INFORMATION: The Labor Department's enforcement responsibility has increased dramatically over the past 10 to 15 years, especially in the area of work-related injuries—occupational safety and health and mine safety and health. There has accompanied this expansion in responsibility an increased interest in access to Department records or information by persons seeking remedies under other laws for injuries or losses they may have sustained. Consequently, Labor Department employees are now frequently subpoenaed in those private actions and called upon to produce Department records or to disclose information relating to Department records. The Department currently has no uniform policy for dealing with these subpoenas. As a result, Department employees have not had clear guidance regarding the manner in which they should respond to subpoenas. As one might expect, the manner in which subpoenas have been dealt with nationwide has been inconsistent. It is the purpose of the regulation proposed below to prescribe a single Department of Labor policy regarding subpoenas so that employees respond in a consistent manner and so that members of the public are accorded consistent treatment.

The most efficient way to deal with the problem, it appears, is to follow the lead of other Federal agencies and establish within the Department a "clearinghouse" to which all subpoenas, no matter who is served, would be referred for a determination of the Department's response. Accordingly, pursuant to the regulation proposed below, the Secretary of Labor, who has custody over all Labor Department records, would delegate to the Solicitor of Labor and the Deputy Solicitor of Labor the authority to determine the appropriate response to subpoenas which are served upon Labor Department employees.

Consistent with this uniform policy approach, to the extent divisions of the Department have issued regulations addressing the manner in which employees of that division are to respond to subpoenas, those regulations would be revoked.

This document is being jointly executed by the Secretary of Labor, the Assistant Secretary for Employment Standards and the Assistant Secretary for Occupational Safety and Health. Each of these signatories has rulemaking authority for the three various parts of the Code of Federal Regulations, which are today being proposed to be amended. These parts are 20 CFR Part 10 (the Assistant Secretary for Employment Standards); 29 CFR Part 2 (the Secretary of Labor); and 29 CFR Part 1906 (the Assistant Secretary for Occupational Safety and Health).

The Department of Labor has determined that the proposal in this document is not a "major regulation" that requires preparation of a regulatory analysis under Executive Order 12044 and the Department's guidelines published at 44 FR 5570 (Jan. 26, 1979). The Secretary of Labor has also certified, in accordance with 5 U.S.C. 605(b), that the regulation in this document will not have a significant economic impact on a substantial number of small business entities.

Accordingly, it is proposed to amend the following three parts of the Code of Federal Regulations, being—

(a) Part 10, Chapter I of Title 20, Code of Federal Regulations (20 CFR Part 10);

(b) Part 2, Subtitle A of Title 29, Code of Federal Regulations (29 CFR Part 2); and

(c) Part 1906, Chapter XVII of Title 29, Code of Federal Regulations (29 CFR Part 1906) as set forth below.

Title 20—Employees' Benefits

PART 10—CLAIMS FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT, AS AMENDED

1. The authority citation for Part 10 is revised to read as follows:

Authority: (5 U.S.C. 301); Reorganization Plan No. 6 of 1950, 15 FR 3174, 64 Stat. 1263; (5 U.S.C. 8145, 8149); Secretary of Labor's Order No. 16-75, 40 FR 55913, Employment Standards Order No. 78-1, 43 FR 51469.

2. In § 10.11, paragraph (e) is removed and paragraph (f) is redesignated as paragraph (e).

Title 29—Labor

PART 2—GENERAL REGULATIONS

3. The authority citation for Part 2 reads as follows:

Authority: 5 U.S.C. 301, unless otherwise noted.

4. 29 CFR Part 2 is amended by adding new §§ 2.20 through 2.24 being new Subpart C, to read as follows:

Subpart C—Employees Served With Subpoenas

Sec.

2.20 Purpose and scope.
2.21 Production or disclosure prohibited unless approved by Solicitor of Labor or Deputy Solicitor of Labor.
2.22 Procedure in the event of a demand for production or disclosure.
2.23 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.
2.24 Procedure in the event of an adverse ruling.

Subpart C—Employees Served With Subpoenas

§ 2.20 Purpose and scope.

(a) This subpart sets forth the procedures to be followed whenever a subpoena, order, or other demand (hereinafter referred to as a "demand") of a court or other authority is issued for the production or disclosure of (1) any material contained in the files of the Department, (2) any information relating to material contained in the files of the Department, or (3) any information or material acquired by any person while such person was an employee of the Department as a part of the performance of his official duties or because of his official status.

(b) For purposes of this subpart, the term "employee of the Department" includes all officers and employees of the United States appointed by, or subject to the supervision, jurisdiction, or control of the Secretary of Labor.

§ 2.21 Production or disclosure prohibited unless approved by Solicitor of Labor or Deputy Solicitor of Labor.

No employee or former employee of the Department of Labor shall, in response to a demand of a court or other authority, produce any material contained in the files of the Department or disclose any information relating to material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without prior approval of the Solicitor of Labor or the Deputy Solicitor of Labor.

§ 2.22 Procedure in the event of a demand for production or disclosure.

Whenever an employee or former employee of the Department receives a demand for the production of material or the disclosure of information described in 2.20(a), he shall immediately notify the nearest office of the Solicitor.

§ 2.23 Procedure where a decision concerning a demand is not made prior to the time a response to the demand is required.

If the response to the demand is required before the instructions from the Solicitor or Deputy Solicitor are received, a Department attorney or other government attorney designated for the purpose shall appear with the employee or former employee of the Department upon whom the demand has been made, and shall furnish the court or other authority with a copy of the regulations contained in this subpart and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the Solicitor or Deputy Solicitor and shall respectfully request the court or other authority to stay the demand pending receipt of the requested instructions.

§ 2.24 Procedure in the event of an adverse ruling.

If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with pending receipt of instructions, or if the court or other authority rules that the demand must be complied with irrespective of instructions not to produce the material or disclose the information sought, the employee or former employee upon whom the demand has been made shall respectfully decline to comply with the demand. "United States ex rel Touhy v. Ragen," 340 U.S. 462.

PART 1906—ADMINISTRATION WITNESSES AND DOCUMENTS IN PRIVATE LITIGATION

5. The authority citation for Part 1906 reads as follows:

Authority: Sec. 8(g), 84 Stat. 1600; 29 U.S.C. 657.

6. Part 1906 of 29 CFR Chapter XVII is removed and reserved.

Signed at Washington, D.C. this 19th day of January, 1981.

Ray Marshall,

Secretary of Labor.

Donald Elisburg,

Assistant Secretary for Employment Standards.

Eula Bingham,

Assistant Secretary for Occupational Safety and Health.

[FR Doc. 81-2404 Filed 1-19-81; 2:59 pm]
BILLING CODE 4510-27-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Social Security Administration

20 CFR Part 416

Supplemental Security Income for the Aged, Blind, and Disabled; Income

AGENCY: Social Security Administration, HHS.

ACTION: Proposed rule.

SUMMARY: These regulations propose to add a new kind of income to the kinds that are excluded before income is deemed from an ineligible spouse or parent to an eligible individual who lives in the same household. For SSI purposes, a spouse is someone who lives with an eligible individual as husband or wife. A parent is a natural or adoptive parent or such parent's spouse. Payments provided under title XX or other governmental programs to an eligible individual and paid to that person's ineligible spouse or ineligible parent in return for in-home supportive services (chore, attendant, homemaker), or paid directly to the ineligible spouse or ineligible parent to provide these services, will not be deemed to be the income of the eligible individual. This is based on a decision by the Commissioner of Social Security on behalf of the Secretary that deeming this income is inequitable under the circumstances. The provision will be effective on publication of final regulations.

DATES: Your comments will be considered if we receive them no later then March 24, 1981.

ADDRESSES: Send your written comments to Social Security Administration, Department of Health and Human Services, P.O. Box 1585, Baltimore, Maryland 21203.

Copies of all comments we receive can be seen at the Washington Inquiries Section, Office of Governmental Affairs, Department of Health and Human Services, Switzer Building, Room 1212, 330 C Street, S.W., Washington, D.C. 20201.

FOR FURTHER INFORMATION CONTACT: Rita Hauth, Legal Assistant, Room 4234 West High Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235, (301) 594-7112.

SUPPLEMENTARY INFORMATION: We plan to revise our rules on deeming of certain income of an ineligible spouse or ineligible parent to an eligible individual. The Social Security Administration (SSA) has decided to revise these rules because of a conflict between the purpose for which a State provides payments for chore, attendant or homemaker services and the effect of the reduction or termination of SSI benefits which these payments cause under current SSI regulations.

The President's Commission on Mental Health and the President's Committee on Mental Retardation recommend greater assistance for the severely disabled. The 1979 Advisory Council on Social Security recommended the development of adequate means to provide attendant care for the disabled. The Commissioner's decision to add this exclusion from deemed income implements the recommendation of the Commission, the Committee and the Council.

Since the SSI program began, sections 1614(f)(1) and (2) of the Social Security Act have required that the income and resources of spouses and parents who are not eligible for SSI be considered to be the income and resources of their spouses and children who are eligible for SSI benefits and who live in the same household. This process is called deeming—we deem the income and resources of the ineligible spouse or ineligible parent to be those of the SSI beneficiary. The statute requires the deeming of such income (and resources) except to the extent determined by the Secretary to be inequitable under the circumstances. Accordingly, the Secretary many determine the amounts and types of income and resources that are excluded before the balance is deemed to a beneficiary. The deemed income and resources are added to those the beneficiary already has and the total is subject to the limits and exclusions the statute provides for individuals.

A number of States, particularly California, have established programs, funded under title XX of the Social Security Act or another State program, under which they provide monies to pay for in-home supportive services necessary to enable an individual who needs these services in order to live in his or her home. The payments are made to the individual to pay for the services or may be paid directly to the person who performs the services. If the individual is an SSI beneficiary, and the one who performs the service is any one except an ineligible spouse, or ineligible parent (if the beneficiary is a child), who lives in the same household there is no effect on the SSI benefit. The money does not constitute income to the beneficiary because it is earmarked as payment for the specific services. A problem arises when the person who renders the services and receives the payments is the ineligible spouse of an eligible individual, or the ineligible parent of an eligible child, and they live in the same household. In these cases, income of the ineligible spouse or ineligible parent must be deemed to be that of the eligible individual.

Reducing or terminating the SSI benefit of an eligible individual because of these payments tends to defeat the purpose for which the payment is made. Too, this kind of payment to a member of a household other than an ineligible spouse or ineligible parent has no adverse effect on an SSI beneficiary.

If the ineligible spouse or ineligible parent is also an essential person, generally the more strict essential person deeming rules apply and the income must be deemed to the eligible individual. However, the eligible individual has the option of not having the essential person where it is to the individual's advantage. The spouse-to-spouse or parent-to-child deeming rules will then apply and the income may be excluded.

Although relatively few beneficiaries are disadvantaged by "circle-back" deeming (projected to be less than 2,000 nationwide), a change is necessary since to continue deeming these payments would be inequitable under the circumstances. The revised rule will enable these individuals to better cope with their disabilities and prevent their institutionalization. The proposed revision of the regulations imposes no reporting or recordkeeping requirements on beneficiaries or others.

Section 416.1161 of the recodified Part 416, Subpart K (Income), published at 45 FR 65541 on October 3, 1980, is amended by adding to the kinds of income that are not deemed to be the income of eligible individuals. In the case of an ineligible spouse who lives with his or her eligible spouse, or an ineligible parent who lives with his or her eligible child, amounts paid under a Federal, State, or local government program to provide in-home supportive services to an eligible individual will no longer be deemed to be income of an eligible individual.

(Catalog of Federal Domestic Assistance Program No. 13.807, Supplemental Security Income Program)

Dated: January 15, 1981.

William J. Driver,

Commissioner of Social Security.

Approved: January 19, 1981.

Patricia Roberts Harris,

Secretary of Health and Human Services.

Part 416 of Title 20 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Subpart K of Part 416 is revised to read as follows:

Authority: Secs. 1102, 1611, 1612, 1613, 1614, and 1631, of the Social Security Act, as amended; Sec. 211 of Pub. L. 93-66; 49 Stat. 647, as amended, 86 Stat. 1466, 86 Stat. 1468, 86 Stat. 1470, 86 Stat. 1471, 86 Stat. 1475, 87 Stat. 154; U.S.C. 1302, 1382, 1382a, 1382b, 1382c and 1383.

2. In § 416.1161 the introductory text of the section and the introductory text of paragraph (a) is revised and paragraph (a)(16) added to read as follows:

§ 416.1161 Income of an ineligible spouse, ineligible parent, and essential person for deeming purposes.

The first step in deeming is determining how much income your ineligible spouse, ineligible parent, or essential person has. (See § 416.1160 for definitions of these terms.) We do not always include all of their income when we determine how much income to deem to you. In this section we explain the rules for determining how much of their income is subject to deeming. As part of the process of deeming income from your ineligible spouse or ineligible parent we must determine the amount of income of any ineligible children in the household.

(a) *For an ineligible spouse or parent.* We do not include any of the following types of income (see § 416.1102) of an ineligible spouse or parent: * * *

(16) Income of your ineligible spouse or ineligible parent which was paid under a Federal, State, or local government program (For example, payments under title XX of the Social

Security Act) to provide you with chore, attendant or homemaker services.

* * * * *

[FR Doc. 81-1519 Filed 1-22-81; 8:45 am]
BILLING CODE 4110-07-M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 675

Comprehensive Employment and Training Act (CETA) Regulations Concerning Eligibility of Prisoners

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the regulation at 20 CFR 675.5-1(e), published on May 20, 1980 at 45 FR 33859, concerning CETA eligibility requirements for persons institutionalized in prisons, jails or similar correctional institutions. The proposal would permit CETA funds to be used to provide employment and training services to prisoners consistent with participation timeframes applicable to CETA programs, with the restriction that stipends or allowances shall not be paid to any prisoner participating in such activities within the confines of the prison prior to one year from presumptive release. The purpose of this publication is to request comments on the proposed rule.

DATES: Comments on the proposed rule are due on or before February 23, 1981.

ADDRESS: Comments should be addressed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 601 D Street, N.W. Washington, D.C. 20213. Attention: Mr. Robert Anderson, Administrator, Office of Comprehensive Employment Development, Employment and Training Administration.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Anderson, telephone (202) 376-6254.

SUPPLEMENTARY INFORMATION: On January 4, 1980, the Department amended the CETA regulations published on April 3, 1979, in order to limit the eligibility of prisoners for Comprehensive Employment and Training Act (CETA) programs to those who have a reasonable expectation of release, parole or work release within 12 months of enrollment. This provision was retained in the CETA regulations published in the **Federal Register** on May 20, 1980.

The Department has received a number of comments requesting modification of the eligibility provision to expand the timeframes within which CETA services may be provided to prisoners, with a limitation on the period for which wages, allowances and stipends can be paid to such persons. The House of Representatives, in its Report (No. 96-1244) on the FY 1981 appropriation bill for the Departments of Labor, Health and Human Services, Education and Related Agencies, expressed concern that language in the previous year's appropriation bill prohibiting payment of CETA funds to any prisoner for work performed prior to one year before presumptive release had been misconstrued and that the provision was not intended to restrict the availability of CETA training and counseling to prisoners. The House Report advised the Department to revise the eligibility regulation "to allow CETA funds to be used to provide training and counseling to prisoners consistent with participation timeframes applicable to CETA programs, with the only restriction being that stipends or allowances shall not be paid to any prisoner participating in training within the confines of the prison prior to one year from presumptive release" (Report, pp 7-8).

Regulatory Impact: The financial and other impact of the proposed regulation is less than specified in DOL guidelines at 44 FR 5578 (January 20, 1979) for determining when a regulatory analysis should be made. Therefore, preparation of a regulatory analysis is not required for this regulation. Also the Secretary has certified in accordance with 5 U.S.C. 605 (b) that the proposed regulation in this document will not have a significant economic impact on a substantial number of small business entities.

While this regulation is deemed significant within the meaning of Executive Order 12044 (43 FR 12661, March 23, 1978), since the changes merely implement the Congressional intent with respect to CETA services for prisoners the comment period is only 30 days, rather than 60 days.

Section 675.5-1(e) is revised to read as follows:

Accordingly, it is proposed to amend Part 675 of Title 20 of the Code of Federal Regulations as follows:

§ 675.5-1 Eligibility requirements pertaining to all prime sponsor programs.

* * * * *

(e) Persons who are institutionalized in a prison, jail or similar correctional institution and:

(1) Who have a reasonable expectation of release, parole, or work release within 12 months of enrollment are eligible to participate in any activity authorized under these regulations and to be compensated for such participation in accordance with these regulations; or

(2) Who do not have a reasonable expectation of release, parole, or work release within 12 months of enrollment are eligible to participate only in classroom training and to receive services to applicants as described in § 676.25-5 (a) and employment and training services as described in § 675.25-5 (b), provided:

(i) Participation is consistent with participant timeframes as specified in § 676.30 (f);

(ii) No allowances are paid for such participation; and

(iii) Participation is confined to programs conducted within the prison.

Sec. 126 of the Comprehensive Employment and Training Act (Pub. L. 95-524, 92 Stat. 1909, 29 U.S.C. 801 *et seq.*)

Signed at Washington, D.C. this 16th day of January 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-2460 Filed 1-19-81; 5:10 pm]
BILLING CODE 4510-30-M

20 CFR Part 676

Comprehensive Employment and Training Act; Allowability of Legal Expenses

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule.

SUMMARY: This document proposes to specify the conditions under which Comprehensive Employment and Training Act (CETA) funds may be used by recipients (and their subrecipients and contractors) for legal fees associated with administration of their grants. The proposed regulations will provide CETA recipients with more explicit and comprehensive guidance as to the allowability of legal costs than presently exists.

DATES: Comments on this proposed rule are due on or before March 24, 1981.

ADDRESS: Comments should be addressed to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 601 D Street, N.W., Washington, D.C. 20213, Attn: Robert Anderson: Administrator, Office of Comprehensive Employment Development.

FOR FURTHER INFORMATION CONTACT: Robert Anderson, telephone: (202) 376-6254

SUPPLEMENTARY INFORMATION: The reauthorized CETA of 1978 contains a number of provisions which reflect Congressional concern for preventing fraud and abuse in CETA programs. Two such provisions involve the use of CETA funds to pay for legal costs incurred by recipients. Section 123(f) (2) of CETA, 29 U.S.C. 825(f)(2), provides:

> Nothing in section 121 of this section shall be deemed to authorize the Secretary to pre-approve the selection of legal counsel by a prime sponsor, but the Secretary shall assure that no funds available for administrative costs under any title of this Act are used by a prime sponsor for making payments on contracts for legal or other associated services unless the prime sponsor certifies that—
>
> "(A) the payments are not unreasonable in relation to the fees charged by other contractors providing similar services; and
>
> "(B) the services could not be competently provided through employees of the prime sponsor or other available State or local governmental employees.

In addition, Section 123(g) of CETA, 29 U.S.C. 825(g), provides: "The Secretary, by regulation, shall establish such standards and procedures for recipients of funds under this Act as are necessary to assure against program abuses including, but not limited to * * * excessive or unreasonable legal fees * * *"

The present CETA regulations concerning legal costs, at 20 CFR § 676.40–2(b), basically incorporate the statutory language at Section 123(f)(2), but do not otherwise indicate when such costs are allowable. The proposed rule would amend § 676.40–2(b) to further specify the conditions under which CETA funds may be used by recipients (and their subrecipients and contractors) for legal and associated costs arising from administration of the grant.

Specifically, the proposed rule would indicate that legal and associated costs are subject to a variety of existing provisions, such as the overall percentage limitations on the use of CETA funds for administrative expenses, CETA provisions on classification of costs by category, the CETA prohibitions against lobbying and political activities and the cost principles at 41 CFR 29–70.103, which incorporate by reference the provisions on legal expenses and allocability of costs at 41 CFR Part 1–15.

Under the proposed rule, legal costs would be allowable where they are incurred in connection with, and are incident to, administration of the grant. Costs incurred solely for the purpose of discharging the recipient's general responsibilities (*i.e.*, responsibilities that would be performed regardless of the existence of the grant) would be unallowable. The proposed regulation provides a number of examples of legal and associated costs that are allowable under the above standard.

Legal costs associated with representing the prime sponsor in recipient or employer level grievance/complaint proceedings would be allowable since such procedures are mandated by the CETA regulations (20 CFR §§ 676.83 and 676.84) and are related to administration of the grant.

Also, costs for legal services would be allowable where they involve representing the recipient's position before the Grant Officer prior to arriving at a settlement or, if no settlements is reached, prior to the Grant Officer's final determination. For example, the costs of representing the recipient in the informal resolution process under 20 CFR § 676.88(d) would be allowable. In cases involving analogous situations under Federal contracts, the courts have held that such costs are allowable, *e.g.*, *Acme Processing Equipment Co.* v. *U.S.*, 171 Ct. Cl. 251, 347 F.2d 538 (1965); *Kalvas Corporation, Inc.* v. *United States*, 211 Ct. Cl. 192, 543 F.2d 1298 (1976).

The proposed rule also indicates that costs associated with representing a recipient at the Administrative Law Judge (ALJ) or Secretarial level are unallowable except that such costs may subsequently be allowed where the recipient is ultimately held not in violation of the CETA statute or regulations. Such costs may be properly attributable to administration of the grant, and therefore allowable, where the recipient is held in compliance with CETA. Similarly, costs associated with the defense of a recipient in other proceedings related to the recipient's program, *e.g.*, a worker's compensation proceeding involving a CETA participant, would be unallowable except that they could be subsequently allowed where the recipient is ultimately held not in violation of Federal, State or local law.

Finally, the proposed rule specifies that recipients are responsible for insuring compliance with the restrictions on legal costs by their subrecipients and contractors.

While these regulations are deemed significant within the meaning of Executive Order 12044 and the Department of Labor regulations thereunder, the financial and other impact of these regulations are less than specified in DOL criteria for determining when a regulatory analysis should be made (see 44 FR 5576, January 26, 1979). Therefore, the preparation of a regulatory analysis is not required for these regulations.[1]

The program for which this rule is promulgated is listed in the Catalog of Domestic Federal Assistance as No. 17.232, "Comprehensive Employment and Training Programs."

Accordingly, § 676.40–2 of Title 20, Chapter V, of the Code of Federal Regulations is proposed to be amended by revising paragraph (b) as follows.

§ 676.40–2 [Amended]

* * * * *

(b) *Costs of Legal and Associated Services.* (1) Nothing in these provisions shall be deemed to authorize the Department to pre-approve the selection of legal counsel by a prime sponsor, but no administrative funds under any Title of the Act may be used by a prime sponsor for legal or other associated services from contractors unless the prime sponsor certifies in writing that:

(i) The payments are not unreasonable in relation to the fees charged by other contractors providing similar services; and

(ii) The services could not be competently provided through employees of the prime sponsor or other available State or local governmental employees (sec. 123(f)(2)).

(2) The costs of legal and associated services are allowable where they are incurred in connection with, and are incident to, the administration of the grant and are not incurred solely for the purpose of discharging the recipient's general responsibilities (*i.e.*, those responsibilities that would be performed regardless of the existence of the grant program). Examples of such allowable costs include, but are not limited to:

(i) Review for legal sufficiency of: the Comprehensive Employment and Training Plan, the recipient's eligibility determination and participant tracking procedures, the local grievance/complaint system, the recipient's procurement and contracting procedures and other fiscal, management and monitoring systems;

(ii) Providing legal advice with respect to interpretations of the CETA statute and regulations;

(iii) Representing the recipient at the local grievance/complaint level;

(iv) Negotiating, drafting and interpreting subgrants, contracts and agreements;

(v) Litigation of matters arising under subgrants and contracts, except as

[1] A copy of a letter, dated January 16, 1981, from Ray Marshall to the Small Business Administration was filed with the original document. This letter certified that this rule would not have a significant economic impact upon a substantial number of small business entities.

limited in paragraph (b)(5) of this section;

(vi) Obtaining licenses and permits from, and resolving legal issues with, State or local regulatory and taxing authorities, where such activities are pertinent to program operations; and

(vii) Providing legal assistance in connection with personnel and labor relations problems involving CETA staff and participants.

(3) Costs of legal and associated services must otherwise be in accordance with other applicable provisions, including, but not limited to:

(i) The limitation at § 676.42(a) on the percentage of grant funds which may be used for administrative costs;

(ii) The provisions at § 676.41–1 on classification of costs by category;

(iii) The prohibition at § 676.69 against political activities in CETA programs;

(iv) The prohibition at § 676.70 against the use of CETA funds for lobbying activities; and

(v) The cost principles at 41 CFR 29–70.103, which incorporate by reference the provisions on allowability of costs set forth at 41 CFR § 1–15.703–2, and the restrictions on legal expenses specified at 41 CFR § 1–15.711–16.

(4) "Associated Services" shall mean, for purposes of this section, services that are ancillary to and are provided in connection with, legal services. Examples of associated services include, but are not limited to, clerical and paralegal services rendered in conjunction with legal services and provision of related information on legislative, regulatory and administrative changes applicable to the CETA program. Where the costs of legal services are unallowable, the costs of associated services shall also be unallowable.

(5)(i) Legal and associated costs are allowable where they involve representing the recipient in arriving at an informal resolution of the dispute or, if no such resolution is reached, such costs as were reasonably incurred prior to the Grant Officer's final determination.

(ii) Costs of representing the recipient in a CETA proceeding at the Administrative Law Judge or Secretarial level are unallowable except that such costs may subsequently be allowed where the recipient demonstrates by a final decision or order (after all appeals have been exhausted) that the recipient is not in violation of the CETA statute and regulations.

(iii) Costs of representing the recipient in other proceedings related to the recipient's CETA program, *e.g.*, a workers compensation proceeding involving a CETA participant, are unallowable, except that such costs may subsequently be allowed where the recipient demonstrates by a final decision or order (after all appeals have been exhausted) that the recipient is not in violation of Federal, state or local law.

(6) Each recipient is responsible for ensuring compliance with these provisions on legal and associated costs by its subrecipients and contractors.

* * * * *

(Sections 123(g) and 126 of the Comprehensive Employment and Training Act (29 U.S.C. 801 *et seq.*, Pub. L. 95–524, 92 Stat. 1907))

Signed at Washington, D.C. this 19th day of January, 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81–2429 Filed 1–19–81; 3:56 pm]

BILLING CODE 4510–30–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 161

[Docket No. 80N–0384]

Canned Sardines and Sardine-Type Products; Intent To Establish Standards

Correction

In FR Doc. 80–34280, at page 73092, in the issue of Tuesday, November 4, 1980, on page 73093, in the second column, the first full paragraph, the second from the last line, insert the word "providing" after the word "country".

BILLING CODE 1505–01–M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[LR–88–79]

Income Tax—Investment Credit for Single Purpose Agricultural or Horticultural Structures; Notice of Proposed Rulemaking

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the investment credit for single purpose agricultural or horticultural structures. Changes to the applicable tax law were made by the Revenue Act of 1978. This regulation would provide the public with the guidance needed to comply with that Act.

DATES: Written comments and requests for a pulic hearing must be delivered or mailed by March 24, 1981. The amendments are proposed to be effective for open taxable years ending after August 15, 1971.

ADDRESS: Send comments and requests for a public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR–88–79), Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: Carolyn Swift of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3458) (not a toll free call).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 48 of the Internal Revenue Code of 1954 as amended by section 314 of the Revenue Act of 1978 (92 Stat. 2763), and are to be issued under the authority contained in section 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805).

After the restoration of the investment credit by section 101(a) of the Revenue Act of 1971 (85 Stat. 497) a controversy arose over whether investments in certain agricultural or horticultural structures were eligible for the credit. The determination concerning the eligibility of these structures was made on a case-by-case basis and taxpayers frequently litigated the Commissioner's denial of the credit. S. Rep. No. 95–1263, 95th Cong., 2d Sess. 116 (1978), 1978–3 C.B. 315. As a result of the continuing controversy over this question, Congress decided to provide specifically, in section 314 of the 1978 Act, that single purpose agricultural or horticultural structures are eligible for the investment credit. The new statute describes the property to which the credit extends and sets out a special rule for recapture under section 47 of the Code. These proposed regulations will implement the provisions of section 314 of the 1978 Revenue Act.

Effective Date

The provisions of section 48(a)(1)(D) and this regulation apply to taxable years ending after August 15, 1971. The Internal Revenue Service already has received comments from the public suggesting that the regulations provide a method for allowing taxpayers to claim a credit for taxable years ending after August 15, 1971 which are closed by the

statute of limitations. However, on the authority of *United States v. Zacks*, 375 U.S. 59 (1963), the statute of limitations cannot be waived to apply section 48 (a)(1)(D) retroactively. See also Rev. Rul. 79-343, 1979-2 C.B. 18, which holds that the credit is available for open taxable years ending after August 15, 1971.

Single Purpose Agricultural Structure

A single purpose agricultural structure is a structure specifically designed, constructed, and used exclusively for the housing, raising, and feeding of a particular type of livestock and their produce. The structure also may contain a limited amount of work space for specific purposes. In addition, the structure must include equipment necessary to house, raise, and feed that particular type of livestock. The use of the conjunctive in section 48(p)(2) and the legislative history indicate that a qualifying structure must contain this equipment. H.R. Rep. No. 95-1800, 95th Cong. 2d Sess. 227 (1978), 1978-3 C.B. 521. A qualifying structure may not be designed, constructed, or used for any purposes unrelated to those stated above.

Single Purpose Horticultural Structure

A single purpose horticultrual structure is a greenhouse or structure which is specifically designed, constructed, and used exclusively for the commercial production of plants or mushrooms. The stucture also may contain a limited amount of work space for certain specific purposes. A qualifying structure may not be designed, constructed, or used for any purposes unrelated to the commercial production of plants or mushrooms.

Specifically Used

Single purpose agricultural and horticultural structures must be specifically used only for permissible purposes. The proposed regulations set out the permissible purposes and explain how the specific use test is satisifed.

Workspace; Ancillary Post-Production Activities

Under section 48(p)(4), single purpose agricultural and horticultural structures may contain work space only if the work space is used for stocking, caring for, or collecting livestock, plants, or mushrooms; for maintenance of the structure; or for maintenance or replacement of equipment or stock enclosed or contained in the structure. The legislative history discusses this provision. See S. Rep. No. 95-1263, 95th Cong., 2d Sess. 116-17 (1978), 1978-3 C.B. 315. Proposed § 1.48-10(d) consequently provides that work space is permitted for these uses, including ancillary post-production activities. These activities, which include gathering, loading, sorting, and packing unprocessed plants and livestock produce, are to be distinguished from disqualifying activities such as processing or marketing.

Relation to Section 1250

The proposed regulations treat property to which section 48(a)(1)(D) applies as section 1250 property. Consequently the more rapid methods of depreciation that are available for section 1245 property may not be used for section 48(a)(1)(D) property and only limited depreciation recapture under section 1250 applies.

An analysis of the statute and its legislative history indicates that section 48(a)(1)(D) was intended to be section 1250 property other than section 1245 property and section 1245 property is defined by a specific list of types of property. Single purpose agricultural and horticultral structures are not included in this list. In the past, Congress has amended section 1245 to add to the definition of section 1245 property new categories of section 38 property under section 48(a)(1), as in the case of elevators and escalators. Revenue Act of 1962, § 13(a)(1), 76 Stat. 1032. In the case of section 48(a)(1)(D) property, however, no such amendment was enacted, despite the fact that the original House bill (H.R. 12846, 95th Cong., 2d Sess. (1978)), did contain a companion amendment to section 1245. The Conference Committee adopted substantially all of the provisions of the House bill, but did not include the amendment to section 1245.

Cases decided before section 48(a)(1)(D) was added to the Code classified some kinds of agricultural and horticultural structures as section 48(a)(1)(B) property and hence, by inference, as section 1245 property, since section 48(a)(1)(B) property is section 1245 property. In enacting section 48(a)(1)(D), however, Congress created a new category of property. Since the categories of property under section 48(a)(1) are mutually exclusive, this prior case law is not controlling for purposes of determining the nature of section 48(a)(1)(D) property. Instead, the statute and its legislative history must be analyzed and both indicate that Congress intended agricultural and horticultural structures to be section 1250 property. Accordingly, § 1.48-10(g)(2) provides that property to which section 48(a)(1)(D) applies is section 1250 property.

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably six copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Regulatory Flexibility Act

Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Drafting Information

The principal author of these proposed regulations is Carolyn Swift 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 regulation, both on matters of substance and style.

Proposed Amendments to the Regulations

The Income Tax Regulations (26 CFR Part 1) are proposed to be amended by adding the following new § 1.48-10:

§ 1.48-10 Single purpose agricultural or horticultural structures.

(a) *In general*—(1) *Scope.* Under section 48(a)(1)(D), "section 38 property" includes single purpose agricultural and horticultural structures, as defined in section 48(p) and paragraphs (b) and (c) of this section. These structures are subject to a special rule for recapture of the credit. See paragraph (g) of this section. For the relation of this section to section 48(a)(1)(B) (other tangible property) and to section 1250 (depreciation recapture), see paragraph (h) of this section.

(2) *Effective date.* The provisions of section 48(a)(1)(D) and this section apply to open taxable years ending after August 15, 1971.

(b) *Definition of single purpose agricultural structure*—(1) *In general.*

Under section 48(p)(2), a single purpose agricultural structure is any structure or enclosure that meets all of the following requirements:

(i) It is specifically designed and constructed exclusively for permissible purposes (as defined in paragraph (b)(2) of this section). See paragraph (d) of this section for the rule regarding "specifically designed and constructed".

(ii) It is specifically used exclusively for those permissible purposes. See paragraph (e) of this section for the rules regarding "specifically used".

(iii) It houses equipment necessary to house, raise, and feed livestock and their produce. See paragraph (b) (3) and (4) of this section.

(2) *Permissible purposes.* The following are the only permissible purposes for a single purpose agricultural structure:

(i) Housing, raising, and feeding a particular type of livestock or its produce. The term "housing, raising, and feeding" includes the full range of livestock breeding and raising, activities including ancillary post-production activities (as defined in paragraph (f) of this section). Thus, for example, use of a structure for breeding livestock, or for producing eggs or livestock, is permitted. The structure may also be used for storing feed or machinery, but more than strictly incidental use for these purposes will disqualify the structure. See paragraph (e)(1) of this section. For the special rule concerning the permissible purposes for a milking parlor, see paragraph (b)(2)(iii) of this section.

(ii) Housing required equipment (including any replacements) as defined in this paragraph and in paragraph (b) (4) of this section.

(iii) If the structure is a dairy facility, it will qualify if it is used for: (A) the production of milk or for the production of milk and for housing, raising, or feeding dairy cattle, and (B) housing equipment (including any replacements) necessary to house, raise, or feed livestock. The term "housing, raising, or feeding" includes the full range of dairy cattle breeding and raising activities including ancillary post-production activities (as defined in paragraph (f) of this section). The structure may also be used for storing feed or machinery, but more than incidental use for these purposes will disqualify the structure. See paragraph (e)(1) of this section.

(3) *Livestock; particular type of livestock*—(i) *Livestock.* Livestock within the meaning of § 1.48–1(l) constitutes livestock for purposes of this section. Under section 48(p)(6), poultry constitutes livestock for purposes of section 48(a)(1)(D). The term "livestock" includes the offspring of livestock and the produce of livestock, such as milk and eggs. However, a structure that is used solely to house produce of livestock or equipment necessary to house produce of livestock will not qualify as a single purpose agricultural structure.

(ii) *Particular type of livestock.* A structure does not qualify as a single purpose agricultural structure if it is designed, constructed, or used exclusively for permissible purposes with respect to more than one particular type of livestock. For purposes of this section, each species is a different type except that all species of poultry are considered to be of a single type. Thus, for example, a structure will not qualify as a single purpose hog-raising facility if it also can be used to raise dairy cows, but a structure specifically designed, constructed, and used to raise poultry may house, raise, and feed both chickens and turkeys.

(4) *Required equipment rule.* (i) A single purpose agricultural structure must also house equipment necessary to house, raise, and feed the livestock ("required equipment"). Required equipment must be an integral part of the structure, and includes, but is not limited to, equipment necessary to contain the livestock, to provide them with water or feed, and to control the temperature, lighting, and humidity of the interior of the structure. For purposes of this section, equipment is an integral part of the structure if, after it is installed, it is economically impractical to put the structure to a use other than the use by reason of which it qualifies for the credit. The useful life of the structure, however, need not be contemporaneous with the life of the equipment it houses. A structure without required equipment is not a single purpose agricultural structure.

(ii) A single purpose agricultural structure may, but is not required to, house equipment (for example, loading chutes) necessary to the conduct of ancillary post-production activities as defined in paragraph (e) of this section.

(5) *Livestock structure.* In section 48(p)(2), the terms "single purpose livestock structure" and "single purpose agricultural structure" are interchangeable.

(c) *Definition of single purpose horticultural structure*—(1) *In general.* Under section 48(p)(3), a single purpose horticultural structure is any structure that meets both of the following requirements:

(i) It is a greenhouse or structure specifically designed and constructed exclusively for permissible purposes (as defined in paragraph (C)(2) of this section). See paragraph (d) of this section for the rule regarding "specifically designed and constructed."

(ii) It is specifically used exclusively for those permissible purposes. See paragraph (e) of this section for the rules regarding "specifically used."

(2) *Permissible purposes.* The following are the only permissible purposes for a single purpose horticultural structure:

(i) The commercial production of plants (including plant products such as flowers, vegetables, or fruit) in a greenhouse.

(ii) The commercial production of mushrooms in a structure.

(iii) A single purpose horticultural structure also may, but is not required to, house equipment necessary to carry out these permissible purposes listed in paragraph (c)(2) (i) and (ii) of this section.

(3) *Ancillary post-production activities.* The terms "commercial production of plants" and "commercial production of mushrooms" include ancillary post-production activities (as defined in paragraph (f) of this section).

(d) *Specifically designed and constructed.* A structure must be designed, constructed, and equipped in such a way that it is economically impractical to use the structure except for the specific use by reason of which it qualifies for the credit. For principles relating to required equipment, see paragraph (b)(4) of this section.

(e) *Specifically used.* There are two aspects of the specific use requirement—exclusive use and actual use.

(1) *Exclusive use.* (i) A structure qualifies as a single purpose agricultural or horticultural structure only if it is used exclusively for the permitted purposes by reason of which it qualified for the credit. Thus—

(A) The structure may not be used for any nonpermissible purposes (for example, processing, marketing, or more than incidental use for storing feed or equipment) and

(B) It may not be put to any use other than the specific use by reason of which it qualifies for the credit.

(ii) For purposes of this section, the term "incidental use" means a use which is both minor and related to the qualifying purpose. Thus, for example, if feed is stored in an agricultural structure which will be used for raising hogs, the feed stored must be used only for the hogs, and only a minor amount of space within the structure may be devoted to storing the feed.

(iii) A structure may fail the exclusive use test if either of the requirements of paragraph (e)(1)(i) is not met. Thus, for example, a horticultural structure that

contains an area for processing plants or plant products will fail the exclusive use test because there is a nonpermissible use. An agricultural structure that is used to house more than one particular type of livestock fails the exclusive use test for the same reason. A change in the use of an agricultural structure from one species of livestock to another will cause the structure to fail the exclusive use test when the change occurs. Thus, for example, a hog-raising facility which qualified for the credit when it was placed in service cannot later be modified and used for producing broiler chickens even if the structure would have qualified for the credit if it had been originally designed, constructed, and used exclusively for producing broiler chickens.

(2) *Actual use.* (i) A single purpose agricultural or horticultural structure also must actually be used for the permissible purpose by reason of which it qualifies for the credit. "Actual use" means "placed in service" (as defined in § 1.46-3 (d)). Mere vacancy, on a temporary basis, will not disqualify the structure. Thus, for example, a structure that is designed and constructed as a hog-raising structure will not qualify if it is never placed in service for raising hogs. However, a turkey-raising facility will not be disqualified if the turkeys are all sent to a packing plant in November and the structure remains vacant until the next spring when newly hatched turkeys are placed in the structure to be raised.

(ii) For purposes of this section, "vacancy on a temporary basis" includes temporary vacancy caused by market fluctuations or other economic considerations and vacancy on a seasonal basis.

(f) *Work space; ancillary post-production activities*—(1) *Permissible work space.* Under section 48(p)(4), a single purpose agricultural or horticultural structure may contain work space only if it is used for—

(i) Stocking, caring for, or collecting livestock, plants, or mushrooms,

(ii) Maintenance of the structure, and

(iii) Maintenance or replacement of the equipment or stock enclosed by or contained in the structure. Thus, for example, an eligible structure may not contain space devoted to processing or marketing or other nonpermissible purposes.

(2) *Ancillary post-production activities.* The term "stocking, caring for, or collecting" the livestock, plants, or mushrooms includes ancillary post-production activities. These activities, therefore, consititute permissible purposes when carried on in conjunction with other permissible purposes, and a qualifying structure may contain work space devoted to such activities. Ancillary post-production activities include gathering, sorting, and loading livestock, plants, and mushrooms and packing unprocessed plants, mushrooms, and the live offspring and unprocessed produce of the livestock. Ancillary post-production activities do not include processing activities, such as slaughtering or packing meat, nor do they include marketing activities.

(g) *Special rule for recapture under section 47.* Under section 48(p)(5), if a structure which qualifies for the credit under this section becomes ineligible because, within 7 years after the time it was placed in service, it ceases to be held for the specific use by reason of which it qualified, or it is used for other than that qualifying use, then the investment credit previously allowed with respect to the structure may be partially or entirely recaptured under section 47. Unlike other property to which section 47 applies, single purpose structures may not be converted from one permissible use to another without recapture. See subparagraph (e)(2) of this section.

(h) *Relationship to other sections*—(1) *Relation to section 48(a)(1)(B).* All structures that meet the requirements of section 48(a)(1)(D) will be considered to qualify under section 48(a)(1)(D) and not under section 48(a)(1)(B). Property that does not qualify under section 48(a)(1)(D), however, may nonetheless qualify under section 48(a)(1)(B) if it otherwise meets the requirements of that section.

(2) *Relationship to section 1250.* For purposes of depreciation recapture, property to which section 48(a)(1)(D) applies is section 1250 property.

(i) [Reserved]

(j) *Examples.* The provisions of this section may be illustrated by the following examples.

Example (1). A constructs a rectangular structure for use as an egg-producing facility. The structure has no windows. The walls and roof are made of corrugated steel and there is a door which is 4 feet wide and 8 feet tall at each end of the structure. At the end of each wall are louvered openings approximately 4 feet high and 8 feet long. These openings house thermostatically controlled fans. In the center of the walls are manually operated fresh-air openings. Corrugated steel "curtains" hang from the top of the openings so that the openings can be completely closed in cold weather, but the curtains can be propped open to admit fresh air. The building is well insulated. A has reinforced the roof with extra trusses and rafters and reinforced the buildings with extra wall studs. Two rows of cages are suspended from the rafters by thin steel girders and wires. The floor of the structure is a sloping concrete slab pierced with long troughs which run the length of structure beneath the cages. The troughs are used for collection and disposal of chicken wastes. When this structure is placed in service it will qualify for an investment credit under this section.

Example (2). B constructs a greenhouse for the commercial production of plants. The greenhouse is a rectangular structure with translucent fiberglass walls and roof. The structure is equipped with an automatic temperature and humidity control system. Pipes were installed to carry water and liquid fertilizer to the plants and to release minute amounts of carbon dioxide into the air. When the structure was originally placed in service B used the entire structure for growing flowers commercially. In September 1978, B began to use the structure for growing tomatoes. Because of the success of the venture, in January 1979, B began to use the entire structure for growing tomatoes. In February 1980, B set up a small counter with a cash register at one end of the structure so that workers could sell tomatoes to customers at the greenhouse. Until February 1980, the structure would qualify for the credit under this section. The change in use from growing flowers to growing tomatoes will not affect the eligibility of the structure. Once the cash register is installed, however, the structure fails to meet both the exclusive use test of paragraph (e)(1) of this section and the work space rule of paragraph (f) of this section since a single purpose structure may not be used for marketing activities.

Example (3). C purchases a prefabricated structure and makes modifications so that the structure will meet C's requirements. C adds gates and constructs a partition which divides the structure into two parts. One part of the structure constitutes less than one-third of the total area of the structure and is used to house feeder cattle while they are fed with hay. This part of the structure has a sloping concrete floor. The other part of the structure constitutes more than two-thirds of the total area of the structure and is used to store the hay used to feed the cattle. This structure will not qualify for the credit since it fails the required equipment rule. The structure does not contain equipment which is an integral part of the structure and the installation of which makes it economically impractical to use the structure for other uses. This structure would also fail the "specifically designed and constructed" test of paragraph (d) of this section since it could be economically practical to use at least two-thirds of the structure for uses other than housing, raising, and feeding feeder cattle. The structure would also fail the specific use test of paragraph (e) of this section because it is not exclusively used to house, raise, and feed the cattle and because it is used for storing hay, which is a nonpermissible use.

Jerome Kurtz,

Commissioner of Internal Revenue.

[FR Doc. 81-2464 Filed 1-19-81; 5:02 pm]

BILLING CODE 4830-01-M

26 CFR Part 1

[LR-133-78]

Books and Records of Foreign Corporations and Operations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This document contains proposed regulations relating generally to the books and records of a foreign organization, trade, or business. The proposed regulations authorize a district director or the Director of International Operations to designate, under certain circumstances, the location where the records must be kept and to require that a translation or interpreter be provided at the time records kept in a foreign language are made available for examination. The proposed regulations also require certain records of a controlled foreign organization, trade, or business to be kept and clarify when the records of a controlled foreign coropration must be provided.

DATES: Written comments and requests for a public hearing must be delivered or mailed by March 24, 1981. Section 1.6001–1(f), authorizing the designation of a location, is proposed to apply if the time fixed in accordance with § 301.7605–1 occurs more than 30 days after the date on which these proposed regulations are published in the **Federal Register** as a Treasury Decision. The language added to § 1.6001–1(a), requiring certain records of a controlled foreign organization, trade, or business to be kept, is proposed to apply to records of certain transactions occurring more than 30 days after the date on which those proposed regulations are published in the **Federal Register** as a Treasury Decision. Section 1.6001–1(g) and the language added to § 1.964–3(a) are proposed to be effective retroactively.

ADDRESS: Send comments and requests for public hearing to: Commissioner of Internal Revenue, Attention: CC:LR:T, Washington, D.C. 20224.

FOR FURTHER INFORMATION CONTACT: Herman B. Bouma of the Legislation & Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224, Attention: CC:LR:T, 202–566–3289, not a toll-free call.

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) under sections 964(c) and 6001 of the Internal Revenue Code of 1954. The amendments are proposed under the authority contained in sections 964(c), 6001, and 7805 of the Internal Revenue Code of 1954 (76 Stat. 1027, 26 U.S.C. 964(c); 68A Stat. 731, 26 U.S.C. 6001; 68A Stat. 917, 26 U.S.C. 7805).

Explanation of Provisions

Paragraph (a) of § 1.964–3 would be amended to make clear that the records of a controlled foreign corporation must be provided even though the U.S. shareholder claims it has no amounts includible in income under section 951.

Paragraph (a) of § 1.6001–1 would be amended to provide that a U.S. taxpayer must keep (or have kept on its behalf) certain records of any foreign organization, trade, or business that the taxpayer owns or controls directly or indirectly.

Proposed § 1.6001–1(f) applies to a person who has failed to provide at the time and place fixed in accordance with § 301.7605–1 records kept outside the United States and required by the Internal Revenue Code or the regulations thereunder. If it is reasonable to believe, considering the causes of the failure, that keeping the records at a different location would have facilitated obtaining the records, then the district director or the Director of International Operations may designate a location where the records must be kept. The location may be the United States.

Proposed § 1.6001–1(g) applies to records that are kept in a foreign language. If such records have been requested for examination, the district director or the Director of International Operations may require that a translation of the records or the services of a qualified interpreter be provided at the time of the examination.

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably six copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(b), the Secretary of the Treasury has certified that the requirements of the Regulatory Flexibility Act do not apply to this Notice of Proposed Rulemaking as it will not have a significant economic impact on a substantial number of small entities. The proposed rules do not impose a significant economic burden on taxpayers. The records required by the amendment to paragraph (a) of § 1.6001–1 are already available to taxpayers; under paragraph (f) of § 1.6001–1, a taxpayer would be required to keep its records at a particular location only if the taxpayer failed to provide records and the location is necessary to facilitate obtaining the records. In addition, the proposed rules primarily affect taxpayers that own or control foreign organizations or that are required to keep records of foreign organizations. Only a limited number of small entities own or control foreign organizations.

Drafting Information

The principal author of these proposed regulations is Herman B. Bouma of the Legislation & 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 regulations, both on matters of substance and style.

Proposed Amendments to the Income Tax Regulations

The proposed amendments to 26 CFR Part 1 are as follows:

Paragraph 1. Section 1.482–1 is amended by adding a new paragraph (e) to read as follows:

§ 1.482–1 Allocation of income and deductions among taxpayers.

* * * * *

(e) *Records of a controlled foreign organization, trade, or business.* For the records that a U.S. taxpayer must keep of any foreign organization, trade, or business it owns or controls, see paragraph (a) of § 1.6001–1.

Par. 2. Paragraph (a) of § 1.964–3 is amended by adding immediately after the first sentence a new sentence to read as follows:

§ 1.964–3 Records to be provided by United States Shareholders.

(a) *Shareholder's responsibility for providing records.* * * * The books and records must be provided even though the United States shareholder claims he has no such liability. * * *

* * * * *

Par. 3. Paragraph (a) of § 1.6001–1 is amended by adding a new sentence to read as follows:

§ 1.6001–1 Records.

(a) *In general.* * * * If the person owns or controls directly or indirectly any foreign organization, trade, or business, the person shall keep (or have kept on its behalf) the permanent books of account or records (that the person is not otherwise required to keep or have kept on its behalf) of the foreign organization, trade, or business relating to transactions that occur more than 30 days after the date on which these proposed regulations are published in the Federal Register as a Treasury Decision and that are between the foreign organization, trade, or business and any organization, trade, or business (including the person) owned or controlled directly or indirectly by the same interests that own or control directly or indirectly the person.

* * * * *

Par. 4. Section 1.6001–1 is amended by adding new paragraphs (f) and (g) to read as follows:

§ 1.6001–1 Records.

* * * * *

(f) *Designation of location of records}*—(1) *Authority to designate.* If—

(i) A person fails to provide at the time and place fixed in accordance with § 301.7605–1 books of account or records ("records") that the person is required by the Internal Revenue Code or the regulations thereunder to keep (or have kept on its behalf, including records to which § 1.964–3 applies),

(ii) The records are not kept in the United States, and

(iii) It is reasonable to believe, considering the causes of the failure, that keeping the records at a different location would have facilitated obtaining the records,

the district director or the Director of International Operations may designate by registered or certified mail to the person a location or locations, which may include the United States, where the person must keep the records described in paragraph (f)(2) of this section. The person failing to provide the records ("recordkeeper") and the person whose records were not provided ("recorded person") may or may not be identical.

(2) *Records required to be kept at designated location.* The records that must be kept at the designated location or locations are the records (or true copies thereof) of the recorded person that relate to the recorded person's first taxable year to which the records that the recordkeeper failed to provide relate, and to the nine immediately succeeding taxable years. The records shall be up to date with respect to a taxable year of the recorded person on or before the later of—

(i) The time (including extensions thereof) by which the recordkeeper is required to file a U.S. income tax return for the taxable year to which the taxable year of the recorded person relates, or

(ii) The 90th day after the notice designating the location or locations is mailed to the recordkeeper.

(3) *Revocation of designation.* The district director or the Director of International Operations may revoke the designation of a location or locations if the director concludes that the designation is no longer needed to facilitate obtaining records.

(4) *Effective date.* The provisions of this paragraph (f) shall apply if the time fixed in accordance with § 301.7605–1 occurs more than 30 days after the date on which these proposed regulations are published in the Federal Register as a Treasury Decision.

(g) *Records in a foreign language.* The district director or the Director of International Operations may require a person that is required by the Internal Revenue Code or the regulations thereunder to keep (or have kept on its behalf) books of account or records ("records") to provide, at the time the records are made available for examination, an accurate English translation of the records or the services of a qualified interpreter satisfactory to the director.

William E. Williams,

Acting Commissioner of Internal Revenue.

[FR Doc. 81-2468 Filed 1-19-81; 5:14 pm]

BILLING CODE 4830-01-M

Bureau of Alcohol, Tobacco and Firearms

27 CFR Part 6

[Notice No. 363; Reference Notice No. 355]

"Tied-House" Regulations Credit To Retailers in Arrears

AGENCY: Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury.

ACTION: Proposed rule; extension of comment periods.

SUMMARY: On November 6, 1980, the Bureau of Alcohol, Tobacco and Firearms (ATF) published a notice of proposed rulemaking (Notice No. 355) in the Federal Register (45 FR 73692), relating to extension of credit to retail liquor dealers. That notice solicited comments on five proposed methods intended to prevent creation of a tied-house relationship between retailers in arrears of payments, and suppliers or wholesale liquor dealers who extended credit to retailers. The comment period for that notice expired January 5, 1981.

A number of industry members have requested more time in order to study the five proposed alternatives. The Director feels that extending the comment period for 30 days will provide adequate time for the preparation and submission of written comments by interested persons.

DATE: Comments must be received by February 5, 1981.

ADDRESS: Send comments to: Chief, Regulations and Procedures Division, Bureau of Alcohol, Tobacco and Firearms, Post Office Box 385, Washington, D.C. 20044, Attention: Notice No. 355.

FOR FURTHER INFORMATION CONTACT: Charles N. Bacon, Research and Regulations Branch, Telephone: 202–566–7626.

Sec. 5 of the Federal Alcohol Administration Act, 49 Stat. 981, as amended (27 U.S.C. 205).

Signed: January 14, 1981.

G. R. Dickerson,

Director.

[FR Doc. 81-2550 Filed 1-22-81; 8:45 am]

BILLING CODE 4810-31-M

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1990

Identification, Classification and Regulation of Potential Occupational Carcinogens; Proposed Amendments

AGENCY: Occupational Safety and Health Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: Amendments are proposed to the permanent standard for the Identification, Classification and Regulation of Potential Occupational Carcinogens ("Cancer Policy" standard, 29 CFR Part 1990, 45 FR 5002, Jan. 22, 1980) to add new provisions to conform it to the recent Supreme Court decision on OSHA's benzene standard, *Industrial Union Department, AFL–CIO* v. *American Petroleum Institute, et al.* 65 L Ed. 2d 1010, 100 S. Ct. 2844 (July 2, 1980). The proposed amendments reflect the Court's interpretation of the Occupational Safety and Health Act of 1970 to the effect that a determination of the significance of the risk must be made prior to the issuance of a carcinogen standard, that the exposure limit be set at the lowest feasible level

which is reasonably necessary or appropriate to eliminate significant risk, and that OSHA must consider all relevant evidence in making these determinations. In a separate Federal Register notice, 46 FR 4889, OSHA has deleted those provisions of the Cancer Policy which were inconsistent with the Supreme Court's decision. This proposal for amending the Cancer Policy is intended to incorporate new provisions which would clarify the Cancer Policy in light of the benzene decision.

DATES: Comments on the proposed amendments must be received on or before March 31, 1981.

ADDRESSES: Comments should be submitted to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-090A, Room S-6212, U.S. Department of Labor, 3rd and Constitution Avenue NW., Washington, D.C. 20210.

FOR FURTHER INFORMATION CONTACT: Mr. James F. Foster, OSHA Office of Public Affairs, Room N-3641, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Washington, D.C. 20210 telephone (202) 523-8151.

SUPPLEMENTARY INFORMATION:

1. Introduction

On January 22, 1980, the Occupational Safety and Health Administration published a final standard for the Identification, Classification and Regulation of Potential Occupational Carcinogens (the "Cancer Policy") 29 CFR Part 1990, at 45 FR 5002. On June 27, 1980, OSHA issued a correction document at 45 FR 43403. The Cancer Policy included scientific policies, regulatory policies and procedures designed to lead to the more effective regulation of occupational carcinogens. Among the regulatory policies was the provision that exposures to Category I Occupational Carcinogens be reduced to the lowest feasible level taking into account economic and technical considerations. Limitations on the consideration of some types of evidence already considered in the Cancer Policy were also included.

On July 2, 1980, the Supreme Court issued its decision on the OSHA benzene standard, *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, et al.* 65 L Ed. 2d 1010, 100 S. Ct. 2844 (the "benzene decision" or *IUD* v. *API*). The Court held that OSHA must consider the significance of the risk before regulating toxic substances, that OSHA had the burden of demonstrating the significance of the risk, and that OSHA must consider all relevant evidence in making these determinations.

In a separate notice published in the **Federal Register** on January 19, 1981, OSHA deleted certain provisions of the Cancer Policy which were inconsistent with the Supreme Court's decision. In the notice published today, OSHA is proposing amendments to the Cancer Policy which will explicitly incorporate the new elements required by the benzene decision into the Cancer Policy. The proposed changes explicitly provide that a determination of the risk must be made prior to the issuance of a carcinogen standard, that the exposure limit be set at the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk and that OSHA must consider all relevant evidence in these determinations.

It should be noted that most provisions of the Cancer Policy are not affected by the benzene decision, and therefore have not been changed by the previously published deletion document or by this proposal. These provisions include scientific policies, priorities setting, identification criteria and classification criteria. A more extensive discussion of the Cancer Policy and the provisions unaffected by the Court's decision in *IUD* v. *API* is found in the **Federal Register** deletion notice, 46 FR 4889.

2. Proposed Amendments to Regulatory Sections

The following paragraphs discuss those sections of the Cancer Policy standard OSHA proposes to change to incorporate the elements of the Supreme Court's benzene decision with the Cancer Policy. The effect of the previous document was to delete provisions of the Cancer Policy which no longer had the force of law because they were inconsistent with the Supreme Court decision. As a result, the Cancer Policy is now fully consistent with the law of the benzene case. This proposal would now add a limited number of provisions to the Cancer Policy which would affirmatively incorporate the benzene decision into the Cancer Policy.

The Cancer Policy was intended to comprehensively cover issues relevant to identifying and regulating occupational carcinogens. Therefore the amendments are intended to reflect the Agency's position on the issues which OSHA must consider because of the benzene decision. OSHA intends that this rulemaking be confined to the regulatory and policy issues raised by the proposed amendments. As stated above, the scientific policies in the Cancer Policy were not affected by the Supreme Court's decision and are not the subject of this proceeding. Participants who wish to petition to amend a scientific policy should refer to 29 CFR §§ 1990.106 and 1990.145 for the appropriate procedures.

The proposed changes would not establish generic policies for determining whether a risk is significant or evaluating specific risk assessments. These questions will remain open issues for consideration in substance specific rulemakings. OSHA believes it is inappropriate at this time to propose generic policies for the determination of the significance of risk, because in contrast to the Cancer Policy which is based on extensive OSHA experience in regulating carcinogens, OSHA rulemakings have not generally considered the case by case applications of risk assessments.

§ *1990.111(h)*

This paragraph, after the deletions made by the January 19, 1981 **Federal Register** notice, provides that exposure to Category I Potential Carcinogens is to be reduced primarily through the use of engineering and work practice controls. *IUD* v. *API* requires that the significance of the risk created by the substance be considered before a standard is issued, (slip. op. pp. 4-5). To make this explicit in the Cancer Policy, an introductory clause, "where a significant risk exists" has been proposed for the paragraph, thereby explicitly indicating that consideration must be given to the significance of the risk before a standard may be issued.

In addition, the decision held that the agency could lower exposures to eliminate significant risks (sl. op. pp. 31, 33 n 49, 34-35). Accordingly, to incorporate this interpretation and to recognize that reducing exposures to the lowest feasible level is appropriate where reasonably necessary to eliminate significant risk, it is proposed to modify the paragraph to provide that the level set shall be the "lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk."

As conformed to the Supreme Court's interpretation of the OSHA Act, this incorporates the three statutory concepts relevant to setting exposure levels. Section 6(b)(5) limits exposure levels to what is "feasible". Therefore exposure levels cannot be reduced below the lowest feasible level even if there is remaining significant risk. Substitution, if possible, may be considered as a regulatory alternative if such a risk remains.

Secondly, the lowest feasible level is to be set if reasonably necessary and appropriate to eliminate significant risk. This incorporates the requirement of

§ 6(b)(5) of the Act "that no employee will suffer material impairment of health or functional capacity" and the requirement of § 3(8) as interpreted by the Supreme Court that "health standards . . . be reasonably necessary or appropriate to provide safe or healthful employment . . .".

Finally, if the lowest feasible level is not reasonably necessary or appropriate to eliminate significant risk, then the exposure level is to be set at the level which is reasonably necessary or appropriate to eliminate significant risk.

The Supreme Court did not reach the question of whether the Act provides for cost benefit analysis in setting exposure limits. This issue is now before the Supreme Court in *American Textiles Manufacturers Institute* v. *Marshall*, No. 79–1429. Accordingly no change is proposed to the Cancer Policy with respect to cost benefit analysis.

No change is proposed in the regulatory policy of primary reliance on engineering and work practice controls. That policy was adopted by OSHA based on an extensive analysis of the record (see the discussion at 45 FR 5222) and was not affected by the Supreme Court's decision.

§ 1990.111(i)

This paragraph provides that exposures to Category II Potential Carcinogens "will be reduced as appropriate and consistent with the statutory requirements on a case-by-case basis". It is proposed to change the paragraph by inserting "where a significant risk exists" to make explicit the Supreme Court's interpretation that this issue must be considered before a standard can be issued. No other changes are needed, since the formulation of the criteria for setting the exposure limit is "as appropriate and consistent with statutory requirements." The existing language therefore automatically incorporates the Supreme Court's interpretation in *IUD* v. *API*.

§ 1990.111(j)

This paragraph, after the deletions made by the January 19, 1981 **Federal Register** notice, states that risk assessments will be performed based on the available data utilizing cautious and prudent assumptions. Again, as the significance of risk is now an explicit issue, it is proposed to change the paragraph to so indicate.

The clause that "cautious and prudent assumptions" are to be used remains. The Supreme Court held this was appropriate stating that,

> So long as they are supported by a body of reputable scientific thought, the agency is free to use conservative assumptions in interpreting the data with respect to carcinogens, risking error on the side of over protection, rather than under protection. (sl. op. p. 45).

§ 1990.111(k)

This section sets forth principles for regulation when a suitable substitute exists for a Category I Potential Carcinogen. It provides that when a suitable substitute exists that is less hazardous, a no occupational exposure limit be set. It is proposed to change it to explicitly require consideration of the question of whether "substitution is reasonably necessary or appropriate to reduce significant risk". This change would be added merely for clarification. The language, of course, incorporates the statutory language of § 3(8) of the Act.

§ 1990.132

This section sets forth factors which may be considered in setting priorities. A new paragraph 1990.132(b)(4) is proposed to be added to indicate explicitly that the "significance of the risk from exposure to the substance taking into account the results of risk assessments which may have been performed and other relevant factors", may also be taken into account in setting priorities. This makes it explicit that the significance of the risk, a factor required to be considered in regulation by the Supreme Court's interpretation, is one of the factors which may be taken into account in the priorities process. It should be noted that § 1990.132 is permissive and would remain so. The Secretary is not required to take into account every factor or weigh them in particular ways in setting priorities and no legal rights are created. Of course, the Secretary must take into account all required factors in issuing final regulations. The last four paragraphs of § 1990.132(b) are renumbered in a conforming change.

§ 1990.141

This section states that OSHA normally will issue an advance notice of proposed rulemaking before proposing to regulate a carcinogen. Paragraph 1990.141(a)(3) indicates that the advance notice will include a brief summary of health effects. A new clause is proposed specifying that a brief summary of the significance of the risk will be included. This change is made since this matter has regulatory importance as a result of the Supreme Court decision. However, advance notices are not required and they are pre-regulatory documents which do not create legal rights or liabilities in this respect. It is usually advantageous for the public to be notified in the early stages of the regulatory process before the agency has completed its analyses, so the public will have adequate time to gather data. Therefore it would be appropriate to issue an advance notice even though a risk assessment had not been completed, and although the discussion of the significance of the risk is limited to qualitative data as to carcinogenicity.

§ 1990.142(a)(1)

This section provides that after a notice of proposed rulemaking, the comment period shall be no more than 60 days and a hearing, if provided, shall commence within 100 days. The hearing's start may be postponed for no more than 30 days. As as result of the Supreme Court's decision, additional issues become relevant in the rulemaking. Therefore more time may be required by the public to submit comments and prepare for a hearing. Accordingly, a procedural change is proposed to permit the Agency to extend the periods for good cause shown.

§ 1990.142(a)(2)(iii)

This section sets forth the exposure limits to be set for a Category I Potential Carcinogen. It carries out in regulatory form the policy principles enunciated in § 1990.111(h) as to exposure limits and § 1990.111(k) as to suitable substitutes. It is proposed to change the language of § 1990.142(a)(2)(iii) to conform to the proposed changes made in § 1990.111(h) and (k). The specific reasons for the changes have been discussed above and need not be repeated.

§ 1990.142(b)(2)(iii) (originally designated § 1990.142(b)(3)(iii)

This paragraph deals with the exposure limit for Emergency Temporary Standards. For the same reasons discussed for the changes to § 1990.111(h), it is proposed that the language be changed to the "lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk".

§ 1990.143

This section sets forth scientific principles to be utilized in the identification of carcinogenic substances. They are based on an extensive scientific record including review of hundreds of scientific articles, testimony of more than 100 scientific witnesses and extensive OSHA experience in earlier rulemaking proceedings. They are discussed in over 200 pages of Federal Register preamble. The agency is to apply these principles unless contrary arguments are based on substantial new evidence not

considered by the agency, substantial new issues (§ 1990.145), or upon evidence which meets certain threshold criteria (§ 1990.144).

The Supreme Court's decision is consistent with OSHA's recognizing scientific principles and policies based on a substantial evidentiary record. Several Supreme Court cases have recognized the appropriateness of generic policies so that the same issues need not be constantly repeated.

> To require the Commission to proceed only on a case-by-case basis would require it, so long as its policy outlawed indefinite price changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. There would be a vast proliferation of hearings. . . . We see no reason why under the statutory scheme the process of regulation need to be so prolonged and so crippled. (*F.P.C.* v. *Texaco*, 377 U.S. 33, 112 (1964).)

See also *United States* v. *Storer Broadcasting*, 351 U.S. 199 (1956) and *Weinberger* v. *Hynson*, 421 U.S. 609 (1973). Therefore these scientific principles remain established for the identification of carcinogens and the language of the section indicates that their purpose is limited to the identification of carcinogens.

However, arguments based on evidence which would not be relevant for identification (such as the dose levels in animal testing) could be relevant in assessing the significance of the risk. Therefore it is proposed to add a clarifying sentence indicating that "arguments based on evidence which does not conform to such criteria will nonetheless be considered to the extent justified by its relevance in assessing the risk of a substance for purposes of regulations."

§ 1990.144

This section, after the deletions made by the January 19, 1981 **Federal Register** notice, sets minimum quality standards for the consideration of certain types of evidence for the identification or classification of carcinogens. As discussed in regard to § 1990.143, the criteria are based on an extensive scientific record and are consistent with the Supreme Court's decision when utilizing the criteria for the identification and classification of carcinogens. However, data which do not meet those criteria may be relevant to assessing the significance of the risk in regulating carcinogens pursuant to the Supreme Court's decision. Therefore, it is proposed that a clarifying sentence be added, identical to the change to § 1990.143, to indicate that evidence not meeting the quality criteria will be considered, depending on its merit, for purposes of assessing the significance of the risk for regulation.

§ 1990.146

This section sets forth those issues to be considered during a rulemaking on a carcinogen. A new paragraph (i) is proposed explicitly providing for consideration of the significance of the risk from exposure to the substance taking into account the results of risk assessments which may have been performed and other relevant factors. It should be noted that the Supreme Court required consideration of the significance of the risk including risk assessments when they could be appropriately performed. The Court stated that this requirement was not to be a "mathematical straitjacket." It added that "OSHA is not required to support its finding that significant risk exists with anything approaching scientific certainty;" but can utilize the "best available evidence." The Court recognized that "there are a number of ways in which the agency can make a rational judgment about the relative significance of the risks. . . ." (sl. op. pp. 44, 45, 46). Therefore when data are not available to perform a formal quantitative risk assessment, other evidence may be appropriately utilized to base a determination of significance of risk.

Paragraphs subsequent to the proposed new paragraph (i) would be relettered. Paragraph (i) as originally lettered provides for the consideration of evidence relevant to setting exposure limits for Category I Potential Carcinogens. It is proposed to change it (as relettered paragraph (j)) to make explicit the Court's requirement that evidence of the risk be considered. The discussion of the reasons for the specific change is included in the discussion of § 1990.111(h).

Paragraph (k) as originally lettered provides for consideration of the suitability of substitutes and other issues relevant to substitution in the rulemaking process. It is proposed to change it (as relettered paragraph (l)) to explicitly include consideration of "whether substitution is reasonably necessary or appropriate to reduce significant risk." This change is proposed to conform to the Court's decision for the reasons stated in § 1990.111(k).

§ 1990.151(c)

Section 1990.151, the model standard for permanent carcinogen standards, sets forth guidelines for monitoring, exposure limit format, methods of compliance, medical protection, housekeeping, and other provisions. Conforming changes are proposed to paragraph (c) to be consistent with the Supreme Court's decision and with changes proposed in the prior sections of the Cancer Policy. The reasons are explained in the discussion for § 1990.111 (h) and (k).

Paragraph (c)(1)(i) is proposed to be conformed by adding a clause which would set the exposure limit for a Category I Potential Carcinogen, at the "lowest feasible level which is reasonably necessary and appropriate to eliminate significant risk." The clause which provides that when suitable substitutes are available a no occupational exposure limit be set, is proposed to be amended by adding that the Secretary determine that substitution is reasonably necessary or appropriate to reduce significant risk. Note that several minor wording changes have been proposed to make the language consistent with § 1990.111(k) and § 1990.151(c)(4) indicating that substitution is to be determined on a use or class of use basis.

Paragraphs (c)(1)(ii) on ceiling limits, (c)(2)(i) on eye exposure limits and (c)(2)(ii) on skin exposure limits are proposed to be changed by adding a reference to the "lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk." It is proposed to change paragraph (c)(4) to explicitly indicate that in addition to determining that suitable substitutes are available, the Secretary must determine "that substitution is reasonably necessary or appropriate to reduce significant risk."

§ 1990.152(c)

Section 1990.152, the model standard for emergency temporary standards, sets forth guidelines similar to the guidelines contained in § 1990.151. Paragraph (c)(1)(i) on exposure limits, (c)(1)(ii) on ceiling limits, (c)(2)(i) on eye exposure and (c)(2)(ii) on skin exposure are proposed to be changed to provide for setting the exposure limit at the "lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk."

3. Submission of Comments

Interested persons are invited to submit written comments on the proposed changes. OSHA emphasizes that this proposal is not intended to reopen the Cancer Policy generally, or to review regulatory issues other than as stated. Since the Supreme Court decision left intact the scientific policies established by the Cancer Policy for identifying carcinogens, they too are outside the scope of this rulemaking.

Comments should be submitted in quadruplicate and be received by March 31, 1981. They should be sent to the Docket Officer, Occupational Safety and Health Administration, Docket No. H-090A, Rm. S-6212, U.S. Department of Labor, 3rd Street and Constitution Avenue NW., Washington, D.C. 20210, where they will be available for inspection and copying.

OSHA does not believe that an oral hearing will be necessary since the principal issues are the very limited proposed changes to conform the Cancer Policy to the Supreme Court's decision in *IUD* v *API*. However, pursuant to Section 6(b) of the Act and OSHA's procedural rules, 29 CFR § 1911.11, interested persons may file, in addition to comments, written objections to proposals and may request a hearing thereon. Persons may submit such objections and hearing requests to the Docket Officer pursuant to those rules, by March 31, 1981. Any hearing requests must include a detailed summary of the evidence proposed to be adduced and must state the relevance of the evidence to the questions at issue in this proceeding and demonstrate that the evidentiary questions had not already been considered in the hearing already held for the Cancer Policy. If such submissions are filed OSHA will consider whether there are issues upon which a hearing would be appropriate.

Since the proposed changes are limited and merely conform the Cancer Policy to the Supreme Court's benezene decision, this amendment is not considered significant and therefore no regulatory assessment or analysis or regulatory flexibility analysis is required.

This document was prepared under the direction and supervision of Eula Bingham, Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, pursuant to sections 4(b), 6(b), 8(c) and 8(g) of the Occupational Safety and Health Act of 1970 (84 Stat. 1592, 1593, 1599; 29 U.S.C. §§ 653, 655, 657), the Secretary of Labor's Order 8-76 (41 FR 25059), and 29 CFR Part 1911, it is hereby proposed to amend Part 1990, of Title 29 of the Code of Federal Regulations as set forth below.

Signed at Washington, D.C. this 19th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

It is proposed to amend Part 1990 of title 29, Code of Federal Regulations as follows:

1. Section 1990.111 is amended by revising paragraphs (h), (i), (j) and (k) to read as follows:

§ 1990.111 General statement of regulatory policy.

* * * * *

(h) Where a significant risk exists, worker exposure to Category I Potential Carcinogens will be reduced, primarily through the use of engineering and work practice controls, to the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk.

(i) Where a significant risk exists, workers exposure to Category II Potential Carcinogens will be reduced as appropriate and consistent with the statutory requirements on a case-by-case basis in the rulemaking proceedings on individual substances. Any permissible exposure level so established shall be met primarily through engineering and work practice controls.

(j) The assessment of cancer risk to workers resulting from exposure to a potential occupational carcinogen and the significance of the risk will be made on the basis of available data. Because of the uncertainties and serious consequences to workers if the estimated risk is understated, cautious and prudent assumptions will be utilized to perform risk assessments.

(k) Where the Secretary determines that one or more suitable substitutes exist for certain uses of Category I Potential Carcinogens that are less hazardous to humans and that substitution is reasonably necessary or appropriate to reduce significant risk a no occupational exposure level shall be set for those uses, to be achieved solely through the use of engineering and work practice controls to encourage substitution. In determining whether a substitute is suitable, the Secretary will consider the technological and economic feasibility of the introduction of the substitute, including its relative effectiveness and other relevant factors, such as regulatory requirements and the time needed for an orderly transition to the substitute.

2. Section 1990.132 is amended by adding a new paragraph (b)(4) and renumbering existing paragraphs (b)(4), (b)(7) as (b)(5) through (b)(8) as follows:

§ 1990.132 Factors to be considered.

* * * * *

(b) * * *

(4) The significance of the risk from exposure to the substance taking into account the results of risk assessments which may have been performed and other relevant factors;

(5) The extent to which regulatory action could reduce not only risks of contracting cancer but also other occupational and environmental health hazards;

(6) Whether the molecular structure of the substance is similar to the molecular structure of another substance which meets the definition of a potential occupational carcinogen;

(7) Whether there are substitutes that pose a lower risk of cancer or other serious human health problems, or available evidence otherwise suggests that the social and economic costs of regulation could be small; and

(8) OSHA will also consider its responsibilities for dealing with other health and safety hazards and will consider the actions being taken or planned by other governmental agencies in dealing with the same or similar health and safety hazards.

(3) Section 1990.141 is amended by revising paragraph (a)(3) as follows:

§ 1990.141 Advance notice of proposed rulemaking.

(a) * * *

(3) A brief summary of the available data on health effects and the significance of the risk;

* * * * *

(4) Section 1990.142 is amended by revising paragraphs (a)(1), (a)(2)(iii), and (b)(2) as follows:

§ 1990.142 Initiation of a rulemaking.

* * * * *

(a) *Notice of proposed rulemaking (Section 6(b) of the Act).*—(1) *General.* The Secretary may issue a notice of proposed rulemaking in the Federal Register, pursuant to Section 6(b) of the Act and Part 1911 of this Chapter. The notice shall provide for no more than a sixty (60) day comment period, and may provide for a hearing, which shall be scheduled for no later than one hundred (100) days after publication of the Notice of Proposed Rulemaking. The comment period may be extended and the commencement of the hearing may be postponed for good cause shown.

(2) * * *

(iii) The permissible exposure limit shall be set, at the level which reduces worker exposure, primarily through engineering and work practice controls, to the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk, except that if a suitable substitute is available for one or more uses and if substitution is reasonably necessary or appropriate to reduce significant risk, no occupational exposure shall be permitted for those uses.

* * * * *

(b) * * *

(2) *Provisions of the ETS.* (i) The ETS shall contain at least provisions for scope and application, definitions, notification of use, a permissible

exposure limit, monitoring, methods of compliance including the development of a compliance plan, respiratory protection, protective clothing and equipment, housekeeping, waste disposal, medical surveillance, employee information and training, signs and labels, recordkeeping and employee observation of monitoring, unless the Secretary explains why any or all such provisions are not appropriate.

(ii) The model standard set forth in § 1990.152 shall be used as a guideline.

(iii) The permissible exposure limit shall be set at the lowest feasible level which is necessary to eliminate significant risk through any practicable combination of engineering controls, work practice controls and respiratory protection.

5. Section 1990.143 is amended by revising the introductory paragraph as follows:

§ 1990.143 General provisions for the use of human and animal data.

Human and animal data which are scientifically evaluated to be positive evidence for carcinogenicity shall be uniformly relied upon for the identification of potential occupational carcinogens. Arguments challenging the following provisions or their application to specific substances will be considered in individual rulemaking proceedings only if the evidence presented in support of the arguments meets the criteria for consideration specified in § 1990.144 or § 1990.145. Arguments based on evidence which does not conform to such criteria will nonetheless be considered to the extent justified by its relevance in assessing the risk of a substance for purposes of regulation.

* * * * *

6. Section 1990.144 as amended by revising the introductory paragraph as follows:

§ 1990.144 Criteria for consideration of arguments on certain issues.

Arguments on the following issues will be considered by the Secretary in identifying or classifying any substance pursuant to this Part, if evidence for the specific substance subject to the rulemaking conforms to the following criteria. Such arguments and evidence will be evaluated based upon scientific and policy judgments. Arguments based on evidence which does not conform to such criteria will nonetheless be considered, to the extent justified by its scientific merit and its relevance in assessing the risk of a substance for purposes of regulation.

* * * * *

7. Section 1990.146 is amended by adding a new paragraph (i) and relettering and revising paragraphs (i) through (l) as paragraphs (j) through (m) as follows:

§ 1990.146 Issues to be considered in the rulemaking.

* * * * *

(i) The determination of the significance of the risk from exposure to the substance taking into account the results of risk assessments which may have been performed and other relevant factors.

(j) The determination of the lowest feasible level to control exposures to Category I Potential Carcinogens primarily through the use of engineering and work practice controls including technological and economic considerations, which is reasonably necessary or appropriate to eliminate significant risk;

(k) The determination of the appropriate employee exposure level, consistent with the Act's requirements, for Category II Potential Carcinogens.

(l) Whether suitable substitutes are available for one or more uses of Category I Potential Carcinogens and whether substitution is reasonably necessary or appropriate to reduce significant risk and, if so, the no occupational exposure level to be achieved solely with engineering and work practice controls and other issues relevant to substitution; and

(m) Whether the provisions of the proposal and of § 1990.151 and § 1990.152 (model standards) are appropriate, except as limited by § 1990.142 and whether additional regulatory provisions may be appropriate.

8. Section 1990.151 is amended by revising paragraphs (c)(1), (c)(2) and (c)(4) as follows:

§ 1990.151 Model standard pursuant to section 6(b) of the Act.

* * * * *

(c) *Permissible exposure limits provisions*—(1) *Inhalation*—(i) *Time weighted average limit (TWA).* Within (insert appropriate time period) of the effective date of this section, the employer shall assure that no employee is exposed to an airborne concentration of ——— in excess of: (insert appropriate exposure limit representing: (A) the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk, except as modified by paragraph (c)(4) of this section or (B) when it is determined by the Secretary that there are available substitutes for all uses or classes of uses that are less hazardous to humans and that substitution is reasonably necessary or appropriate to reduce singnificant risk, the proposal shall permit no occupational exposure) as an eight (8)-hour time-weighted average.

(Where the Secretary finds that substitutes for ——— may which is reasonably necessary or appropriate to eliminate significant risk exist, the determination of the lowest feasible level/shall include consideration of the availability, practicability, relative degree of hazards, and economic consequences of the substitutes.)

(ii) *Ceiling limit. (If appropriate.)* Within (insert appropriate time period) of the effective date of this section the employer shall assure that no employee is exposed to an airborne concentration of ——— in excess of: insert exposure limit representing the lowest feasible level of exposure which is reasonably necessary or appropriate to eliminate significant risk as averaged over any: (insert appropriate time period) during the working day.

(2) *Dermal and eye exposure.* (If appropriate.) (i) Within (insert appropriate time period) of the effective date of this section, the employer shall (if eye exposure to ——— does not create a risk or cancer, insert exposure level or criteria which will prevent other adverse health effects of eye exposure to ——— if any. If eye exposure creates a risk of cancer, insert exposure level or criteria which represent the lowest feasible level of eye exposure to ——— which is reasonably necessary or appropriate to eliminate significant risk.)

(ii) Within (insert appropriate time period) of the effective date of this section, the employer shall (If skin exposure to ——— does not create a risk of cancer, insert exposure level or criteria which will prevent other adverse health effects of skin exposure to ——— if any. If skin exposure creates a risk of cancer, insert exposure level or criteria which represents the lowest feasible level of skin exposure to ——— which is reasonably necessary or appropriate to eliminate significant risk.)

(3) * * *

(4) *Other restrictions.* The employer shall assure that there is no occupational exposure to ——— from the following uses or classes of uses: (Where the Secretary determines, in the proposal or upon the record of the public rulemaking, that there are available suitable substitutes in certain applications where ——— might otherwise be used and that substitution is reasonably necessary or appropriate to reduce significant risk, the Secretary here shall specify that no occupational exposure to ——— shall be permitted in those circumstances and uses, listing

those circumstances or uses and including appropriate transitional provisons. Where the Secretary finds that substitutes for ——— exist, the determination of their suitability shall include consideration of the availability, practicability, relative degree of hazard, and economic consequences of the substitutes.)

(The preceding paragraph 1990.151(c) on permissible exposure limit provisions is for Category I Potential Carcinogens. Worker exposure to Category II Potential Carcinogens will be reduced as appropriate and consistent with the statutory requirements on a case-by-case basis in the individual rulemaking proceedings. Any permissible exposure level so established shall be met primarily through engineering and work practice controls. See § 1990.142(a)(3).)

* * * * *

9. Section 1990.152 is amended by revising paragraphs (c)(1) and (c)[2) as follows:

§ 1990.152 Model emergency temporary standard pursuant to section 6(c) of the Act.

* * * * *

(c) *Permissible exposure limits.* -(1) *Inhalation.* (i) *Time-weighted average limit (TWA).* Within (insert appropriate time) from the effective date of this emergency temporary standard, the employer shall assure that no employee is exposed to an airborne concentration of ——— in excess of: (insert appropriate exposure limit representing the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk that can be complied with immediately) as an eight (8)-hour time-weight average.

(ii) *Ceiling limit.* (If appropriate.) The employer shall assure that no employee is exposed to an airborne concentration of ——— in excess of: [insert appropriate exposure limit representing the lowest feasible level which is reasonably necessary or appropriate to eliminate significant risk that can be complied with immediately) as averaged over any: (insert appropriate time period) during the working day.

(2) *Dermal and eye exposure.* (If appropriate.)

(i) Within (insert appropriate time period) of the effective date of this section, the employer shall (If eye exposure to ——— does not create a risk of cancer, insert exposure level or criteria which will prevent other adverse effects of eye exposure to ———, if any. If eye exposure creates a risk of cancer, insert exposure level or criteria which represent the lowest feasible level of eye exposure to ——— which is reasonably necessary or appropriate to eliminate significant risk.)

(ii) Within (insert appropriate time period) of the effective date of this section, the employer shall (If skin exposure to ——— does not create a risk of cancer, insert exposure level or criteria which will prevent other adverse health effects of skin exposure to ——— if any. If skin exposure creates a risk of cancer, insert exposure level or criteria which represents the lowest feasible level of skin exposure to ——— which is reasonably necessary to appropriate to eliminate significant risk).

* * * * *

[FR Doc. 81-2401 Filed 1-19-81; 5:00 pm]

BILLING CODE 4510-26-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

42 CFR Parts 405, 442, and 483

Conditions of Participation for Skilled Nursing and Intermediate Care Facilities

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Withdrawal of Secretarial approval.

SUMMARY: On July 14, 1980, we published a notice of proposed rulemaking which would have revised the standards skilled nursing and intermediate care facilities must meet in order to participate in the Medicare or Medicaid programs. By the end of the 90-day comment period, which had been extended due to interest in the regulation, we had received over 3500 comments.

In December, 1980, Congress enacted Pub. L. 96-536, which specifically prohibits the expenditure of funds by the Department for the publication, implementation, or enforcement of the proposed regulation unless and until certain conditions were met.

On January 19, 1981, former Secretary Harris approved one portion of the regulation dealing with patients' rights. However, since one of the conditions set by Congress had not been fulfilled, *viz.*, receipt of the final report of the General Accounting Office concerning the impact of the proposed regulation, the regulation signed by Secretary Harris could not be issued.

Because this regulation may have considerable impact on both consumers and providers of health care, we have decided not to issue the regulation, or any portion thereof, until we have an opportunity to evaluate further all comments received, and the economic impact of the regulation as a whole. For this reason, we have withdrawn Secretarial approval of that section of the regulation approved January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. J. Richard Lenehan, Jr., (301) 594-7651.

(Catalog of Federal Domestic Assistance Program; No. 13.714—Medical Assistance Program; No. 13.773—Medicare-Hospital Insurance; No. 13.774—Medicare-Supplementary Medical Insurance)

Dated: January 21, 1981.

Paul Willging,

Acting Administrator, Health Care Financing Administration.

Approved: January 21, 1981.

Donald S. Fredrickson,

Acting Secretary.

[FR Doc. 81-2731 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-35-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Part 67

[Docket No. FEMA-5893]

National Flood Insurance Program; Proposed Flood Elevation Determinations; Correction

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Proposed rule; correction.

SUMMARY: This document corrects a notice of Proposed Determinations of base (100-year) flood elevations for selected locations in the City of Ansonia, New Haven County, Connecticut, previously published at 45 FR 59600 on September 10, 1980.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, Federal Emergency Management Agency, Federal Insurance Administration, National Flood Insurance Program, (202) 426-1460 or Toll Free Line (800) 424-8872, (In Alaska and Hawaii call Toll Free Line (800) 424-9080), Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the correction to the Notice of Proposed Determinations of base (100-year) flood elevations for

selected locations in the City of Ansonia, New Haven County, Connecticut, previously published at 45 FR 59600 on September 10, 1980, in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added Section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448)), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a).

Due to a clerical error, the elevation at the upstream side of dam, approximately 435 feet downstream of State Route 243 (Pulaski Highway), under the Source of Flooding of Two Mile Brook, was incorrectly published as 365 feet (National Geodetic Vertical Datum). It should be amended to read 265 feet in elevation. The corresponding Flood Insurance Study (profile) and Flood Insurance Rate Map were correct as printed.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2276 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

[44 CFR Part 67]

[Docket No. FEMA-5841]

National Flood Insurance Program; Revision of Proposed Flood Elevation Determinations

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Proposed rule.

SUMMARY: Techical information or comments are solicited on the proposed base (100-year) flood elevations listed below for selected locations in the Township of Willistown, Chester County, Pennsylvania.

Due to recent engineering analysis, this proposed rule revises the proposed determinations of base (100-year) flood elevations published in the *Daily Local News* on May 21, and May 28, 1980, and in the **Federal Register** at 45 FR 42714 on June 25, 1980, and hence supersedes those previously published rules.

DATES: The period for comment will be ninety (90) days following the second publication of this notice in a newspaper of local circulation in each community.

ADDRESSES: Maps and other information showing the detailed outlines of the floodprone areas and the proposed flood elevations are available for review at the Willistown Township Muncipal Building.

Send comments to: Honorable William Tarr, Willistown Township Manager, Box 67, Sugartown Road, Malvern, Pennsylvania 19355.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, Federal Emergency Management Agency, Federal Insurance Administration, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: Proposed base (100-year) flood elevations are listed below for selected locations in the Township of Willistown, Chester County, Pennsylvania, in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added Section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448)), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a).

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations will also be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for the second layer of insurance on existing buildings and their contents.

Proposed Base (100-Year) Flood Elevations

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
Pennsylvania	Willistown, Township, Chester County (Docket No. FEMA-5841.	Crum Creek	Downstream Corporate Limits	*235
			Downstream of Bartram Covered Bridge	*242
			Upstream of Goshen Road	*244
			Upstream of Private Road	*258
			Upstream of Old Covered Bridge Road (Extended)	*282
			Upstream of Private Road (Extended)	*286
			Downstream of confluence of West Tributary to Crum Creek	*304
			Confluence of West Tributary to Crum Creek	*307
			Approximately 1,840' upstream of Confluence with West Tributary	*325
			560' upstream of Whitehorse Road	*338
			Upstream Foxchase Road (Extended)	*356
			Downstream of Whitehorse Road	*367
			Upstream of Whitehorse Road	*371
			Upstream of Davis Road	*375
			Downstream of Jaffery Road	*378
			Downstream of Private Drive	*389
			Evergreen Lane (Extended)	*407
			Downstream of Footbridge	*416
			Upstream of Footbridge	*417
			Downstream of Warren Avenue	*433
			Downstream of Vernon Lane	*441
			Upstream of Eisenhower Drive	*443
			Upstream of Marlin Drive	*446
			Upstream of Long Lane	*453
			Downstream of Paoli Lake	*461
		Tributary A	Confluence with Crum Creek	*437
			Upstream Corporate Limits	*448
		West Tributary to Crum Creek	Confluence with Crum Creek	*307
			Approximately 1,200' upstream of confluence	*320
			Approximately 1,800' upstream of confluence	*332
			Upstream of Hillview Road	*354
			Upstream of 1st Footbridge	*360

Proposed Base (100-Year) Flood Elevations—Continued

State	City/town/county	Source of flooding	Location	#Depth in feet above ground. *Elevation in feet (NGVD)
			Downstream of Warren Avenue	*383
			Downstream of Private Drive	*391
			Upstream of Spring Road	*412
			Upstream of Laurel Circle (1st crossing)	*419
			Upstream of Laurel Circle (2nd crossing)	*424
			Downstream of Andrews Avenue	*436
			Upstream of Harvey Lane	*442
			Downstream of Sugartown Road	*468
			Downstream of Paoli Pike	*480
		Northeast Branch Ridley Creek	Upstream of Line Road	*450
			Upstream of Dam	*454
			Upstream of Forest Lane	*472
			Upstream of Monument Road	*486
			Approximately 2,000' upstream of Monument Avenue	*523
		East Tributary to Crum Creek	Confluence with Crum Creek	*392
			Upstream of Dam	*405
			Upstream of Grubb Road	*409
			Downstream of Private Drive	*426
			Downstream of Devon Road	*454
			Upstream of Devon Road	*458
			Upstream of Corporate Limits	*467
		Tributary B	Confluence with East Tributary to Crum Creek	*405
			Downstream of Grubb Road	*410
Downstream of Colonial Lane				*424
			Upstream of Colonial Lane	*428
			Downstream of Devon Road	*451
			Upstream of Devon Road	*461
			Spruce Lane (Extended)	*478
			Lynnbrook Road (Extended)	*492
			Fairview Road (Extended)	*498
		Ridley Creek	Downstream Corporate Limits	*224
			Upstream of Delchester Road	*226
			Upstream Corporate Limits	*228

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: December 15, 1980.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2277 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

[Docket No. FEMA-5853]

National Flood Insurance Program; Proposed Flood Elevation Determinations; Correction

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Proposed rule; corection.

SUMMARY: This document corrects a Notice of Proposed Determinations of base (100-year) flood elevations for selected locations in the Town of Belchertown, Hampshire County, Massachusetts, previously published at 45 FR 49611 on July 25, 1980.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, Federal Emergency Management Agency, Federal Insurance Administration, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872 (In Alaska and Hawaii call Toll Free Line (800) 424–9080), Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: The Federal Insurance Administrator gives notice of the correction to the Notice of Proposed Determinations of base (100-year) flood elevations for selected locations in the town of Belchertown, Hampshire County, Massachusetts, previously published at 45 FR 49611 on July 25, 1980, in accordance with Section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added Section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448)), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a).

Due to a clerical error, the elevation at the upstream side of Boston and Maine Railroad, under the Source of Flooding of Swift River, was incorrectly published as 366 feet (National Geodetic Vertical Datum). It should be amended to read 351 feet in elevation. The corresponding Flood Insurance Study (profile) and Flood Insurance Rate map were correct as printed.

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968); effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81-2278 Filed 1-22-81; 8:45 am]

BILLING CODE 6718-03-M

44 CFR Part 67

[Docket No. FEMA-5845]

Revision of Proposed Flood Elevation Determinations for Town of Fromberg, Carbon County, Montana, Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are solicited on the proposed base (100-year) flood elevations listed below for selected locations in the Town of Fromberg, Montana.

Due to recent engineering analysis, this proposed rule revises the proposed determinations of base (100-year) flood elevations published in 45 FR 46115 on July 9, 1980 and in the *Valley Voice*, published on or about July 10, 1980, and July 17, 1980, and hence supersedes those previously published rules.

DATES: The period for comment will be ninety (90) days following the second publication of this notice in a newspaper of local circulation in the above-named community.

ADDRESSES: Maps and other information showing the detailed outlines of the flood-prone areas and the proposed flood elevations are available for review at Town Hall, Fromberg, Montana.

Send comments to: Honorable Myron Skurdal, Fromberg, Montana 59041.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872. In Alaska or Hawaii, call Toll Free Line (800–424–9080), Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: Proposed base (100-year) flood elevations are listed below for selected locations in the Town of Fromberg, Montana, in accordance with section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a)).

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations will also be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for the second layer of insurance on existing buildings and their contents.

The proposed base (100-year) flood elevations are:

Source of flooding	Location	#Depth in feet above ground *Elevation in feet (NGVD)
Clarks Fork Yellowstone River.	On the north side of River Street approximately 400 feet east of intersection of Lovers Lane and River Street.	*3,520
	Southermost end of Third Avenue at the corporate limits.	*3,525

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator.)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81–2279 Filed 1–22–81; 8:45 am]

BILLING CODE 6718–03–M

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44 CFR Part 67

[Docket No. FEMA–5673]

Revision of Proposed Flood Elevation Determinations for City of Phoenix, Jackson County, Oregon, Under the National Flood Insurance Program

AGENCY: Federal Insurance Administration, FEMA.

ACTION: Proposed rule.

SUMMARY: Technical information or comments are solicited on the proposed base (100-year) flood elevations listed below for selected locations in the City of Phoenix, Oregon.

Due to recent engineering analysis, this proposed rule revises the proposed determinations of base (100-year) flood elevations published in 44 FR 47574 on August 14, 1979 and in the *Medford Mail Tribune*, published on or about August 1, 1979, and August 8, 1979, and hence supersedes those previously published rules.

DATE: The period for comment will be ninety (90) days following the second publication of this notice in a newspaper of local circulation in the above named community.

ADDRESS: Maps and other information showing the detailed outlines of the flood-prone areas and the proposed flood elevations are available for review at City Hall, 510 West First Street, Phoenix, Oregon.

Send comments to: Honorable Otto Caster, Mayor, City of Phoenix, City Hall, P.O. Box 327, Phoenix, Oregon 97535.

FOR FURTHER INFORMATION CONTACT: Mr. Robert G. Chappell, National Flood Insurance Program, (202) 426–1460 or Toll Free Line (800) 424–8872, In Alaska or Hawaii, call Toll Free Line (800–424–9080), Federal Emergency Management Agency, Washington, D.C. 20472.

SUPPLEMENTARY INFORMATION: Proposed base (100-year) flood elevations are listed below for selected locations in the City of Phoenix, Oregon, in accordance with section 110 of the Flood Disaster Protection Act of 1973 (Pub. L. 93–234), 87 Stat. 980, which added section 1363 to the National Flood Insurance Act of 1968 (Title XIII of the Housing and Urban Development Act of 1968 (Pub. L. 90–448), 42 U.S.C. 4001–4128, and 44 CFR 67.4(a)).

These base (100-year) flood elevations are the basis for the flood plain management measures that the community is required to either adopt or show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

These modified elevations will also be used to calculate the appropriate flood insurance premium rates for new buildings and their contents and for the second layer of insurance on existing buildings and their contents.

The proposed base (100-year) flood elevations are:

Source of flooding	Location	#Depth in feet above ground *Elevation in feet (NGVD)
Bear Creek	Fern Valley Road—150 feet upstream from centerline.	*1,472
	Corporate limits (5th crossing).	*1,486
Coleman Creek	U.S. Highway 99—300 feet downstream from centerline.	*1,473
	U.S. Highway 99—70 feet upstream from centerline.	*1,489

(National Flood Insurance Act of 1968 (Title XIII of Housing and Urban Development Act of 1968), effective January 28, 1969 (33 FR 17804, November 28, 1968), as amended; 42 U.S.C. 4001–4128; Executive Order 12127, 44 FR 19367; and delegation of authority to Federal Insurance Administrator)

Issued: January 6, 1981.

Gloria M. Jimenez,

Federal Insurance Administrator.

[FR Doc. 81–2280 Filed 1–22–81; 8:45 am]

BILLING CODE 6718–03–M

Notices

Federal Register
Vol. 46, No. 15
Friday, January 23, 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

Agricultural Marketing Service

Farmers Livestock Auction Russellville, Alabama; Proposed Posting of Stockyards

The Chief, Rates and Registrations Branch, Packers and Stockyards, Agricultural Marketing Service, United States Department of Agriculture, has information that the livestock markets named below are stockyards as defined in section 302 of the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 202), and should be made subject to the provisions of the Act.

AL–164 Farmers Livestock Auction, Russellville, Alabama
CO–150 Hi-Country Cattle Company, Ignacio, Colorado
FL–126 Trenton Livestock Market, Inc., Trenton, Florida
FL–127 North Florida Farmers Cooperative, Inc., Lake City, Florida
FL–128 Marvin Wages Auction, Leesburg, Florida
GA–190 Triple T Livestock Co., Dalton, Georgia
KS–203 Clay Center Livestock Company, Inc., Clay Center, Kansas
KY–166 Central Kentucky Livestock Market, Inc., Stanford, Kentucky
MN–175 Hecksel Auction, Inc., Winsted, Minnesota
MN–176 Minnesota Feeder Pig Markets, Inc., Elysian, Minnesota
MS–159 Central Mississippi Livestock Exchange, Inc., Bay Springs, Mississippi
MS–160 George County Stockyards, Inc., Lucedale, Mississippi
NE–190 Loup City Commission Company, Inc., Loup City, Nebraska
NY–160 Walt Wagner Cattle Sales, Central Bridge, New York
TX–319 Ranchers and Farmers Livestock, Inc., Uvalde, Texas
TX–321 Cattlemans Livestock Auction, Inc., Freer, Texas
WI–136 Barron Livestock Sales Barn, Barron, Wisconsin

Notice is hereby given, therefore, that the said Chief, pursuant to authority delegated under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), proposes to issue a rule designating the stockyards named above as posted stockyards subject to the provisions of the Act as provided in section 302 thereof.

Any person who wishes to submit written data, views, or arguments concerning the proposed rule, may do so by filing them with the Chief, Rates and Registrations Branch, Packers and Stockyards, Agricultural Marketing Service, U.S. Department of Agriculture, Washington, D.C. 20250, by February 9, 1981.

All written submissions made pursuant to this notice shall be made available for public inspection at such times and places in a manner convenient to public business (7 U.S.C. 1.27(b)).

Done at Washington, D.C., this 19th day of January, 1981.

Jack W. Brinckmeyer,
Chief, Rates and Registrations Branch, Livestock Marketing Division.

[FR Doc. 81-2522 Filed 1-22-81; 8:45 am]
BILLING CODE 3410-02-M

Packers and Stockyards; Louisiana Horse Palace, Inc., Elm Grove, Louisiana; Posted Stockyard

Pursuant to the authority delegated under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. *et seq.*), it was ascertained that the livestock market named below was a stockyard within the definition of that term contained in section 302 of the Act, as amended (7 U.S.C. 202), and notice was given to the owner and to the public by posting notice at the stockyard as required by said section 302, on the respective data specified below.

Louisiana

Facility Number, name, and location of stockyard	Date of posting
La–139 Louisiana Horse Palace, Inc., Elm Grove.	Dec. 13, 1980.

Done at Washington, D.C., this 19th day of January, 1981.

Jack W. Brinckmeyer,
Chief, Rates and Registrations Branch, Livestock Marketing Division.

[FR Doc. 81-2523 Filed 1-22-81; 8:45 am]
BILLING CODE 3410-02-M

Packers and Stockyards; Norvel Reed & Sons, Inc., Jamestown, New York; Posted Stockyard

The stockyard formerly known as the Norvel Reed & Sons, Inc., Jamestown, New York, was originally posted on September 26, 1960, as being subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*). On November 11, 1980, there was published in the **Federal Register** a notice concerning the deposting of such stockyard for the reason that it was no longer being conducted as a public market. Subsequent to the publication of such notice and prior to the taking of further steps required by section 302(b) of the Act (7 U.S.C. 202(b)) for the deposting of a stockyard, it was ascertained that operation of such livestock market, under the name of Norvel Reed & Sons, Inc., is continuing as a stockyard within the definition of that term contained in section 302(a) of the Act (7 U.S.C. 202(a)).

Notice is hereby given, therefore, that the livestock market presently known as Norvel Reed & Sons, Inc., Jamestown, New York, originally posted on September 26, 1960, remains posted as a stockyard within the definition of that term contained in section 302 of the Act and remains subject to the provisions of the Act.

Done at Washington, D.C., this 19th day of January 1981.

Jack W. Brinckmeyer,
Chief, Rates and Registrations Branch, Livestock Marketing Division.

[FR Doc. 81-2524 Filed 1-22-81; 8:45 am]
BILLING CODE 3410-02-M

Packers and Stockyards; Nuel E. Hill Livestock Auction Co., Batesville, Arkansas; Depositing of Stockyards

It has been ascertained, and notice is hereby given, that the livestock markets named herein, originally posted on the respective dates specified below as being subject to the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 et seq.), no longer come within the definition of a stockyard under said Act and are, therefore, no longer subject to the provisions of the Act.

Facility No., name, and location of stockyard	Date of posting
AR-104 Nuel E. Hill Livestock Auction Co., Batesville, Arkansas.	July 10, 1963.
KS-110 Clay Center Livestock Co., Inc., Clay Center, Kansas.	Mar. 29, 1950.
MS-125 George County Stockyards, Inc., Lucedale, Mississippi.	Feb. 18, 1959.
OH-108 Cincinnati Union Stock Yards, Cincinnati, Ohio.	Nov. 1, 1921.

Notice or other public procedure has not proceeded promulgation of the foregoing rule. There is no legal justification for not promptly depositing a stockyard which is no longer within the definition of that term contained in the Act.

The foregoing is in the nature of a change relieving a restriction and may be made effective in less than 30 days after publication in the **Federal Register**. This notice shall become effective January 23, 1981.

(42 Stat. 159, as amended and supplemented; 7 U.S.C. 181 *et seq.*).

Done at Washington, D.C., this 19th Day of January, 1981.

Jack W. Brinckmeyer,

Chief, Rates and Registrations Branch, Livestock Marketing Division.

[FR Doc. 81-2525 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-02-M

Food and Nutrition Service

Child Care Food Program; Day Care Home Food Service Payment Rates for the Period January 1–June 30,1981

AGENCY: Food and Nurtition Service, USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of adjustments in the food service payment rates for meals served in day care homes to reflect changes in the Consumer Price Index. These adjustments are required by regulations governing the Program.

FOR FURTHER INFORMATION CONTACT: Jordan Benderly, Director, or Beverly Walstrom, Child Care and Summer Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250, 202–447–6509.

EFFECTIVE DATE: January 1, 1981.

SUPPLEMENTARY INFORMATION: Pursuant to Section 17 of the National School Lunch Act (NSLA), as amended by Public Law 95–627, and § 226.4(g)(1) of the regulations governing the Child Care Food Program (7 CFR Part 226), notice is hereby given of the new food service payment rates for meals served to children attending day care homes. These rates shall be in effect during the period January 1–June 30, 1981. The administrative payment rates for administrative costs of sponsoring organizations with day care homes are adjusted annually, on July 1 of each year, and, therefore, are not included in this notice of adjustments to the Program's food service payment rates. In all States except Alaska and Hawaii, the new rates are as follows:

Section 17.—*Food Service Payment Rates (Day Care Homes)*

Meal	Rate in cents
Breakfasts	50
Lunches and suppers	99
Supplements	30

Note.—All States except Alaska and Hawaii.

The Department is developing a notice which will announce higher payment rates for participating institutions in the State of Hawaii. That notice will include the new food service payment rates for meals served to children attending day care homes in the State of Hawaii, in addition to new payment rates for administrative costs of sponsoring organizations with day care homes and new payment rates for meals served to children attending centers to reflect the higher cost of providing meals in that State.

Pursuant to Section 12(f) of the NSLA, the Department adjusts the payment rates for participating institutions in the State of Alaska. The new payment rates for Alaska shall be in effect during the period of January 1–June 30, 1981. The new rates for Alaska are as follows:

Section 12(f).—*Food Service Payment Rates—(Day Care Homes)—for Alaska*

Meal	Rate in cents
Breakfasts	82
Lunches and suppers	160
Supplements	48

The changes in the food service payment rates reflect a 4.12 percent increase in the rates prescribed for the period of July 1–December 31, 1980. This represents the percentage of increase during the six month period May to November 1980 (from 264.6 in May to 275.3 in November) 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.

The amount of payments available to each State agency for distribution to sponsoring organizations of day care homes is based on the rates contained in this notice, plus any administrative payments for sponsoring organizations of day care homes.

Definitions. The terms used in this notice shall have the meanings ascribed to them in the regulations governing the Child Care Food Program (7 CFR Part 226) published on January 22, 1980 at 45 FR 4960.

(Catalog of Federal Domestic Assistance Program No. 10.558.

(Sec. 2, Public Law 95–627, 92 Stat. 3603, 42 USC 1766; Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623, 42 USC 1760)

Effective date: This notice shall be effective as of January 1, 1981.

Dated: January 8, 1981.

Bob Greenstein,

Administrator.

[FR Doc. 81-2170 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-30-M

Child Care Food Program; Payment Rates for the State of Hawaii for the Period January 1–June 30, 1981

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: This notice informs the public of adjustments in the payment rates for meals served during the period January 1–June 30, 1981 to children participating in the Child Care Food Program in the State of Hawaii. These adjustments are authorized by the National School Lunch Act and are made to reflect the higher cost of providing meals in Hawaii.

FOR FURTHER INFORMATION CONTACT: Jordan Benderly, Director, or Beverly Walstrom, Child Care and Summer Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C., 20250, (202) 447–6509.

EFFECTIVE DATE: January 1, 1981.

SUPPLEMENTARY INFORMATION: Section 12 of the National School Lunch Act, as amended by Pub. L. 95–627, provides the Secretary with the discretionary authority to make adjustments in the payment rates for the State of Hawaii to reflect higher food service costs in that State. After enactment of Pub. L. 95–627, the Department undertook a study to document the degree of higher than average costs and to determine what, if any, additional assistance should be made available. Based on this study, which is discussed in the **Federal Register** of October 19, 1979 (44 FR 60344), the Department has determined that the rates of payment for Hawaii should be increased by 17 percent.

Accordingly, the Department announces the following payment rates for meals served in the State of Hawaii to children participating in the Child

Care Food Program (7 CFR Part 226) during the six-month period January 1–June 30, 1981.

Hawaii.—*Meals Served in Centers—Per Meal Payment Rates*

	Amount
Breakfasts:	
Paid	$17.50
Free	43.50
Subtotal	61.00
Reduced	32.50
Paid	17.50
Total	50.00
Lunches and suppers:	
Paid	[1] 21.75
Free	97.75
Subtotal	[1] 119.50
Reduced	77.75
Paid	21.75
Total	[1] 99.50
Supplements:	
Paid	[2] 6.00
Free	[2] 32.75
Reduced	[2] 24.25

[1] These rates do not include the value of commodities (or cash-in-lieu of commodities) which institutions receive as additional assistance for each lunch and supper served to children under the Program. Notices announcing the value of commodities and cash-in-lieu of commodities are published separately in the FEDERAL REGISTER.

[2] These rates reflect not only the 17 percent upward adjustment for higher food service costs, but also a three-cent reduction in the paid, free, and reduced price rates for supplements served in centers. This reduction was mandated by Pub. L. 96–499, which became law on December 5, 1980. Three cents was subtracted from each of these rates after the 17 percent adjustment had been computed.

Hawaii.—*Administrative Payment Rates for Sponsoring Organizations of Day Care Homes—Per Home/Per Month in Dollars*

	Amount
Initial 25 day care homes	$57.00
Next 50 day care homes	44.00
Additional day care homes	38.00

Hawaii.—*Meals Served in Day Care Homes—Per Meal Payment Rates in Cents*

	Amount
Breakfasts	[1] 59
Lunches and Suppers	[1] 115
Supplements	[1] 35

[1] These rates reflect not only the 17 percent upward adjustment for higher food service costs, but also changes in the Consumer Price Index. Public Law 96–499, enacted on December 5, 1980, announced that no semi-annual rate adjustment to reflect changes in the Consumer Price Index would be made for meals served in centers for the period January 1–June 30, 1981. However, the semi-annual rate adjustment for meals served in day care homes was not affected. The semi-annual adjustment to the food service payment rates reflects a 4.12 percent increase in the rates prescribed for the period of July 1–December 31, 1980. This represents the percentage of increase during the six month period May to November 1980 (from 264.6 in May to 275.3 in November) 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.

Definitions

The terms used in this notice shall have the meanings ascribed to them in the regulations governing the Child Care Food Program (7 CFR Part 226) published in the **Federal Register** of January 22, 1980 (45 FR 4960).

(Catalog of Federal Domestic Assistance Program No. 10.558.)

Authority: Sec. 10(a), Pub. L. 95–627, 92 Stat. 3623, 42 USC 1760.

Dated: January 8, 1981.

Bob Greenstein,

Administrator.

[FR Doc. 81-2228 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-30-M

National School Lunch and School Breakfast Programs; Payment Rates for the State of Hawaii for the Period January 1–June 30, 1981

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice.

SUMMARY: The Department announces new payment rates of reimbursement for Hawaii for the period January 1 through June 30, 1981. These rates reflect an upward adjustment over the previous rates for the National School Lunch and School Breakfast Programs. This adjustment is necessary to make up the difference between the costs of providing lunches and breakfasts in Hawaii and the national average costs of providing lunches and breakfasts. The revised payment rates will provide for more funds to cover the costs of meals served to children in schools and institutions participating in the school lunch and breakfast programs. Payment rates for the Child Care Food Program and the Summer Food Service Programs for Hawaii for the subject six-month period will be announced in a separate **Federal Register** publications.

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. The final impact 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

Pub. L. 95–627 provides the Secretary with discretionary authority to made adjustments in the national average payment factors to Alaska, Hawaii, Guam, American Samoa, Puerto Rico, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Northern Mariana Islands. Section 10 of Pub. L. 95–627 amended Section 12 of the National School Lunch Act (NSLA) to read "* * * the Secretary may establish appropriate adjustments for each such State to the national average payment rates * * * reflect the differences between the costs of providing lunches and breakfast in those States and the costs of providing lunches and breakfast in all other States." After enactment, the Department undertook a study to document the existence and degree of higher than average costs in outlying areas and to determine what additional assistance, if any, should be made available.

To compare national average costs with those of Alaska, Hawaii and the outlying areas, an index of food and labor costs was constructed using the U.S. national average of such costs as the base of 100. Food and labor were selected as the two most significant cost items in producing a meal, accounting for over 90 percent of the total costs. (For purposes of this analysis, other costs and donated goods and services were assumed to vary in the same manner as the weighted average of food and labor.) A variety of data sources were examined to construct the index including routine reports received by FNS and various surveys conducted by other Federal agencies. Data from the September 1976 Thrifty Food Plan (for food) developed for the Food Stamp Program and the 1976 County Business Patterns prepared by the Bureau of the Census, Department of Commerce (for labor) were selected as the best available data sources to construct the indices. To compute a weighted average index to reflect the cost of producing a meal, indices for food and labor were separately constructed, a ratio of food and labor costs to total costs was calculated from data submitted for FY 1975 on Form FNS–13, Annual Statement of Income and Expenditures, and the indices were weighted and averaged. Based on these calculations the average cost of producing a meal in Alaska and Hawaii, respectively, is 62 percent and 17 percent greater than the national average cost. Comparable data were not available for the other outlying areas, and the data that were available did not appear to support the need for additional payments.

In its **Federal Register** notice of October 19, 1979, the Department authorized increased payment factors for Alaska, indicated its intent to assess the meal cost differences between Hawaii and the mainland States and to consider adjustment of Hawaii's payment factors. Further assessment of food costs by the Department indicates that these costs in Hawaii are substantially higher than those in the 48 States and the District of Columbia, and

account for virtually all of the difference in total meal costs. In this notice the Department authorizes payment factors for Hawaii that are 17 percent greater than the corresponding national average payment factors for the lower 48 States and the District of Columbia.

Payment Rates of Reimbursement

Pursuant to Sections 11, 12, and 17 of the National School Lunch Act (42 U.S.C. 1759a) as amended, notice is hereby given of adjustments to the national average payment rates and to maximum rates of payment for meals and supplements served in Hawaii during the six-month period January 1 through June 30, 1981 to children participating in the National School Lunch and School Breakfast Programs. For lunches served during the aforementioned period to children participating in the National School Lunch Program in Hawaii, national average payment rates are as follows: (a) 21.75 cents from general cash-for-food assistance funds for each lunch, (b) an additional 77.75 cents from special cash assistance funds for each reduced price lunch and (c) an additional 97.75 cents from special cash assistance funds for each free lunch.

For the six-month period January 1 through June 30, 1981, the maximum per lunch rates of payment for lunches served in the National School Lunch Program shall be as follows: (a) 28.75 cents from general cash-for-food assistance funds and (b) from a combination of general cash-for-food assistance and special cash assistance, 137.00 cents for a free lunch and 117.00 for a reduced price lunch.

For breakfasts served during the aforementioned period to children in schools participating in the School Breakfast Program in Hawaii, payment rates are as follows: (a) 17.50 cents for all breakfasts, (b) an additional 32.50 cents for each reduced price breakfast, and (c) an additional 43.50 cents for each free breakfast. The total amount of breakfast assistance payments to be made to Hawaii from sums appropriated therefore, shall be based upon the aforementioned adjustments to national average payment factors; *Provided, however*, that additional payments shall be made in such amounts as are needed to finance payment rates assigned for schools with severe need under § 220.9 of regulations governing the School Breakfast Program (7 CFR Part 220).

For schools in Hawaii determined to be in severe need under the School Breakfast Program, the maximum rates of payment for breakfasts are established pursuant to Section 4(b) of the Child Nutrition Act of 1966, as amended. This law requires that these rates be computed using two methods and that the method yielding the higher rates be used. Accordingly, for schools in Hawaii found to be in severe need, the maximum rate of payment for paid breakfasts shall be equal to the adjusted national average factor for all breakfasts (17.50 cents), and the maximum rate of payment for reduced price and free breakfast shall be 68.25 cents and 73.25 cents respectively.

Section 4 Cut In Payment Rates of Reimbursement:

Pub. L. 96–499, enacted on December 5, 1980, mandates that in school food authorities in which *less than 60 percent* of the lunches served during the second preceding year (School Year 1978–1979) were served free or at a reduced price, the section 4 payment would be reduced by two and a half cents for each meal served (free, reduced price, or paid) under the National School Lunch Program.

The payment rates of reimbursement as listed above must be adjusted accordingly if the school falls in the "less than 60 percent" category.

Definitions

The terms used in this notice shall have the meanings ascribed to them in regulations governing the National School Lunch Program (7 CFR Part 210), the School Breakfast Program (7 CFR Part 220), and in regulations for Determining Eligibility for Free and Reduced Price Meals and Free Milk in Schools (7 CFR Part 245).

(Catalog of Federal Domestic Assistance Programs Nos. 10.553 and 10.555)

(NSLP (Sec. 4, Pub. L. 92–433, 76 Stat. 944, 42 U.S.C. 1753, 84 Stat. 208, 42 U.S.C. 1752, 60 Stat. 231, 42 U.S.C. 1754; Sec. 2, Pub. L. 93–150, 86 Stat. 726, 42 U.S.C. 1753, 60 Stat. 232, 86 Stat. 729, 42 U.S.C. 1757). SBP (Sec. 4. [U.S.C. 1773 (b)] Pub. L. 92–433, 80 Stat. 886; Post, p. 726; Sec. 4, Pub. L. 93–105, 80 Stat. 866; 85 Stat. 85; 86 Stat. 725, 42 U.S.C. 1773; 86 Stat. 724).)

Dated: January 7, 1981.

Robert Greenstein,

Administrator, Food and Nutrition Service.

[FR Doc. 81-2270 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-30-M

Special Supplemental Food Program for Women, Infants and Children (WIC); Allocation of WIC Program and Administrative Grants in Fiscal Year 1981

AGENCY: Food and Nutrition Service, USDA.

ACTION: Notice: Food and administrative funding formulas for the WIC Program.

SUMMARY: The Department of Agriculture is publishing a notice describing how it is allocating FY 1981 program and administrative grants for the second, third and fourth quarters of FY 1981 to State agencies participating in the Special Supplemental Food Program for Women, Infants and Children (WIC). The procedure described in this notice is being followed because the funds available for FY 1981 are insufficient to permit the Department to use the existing program and administrative funding formulas to allocate FY 1981 grant levels.

DATE: Effective January 1, 1981.

FOR FURTHER INFORMATION CONTACT: Barbara P. Sandoval, Director, Supplemental Food Programs Division, Food and Nutrition Service, USDA, Washington, D.C. 20250.

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

On October 24, 1980, the Department published at 45 FR 70527 a notice announcing the Department's plans to distribute FY 1981 program (food) monies to State agencies participating in the WIC Program. The action described in that notice was taken because the FY 1981 WIC appropriations provided in Pub. L. 96–369 making continuing appropriations for FY 1981 were insufficient to permit the Department to use the existing program funding formula in its entirety to allocate FY 1981 program grants. Therefore, the Department decided to guarantee either the State agency's FY 1980 fourth quarter funding level base or its maximum grant funding level in the first quarter of FY 1981. Provisions were also made to award special migrant funds and to negotiate lower first quarter program funding levels where possible.

Since funds had to be allocated to participating State agencies by October 1, 1980, this action was determined an emergency situation and was therefore published in the **Federal Register** without an opportunity for prior public comment.

A total of four comment letters were received on the food funding formula notice during the official comment period which ended December 24, 1980. The commenters included two State agencies, one local agency and one FNS Regional Office.

Two commenters supported the Department's action to guarantee State agencies their fourth quarter FY 1980 funding level or maximum grant level as the base for FY 1981 funding. It was felt

that this measure would ensure that State agencies could effectively plan and execute budgets with their local agencies. The other two commenters felt that the method of allocating grants was not equitable and would allow some State agencies to expand their Program while limiting the growth of others. The same commenters further suggested that funding levels for FY 1981 be derived using each State agency's September 1980 participation figure times a food package cost plus an inflation factor.

Because there was a consensus among all commenters that the Department establish a firm funding level for all State agencies in FY 1981, the Department has decided that the most equitable means of allocating available FY 1981 monies for the second, third and fourth quarters of the fiscal year is to provide State agencies funds based on September 1980 participation levels. Available funds do not permit any further growth beyond that participation level nationwide. Each State agency's funding level has been determined by using the agency's September 1980 participation and food package cost data as well as a food price inflation factor to the extent that available funds permitted. Whether these allocations permit State agencies to maintain their September participation levels will depend on whether actual food price inflation exceeds the inflation factor used. The Department has used the highest inflation factor possible within available funds.

The formula used by the Department to allocate WIC program and administrative grants for the second, third and fourth quarters of FY 1981 is described below.

Program Grants

The following funds were subtracted from the total estimated funds available for FY 1981: the funds set aside for WIC developmental project; the $235 million already awarded in the first quarter; the funds needed for migrant grants; the funds needed for grants to the three new State agencies (District of Columbia; Miccosukee, Florida; and Wyoming); and the special negotiated administrative grant guarantees resulting from the first quarter of FY 1981. Eighty percent of the funds remaining from this subtraction were then distributed to all remaining State agencies based on their September participation (less any migrant participants) and September food package cost information furnished to the Department from the FNS Regional Offices subsequent to recent reviews of State agencies' financial records. Due to the limited funding available, an inflation factor of .33665 percent per month was added to each State agency's September food package cost for each month following September. The resulting food package cost for each month from January 1981 through September 1981 was then multiplied by the State agency's September 1980 participation level. The resulting monthly amounts were then aggregated by quarter to derive each State agency's program grant level for the second, third and fourth quarters.

Administrative Grants

The 20 percent of funds remaining after the allocation of Program grants was allocated for administrative grants. Administrative grants for the second, third and fourth quarters were calculated by applying each States agency's FY 1980 administrative percentage (FY 1980 administrative grant as a percentage of the State agency's FY 1980 food grant) to the resulting program levels for the second, third and fourth quarters of FY 1981. This action was taken to minimize the variances of administrative grants between the first and the second, third and fourth quarters of FY 1981. Further, those State agencies receiving a minimum administrative grant amount of $7,500 per quarter were held to that grant level.

Migrant Grants

In order to continue the Department's commitment of providing continuous service to migrants to the maximum extent feasible, separate computations were used to determine migrant grants. The food grant portion was calculated by taking the FNS–187 monthly FY 1980 migrant participation data and multiplying that monthly figure by each State agency's inflated September 1980 food package cost. An inflation factor of .5 percent per month was used as migrant food package costs are often slightly higher than non-migrant food package costs. Consistent with past policy, if the migrant food grant computed for FY 1981 exceeded the food grant provided in FY 1980, affected State agencies were held to their FY 1980 migrant food grant. However, the total FY 1980 migrant food grant level was inflated by 6 percent to take into consideration food inflation in FY 1981. Because migrant grants were already awarded for the first quarter, these first quarter grant amounts were subtracted from the maximum allowable migrant grant each State could receive in FY 1981. The difference became the maximum amount of migrant program funds each State agency could receive in FY 1981 for the second, third and fourth quarters to serve migrants. The migrant administrative grant was calculated by utilizing each State agency's FY 1980 basic administrative percentage. Unlike non-migrant program and administrative grants which were allocated in escalating levels, migrant food and administrative grants for the second, third and fourth quarters were allocated in three equal quarterly allotments.

Negotiated Administrative Grant Increases

The Department believes that those State agency administrative grant levels which were increased for the first quarter of FY 1981 as a result of the negotiated administrative grant provisions (45 FR 72082) should be continued for the rest of the fiscal year because State agencies have already planned for the use of this money. Consequently, all State agencies receiving additional administrative funds through negotiated administrative grants in the first quarter of FY 1981 were quaranteed their first quarter administrative grant amount for the remaining quarters of the fiscal year. However, no new negotiated administrative grant increases were approved.

New State Agencies

The three new State agencies which started program operations in the fourth quarter of FY 1980 or have started or plan to start during FY 1981 could not be funded under the same provisions as other State agencies without seriously jeopardizing the new agencies' operation. That is because new State agencies may have extremely small caseloads in their early months that cannot permanently sustain a viable program. Consequently, the Department awarded these three State agencies a basic grant level that was determined necessary to sustain their operation during the fiscal year or permit them to begin operation. This determination was based on the review and evaluation of the State agencies' funding needs by FNS Regional Offices.

The grant levels allocated to WIC State agencies for the second, third and fourth quarters of FY 1981 result in a very slight funding increase for some State agencies from their first quarter allocation and a decrease for others. There is no room for program growth in these grant levels. The Department will make every effort not to recover funds for future reallocations from the first and second quarters of FY 1981 as long as State agencies have plans to use these funds to continue a stable participation level for the remainder of the fiscal year.

Signed in Washington, D.C. on January 13, 1981.

Bob Greenstein,

Administrator, FNS.

[FR Doc. 81-2474 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-30-M

Forest Service

1981 Vegetation Management Program; Siuslaw National Forest, Benton, Douglas, Lane, Lincoln, Tillamook, and Yamhill Counties, Oregon; Finding of no Significant Impact

An environmental assessment has been prepared that discusses the 1981 vegetation management program for site preparation, conifer release, roadside vegetation, control of noxious weeds, and tree nursery management, on the Alsea, Hebo, Mapleton, and Waldport Ranger Districts of the Siuslaw National Forest. The environmental assessment involves the control of competing vegetation on 9,167 acres. All proposed treatment areas are located on National Forest lands within Benton, Douglas, Lane, Lincoln, Tillamook and Yamhill Counties, Oregon. The assessment is available for public review at the Alsea Ranger District in Alsea, Oregon, Hebo Ranger District in Hebo, Oregon, Mapleton Ranger District in Mapleton, Oregon, Waldport Ranger District in Waldport, Oregon, and the Siuslaw National Forest Office in Corvallis, Oregon.

Under the preferred alternative, 5,453 acres are proposed to be treated for conifer release, 3,471 acres for site preparation, and 71 acres for control of noxious weeds. Sixty-four percent of proposed acreage will be treated by aerial application method, 18 percent by chemical ground application, and 18 percent will be deferred.

I have determined through the environmental analysis that this is not a major Federal action that would significantly affect the quality of the human environment; therefore, an environmental impact statement is not needed. This determination was made considering the following factors, which are discussed in detail in the environmental assessment: (a) that the physical and biological effects of the proposed treatment are limited to the project area, (b) management requirements and constraints and mitigation measures ensures against the potential of significant adverse effects, (c) no irretrievable loss of timber production, (d) there are no apparent adverse cumulative or secondary effects, (e) no known threatened or endangered plants or animals within affected areas. This alternative has been determined to be environmentally preferable to the other alternatives considered in the assessment because it will provide a balance of environmental protection as well as goods and services for the public.

Some public concern has been expressed over the use of any chemical and the effects it has on water quality. The required mitigation measures and constraints on the implementation of the preferred alternative is designed to protect the water quality. State and Federal water quality standards will be met.

No action will be taken prior to February 23, 1981.

The responsible official is Larry A. Fellows, Forest Supervisor, Siuslaw National Forest, P.O. Box 1148, Corvallis, Oregon 97330.

January 15, 1981.

Larry A. Fellows,

Forest Supervisor.

[FR Doc. 81-2356 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Willamette National Forest—Control of Undesirable Species for the Purpose of Plantation Release and Site Preparation, Decision Notice and Finding of No Significant Impact; Lane, Douglas, Linn, and Marion Counties

An environmental assessment that discusses proposed control of undesirable vegetation for the purpose of site preparation and conifer release on not more than 5,600 acres on the Willamette National Forest, Lane, Douglas, Linn, and Marion Counties in Oregon, is available for review in the Forest Service Office in Eugene, Oregon and local Ranger Districts of the Willamette National Forest.

Based on the analysis and evaluation described in the environmental assessment, it is my decision to adopt a preferred alternative that includes the following control measures: scarification with heavy machinery, 66 acres; hand cutting of vegetation, 89 acres; hand pulling or grubbing vegetation, 810 acres; aerial application of phenoxy herbicides, 537 acres; aerial application of non-phenoxy herbicides, 2,170 acres; aerial application of phenoxy herbicides followed by burning, 28 acres; hand treatment with phenoxy herbicide mixture, 181 acres; hand treatment with non-phenoxy herbicides, 491 acres; hand cut vegetation and treat with phenoxy herbicide mixture, 1,130 acres; hand cut vegetation and treat with non-phenoxy herbicides, 45 acres.

A no treatment alternative was selected on 1,815 acres.

This preferred alternative, with specified mitigation measures and monitoring, provides the best combination of physical, biological, social and economic benefits and is considered to be the evironmentally preferable alternative.

I have determined, based on the environmental analysis, that this is not a major Federal action that would significantly affect the quality of the human environment; therefore, an environmental impact statement is not needed. This determination was made considering the following factors: (a) all chemicals are approved by EPA for the proposed use; (b) application of chemicals will comply with applicable EPA labels, State and Federal law, Forest Service policies and the current R-6 Environmental Statement dealing with vegetative management; (c) treatment with chemical, mechanical or hand methods will have only slight and temporary effect on the ecosystems in the treatment areas; (d) physical and biological effects are limited to the areas of planned treatment; and (e) there are no irreversible or irretrievable resource commitments or losses.

Project implementation may take place immediately after the date of this decision.

This decision is subject to administrative review (appeal) pursuant to 36 CFR 211.19.

Dated: January 14, 1981.

John E. Lowe,

Acting Forest Supervisor.

[FR Doc. 81-2391 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Black Hills National Forest Grazing Advisory Board; Meeting

The Black Hills National Forest Grazing Advisory Board will meet at 10:00 a.m., February 11, 1981 in the Conference Room of the Supervisor's Office, Custer, South Dakota. The purpose of this meeting is to discuss and make recommendations regarding allotment management planning goals and range betterment funding priorities which will result in realizing the potential for increasing forage production and livestock use.

The meeting will be open to the public. Persons who wish to attend should notify Lloyd Todd, Black Hills National Forest, 605/673-2251. Written statements may be filed with the committee before or after the meeting.

Dated: January 9, 1981.

James R. Mathers,

Forest Supervisor.

[FR Doc. 81-2387 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Forest Land and Resource Management Plan; Fishlake National Forest, Juab, Millard, Sanpete, Sevier, Beaver, Piute, Iron, Garfield, and Wayne Counties, Utah; Intent To Prepare an Environmental Impact Statement

A Notice of Intent To Prepare an Environmental Impact Statement for the Fishlake National Forest Land and Resource Management Plan was published in the **Federal Register**, Volume 45, No. 154, p. 52434, on August 7, 1980.

In conjunction with this planning effort and pursuant to 43 CFR, Part 3460, the Fishlake National Forest is in the process of applying coal unsuitability criteria as mandated by the Surface Mining Control and Reclamation Act of 1977. The Emery and Wasatch Plateau Known Recoverable Coal Resources Areas (KRCRA) and designated buffer area within the Fishlake National Forest are where the criteria are being applied. Applications of the criteria will be for all Fishlake National Forest lands within the following legal descriptions in Sevier and Wayne Counties, Utah:

T20S, R3E, R4E, S.L.M.
T21S, R2E, R3E, R4E, R5E, S.L.M.
T22S, R2E, S.L.M.
T23S, R2E, S.L.M.
T24S, R3E, R4E, S.L.M.
T25S, R3E, R4E, R5E, S.L.M.
T26S, R3E, R4E, R5E, S.L.M.

A map is available at the Forest Supervisor's Office, 170 North Main Street, Richfield, Utah, which shows those areas where the coal unsuitability criteria will be applied.

The Fishlake National Forest will hold a public meeting to discuss the coal unsuitability recommendations for the Fishlake National Forest Land and Resource Management Plan on February 10, 1981, at 10:00 a.m. at the Sevier County Courthouse auditorium in Richfield, Utah. At the same meeting, the unsuitability criteria recommendation for the Coastal States Energy Company proposal lease will be discussed.

Information, concerns, and issues which are made known at this meeting will be used to determine what lands are unsuitable for future coal leasing. Future planning efforts for the Fishlake National Forest Land and Resource Management Plan will incorporate the recommendations as appropriate to the application of the unsuitability criteria.

For further information about this planning effort or to present comments contact: Andrew E. Godfrey, Forest Planning Staff Officer, Fishlake National Forest, 170 North Main St., Richfield, Utah 84701, (801) 896-4491.

Dated: January 14, 1981.

Jeff M. Sirmon,

Regional Forester.

[FR Doc. 81-2388 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Irish Wilderness RARE II Further Planning Area; Mark Twain National Forest, Oregon County, Missouri; Intent To Prepare an Environmental Impact Statement

The Forest Service, Department of Agriculture, will prepare an environmental impact statement for the proposal to prospect for hard rock minerals within a part of the Irish Wilderness (an area designated for further planning during the Second Roadless Area Review Evaluation (RARE II)) on the Doniphan Ranger District.

A range of alternatives will be considered. One alternative will be not to permit prospecting within the area. Analysis of the alternatives must determine whether impacts adverse to the wilderness characteristics of the area would be sustained.

The major issues regarding the Irish Wilderness were identified during the recent scoping process used in development of the Forest Land and Resource Management Plan, therefore a separate scoping process is not planned for this proposed action.

The estimated release date of the draft environmental impact statement is December 1981. August 1982 is estimated as the release date of the final environmental impact statement.

Steve Yurich, Regional Forester, Eastern Region, Milwaukee, Wisconsin, is the responsible official.

Questions about the study and environmental impact statement should be directed to Robert Pokela, District Ranger, Doniphan, Missouri, telephone (314) 996-2153.

Written comments and suggestions concerning the study process should be sent to Leon Cambre, Forest Supervisor, Mark Twain National Forest, Rolla, Missouri, 64501.

James H. Freeman,

Director of Planning, Programming and Budgeting.

January 12, 1981.

[FR Doc. 81-2385 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Medicine Bow National Forest Grazing Advisory Board; Meeting

The annual meeting of the Medicine Bow National Forest Grazing Advisory Board will be February 23, 1981, at 10 a.m. in the Medicine Bow National Forest Supervisor's Office, 605 Skyline Drive, Laramie, Wyoming.

The agenda for the meeting will include: (1) accepting new board members; (2) acquaint new members with the function of the Board; (3) recommendations concerning the development of allotment management plans and the utilization of range betterment funds; (4) location and agenda for the summer tour; and (5) amend by-laws for ways to select a board member in case of tie vote.

The meeting will be open to the public. Persons who wish to attend and participate should notify Don Schmidtlein (307-745-8971) Laramie, Wyoming, prior to the meeting. Public members may participate in discussions at any time during the meeting, or may file a written statement following the meeting.

Dated: January 14, 1981.

Donald L. Rollens,

Forest Supervisor.

[FR Doc. 81-2390 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M

Office of the Secretary

African Swine Fever; Declaration of Emergency Because of the Existence of African Swine Fever in Haiti

Whereas, the highly contagious, infectious swine disease known as African swine fever exists in the Country of Haiti, and

Whereas, Haiti is a very close neighbor of the United States and the Commonwealth of Puerto Rico, and

Whereas, the potential dissemination of African swine fever to locations in the United States and its territories or possessions constitutes a danger to producers, shippers, slaughterers, and others concerned with the swine industry and to the national economy, and

Whereas, the Government of Haiti has requested assistance in combatting African swine fever,

Now, Therefore, in accordance with the provisions of the appropriation item for the Animal and Plant Health Inspection Service in the Agriculture, Rural Development, and Related Agencies Appropriation Act, 1981 (Pub. L. 96-528) and sections 1 and 2 of the Act of February 28, 1947, 61 Stat. 7, as amended (21 U.S.C. 114b and 114c), I find an emergency arising out of the existence of African swine fever in Haiti, a very close neighboring country, which constitutes a threat to the swine industry of the United States, and I hereby authorize the transfer from other appropriations or funds available to the agencies and corporations of the Department such sums as may be necessary to be utilized in a program in cooperation with the Government of Haiti, and with other governments and international organizations or associations, in carrying out operations or measures to eradicate, suppress, or control African swine fever in Haiti or to prevent or retard African swine fever or vectors thereof from being introduced to and disseminated into the United States.

This final action has been reviewed under procedures established in Secretary's Memorandum 1955 to implement Executive Order 12044 and has been classified as "significant." The emergency nature of this action warrants publication of this final action without completion of a Final Impact Statement. A Final Impact Statement will be developed as soon as possible.

Effective Date: This declaration of emergency shall become effective January 16, 1981.

Jim Williams,

Acting Secretary of Agriculture.

[FR Doc. 81-2376 Filed 1-19-81; 1:43 pm]

BILLING CODE 3410-34-M

Rural Electrification Administration

Cajun Electric Power Cooperative, Inc.; Proposed Loan Guarantee

Under the authority of Pub. L. 93-32 (87 Stat. 65) and in conformance with applicable agency policies and procedures as set forth in REA Bulletin 20-22 (Guarantee of Loans for Bulk Power Supply Facilities), notice is hereby given that the Administrator of REA will consider providing a guarantee supported by the full faith and credit of the United States of America for a loan in the approximate amount of $300,000,000 to Cajun Electric Power Cooperative, Inc., (Cajun) of New Roads, Louisiana. This loan guarantee will provide supplemental funds needed to complete the construction of Units 1, 2 and 3 at the Big Cajun 2 generating plant and working capital to finance a coal inventory.

Legally organized lending agencies capable of making, holding and servicing the loan proposed to be guaranteed may obtain information on the proposed program, including the engineering and economic feasibility studies and the proposed schedule of advances to the borrower of the guaranteed loan funds from Mr. James R. Smith, Manager, Cajun Electric Power Cooperative, Inc., P.O. Box 578, New Roads, Louisiana 70760.

In order to be considered, proposals must be submitted on or before February 23, 1981, to Mr. Smith. The right is reserved to give such consideration and make such evaluation or other disposition of all proposals received as Cajun and REA deem appropriate.

Prospective lenders are advised that the guaranteed financing for this project is available from the Federal Financing Bank under a standing agreement with the Rural Electrification Administration.

Copies of REA Bulletin 20-22 are available from the Director, Office of Information and Public Affairs, Rural Electrification Administration, U.S. Department of Agriculture, Washington, D.C. 20250.

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 14th day of January, 1981.

Robert W. Feragen

Administrator, Rural Electrification Administration.

[FR Doc. 81-2321 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-15-M

Basin Electric Power Cooperative; Bismarck, North Dakota; Proposed Loan Guarantee

Under the authority of Public Law 93-32 (87 Stat. 65) and in conformance with applicable agency policies and procedures as set forth in REA Bulletin 20-22 (Guarantee of Loans for Bulk Power Supply Facilities), notice is hereby given that the Administrator of REA will consider providing a guarantee supported by the full faith and credit of the United States of America for a loan in the approximate amount of $434,000 to Basin Electric Power Cooperative of Bismarck, North Dakota. These loan funds will be used to finance early costs in connection with possible utilization of oil sunflower seed hulls as a supplemental boiler fuel and for modification of existing generating facilities to provide cogeneration of process steam at the William J. Neal Station.

Legally organized lending agencies capable of making, holding and servicing the loan proposed to be guaranteed may obtain information on the proposed project, including the engineering and economic feasibility studies and the proposed schedule for the advances to the borrower of the guaranteed loan funds from Mr. James L. Grahl, General Manager, Basin Electric Power Cooperative, 1717 East Interstate Avenue, Bismarck, North Dakota 58501.

In order to be considered, proposals must be submitted on or before February 23, 1981, to Mr. Grahl. The right is reserved to give such consideration and make such evaluation or other disposition of all proposals received, as Basin Electric Power Cooperative and REA deem appropriate. Prospective lenders are advised that the guaranteed financing for this project is available from the Federal Financing Bank under a standing agreement with the Rural Electrification Administration.

Copies of REA Bulletin 20-22 are available from the Director, Office of Information and Public Affairs, Rural Electrification Administration, U.S. Department of Agriculture, Washington, D.C. 20250.

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 15th day of January, 1981.

Robert W. Feragen,

Administrator, Rural Electrification Administration.

[FR Doc. 81-2475 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-15-M

CHRYSLER CORPORATION LOAN GUARANTEE BOARD

Closed Board Meeting

The Chrysler Corporation Loan Guarantee Board will hold a meeting closed to the public on January 19, 1981 at 8:00 a.m., in Room 4426, Main Treasury Building, 15th Street and Pennsylvania Avenue, NW., 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. On Wednesday, January 14, the Board approved a summary of the terms on which it expected to be able to grant formal approval later in the week. The January 19 meeting will be a continuation of the Board's meeting of

Friday, January 16, which was recessed until January 19. At the January 19 meeting the Board expects to take formal action on Chrysler's application for up to 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 commercial 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 commercial 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 vote of the Board taken at the end of the January 16 meeting. Secretary of the Treasury G. William Miller and Comptroller General Elmer B. Staats voted to close the meeting. Federal Reserve Board Chairman Paul A. Volcker was absent and did not vote.

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 17, 1981.

Bruce D. Bolander,

Secretary of the Board.

[FR Doc. 81–2330 Filed 1–22–81; 8:45 am]

BILLING CODE 4810–27–M

CIVIL AERONAUTICS BOARD

[Docket 39030]

Eastern Air Lines, Inc.; Service Suspensions Enforcement Proceeding; Assignment of Proceeding

The above-entitled proceeding has been assigned to Administrative Law Judge William A. Kane, Jr. Future communications should be addressed to Judge Kane.

Dated at Washington, D.C., January 19, 1981.

Joseph J. Saunders,

Chief Administrative Law Judge.

[FR Doc. 81–2516 Filed 1–22–81; 8:45 am]

BILLING CODE 6320–01–M

[Docket 36115]

South Pacific Island Airways; Fitness Investigation; 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 9, 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 19, 1981.

William A. Pope II,

Administrative Law Judge.

[FR Doc. 81–2512 Filed 1–22–81; 8:45 am]

BILLING CODE 6320–01–M

DEPARTMENT OF COMMERCE

International Trade Administration

Worldwide Information and Trade System; Fee Schedule

AGENCY: International Trade Administration, Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce announces fee for on-line searches of the computerized Worldwide Information and Trade System (WITS).

EFFECTIVE DATE: January 26, 1981.

FOR FURTHER INFORMATION CONTACT: Search requests and other inquiries should be directed to the WITS Staff or to the nearest participating district office:

WITS Staff, Room 1098, The Great Hall, U.S. Dept. of Commerce, Washington, D.C. 20230, (202) 377–5291.

International Trade Administration, U.S. Dept. of Commerce Los Angeles District Office, 11777 San Vicente Boulevard, Los Angeles, CA 90049, (213) 824–7591.

International Trade Administration, U.S. Dept. of Commerce Chicago District Office, 1406 Mid Continental Plaza Building, 55 East Monroe Street, Chicago, IL 60603, (312) 353–4450.

International Trade Administration, U.S. Dept. of Commerce Boston District Office, Tenth Floor, 441 Stuart Street, Boston, MA 02116, (617) 223–2312.

International Trade Administration, U.S. Dept. of Commerce Dallas District Office, 1100 Commerce St., Dallas, TX 75242, (214) 767–0542.

International Trade Administration, U.S. Dept. of Commerce Seattle District Office, Lake Union Building, 1700 Westlake Avenue North, Seattle, WA 98109, (206) 442–5615.

SUPPLEMENTARY INFORMATION: WITS is a new computerized, international marketing information system for business and government designed by the Department of Commerce to provide fast, convenient access to current marketing intelligence. WITS can provide domestic businessmen with foreign trade leads, information on foreign companies and market trends, schedules of upcoming trade shows, and sources of further advice.

Trade specialists at the locations listed will advise what is available from WITS and help users formulate their search queries. The fee charged for on-line searches of WITS will be $2 for each minute of computer connect time. Additional charges may be incurred for certain off-line services, such as for ordering publications, reports, printouts, and other information in hard copy through WITS. In these cases, the user will pay the normal purchase price for the product ordered.

Dated: January 19, 1981.

Vernon Stansbury,

Deputy to the Deputy Assistant Secretary for Export Development.

[FR Doc. 81–2415 Filed 1–22–81; 8:45 am]

BILLING CODE 3510–25–M

National Oceanic and Atmospheric Administration

National Marine Fisheries Service; Permit Application; Correction

On December 12, 1979, Notice was published in the **Federal Register** (44 FR 71856), that an application had been filed with the National Fisheries Marine Service for a Scientific research permit to, among other things, radio-tag five female Northern elephant seals (*Mirounga angustirostris*). The permit subsequently issued and the Notice of Receipt should be corrected to read that five female Northern elephant seals will be out-fitted with digital depth recording/radio tag devices.

Documentation concerning this correction is available for review in the following offices:

Assistant Administrator for Fisheries, National Marine Fisheries Service, 3300 Whitehaven Street, N.W., Washington, D.C.; and

Regional Director, National Marine Fisheries Service, Southwest Region, 300 South Ferry Street, Terminal Island, California 90731.

Dated: January 16, 1981.

Richard B. Roe,

Acting Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service.

[FR Doc. 81-2423 Filed 1-22-81; 8:45 am]

BILLING CODE 3510-22-M

Fisherman's Protective Act; Claims Pending Before the International Claims Board

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of waiver of 60-day filing deadline and of cognizability under section 10(c)(1) of claims pending before the international claims board.

SUMMARY: Applications for compensation under Section 10 of the Fisherman's Protective Act, the Fishing Vessel and Gear Damage Compensation Fund, for damage, loss, or destruction of fishing gear and fishing vessels occurring after September 17, 1978, and before December 22, 1980, may be filed during the 60-day period from December 22, 1980, to February 19, 1981. Also, claims for fishing gear loss pending on June 1, 1980, before the United States-Union of Soviet Socialist Republics Claims Board or the American-Spanish Fisheries Board shall be treated as timely filed under Section 10 for compensation. These provisions were effected by section 240 (a) and (b) of title II—Promotion of American Fisheries—of Pub. L. 96-561, enacted December 22, 1980.

EFFECTIVE DATE: Effective as of December 22, 1980.

FOR FURTHER INFORMATION CONTACT: Ms. Kathryn E. Hensley, Financial Services Division, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Washington, D.C. 20235, telephone (202) 634-4688.

Accordingly, notwithstanding any other provision under 50 CFR Part 258, (i) any application for compensation from the Fishing Vessel and Gear Damage Compensation Fund of fishing vessel or gear damage, loss, or destruction occurring after September 17, 1978, and before December 22, 1980, shall be considered timely filed if filed on or after December 22, 1980, and no later than February 19, 1981, and (ii) any claims for fishing gear loss, pending on June 1, 1980, before the United States-Union of Soviet Socialist Republics Fisheries Claims Board or the American-Spanish Fisheries Board shall be treated as timely filed for compensation from the Fishing Vessel and Gear Damage Compensation Fund.

(Authority: Pub. L. 95-376, 92 Stat. 715 (22 U.S.C. 1980))

Dated: January 15, 1981.

Robert K. Crowell,

Deputy Executive Director, National Marine Fisheries Service.

[FR Doc. 81-2402 Filed 1-22-81; 8:45 am]

BILLING CODE 3150-22-M

Office of the Secretary

[Dept. Organization Order 30-2B]

National Bureau of Standards; Statement of Organization, Functions, and Delegation of Authority

This order effective December 23, 1980 supersedes the material appearing at 43 15473 of April 13, 1978, 43 FR 43534 of September 28, 1978, 44 FR 6976 of February 5, 1979, 44 FR 18720 of March 29, 1979, 45 FR 47902 of July 17, 1970 and 45 FR 80861 of December 8, 1980.

Section 1. Purpose

.01 This Order prescribes the organization and assignment of functions within the National Bureau of Standards (NBS). The scope of authority and functions are set forth in Department Organization Order 30-2A.

.02 This revision is a general update of the Order. It abolishes the position of Deputy Director for Information Systems; restructures the position of Deputy Director for Administrative Systems into a new position of Deputy Director of Administration (Section 6.); changes the title of the Director of Administrative and Information Systems to Director of Administration; changes the title of the Office of the Director of Administrative and Information Systems to Director of Administration; and incorporates outstanding amendments to the Order.

Section 2. Organization

The organization structure and line of authority of NBS shall be as depicted in the attached organization chart (Exhibit 1). A copy of the organization chart is on file with the original of this document in the Office of the Federal Register.

Section 3. Office of the Director

.01 The *Director* shall determine the policies of NBS and direct the development and execution of its programs.

.02 The *Deputy Director* shall assist the Director in the direction of NBS and perform the functions of the Director in the latter's absence.

Section 4. Staff Functions Reporting to the Director

.01 The *Legal Adviser* shall, under the professional supervision of the Department's General Counsel and as provided in Department Organization Order 10-6, serve as the law office of, and have responsibility for all legal services at NBS.

.02 The *Chief, EEO Support Division* shall report to the Director of Administration; except that, on matters pertaining to EEO or affirmative action, the Chief shall be directly responsible and have access to the Director and/or Deputy Director of NBS. Such direct responsibilities shall primarily include EEO and affirmative action policy recommendations to these officials and the NBS Executive Board, fulfilling EEO objectives, accomplishing the Affirmative Action Plan, and monitoring NBS' progress in these areas through formal quarterly reviews.

.03 The *Public Affairs Officer* shall serve as the public information spokesperson for the NBS; serve as Chief of the Public Information Division; and work with the NBS Executive Board in developing communications strategies for the Bureau, using the resources of the Division in implementing those strategies. The Public Affairs Officer shall report to the Director of Administration; except that, on certain matters pertaining to public relations or the dissemination of information to the public, the Officer shall be directly responsible and have access to the Director of NBS.

Section 5. Associate Director for Programs, Budget, and Finance

The *Associate Director for Programs, Budget, and Finance* shall plan, develop, and evaluate Bureau-level programs and formulate and carry out policies and strategies for programmatic, budgetary, and financial matters; develop techniques for an coordinate the review of technical and overhead programs; serve as the Director's staff for Bureau-level programmatic, budget formulation and execution, and finance matters; develop and maintain mechanisms to monitor planned and actual use of resources by providing integrated, evaluated information on program progress, opportunities, and resources to the NBS Director; advise management on significant changes and deviations; recommend programs, budget, finance, and accounting priorities to the NBS Director; serve as the focal point of intelligence and feedback for Bureau-level programmatic issues; coordinate

the formulation of the NBS budget and other Bureau-wide information packages and critique documents developed by line units; administer the NBS systems of accounting, financial management, travel, and payments; analyze resource and program proposals and investment levels; recommend distributions of the Working Capital Fund and Director's Reserve of funds, positions, and equipment to the NBS Director; and, through the comptroller, who shall report directly to the NBS Director on these matters, provide certification of official accounting records and reports and the control of funds.

a. The *Program Office* shall perform the functions of policy development, program analysis, and program development; sponsor, coordinate, and participate in issue studies and Bureau-wide information packages; develop analytical techniques for and coordinate the review of Bureau technical and overhead programs; generate strategies, guidelines, and formats for Bureau planning; articulate and document Bureau-level program plans and status for internal and external use; and define alternatives for resource allocation, and advise Bureau management on their implications.

b. The *Budget Office* shall provide advice and assistance to line management in the preparation, review, justification, presentation, and execution of the Bureau's budget, including financial management and resource allocation monitoring on the Bureau's total resources; interpret regulations and develop budgetary policy and procedures for the budget process; provide assistance in integrating program planning with the budgetary process using as a principal vehicle the Program and Financial Plan; maintain external liaison on budgetary matters; assist in the solution of budget and financing problems; design procedures for the resource monitoring system and review the execution of these procedures for the resource monitoring system and review the execution of these procedures; perform analyses and continuing reviews of status of funds in relation to fiscal plans; advise on appropriate use of resources; and review other agency orders for conformance to policy and regulations.

c. The *Office of the Comptroller* shall manage a comprehensive accounting and finance program for the Bureau; administer the NBS system of accounting, payments, billings and collections, and financial reports; execute agreements for obtaining other agency funds; analyze and develop improved financial policies and practices; monitor the fiscal health of the NBS Working Capital Fund; monitor the overall fund controls and certify the official NBS accounting records and reports.

d. The *Planning Office* shall perform long-range program planning functions; maintain user liaison mechanisms; analyze external trends, opportunities, and user needs as they relate to program priorities; and provide economic benefit analyses.

Section 6. Director of Administration

The *Director of Administration* shall manage and operate Bureau-wide administrative programs and equal employment opportunity support services; and shall establish and implement the related policies and plans; ensuring maximum responsiveness to the needs of NBS technical programs. The Director shall be assisted by a *Deputy Director of Administration*, who shall assist the Director in the performance of administrative functions, and serve as the Director during the latter's absence. The administrative functions are carried out in the following divisions:

a. The *Computing Systems Design Division* shall design, program, implement, and maintain the automated administrative information system; provide consulting , advisory, training, and user-communication services on computing and information needs by technical and adminstrative staff members; initiate developmental and experimental projects to evaluate and implement new hardware and software systems; and identify the need for and implement improvements in central computer resources such as data base management systems, computer graphics, and text handling facilities.

b. The *Library Division* shall furnish full bibliographic, document, information, and information referral services to the staff of the Bureau; provide consulting and training services for computerized information search and retrieval systems, initiate experimental projects to evaluate applications of new information storage, transmission, and retrieval technologies to the library's operations and services; participate in library and information networking and consortia activities in order to facilitate resource sharing among area and regional libraries; carry out the Bureau's library services and related information retrieval functions using both traditional and computerized information resources and methods; provide limited reference, loan, information, and training services to members of the outside scientific and academic communities.

c. The *Technical Information and Publications Division* shall carry out the overall planning and management of the NBS publications program, including: NBS policy, editorial, and procedural guidelines, publication budgeting, publication editing, design, and production, research and development on advance electronic typesetting technologies and their adaptation to NBS use, computer automation of publication statistics, and the distribution and archiving of all publications that record results of NBS scientific and technical research; coordinate technical and policy review of manuscripts prepared at Gaithersburg for publication; provide secretariat for the Washington Editorial Review Board; and serve as the central information center for users of the Bureau's outputs.

d. The *Public Information Division* shall serve as the focal point of Bureau communications with the public through interaction with the print and broadcast media, and by means of conferences, tours, and exhibits; advise on the public affairs impact and ramifications of program decisions; and coordinate handling and dissemination of information for the public.

e. The *Management and Organization Division* shall provide consultative services to line management in organization, procedures, and management practices; maintain the directives system; perform reports management and committee management functions; and serve as liaison with the Departmental Office of Information Management.

f. The *Plant Division* shall be responsible for the design, construction, alterations, and maintenance of all buildings, structures, roads, grounds, and utilities systems for NBS-Gaithersburg; manage all Bureau-owned and leased real property; operate and maintain the central steam and chilled water generation plant at NBS-Gaithersburg; provide administration and field inspection on all physical plant and construction, alteration, and repair contracts; manage space planning and utilization; and coordinate the energy conservation program for the NBS-Gaithersburg site.

g. The *Instrument Shops Division* shall design, fabricate, modify, and repair scientific instruments, apparatus, and equipment to meet the requirements of the Bureau's research, developmental work, and other agency work; provide engineering design and drafting, machining, finishing, welding, optical, glassblowing, and electronic fabricating services; and coordinate advisory service to the Statutory Import Programs

Staff (ITA) on Scientific Equivalency of Instruments (Florence Agreement).

h. The *Facilities Services Division* shall provide physicial security protection, fire protection, ambulance service, building, laboratory, and office cleaning for the NBS-Gaithersburg site; maintain property records; arrange for the transportation of materials and household moves; operate NBS storerooms; distribute and store Standard Reference Materials; provide audio-visual and conference facilities, mail, messenger, telecommunications, and warehouse services; and manage the NBS motor vehicle fleet.

i. The *Occupational Health and Safety Division* shall administer the Bureau's occupational safety/health (OSH) program; provide radiation protection services to Bureau users of ionizing and nonionizing radiation sources and lasers; conduct educational and preventive health programs for the staff; provide treatment of minor ailments and injuries with initial treatment and referral of emergencies of a more serious nature; carry out the NBS workmen's compensation program; provide technical direction on safety matters to the NBS fire protection unit; and conduct medical surveillance as determined by Occupational Safety and Health Administration (OSHA) standards.

j. The *Personnel Division* shall advise on personnel policy and utilization; administer recruitment, placement, classification, employee development, employee relations, labor relations, and special programs activities; advise and assist operating officials and employees on these and other aspects of personnel management; and process employee security clearances.

k. The *Office Management Division* shall, within the limitations on procurement authority spelled out in pertinent Department Orders, procure materials/services, prepare awards and administer grants, cooperative agreements, and contracts; arrange for repair of office machines and equipment; provide visual arts, quick copy, and printing services; conduct records and forms management programs; operate NBS records holding area; insure safeguarding of classified records materials; manage the WAE/Clerical Staffing Program; and provide office support for organizations reporting to the Office of the Director of Administration and for other organizational units in the Bureau who request the service.

l. The *EEO Support Division* shall develop program policy recommendations for the Director of NBS and members of the NBS Executive Board; assist the Director and Deputy Director of NBS and the Executive Board and line managers with their responsibilities for fulfilling the objectives of EEO and Affirmative Action Plan compliance throughout NBS, and the requirements of civil rights statutes, Executive Orders, and other regulatory provisions relating to equal opportunity and affirmative action; advise and assist the Personnel Division and line managers in the development and implementation of recruitment programs of qualified minorities, women, veterans, and handicapped persons assuring unbiased and equitable treatment of applicants; cooperate with the Minority Business Development Agency and the minority business community in support of minority business development; administer NBS' internal discrimination complaint system; coordinate the Special Emphasis Programs for Women, Hispanics, Handicapped, Veterans, Grants to Black Colleges, and Minority Business; and carry out related activities in cooperation with the EEOC, OPM, the Departmental Office of Civil Rights, the NBS Legal Adviser and the Department's General Counsel.

Section 7. National Measurement Laboratory

The *National Measurement Laboratory* shall provide the national system of physical and chemical and materials measurement; coordinate the system with measurement systems of other nations and furnish essential services leading to accurate and uniform physical and chemical measurement throughout the Nation's scientific community, industry, and commerce; conduct materials research leading to improved methods of measurement, standards, and data on the properties of materials needed by industry, commerce, educational institutions, and government; provide advisory and research services to other Government agencies; conduct physical and chemical research; develop, produce, and distribute Standard Reference Materials; provide standard reference data; provide calibration services; and collaborate with the National Engineering Laboratory and the Institute for Computer Sciences and Technology in carrying out the responsibilities of the National Measurement Laboratory.

a. The *Center for Absolute Physical Quantities* shall develop and maintain the scientific competences and laboratory facilities necessary to preserve and continue to refine the base physical quantities upon which the Nation's Measurement sytem is constructed; perform research, both experimental and theoretical, at the frontiers of physics in order to improve our measurement capability and our quantitative understanding of basic physical processes that underlie measurement science; improve, maintain, and transfer the measurement base for time, frequency, electricity, temperature, pressure, mass, and length; coordinate the National base standards with the Bureau International des Poids et Measures and national laboratories; measure at the highest level of accuracy the fundamental constants of nature; work closely with other centers of NBS in the interdisciplinary development of measurement science; and maintain scientific exchange programs with other measurement laboratories, including a continuing cooperative program with the University of Colorado.

b. The *Center for Radiation Research* shall develop and maintain the scientific competences and experimental facilities necessary to provide the Nation with a central basis for uniform physical measurements, measurement methodology, and measurement services in the areas of optical radiation, ultraviolet radiation, and ionizing radiation (x-ray, gamma rays, electrons, neutrons, radioactivity, etc); provide government, industry, and the private sector with essential calibrations for field radiation measurements needed in such applied areas as nuclear power, health care, radiation processing, advanced laser development, and radiation protection for public safety; carry out research in order to develop improved radiation standards, new radiation measurement technology, and improved understanding of atomic and nuclear radiation processes; collect, compile, critically evaluate, and supplement the existing atomic and nuclear data base in order to meet the major demands of the Nation for such data; and participate in collaborative efforts with other centers in the interdisciplinary applications of radiation.

c. The *Center for Analytical Chemistry* shall carry out basic and applied research in analytical chemistry; develop and improve methods for the separation, analysis, and characterization of materials, including Standard Reference Materials; conduct fundamental investigations of the phenomena on which measurement of the composition and behavior of chemical systems is based; use these measurement methods to improve the accuracy of composition measurement, and thereby the comparability among laboratories throughout the United States as well as ensuring measurement compatibility with other nations; use

these techniques to assist in the solution of problems of national impact, e.g., in improving the accuracy of clinical analytical chemistry, air and water pollution analysis, and in providing advisory services in analytical chemistry to government agencies, scientific organizations, and industry; and participate in collaborative efforts with other centers in the interdisciplinary applications of analytical chemistry.

d. The *Center for Thermodynamics and Molecular Science* shall develop and maintain the scientific competences and experimental facilities necessary to provide the Nation with uniform measurements, measurement methodologies, and measurement services in the areas of thermodynamics and transport properties, chemical kinetics, surface science, and molecular spectroscopy; provide government, industry, and the scientific community with essential standards and certified Standard Reference Materials needed to maintain the integrity of the measurement system; develop standards and techniques of measurement, conduct theoretical and experimental reseach, and provide consultative services in the fields of thermodynamics, kinetics, surface science, and molecular spectroscopy; measure, compile, critically evaluate, and disseminate thermodynamic spectroscopic data, chemical kinetic data, and data on photochemistry to the industrial, governmental, and technological communities nationally and internationally; and participate in collaborative efforts with other centers in disciplinary developments involving thermodynamics, kinetics, surface science, and molecular spectroscopy.

e. The *Center for Materials Science* shall characterize and conduct research on the structure of materials, key chemical reactions, and key physical and chemical properties which will lead to the safest, most efficient uses of materials, improve materials technologies, and encourage recycling; provide standards, measurement methods, data, concepts, and information concerning the properties and performance of metals, polymers, and inorganic materials, and disseminate this information to industry, government, universities, and consumers; maintain and develop research reactor activities which provide precise information about these materials.

Section 8. National Engineering laboratory

The *National Engineering Laboratory* shall provide technology and technical services to users in the public and private sectors to address National needs and to solve National problems in the public interest; conduct research in engineering and applied science in support of objectives in these efforts; build and maintain competence in the necessary disciplines required to carry out this research and technical service; develop engineering data and measurement capabilities; provide engineering measurement traceability services; develop test methods and propose engineering standards and code changes; develop and propose new engineering practices; develop and improve mechanisms to transfer results of its research to the ultimate user; and collaborate with the National Measurement Laboratory in conducting the National Engineering Laboratory's assigned responsibilities.

a. The *Center for Applied Mathematics* shall conduct research, collaborate with, and provide support to all Bureau activities and to other Federal agencies in selected fields of the mathematical and computer sciences important in science and engineering; undertake specialized computational support and services for high-technology science and engineering programs; develop tools for mathematical work such as mathematical models, statistical models and computational methods, mathematical tables, handbooks, and manuals, and advise on their use; provide training in disciplines related to these functions; operate, on a reimbursable basis, the Bureau's central computing facility that serves NBS and other agencies; provide the systems software and hardware support required for efficient operation of the facility; conduct computer performance monitoring and determine needs for additional hardware and systems software; maintain records of use of computing resources; and provide consulting and training to assist users in the effective utilization of the computing resources.

b. The *Center for Electronics and Electrical Engineering* shall provide a focus in NBS for research, development, and applications in the field of electronic and electrical materials and engineering; maintain and develop competences in measurements and analytic methods, in fabrication processes, in performance evaluation, and in practical applications appropriate to a wide range of electrical and electronic materials, devices, instruments, and systems; identify technologies for the achievement of National goals; conduct responsive applied research to yield the requisite practical data, measurement methods, theory, standards, technology, and technical services; and provide national reference standards and engineering measurement traceability and deliver the results for the benefit of the government, industry, the scientific community, and the consumer, either directly or through effective intermediaries.

c. The *Center for Mechanical Engineering and Process Technology* shall provide, within the National Engineering Laboratory, competence in mechanics, mechanical engineering, materials engineering, industrial engineering, mechanical engineering metrology, and automatic control technology; manage these competences to provide technology, standards, and measurement traceability services to strengthen the manufacturing industries, public utilities, and Government agencies for the purposes of increased productivity, improved international competitiveness, and efficiency in regulatory compliance.

d. The *Center for Building Technology* shall perform analytical, laboratory, and field research involving architecture, engineering, and physical and social sciences to produce performance criteria and methods of evaluation, and tests and measurements for codes and standards; serve building owners, occupants, designers, manufacturers, builders, regulatory authorities of State and local governments and Federal agencies with building programs; provide for demonstration, implementation, and evaluation of improved building practices by means of cooperative programs with other research organizations, professional societies, standards-writing organizations, State and local governments and other Federal agencies; and apply these methods and disciplines for the purposes of improving safety in building construction and use, energy conservation in buildings, establishment of sound technical bases for the solar heating and cooling of buildings, more useful and economical new buildings, and effective use of existing buildings.

e. The *Center for Fire Research* shall perform and support research in all aspects of fire with the aim of providing scientific and technical knowledge applicable to the prevention and control of fires, including: (1) basic and applied research for the purpose of arriving at an understanding of the fundamental processes underlying fires, including the physics and chemistry of combustion processes and products, early stages of fires and structural influences in fire

behavior, fire-safe design concepts for buildings, and specific fire hazards; (2) research into the biological, physiological, and psychological factors affecting human victims of fire, and the performance of individual members of fire services, including the phychological factors leading to arson and the prediction and cure of such behavior; and (3) operation tests, demonstration projects, and fire investigations in support of such activities.

f. The *Center of Consumer Product Technology* shall perform research and development toward establishing and advancing measurement techniques and test methodology to evaluate the safety, energy efficiency, and other performance characteristics of consumer products and law enforcement equipment; apply the disciplines of mechanical and electrical engineering, consumer and behavioral sciences, economics, and operations research to programs involving consumer product technology and product-user interactions; develop the technical and analytical bases for performance standards and characterizing product attributes; provide technical assistance, analyses, and evaluations related to consumer product technology to other agencies of Government; and produce descriptive literature and information for the public.

g. The *Center for Field Methods* shall investigate the effectiveness of various incentives and mechanisms to stimulate increased development and use of technology by industry. These investigations shall be designed to provide an experimental basis for the formulation of Government policy in this area.

Section 9. Office of the Director, NBS/ Boulder Laboratories

The *Office of the Director, NBS/ Boulder Laboratories*, located in Boulder, Colorado, shall provide administrative support to the technical programs of the NBS/Boulder Laboratories. These laboratories shall conduct research comprising work on measurement science for the National Measurement Laboratory in time and frequency, quantum physics, thermodynamics, materials science, and the development of essential technical data in quantum physics, thermodynamics, and materials science; and conduct programs for the National Engineering Laboratory in electromagnetics and fluid dynamics. The following administrative divisions are located in the Boulder Laboratories: Instrument Shops Division, and Plant Division.

Section 10. Institute for Computer Sciences and Technology

The *Institute for Computer Sciences and Technology*, in accordance with Public Law 89-306 (40 U.S.C. 759), shall develop and recommend Federal Information Processing Standards and participate in the development of voluntary commercial ADP standards; conduct research in the science and technologies of automatic data processing, computers, and related systems; provide scientific and technical advisory services to the Office of Management and Budget and the General Services Administration to support the formulation of Federal automatic data processing policies; provide advisory services and technical assistance to other Government agencies; build and maintain competence in computer science and engineering necessary to carry out these programs; and collaborate with the National Measurement Laboratory and the National Engineering Laboratory in carrying out the Institute's responsibilities.

a. The *Center for Programming Science and Technology* shall maintain computer science and engineering competence and experimental facilities support in order to provide Federal computer system and software standards and related guidelines for use in evaluation and management of computer utilization. Technical areas include computer programming languages, operating systems, text editors, data base management systems, programming tools and other utility software, data elements and codes, computer security, system certification and validation, performance assurance, and evaluation techniques such as auditing, programming productivity measurement, workload characterization, and system performance measurement. The Center also shall: (1) Provide Federal agencies with technology assessments and advisory services in these and related technical areas, and (2) provide the computer science research and technology base for the Federal ADP standards program.

b. The *Center for Computer Systems Engineering* shall maintain computer science and engineering competence and experimental facilities support in order to provide Federal computer system and network standards and related guidelines for use in the procurement and operation of Federal computer systems and networks, and their hardware and software components. Technical areas include computer system and network architecture, network protocols, local networks and office systems, network measurement, computer system interfaces, data communications, data acquisition and storage, terminals and peripherals, data interchange media, network access control, and system specification languages and verification techniques. The Center also shall: (1) Provide technology forecasts in these and related technical areas for use in establishing priorities for the standards program and for use by Federal agencies in their planning for future requirements; (2) provide advisory services for Federal agencies in these and related technical areas, and (3) provide the computer technology research and engineering base for the Federal ADP standards program.

Elsa A. Porter,

Assistant Secretary for Administration.

[FR Doc. 81-2379 Filed 1-22-81; 8:45 am]

BILLING CODE 3510-17-M

[Dept. Organization Order 20-B]

Office of Personnel; Statement of Organization Functions and Delegation of Authority

This order effective December 10, 1980 supersedes the material appearing at 45 FR 75268 of November 14, 1980.

Section 1. Purpose

.01 This Order prescribes the functions and organization of the Office of Personnel.

.02 This revision reflects a consolidation of functions into fewer organizational units, providing a simpler supervisory structure. A new position of Deputy Director replaces the former positions of Deputy Director for Personnel Development and Deputy Director for Personnel Administration. The former Performance Appraisal and Compensation Division and Employee Development and Awards Division are abolished, and the titles of the other divisions are changed to reflect a redistribution of functions within the Office.

Section 2. Status and Line of Authority

The Office of Personnel, a Departmental office, shall be headed by a Director who shall report and be responsible to the Deputy Assistant Secretary for Resources Management. The Director shall be assisted by a Deputy Director, who shall perform the functions of the Director during the latter's absence.

Section 3. Delegation of Authority

In addition to the authority implicit in and essential to carrying out the

functions assigned to the Office and related to the exercise of such functions, the Director, Office of Personnel:

a. Is delegated all authority and responsibilities vested in the Assistant Secretary for Administration pertaining to personnel programming and management, other than equal employment opportunity, including the direction, administration, processing, and authority to take final action on all personnel actions and other personnel matters;

b. Is authorized to redelegate such authority to appropriate officials of the Office of Personnel and other officials of the Department, subject to such conditions in the exercise of such authority as may be prescribed; and

c. As Director of Personnel for the Department, shall be the adviser to, and serve as the representative of, the Assistant Secretary for Administration and Deputy Assistant Secretary for Resources Management in all matters of personnel utilization, management, and administration, except for equal opportunity employment policies and programs.

Section 4. Functions

Pursuant to the authority vested in the Assistant Secretary for Administration by Department Organization Order 10-5, and subject to such policies and directives as the Assistant Secretary for Administration and the Deputy Assistant Secretary for Resources Management may prescribe, the Office shall:

a. Have Departmentwide staff responsibility for all matters, other than equal employment opportunity, relating to personnel management and administration, including executive resources management, staffing controls, recruitment and placement, employee utilization and development, supervisory and management development, classification and position management, performance appraisal, human development/work improvement, pay administration, labor relations, training, employee relations, employee benefits and services, personnel management evalution, occupational health, incentives programs, prevention of prohibited personnel practices, and compliance with and enforcement of applicable civil service laws, rules, and regulations; and

b. Establish and maintain close working relationships with the Office of Civil Rights and with other external Government agencies such as the Office of Personnel Management (OPM).

Section 5. Organization

Under the direction and supervision of the Director, the functions of the Office shall be organized and carried out as provided below:

.01 The *Office of the Director* shall consist of the Director and Deputy Director and such staff as they need for internal administration and for evaluation of the personnel management programs of the Department and the operating units. The Deputy Director shall be the principal management alternate for the Director, shall carry out special assignments to support and assist the Director, and shall supervise the following elements of the Office:

a. The *Policy Support Staff* shall provide staff assistance and technical advice to the Director, to other components of the Office, and to other Departmental units concerning the regulations, policies, and decisions of external bodies which have an impact on the Department's personnel policies and its labor-management relations. The Staff shall coordinate comments on and clearance of proposed legislation and regulatory material; oversee the development and issuance of Departmental personnel policies; and initiate a variety of special projects or studies peculiar to the overall functions of the Office. The Staff shall have continuing responsibility for the following programs and activities: labor-management relations; relationships with other merit systems (e.g., the foreign service); employee ethics, including financial disclosure and safeguarding of personal information; human development and work improvement; and employee training and career development.

b. The *Information System Staff* shall be responsible for the personnel management information system; for oversight of automated personnel systems in use throughout the Department; for ensuring compliance with the OPM requirements for the Central Personnel Data File—and ultimate conversion to the Federal Personnel Management Information System; and shall serve as the control point for all Departmentwide personnel management forms, reports, statistical evaluations, and analyses.

.02 The *Medical Division* shall plan and coordinate Departmentwide policies and programs in employee health services, represent the Director of Personnel in maintaining professional medical liaison with the U.S. Public Health Service, the OPM, and other appropriate agencies; and provide advice, assistance, and consultative services to operating units in employee health matters as requested. The Division shall be responsible for planning and administering the employee health service program for the Department's central health unit.

.03 The *Executive Resources Division* shall develop policy recommendations and guidance for the management of the Senior Executive Service (SES), and the other executive resources of the Department, and shall develop and oversee the implementation of systems to effect the policies set by the Executive Resources Board and by the Assistant Secretary for Administration, including systems for: the designation or classification of positions, recruitment, assignment and mobility of executives, performance appraisal, compensation, executive development, and those activities relating to the training and development of potential and incumbent managers. The Division shall control executive position authorizations, maintain current data on executive positions and personnel, prepare reports as required by OPM and other agencies outside the Department, provide technical assistance and administrative support to the Executive Resources Board and Performance Review Boards, and assist the Director in the evaluation of the executive resources management programs of the Department and the operating units.

.04 The *Classification and Compensation Division* shall plan, develop, and coordinate Departmentwide programs and activities in the areas of position classification, position management, pay administration, and compensation policy for non-executive employees; administer and monitor the Department's average grade control efforts including the vacancy review and maintenance review program; maintain liaison with the OPM on matters dealing with job evaluation and related program activities; formulate and issue policy guidance on matters peculiar to non-executive excepted positions; develop and issue a variety of special non-executive salary and wage schedules applicable to Department organizations throughout the country; provide technical assistance regarding overseas allowances and differentials; coordinate classification and qualification standards activities; and provide Departmental review on all non-executive job classification appeals. The Division shall provide policy guidance and staff assistance on all phases of the suggestion, awards, and recognition programs (except the incentive programs for executive personnel), provide

support for the Departmental Incentive Awards Board, and coordinate special Department-level recognition activities. The Division shall assist the Director in evaluation of the classification and compensation programs of the Department and of the operating units.

.05 The *Employment Programs Division* shall plan, develop, and oversee the Departmentwide implementation of programs for the recruitment, improvement, utilization, and fair treatment of the work force. Within the scope of its assigned functions, the Division shall provide guidance, advice, and technical assistance to all operating unit personnel programs; serve as the department's liaison with recruitment sources, outside organizations, OPM, and other Federal agencies; and serve as a catalyst for achievement of the Department's affirmative action goals. The Division shall assist the Director in evaluation of the employment programs of the Department and of the operating units, and shall be responsible for the following functions:

a. Recruitment, staffing, employee utilization and promotion, reduction in force, priority placement programs, and examining as delegated by OPM;

b. Special employment programs as assigned (e.g., student and summer employment), including the special funding and reporting requirements of these programs;

c. Performance appraisal (except for executive personnel); and

d. Employee relations, conduct and discipline, grievances, leave and hours of duty, and employee benefits and services (i.e., retirement, life and health insurance, injury compensation, and assistance to troubled or unproductive employees).

Elsa A. Porter,

Assistant Secretary for Administration.

[FR Doc. 81-2377 Filed 1-22-81; 8:45 am]

BILLING CODE 3510-17-M

[Dept. Organization Order 21-3]

Office of Regulatory Policy; Statement of Organization, Functions and Delegation of Authority

This order effective January 7, 1981, amends the material appearing at 45 FR 55798 of August 21, 1980.

Department Organization Order 21-3, dated July 29, 1980, is hereby amended as shown below. The purpose of this amendment is to assign to the Office of Regulatory Policy the responsibility for providing reports under Section 6 of the Federal Water Pollution Control Act Amendments of 1972.

In *Section 3, functions,* a new paragraph 3.m. is added to read as follows:

"m. Prepare a report from the Secretary of Commerce to the President and to the Congress on the effects of water pollution on international trade, as directed by Section 6 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 816; 33 U.S.C. 1251 nt.)."

Elsa A. Porter,

Assistant Secretary for Administration.

[FR Doc. 81-2378 Filed 1-22-81; 8:45 am]

BILLING CODE 3510-17-M

DEPARTMENT OF DEFENSE

Department of the Air Force

USAF Scientific Advisory Board; Meeting

January 9, 1981.

The USAF Scientific Advisory Board Ad Hoc Committee on Traveling Wave Tube Amplifier will meet on February 11 and 12, 1981 at the Space Division of Air Force Systems Command, Los Angeles, California, from 9:00 a.m. to 4:30 p.m. each day. The purpose of this meeting is to review the Traveling Wave Tube Amplifier's reliability.

The meeting concerns matters listed in Section 552b(c) of Title 5, United States Code, specifically subparagraph (4) thereof, and accordingly will be closed to the public.

For further information contact the Scientific Advisory Board Secretariat at (202) 697-4811.

Carol M. Rose,

Air Force Federal Register Liaison Officer.

[FR Doc. 81-2416 Filed 1-22-81; 8:45 am]

BILLING CODE 3910-01-M

Corps of Engineers, Department of the Army

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for Water Resources Development of the Upper Cumberland River at Pineville, Bell County, Kentucky

AGENCY: U.S. Army, Corps of Engineers, Nashville District.

ACTION: Notice of Intent to prepare a Draft Environmental Impact Statement (DEIS) for Water Resources Development of the Upper Cumberland River at Pineville, Bell County, Kentucky.

SUMMARY: Section 202 of the Energy and Water Development Appropriation Act of 1981, 1 October 1980, authorized and directed the Secretary of the Army, acting through the Chief of Engineers, to design and construct flood control measures at or in the vicinity of Pineville, Kentucky, and other flood-damaged localities and their environs on the Cumberland River.

Two alternative plans to provide standard project flood protection at Pineville/Wallsend will be pursued in Section 202 post-authorization planning studies. These are providing a new floodwall/levee system and combining a channel enlargement plan with a new floodwall/levee system.

The floodwall/levee system woud be about 25 feet high at Pine Street Bridge. This is an increase of about 15 feet above the height of the present system and includes three feet of free board. The channel enlargement would be contained within the maximum limits of RM 657, upstream of Pineville, downstream to RM 648.5, the Bell-Knox County line. Nominal bottom width would be 200 feet; however, the bottom cut would be benched to maintain low flows within the existing normal low flow channel. The channel length and cross section be optimized in terms of flood reduction, costs, and environmental impacts. With the channel enlargement plan, a corresponding reduction in floodwall/levee height would be possible, with a resulting possible height of about 20 feet. The channel enlargement plan would also provide some degree of protection to the unprotected areas as well as lowering the height of the floodwall/levee system.

Other features of these alternatives to be considered are: a combination four-lane highway-levee plan and minimal nonstructural plans for homes and other structures outside the existing levee.

SCOPING PROCESS. The public is invited to submit written comments within 30 days of this notice to aid in determining the issues to be covered in the Draft Environmental Impact Statement (DEIS). Input from concerned Federal, State and local agencies will be solicited by letter.

The Corps of Engineers has contracted a biological inventory which will provide baseline data for the DEIS. The following is a list of significant issues which will be analyzed and addressed in the DEIS:

1. Effects on water quality (including turbidity, impacts on water supply and toxic materials).
2. Effects on recreation.
3. Social, economic impacts.
4. Effects on cultural resources.
5. Effects on aquatic habitats (including changes in substrate composition, bottom geometry, loss of associate canopy cover and sedimentation).

6. Effects on benthic and vital plankton populations.
7. Effects on management of floodplains.
8. Effects on prime and unique farmlands.
9. Effects on terrestrial habitat.
10. Effects on fish and wildlife.
11. Effects on endangered species.
12. Effects of discharge of fill material below ordinary high water under Section 404 of the Clean Water Act of 1977.

Inquiry will be made by the Corps of Engineers of the U.S. Fish and Wildlife Service (USFWS) concerning the presence of Federally-proposed or listed threatened or endangered species. If the presence of such species is possible, consultation procedures will be initiated in compliance with Section 7 of the Endangered Species Act of 1973 as amended in 1978. Further coordination will be conducted with USFWS and the Kentucky Department of Fish and Wildlife under the Fish and Wildlife Coordination Act (48 Stat. 401 as amended; 16 U.S.C. 661 et seq.). The Soil Conservation Service will be requested to determine the presence of any prime and unique farmland within the proposed project area. Under provisions of Section 5(a) of the Wild and Scenic Rivers Act in coordination with the Heritage Conservation and Recreation Service will be conducted. The Service will identify any river segment having sectional potential for the designation of a Wild and Scenic River.

Copies of the DEIS will be transmitted to State and area-wide clearinghouses for comments in accordance with ER 200–2–2 and 33 CFR 209.120(i)(1)(iv). Also in accordance with ER 200–2–2, the draft and final EIS will be filed with the Environmental Protection Agency.

Upon completion of the cultural resources reconnaissance, two copies of the report will be forwarded to the Director, Office of Archeology and Historic Preservation, HCRS, with a request for review and comment in accordance with 33 CFR 305 (ER 1105–2–406). Two copies also will be furnished to the Kentucky State Historic Preservation Officer, State Archeologist, and State Historian for review and comment.

SCOPING MEETING: No scoping meeting will be conducted unless comments indicate that one is needed to obtain adequate input from the public and from other agencies. Scoping will be undertaken by mail.

ESTIMATED COMPLETION: The DEIS should be made available to the public May 1981.

QUESTIONS: The District point of contact for questions concerning the proposed action DEIS is MS. Vechere M. Vaughn, (615) 251–5028 or FTS 852–5027. All correspondence should be sent to the following address: U.S. Army Engineer District, Nashville, Environmental Analysis Section, P.O. Box 1070, Nashville, TN 37202.

Date: January 12, 1981.

Lee W. Tucker,

Colonel, Corps of Engineers, District Engineer.

[FR Doc. 81–2417 Filed 1–22–81; 8:45 am]

BILLING CODE 3710–GF–M

Department of the Navy

Chief of Naval Operations, Executive Panel Advisory Committee; Meeting Cancellation

Notice is hereby given that the meeting of the Strategy Sub-Panel of the Chief of Naval Operations (CNO) Executive Panel Advisory Committee scheduled for January 26–27, 1981, notice of which appeared at 46 FR 2376, has been cancelled.

P. B. Walker,

Captain, JAGC, U.S. Navy, Alternate Federal Register Liaison Officer.

January 19, 1981.

[FR Doc. 81–2427 Filed 1–22–81; 8:45 am]

BILLING CODE 3810–71–M

Office of the Secretary

Department of Defense Wage Committee; Closed Meetings

Pursuant to the provisions of section 10 of Public Law 92–463, the Federal Advisory Committee Act, effective January 5, 1973, notice is hereby given that a meeting of the Department of Defense Wage Committee will be held on Tuesday, March 3, 1981; Tuesday, March 10, 1981; Tuesday, March 17, 1981; Tuesday, March 24, 1981; and Tuesday, March 31, 1981 at 10:00 a.m. in Room 3D–325, The Pentagon, Washington, D.C.

The Committee's primary responsiblity is to consider and submit recommendations to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) concerning all matters involved in the development and authorization of wage schedules for Federal prevailing rate employees pursuant to Public Law 92–392. At this meeting, the Committee will consider wage survey specifications, wage survey data, local wage survey committee reports and recommendations, and wage schedules derived therefrom.

Under the provisions of section 10(d) of Public Law 92–463, the Federal Advisory Committee Act, meetings may be closed to the public when they are "concerned with matters listed in section 552b. of Title 5, United States Code." Two of the matters so listed are those "related solely to the internal personnel rules and practices of an agency," (5 U.S.C. 552b. (c)(2)), and those involving "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552b. (c)(4)).

Accordingly, the Deputy Assistant Secretary of Defense (Civilian Personnel Policy) hereby determines that all portions of the meeting will be closed to the public because the matters considered are related to the internal rules and practices of the Department of Defense (5 U.S.C. 552b. (c)(2)), and the detailed wage date considered by the Committee during its meetings have been obtained from officials of private establishments with a guarantee that the data will be held in confidence (5 U.S.C. 552b. (c)(4)).

However, members of the public who may wish to do so are invited to submit material in writing to the Chairman concerning matters believed to be deserving of the Committee's attention. Additional information concerning this meeting may be obtained by writing the Chairman, Department of Defense Wage Committee, Room 3D–281, The Pentagon, Washington, D.C.

M. S. Healy,

OSD Federal Register Liaison Officer, Washington Headquarters Services, Department of Defense.

January 16, 1981.

[FR Doc. 81–2373 Filed 1–22–81; 8:45 am]

BILLING CODE 3810–70–M

DEPARTMENT OF EDUCATION

Education Appeal Board Proceeding

AGENCY: Department of Education.

ACTION: Notice of Education Appeal Board Proceeding scheduled for January 30, 1981.

SUMMARY: This notice advises readers that the Education Appeal Board has scheduled a hearing in the *Appeal of the State of Kentucky*, Docket No. 1–(31)–77, for January 30, 1981.

FOR FURTHER INFORMATION CONTACT: Dr. David S. Pollen, Chairman, Education Appeal Board, 400 Maryland Avenue, S.W. (Room 2141, FOB–6), Washington, D.C. 20202. Telephone (202) 245–7835.

SUPPLEMENTARY INFORMATION: Under the Education Amendments of 1978 (20 U.S.C. 1234), the Education Appeal Board has authority to conduct (1) audit appeal proceedings, (2) withholding, termination, and cease and desist proceedings initiated by the Secretary of

Education, and (3) other proceedings designated by the Secretary as being within the jurisdiction of the Board. For information concerning the Board and its procedures, see the Board's final regulations as published in the **Federal Register** on April 3, 1980 (45 CFR 22634).

Hearing

The Education Appeal Board has scheduled an oral argument in the *Appeal of the State of Kentucky*, Docket No. 1–(31)–77. The hearing is scheduled for January 30, 1981, in Room 3000, 400 Maryland Avenue, SW., Washington, D.C. The hearing will begin at 10:00 a.m.

Kentucky requested the opportunity to present an oral argument in its appeal of a final audit determination made by the Deputy Commissioner for Elementary and Secondary Education (now the Assistant Secretary for Elementary and Secondary Education). The Education Appeal Board Panel granted the State's request.

The final audit determination contested by Kentucky found that the State improper used Federal funds under Title I of the Elementary and Secondary Education Act of 1965, as amended, to support readiness classes in fifty local educational agencies during fiscal year 1974. These expenditures were found by the Deputy Commissioner to result in a decrease in the use of State and local funding for the education of educationally deprived children residing in Title I project areas. This decrease in State and local funding was found to be a supplanting of State or local support with Federal funds in violation of the requirements of Title I. The Department of Education requested a refund from the State of $704,237.

(20 U.S.C. 1234)

(Catalog of Federal Domestic Assistance Number not applicable)

Dated: Janauary 14, 1981.

David S. Pollen,

Chairman, Education Appeal Board.

[FR Doc. 81-2400 Filed 1-22-81; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Economic Regulatory Administration

McClure's Service Station; Action Taken on Consent Order

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of action taken and an opportunity for comment on Consent Order.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) announces action taken to execute a Consent Order and provides an opportunity for comment on potential claims against the refunds deposited in an escrow account established pursuant to the Consent Order.

DATE: Effective date November 3, 1980.

COMMENTS BY: February 23, 1981.

ADDRESS: Send comments to: Edward F. Momorella, District Manager of Enforcement, Northeast District, Department of Energy, 1421 Cherry Street, Philadelphia, Pennsylvania 19102.

FOR FURTHER INFORMATION CONTACT: Joseph B. Connolly, Audit Director, Office of Enforcement, Suite 260, 7 Parkway Center, Pittsburgh, Pennsylvania 15220.

SUPPLEMENTARY INFORMATION: On November 3, 1980, the Office of Enforcement of the ERA executed a Consent Order with McClure's Service Station of Salisbury, Pennsylvania. Under 10 CFR 205.199J(b), a Consent Order which involves a sum of less than $500,000 in the aggregate, excluding penalties and interest, becomes effective upon its execution.

I. The Consent Order

McClure's Service Station (McClure), with its home office located in Salisbury, Pennsylvania, is a firm engaged in the marketing of gasoline, and is subject to the Mandatory Petroleum Price and Allocation Regulations at 10 CFR Part 212. To resolve certain civil actions which could be brought by the Office of Enforcement of the Economic Regulatory Administration as a result of its audit of McClure, the Office of Enforcement of the ERA, and McClure have entered into a Consent Order, the significant terms of which are as follows:

1. The total alleged overcharge during the period April 1, 1979 through September 30, 1980 on all sales of gasoline was $7,702.13.

2. The Office of Enforcement alleged that McClure violated the gasoline price regulations contained in 10 CFR 212.93(a)(1) of the Mandatory Petroleum Price Regulations by exceeding its "maximum legal selling price" for gasoline sold to end-user customers and retail station reseller customers.

3. McClure agreed to refund the total alleged overcharge, plus interest, according to the terms described below.

4. In this Consent Order, McClure agreed to refund, in full settlement of any civil liability with respect to actions which might be brought by the Office of Enforcement, ERA, arising out of the transactions between McClure and its end-user customers during the audit period the sum of $5,410.36 plus interest. This refund will be accomplished initially the issuance by October 31, 1980 of checks to the end-user customers overcharged, calculated consistently with the DOE calculation supplied to McClures. For those end-user customers who are not so repaid by February 1, 1981 McClure agrees to refund by certified check payable to the United States Department of Energy with delivery to the Assistant Administrator for Enforcement, Economic Regulatory Administration, Room 5302, 2000 M Street, N.W., Washington, D.C. 20461, Attention: Refund Coordinator.

5. McClure agreed to refund in full settlement of any civil liability with respect to actions which might be brought by the Office of Enforcement, ERA, arising out of the transactions between McClure and its retail station reseller customers during the audit period the sum of $2,683.66 including interest. McClure agreed to refund by October 31, 1980 by certified check payable to the United States Department of Energy with delivery to the Assistant Administrator of Enforcement.

6. With respect to McClure's payment to the Assistant Administrator for Enforcement under the procedures described above with respect to McClure's retail station reseller customers and end-user customers who have not been repaid by check by February 1, 1981, these funds will remain in a suitable account pending the determination of their proper disposition.

7. McClure agreed to pay a civil penalty of $1,200.00.

8. The provisions of Section 205.199J are applicable to the Consent Order.

Submission of Written Comments

A. *Potential Claimants:* Because of the procedure for refund described above, interested persons who believe that they have a claim to all or a portion of the refund amount held by DOE should provide written notification of the claim to the ERA at this time. Proof of claim is not now being required. Written notice to the ERA at this time is requested primarily for the purpose of identifying potential claims to the refund amount. After potential claims are identified, procedures for proof of claims may be established. Failure to provide written notification of a potential claim within the comment period for this Notice may result in the DOE irrevocably disbursing the funds to other claimants or for the general public interest.

B. *Other Comments:* The ERA invites interested persons to comment on the terms, conditions, or procedural aspects

of this Consent Order. Such comments will be considered solely in connection with DOE's right to rescind or modify the Consent Order upon the discovery of new evidence or upon petition by McClure.

You should send your comments to Edward F. Momorella, District Manager of Enforcement, Northeast District, Department of Energy, 1421 Cherry Street, Philadelphia, Pennsylvania 19102. You may obtain a free copy of this Consent Order by writing to the same address or by calling (215) 597–2633. You should identify your comments on the outside of the envelope and on the documents you submit with the designation, "Comments on McClure's Service Station Consent Order". We will consider all comments which are pertinent as described above and which we receive by 4:30 p.m., Eastern Standard Time, on February 23, 1981. You should identify any information or data which, in your opinion, is confidential and submit it in accordance with the procedures in 10 CFR 205.9(f).

Issued in Philadelphia, Pa.; on the 22, day of December 1980.

Edward F. Momorella,

District Manager, Northeast District Office of Enforcement.

[FR Doc. 81-2365 Filed 1-22-81; 8:45 am]

BILLING CODE 6450-01-M

[Docket No. ERA-FC-80-030; ERA Case No. 51998-2322-07-22]

Nevada Power Co.; Availability of Tentative Staff Analysis

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Notice of Availability of Tentative Staff Analysis.

SUMMARY: On March 27, 1980, Nevada Power Company (Nevada Power) petitioned the Economic Regulatory Administration (ERA) of the Department of Energy (DOE) for a permanent peakload powerplant exemption from the provisions of the Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8301 et seq. (FUA or the Act) which prohibit the use of petroleum or natural gas in new powerplants.

Nevada Power plans to install an 86,566 KW natural gas/oil-fired combustion turbine unit to be known as Clark Unit No. 7 in Clark County, Nevada. Nevada Power certifies that the unit will be operated solely as a peakload powerplant and will be operated only to meet peakload demand for the life of the plant.

After the submissions of additional information by Nevada Power on May 12, 1980, and August 4, 1980, ERA accepted the petition pursuant to 10 CFR 501.3 and 501.63 on October 14, 1980, and published notice of its acceptance in the **Federal Register** on October 21, 1980 (45 FR 65944). Publication of the Notice of Acceptance commenced a 45-day public comment period pursuant to section 701 (c) and (d) of FUA, and 10 CFR 501.31 and 501.33, during which time interested persons were given an opportunity to file comments and to request a public hearing on the petition. The comment period ended December 5, 1980. No comments were submitted. No hearing was requested.

ERA's staff has reviewed the information presently contained in the record of this proceeding. A Tentative Staff Analysis recommends that ERA issue an order which would grant a permanent peakload powerplant exemption to Nevada Power. A copy of the Tentative Staff Analysis is available from the Office of Public Information at the address listed below.

DATES: Written comments on the Tentative Staff Analysis and requests for a hearing are due on or before February 6, 1981.

ADDRESSES: Fifteen copies of written comments, and any request for a public hearing shall be submitted to: Department of Energy, Case Control Unit, Box 4629, Room 3214, 2000 M Street NW., Washington, D.C. 20461. Docket Number ERA–FC–80–030 should be printed clearly on the outside of the envelope and the document contained therein.

FOR FURTHER INFORMATION CONTACT:

Jack C. Vandenberg, Office of Public Information, Economic Regulatory Administration, Department of Energy, 2000 M Street, NW., Room B–110, Washington, D.C. 20461, Phone (202) 653–4055.

Louis T. Krezanosky, New Powerplants Branch, Department of Energy, Room 3012B, 2000 M Street, NW., Washington, D.C. 20461, Phone (202) 653–4208.

Marilyn Ross, Office of General Counsel, Department of Energy, 1000 Independence Avenue, SW., Room 6B–178, Washington, D.C. 20585, Phone (202) 252–2967.

SUPPLEMENTARY INFORMATION: Nevada Power Company (Nevada Power) plans to install an 86,566 KW natural gas/oil-fired combustion turbine unit to be called Clark Unit No. 7 at its Clark Station generating facility in Clark County, Nevada. Based upon estimates by Nevada Power, the proposed unit is expected to consume the energy equivalent of approximately 282,000 barrels of oil per year (772 bbl/day). Clark Unit No. 7 is scheduled for commercial operation on June 30, 1981.

FUA prohibits the use of natural gas or petroleum in certain new major fuel burning installations and powerplants unless an exemption for such use has been granted.

Nevada Power submitted a sworn statement with the petition signed by Mr. J. H. Zornes, Vice President, Generation, of Nevada Power as required by 10 CFR 503.41(b)(1). In his statement, Mr. Zornes certifies that Clark Unit No. 7 will be operated solely as a peakload powerplant and will be operated only to meet peakload demand for the life of the plant. He also certified that the maximum design capacity of the unit is 86,566 KW and that the maximum generation that the unit will be allowed during any 12-month period is the design capacity times 1,500 hours or 129,849,000 Kwh.

Under the requirements of 10 CFR 503.41(b)(1)(ii), if a petitioner proposes to use natural gas or to construct a powerplant to use natural gas in lieu of an alternate fuel as a primary energy source, he must obtain a certification from the Administrator of the Environmental Protection Agency or the director of the appropriate state air pollution control agency. This certification must state that the use by the powerplant of any available alternate fuel as a primary energy source will cause or contribute to a concentration, in an air quality control region or any area within the region, of a pollutant for which any national air quality standard is or would be exceeded. However, since ERA has determined that there are no presently available alternate fuels which may be used in the proposed powerplant, no such certification can be made. The certification requirement is therefore waived with respect to this petition.

Tentative Staff Analysis

On the basis of Nevada Power's sworn statements and information provided, the staff recommends that ERA should grant the requested peakload powerplant exemption.

Based upon the information provided by Nevada Power, ERA conducted an analysis which was reviewed by the DOE's Office of Environment, in consultation with the Office of General Counsel, and DOE has concluded that the granting of this exemption is not a major Federal action significantly affecting the quality of the human environment, within the meaning of the National Environmental Policy Act of 1969. Accordingly, neither an environmental impact statement nor an environmental assessment is required.

Terms and Conditions

Section 214(a) of the Act gives ERA the authority to include terms and conditions in any order granting an exemption. The staff of ERA has tentatively determined and recommends that any order which would grant the requested peakload powerplant exemption should pursuant to section 214 of the Act, be on the following conditions:

A. Nevada Power shall not produce more than 129,849,000 Kwh during any 12-month period with Clark Unit No. 7. Nevada Power shall provide annual estimates of the expected periods (hours during specific months) of operation of Clark Unit No. 7 for peakload purposes (e.g. 8:00–10:00 a.m. and 3:00–6:00 p.m. during the June–September period, etc.). Estimates of the hours in which Nevada Power expects to operate Clark Unit No. 7 during the first 12-month period shall be furnished within 30 days from the date of this order.

B. Nevada Power shall comply with the reporting requirements set forth at 10 CFR 503.41(d).

C. The quality of any petroleum to be burned in the unit will be the lowest grade available which is technically feasible and capable of being burned consistent with applicable environmental requirements.

D. Nevada Power shall comply with any terms and conditions which may be imposed pursuant to the environmental requirements set forth at 10 CFR 503.15(b).

Issued in Washington, D.C. on January 14, 1981.

Robert L. Davies,

Assistant Administrator, Office of Fuels Conversion, Economic Regulatory Administration.

[FR Doc. 81-2366 Filed 1-22-81; 8:45 am]

BILLING CODE 6450-01-M

Office of Conservation and Solar Energy

[Docket Number CAS-RM-81-404]

Inquiry and Public Meeting Concerning the Comprehensive Program Management Plan To Implement the Wind Energy Systems Act of 1980

AGENCY: Department of Energy, Office of Conservation and Solar Energy.

ACTION: Notice of Inquiry and Public Meeting.

SUMMARY: The Wind Energy Systems Division of the Department of Energy's Office of Conservation and Solar Energy invites the public to make suggestions for formulating a Comprehensive Program Management Plan (CPMP) for the research, development, demonstration, and technology application activities to implement the purposes of the Wind Energy Systems Act of 1980 (Pub. L. 96–345). The CPMP must be submitted to Congress by June 8, 1981.

DATES: Public meetings will be held from 9:00 AM to 5:30 PM as follows:

Meeting and date	Place
Small wind energy systems:	
Feb. 9, 1981	John F. Kennedy Federal Bldg., Rm. 2003, Government Center, Boston, MA.
Feb. 12, 1981	Post Office Auditorium, Rm. 269, 1823 Stout Street, Denver, CO.
Large wind energy systems:	
Feb. 10, 1981	John F. Kennedy Federal Bldg., Rm. 2003, Government Center, Boston, MA.
Feb. 13, 1981	Post Office Auditorium, Rm. 269, 1823 Stout Stroet, Denver, CO.

Written comments on the development of the CPMP or any issues under consideration will be accepted. Comments are requested to be submitted by February 23, 1981, to allow sufficient time for full consideration in the formulation of the plan. DOE will continue to accept comments until March 15, 1981.

ADDRESSE: Written comments should be addressed to Carol A. Snipes, U.S. Department of Energy, Hearings Procedures, Office of Conservation and Solar Energy, Mail Stop 6B–025, Docket Number CAS–RM–81–404, Washington, D.C. 20585. Written comments will also be accepted at the public meeting.

Envelopes and the enclosed comments should be clearly marked with the words: Comments on Wind Energy Systems Program Plan, Docket Number CAS–RM–81–404.

FOR FURTHER INFORMATION REGARDING THE MEETING CONTACT:

Lana Shanbar, (617) 223–5287, DOE Region I Office, Boston, MA.

Dale Eriksen, (303) 234–2420, DOE Region VIII Office, Denver, CO.

SUPPLEMENTARY INFORMATION: On September 8, 1980, the President signed the Wind Energy Systems Act of 1980 (Pub. L. 96–345). Section 2(b) provides as follows:

(1) to reduce the average cost of electricity produced by installed wind energy systems, by the end of fiscal year 1988, to a level competitive with conventional energy sources;

(2) to reach a total megawatt capacity in the United States from wind energy systems by the end of fiscal year 1988, of at least eight hundred megawatts of which at least one hundred megawatts are provided by small wind energy systems; and

(3) to accelerate the growth of a commercially viable and competitive industry to make wind energy systems available to the general public as an option in order to reduce national consumption of fossil fuel.

A CPMP for activities to satisfy these objectives must be developed and submitted to Congress by June 8, 1981. The CPMP is required to include:

(1) a five-year program for small wind energy systems (less than 100 kilowatt capacity);

(2) an eight-year program for large wind energy systems (greater than 100 kilowatt capacity); and

(3) a three-year program for wind resource assessment.

Elements of these programs will include anticipated research, development, demonstration, and technology applications objectives; program elements, management structure, and activities, including regional aspects and field responsibilities; program strategies, technology application plans, and milestone goals; significant economic, environmental, and societal effects; and relative financial contributions of Federal and non-Federal participants in the programs.

The purpose of this notice is to solicit oral and written suggestions and comments to assist DOE in the drafting of the CPMP. The public is especially invited to express views on the following subjects:

- Procurement strategy for direct Federal purchase of small wind energy systems (less than 100 kilowatts);
- Effective use of Federal financial assistance to promote purchase and installation of wind energy systems;
- Standards, performance criteria, and test procedures;
- Warranties; and
- Degree of required monitoring and instrumentation.

Written Comment Procedure

Interested persons are invited to submit written suggestions to the address indicated in this notice. Comments should be labeled both on the envelope and the documents as pertaining to the "Wind Energy Systems Meetings, Docket Number CAS–RM–81–404". Ten copies are requested to be submitted, but this is not a requirement for submission.

Any persons submitting information or data which they believe to be confidential and exempt by law from public disclosure, should submit one complete copy, and ten copies from which the information believed to be confidential has been deleted. DOE will honor requests for confidential

treatment of information to the extent allowed by law.

Meeting Procedure

Because of the importance of this program management plan, DOE wishes to achieve the maximum level of public participation possible. The Department encourages attendance and participation by individuals and representatives of organizations, consumer groups, manufacturers and industry, and other government agencies at the meeting.

DOE will summarize current thinking on the CPMP and describe the pros and cons of issues under consideration. DOE will then accept oral comments limited to a time which will be set in light of the number of persons who request to speak. Persons wishing to speak will be asked to so indicate upon registration and after the DOE presentation.

Tentative Program

9:00–9:15 AM—Introduction and meeting objectives.
9:15–9:30 AM—Overview of the Wind Energy Systems Act of 1980: Purpose and requirements.
9:30–10:00 AM—Summary of the Comprehensive Program Management Plan.
10:00–10:30 AM—Summary of issues under consideration.
10:30–10:45 AM—Break.
10:45–11:15 AM—Summary of issues under consideration.
11:15–12:00 PM—Public comment.
12:00–1:30 M—Lunch.
1:30–5:30 PM—Public comment.

Issued in Washington, D.C. January 19, 1981.

T. E. Stelson,

Assistant Secretary, Conservation and Solar Energy.

[FR Doc. 81-2570 Filed 1-22-81; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[WH-FRL 1724-4]

Change in the Development of the 1990 Construction Grants Strategy

AGENCY: Environmental Protection Agency.

ACTION: Notice of meeting.

SUMMARY: On January 5, 1981, the Environmental Protection Agency (EPA) announced public hearings on the Preliminary Draft 1990 Construction Grants Strategy in the **Federal Register.** (46–FR–1025). At the same time EPA stated that the Preliminary Draft Strategy would be published in the **Federal Register** no later than January 23, 1981. Many people have already responded that the schedule proposed by EPA for public comment was inadequate to allow for thorough analysis and discussion of the issues. In addition, the document currently being drafted is a first attempt at preparing a consolidated draft. Therefore, EPA is making the following changes in the schedule to provide more time for public comment:

—A preliminary Draft Strategy will be mailed to a list of interested parties during the last week of January 1981. It is also available upon request.

—Rather than five public hearings, a series of informal workshops will be held around the country to discuss the Preliminary Draft Strategy. The dates will be changed to give more time for public comment. (See new schedule below.)

—On the basis of this public review, EPA will then publish a proposed Strategy in the **Federal Register** later in 1981. The public will then have opportunity to comment on the Proposed Draft developed under the new administration. At the conclusion of this comment period, the Strategy will be finalized.

It is important to note that the Preliminary Draft Strategy which will be available for public comment the last week in January does not represent EPA policy. Preliminary proposals in the Draft Strategy have been developed by EPA staff, based on substantial involvement by many individuals and interest groups.

During the next several weeks EPA will be attempting to resolve many of the issues dealt with by the Draft 1990 Strategy. The Preliminary Draft is being made available to the public, as part of the Agency's continuing effort to assure that the public has a role in helping to shape those decisions.

ADDRESSES: Send written comment to Ms. Merna Hurd, Associate Assistant Administrator for Water and Waste Management, WH–556, Environmental Protection Agency, Washington, D.C. 20460, by March 31, 1981. Expressions of interest in attending one of the workshops should be submitted to Ms. Hurd by March 2, 1981.

FOR FURTHER INFORMATION CONTACT: For more information on the workshops and to receive a copy of the Preliminary Draft Strategy, contact Francine Zucker, Office of Water Programs, WH–554, Environmental Protection Agency, Washington, D.C. 20460, (202) 755–6026.

New Schedule

March 10

San Francisco, California, Sir Francis Drake Hotel, Powell and Sutter Streets, 8:30 a.m.—6:00 p.m., EPA local information number (415) 556–8023.

Boston, Massachusetts, Boston Park Plaza, 64 Arlington Street, 8:30 a.m.–6:00 p.m., EPA local information number (617) 223–5779.

March 12

Chicago, Illinois, Palmer House, 17 East Monroe, 8:30 a.m.–6:00 p.m., EPA local information number (312) 886–6585.

New York, New York, New York Sheraton Hotel, 870 7th Avenue, 8:30 a.m.–6:00 p.m., EPA local information number (212) 264–2515.

March 17

Atlanta, Georgia, Atlanta Hilton, 255 Courtland Street, 8:30 a.m.–6:00 p.m., EPA local information number (404) 257–3004.

March 20

Springfield, Virginia, Springfield Hilton, 6550 Loisdale Road, 8:30 a.m.–6:00 p.m., EPA local information number (215) 597–8307 or (202) 755–6026.

Dated: January 16, 1981.

Eckardt C. Beck,

Assistant Administrator, Office of Water and Waste Management.

[FR Doc. 81-2384 Filed 1-22-81; 8:45 am]

BILLING CODE 6560-29-M

Availability of Environmental Impact Statements

[ER-FRL-1725-2]

AGENCY: Office of Environmental 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 12, 1981 to Janaury 16, 1981.

REVIEW PERIODS: The 45-day review period for draft EIS'S listed in this notice is calculated from January 23, 1981 and will end on March 9, 1981. The 30-day review period for final EIS's as calculated from January 23, 1981 will end on February 23, 1981.

EIS AVAILABILITY: To obtain a copy of an EIS listed in this noice 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 12, 1981 to January 16, 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 EISS' 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 19, 1981

William N. Hedeman, Jr.,

Director, Office of Environmental Review (A–104)

DEPARTMENT OF AGRICULTURE

Contact: Mr. Barry Flamm, Director, Office of Environmental Quality, Office of the Secretary, U.S. Department of Agriculture, Room 412–A Admin. Building, Washington, D.C. 20250, (202) 447–3965.

Forest Service

Draft

TOWER MOUNTAIN AREA, HURON-MANISTEE NATIONAL FOREST: Wexford County, Michigan, January 14: Proposed is a Land Management Plan for the Tower Mountain Area of the Huron-Manistee National Forest in Wexford County, Michigan. The preferred alternative would allocate this area for ski use and involve management requirements deferring development until such time it is deemed necessary. The other alternatives considered are: (1) Dispersed recreation, (2) natural environment, and (3) traditional forest management. (EIS Order No. 810030.)

Soil Conservation Service

Draft

BELL CITY WATERSHED PROTECTION: Calcasieu, Cameron, and Jefferson Davis Counties in Louisiana, January 13: Proposed is a multipurpose project for the Bell City Watershed in the parishes of Calcasieu, Cameron and Jefferson Davis, Louisiana. The planned works of improvement include conservation land treatment on 36,800 acres, 76 miles of channels and appurtenant structures, four water control structures, setback and rebuilding of the west levee on the Lacassine National Wildlife Refuge Pool, and improvement of boat and parking facilities. Channel work will involve the clearing of 36 miles and enlargement of 67 miles of existing channels. The cooperating agency is the State of Louisiana. (EIS Order No. 810027.)

U.S. Army Corps of Engineers

Contact: Mr. Richard Makinen, Office of the Chief of Engineers, 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

HARBOR BEACH MAINTENANCE DREDGING/DISPOSAL, PERMIT: Huron County, Michigan, January 16: Proposed is the issuance of a permit for maintenance dredging in Lake Huron, offshore of the Harbor Beach Power Plant, and the disposal of dredge materials in a low-lying wetland area inland from Lake Huron, in Huron County, Michigan. The alternatives considered are: (1) Open water disposal, (2) use of various diked disposal sites, (3) artificial habitat creation, (4) placement of dredged material on agricultural land, (5) various dredging methods, and (6) no action. (Detroit district) (EIS Order No. 810034).

ARTHUR KILL FOSSIL FUELED POWER PLANT, PERMIT: Richmond County, New York, January 12: Proposed is the issuance of a permit for the construction of a 700 MW fossil fueled power plant at the Arthur Kill near Travis on Staten Island, Richmond County, New York. In addition to no action two other location alternatives for plant construction are considered which are: (1) The quarry site in Dutchess County, and (2) the Athens site in Greene County. The cooperating agency is DOE. (New York district) (EIS Order No. 810023).

EXTENSION: The review period for the above EIS has been extended until March 16, 1981. (#810023)

Final

White River navigation, Batesville to Mississippi River: Several counties in Arkansas, January 16: Proposed is a navigation project for the White River from Batesville to the Mississippi River in the counties of Arkansas, White, Woodruff, Prairie, Monroe, Jackson, and Phillips, Arkansas. The navigation channel would have a depth of 9 feet available 95 percent of the time and bottom width of 300 feet. Dredging would be required at 154 locations along 56 miles of the 244 miles of the waterway. Channel stabilization measures would include: 36 stone dikes totaling 9,150 feet; and stone bank paving at 9 locations totaling 4.7 miles (Memphis District). Comments made by: EPA, DOI, USDA, DOT, DOC, AHP, State and local agencies. (EIS Order No. 810042.)

Department of Defense, Army

Contact: Col. Kenneth Halleran, Chief of the Environmental Office, Headquarters DAEN–ZCE, Office of the Assistant Chief of Engineers, Department of the Army, Room 1E676, Pentagon, Washington, D.C. 20310, (202) 694–4269.

Final

Fort Carson, training land acquisition: Las Animas and Pueblo Counties, Colorado, January 12: Proposed is the acquisition of land to be used for combat maneuver training at Fort Carson in Huerfano, Las Animas and Pueblo Counties, Colorado. Two sites are under consideration: (1) the Huerfano River parcel located southeast of pueblo, and (2) the Pinon Canyon parcel located along the Purgortoire River between Trinidad and La Junta. Land use management plans have been developed for both sites considering the following major elements: (1) training intensity, (2) time of use, (3) boundaries, (4) limited and restricted use areas, (5) cantonment areas, (6) road development, and (7) river crossings (Omaha District). Comments made by: AHP, USDA, HHS, HUD, DOI, DOT, State and local agencies, groups, individuals and businesses. (EIS Order No. 810041.)

Department of Defense, Air Force

Contact: L/C William Verkest, AFRCE–MX/DEV, Ballistic Missile Office, Box EIS, Norton Air Force Base, California 92409, (714) 382–4891.

Extension: MX Missile, Deployment Area, Selection, published FR December 31, 1980—review extended from April 1, 1981, to May 1, 1981. (No. 800986)

Department of Commerce

Contact: Dr. Robert T. Miki, Acting Deputy Assistant Secretary for Regulatory Policy, Room 7614, Department of Commerce, Washington, D.C. 20230, (202) 377–2482.

National Oceanic and Atmospheric Administration

Draft

Groundfish fishery FMP regulatory analysis: Gulf of Mexico regulatory, January 16: Proposed is the regulatory analysis of the Groundfish Fishery Management Plan for the Gulf of Mexico. Implementation would provide gear restrictions in the shrimp fishery to reduce bycatch of groundfish when such gear is proven to be effective and meets specified criteria. Nursery sanctuaries in State waters and habitat protection would be encouraged (EIS Order No. 810040).

Incidental take of Dall Porpoise: Pacific Ocean, January 16: Proposed is the allowance of the incidental take of Dall Porpoises within the Japanese salmon fishery in the North Pacific and Bering Sea. The alternatives examined are: (1) allow the incidental take of marine mammals, and (2) not allow take, thereby ending the Japanese salmon fishery by taking no action by June, 1981. If the take of marine mammals is allowed the options considered are: (1) granting of an incidental take permit, or (2) recommendation of legislative action to extend the existing permit exemption (EIS Order No. 810033).

Spiny lobster FMP regulatory analysis: Atlantic and Gulf of Mexico regulatory, January 16: Proposed is the regulatory analysis of the Spiny Lobster Fishery Management Plan in the South Atlantic and

the Gulf of Mexico. Management measures considered are: (1) size limits, (2) a closed season, (3) certain gear restriction, (4) measures to protect "shorts" and "berried" females and prevent poaching, and (5) a measure to encourage a mechanism to minimize conflicts (EIS Order No. 810039).

ENVIRONMENTAL PROTECTION AGENCY

Contact: Environmental Protection Agency Library (MD-35), Research Triangle Park, North Carolina 27711, (919) 541-2777.

Draft

SYNTHETIC ORGANIC CHEMICAL EMISSIONS, STANDARDS: Regulatory, January 12: Proposed are performance standards that would limit emissions of volatile organic compounds from new, modified, and reconstructed units in the synthetic organic chemicals manufacturing industry. The standards would reduce emissions from pumps, compressors, valves, safety/relief valves, sampling connections, and open-ended lines, fugitive emissions from affected facilities would be 200 gigagrams (GG)/yr under alternative 1 (no action) and 73, 62 and 26 GG/yr under alternatives 2, 3 and 4, respectively. (EPA-450/3-8033A) (EIS Order No. 810021).

EXTENSION: The review period for the above EIS has been extended until April 6, 1981. (No. 810021).

INDUSTRIAL SURFACE COATING—APPLIANCES, STANDARDS: Regulatory, January 12: Proposed are performance standards limiting emissions of VOC from new, modified and reconstructed appliance surface coating operations. Three regulatory alternatives are considered for prime coat operations and four for topcoat operations. The first two for both are: (1) State regulations only, and (2) no NSPS. The additional alternative for prime coat operations would limit emissions to those of waterborne prime coats applied by electrodeposition. For topcoat operations the alternatives are: (1) 30% reduction through use of various levels of solids coatings and/or incineration, and (2) emission elimination by use of powder coatings. (EPA-450/3-80-037A) (EIS Order No. 810022).

Draft

BENZENE FUGITIVE EMISSION, STANDARDS: Regulatory, January 14: Proposed are emission standards which would limit fugitive emissions of benzene from existing and new petroleum refining and chemical manufacturing units. Six regulatory alternatives are considered which employ various combinations of the available control techniques in the affected industry which reflect increasing levels of emission reduction and range from requiring no new controls to eliminating all benzene fugitive emissions. (EPA-450/3-80-032A) (EIS Order No. 810028).

EXTENSION: The review period for the above EIS has been extended until June 8, 1981. (810028).

PERCHLOROETHYLENE DRY CLEANER EMMISION STANDARDS: Regulatory, January 14: Proposed are performance standards for tetrachloroethylene, more commonly known as perchloroethylene (PERC) dry cleaners. PERC dry cleaners are generally divided into three categories: coin-operated, commercial and industrial. Two regulatory alternatives, each of which vary according to industry category are considered. (EPA-450/3-79-029A) (EIS Order No. 810029).

Final

Contact: Mr. Eugene Wojcik, Region V, Environmental Protection Agency, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 353-2157.

GREEN LAKE WASTE TREATMENT SYSTEMS, CASE STUDY NO. 2: Benzie County, Michigan, January 16: Proposed is a waste treatment system for the Crystal Lake area in Benzie County, Michigan. It is recommended that the existing wastewater treatment plants in the area should be replaced, but that complete abandonment of on-site systems is unjustified. This action would involve: (1) contruction of new sewers and a new rotating biological contractor treatment plant; (2) sewer system evaluation survey and rehabilitation of some existing sewers; (3) design and implementation of a small waste flow district; (4) site-specific analyses of existing on-site systems; (5) repair and replacement of on-site systems; and (6) cluster systems or other off-site treatment in some sections. Comments made by: DOI, DOT, State and local agencies, individuals and businesses. (EIS Order No. 810036).

Final

Contact: Ms. Lisa Corbin, Region X Environmental Protection Agency, 1200 6th Avenue, Seattle, Washington 98101 (206) 442-1285.

BEND CITY SEWAGE EFFLUENT DISPOSAL: Deschutes County, Oregon, January 13: Proposed is the disposal of sewage effluents from the city of Bend's wastewater treatment plant, Deschutes County, Oregon. Six alternatives are considered which include: (1) Discharge to drill holes or fractured rock, (2) discharge to infiltration ponds, (3) discharge to the Deschutes River, (4) discharge to sealed evapotranspiration ponds, (5) land application by spray irrigation, and (6) discharge to the north unit main canal. (EPA-910/9-80-074.) Comments made by: AHP, DOI, USDA, State and local, agencies and businesses. (EIS Order No. 810025.)

DEPARTMENT OF HUD

Contact: Mr. Richard H. Broun, Director, Office of Environmental Quality, Room 7274, Department of Housing and Urban Development, 451 7th Street, S.W., Washington, D.C. 20410 (202) 755-6300.

Final

GREENWOOD LAKES PLANNED UNIT DEVELOPMENT: Seminole County, Florida, January 14: Proposed is the issuance of HUD home mortgage insurance for the Greenwood Lakes planned unit development in Seminole County, Florida. The development encompasses 1,469 acres and will contain 5,110 townhouses, single-family and multi-family homes. The development will also include school, open space, park, and lake areas. (HUD-R04-EIS-78-03.) Comments made by: USDA, USAF, COE, DOC, HHS, DOI, EPA, TVA, DOT, State and local agencies and business. (EIS Order No. 810031.)

GEM HEIGHTS DEVELOPMENT MORTGAGE INSURANCE: Pierce County, Washington, January 15: Proposed is the issuance of HUD home mortgage insurance for the Gem Heights planned development in Pierce County, Washington. The multi-phased planned residential development is 374.55 acres in size and is intended to contain a maximum of 1,727 dwelling units of a variety of housing types. In addition, accessory neighborhood commercial and school areas will be provided. (HUD-R10-EIS-1F.) Comments made by: USDA, COE, EPA, DOT, DOI, HUD, State and local agencies, and businesses. (EIS Order No. 810032.)

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

Final

SOUTHERN APPALACHIAN REGIONAL COAL LEASING: Several Counties, Alabama, January 16: Proposed is the initiation of an active coal leasing program in the counties of Fayette, Jefferson, Tuscaloosa and Walker, Alabama. The low or preferred alternative would offer for lease in mid-1981, six underground tracts and seven surface-mineable tracts, which would result in an average annual production of approximately 8 million tons. The alternatives consider: (1) No action, (2) underground mining, (3) low production, (4) medium production, and (5) high production. (FES-81-3.) Comments made by: AHP, HUD, FERC, USDA, DOI, TVA, HHS, EPA, DOT, State and local agencies, groups and businesses. (EIS Order No. 810035.)

EXTENSION: Fish and Wildlife Coordination Act, Regulations, published FR December 24, 1980—review extended from February 9, 1981 to February 17, 1981. (No. 800960)

INTERSTATE COMMERCE COMMISSION

Contact: Mr. Carl Bausch, Chief, Section of Energy and Environment, Interstate Commerce Commission, Room 3371, 12th and Constitution Ave. NW., Washington, D.C. 20423 (202) 275-7658.

Final

SOMERSET RAILROAD, CONSTRUCTION AND OPERATION: Niagara County, New York, January 16: Proposed is construction of a 9.9 mile rail line between Gasport and Somerset, in Niagara County, New York. The line would connect with an existing rail line in Gasport and serve an existing steam-electric generating facility in Somerset. The alternatives consider various modes of transporting coal. The cooperating agencies are, the State of New York, FWS, COE, FRA, and USCG. (Finance Docket No. 29254) Comments made by: COE, EPA, DOI, DOC, State, and local agencies. (EIS order No. 810043).

NUCLEAR REGULATORY COMMISSION

Contact: Mr. Daniel R. Muller, Assistant Director for Environmental Technology, Nuclear Regulatory Commission, Room P-202, Washington, D.C. 20555 (301) 492-7017.

Draft Supplement

SAN ONOFRE NUCLEAR GENERATING STATION (DS-1): San Diego County, California, January 16: This statement supplements a draft EIS, No. 781287, filed 11-30-78 concerning the operation of the San Onofre nuclear generating station units 2 and 3 in San Diego County, California. The purpose of this supplement is to evaluate the site-specific impacts attributable to plant-specific accident sequences that lead to releases of radition and/or radioactive materials. (NUREG-0490) (EIS order No. 810038).

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

Final

CIRCLE BOULEVARD, IMPROVEMENT/EXTENSION: Benton County, Oregon, January 13: Proposed is the improvement and extension of NW Circle Boulevard from NW Lantana Drive to NW Whitman Hill Drive, city of Corvallis, Benton County, Oregon. The extension would consist of two lanes for 0.35 mile, a left turn lane at the intersection of Whitman Hill Drive, and a bikepath from NW Arbol Place to Whitman Hill Drive. The alternatives considered no build and a modified build alternative. Also addressed is the future construction of a 0.75 mile NW Circle Boulevard section between NW Harrison Boulevard and NW Whitman Hill Drive. The cooperating agency is the State of Oregon. (FHWA-AK-EIS-80-2-F.) Comments made by: DOE, EPA, DOI, USDA, State agencies, and individuals. (EIS order No. 810026).

SOUTH FAIRBANKS EXPRESSWAY: Alaska, January 12: Proposed is construction of the South Fairbanks Expressway betwen Parks Highway and Richardson Highway in Fairbanks, Alaska. The facility would be a limited access, four-lane highway with two terminal and three intermediate interchanges at University Avenue, Peger Road, and Lathrop Street. Alignment alternatives range from 4.3 to 5.3 miles in length. The alternatives consider: (1) No action, (2) four alignment alternatives, (3) postpone action, (4) phase development, and (5) development of other modes of transportation. The cooperating agency is the State of Alaska. (FHWA-AK-EIS-80-2-F.) Comments made by: DOT, HUD, DOI, EPA, COE, DOC, State agencies, and businesses. (EIS order No. 810024).

Final Supplement

I-505, NW NICOLAI STREET TO I-405, PORTLAND: Multnomah County, Oregon, January 16: This statement supplements a final EIS, No. 770901, filed 7-25-77 concerning the construction of I-505 in the city of Portland, Multnomah County, Oregon. The decision has been made not to build I-505. This statement proposes a freeway connection between I-405 and the intersection of Nicolai Street and Yeon Avenue. From that intersection U.S. 30 traffic would use Yeon Avenue which would be widened to five lanes. The number of rail crossings on Yeon Avenue would be reduced to one. Major improvements would occur on St. Helens Road, Wardway, Vaughn Street and Nicolai Street. (FHWA-OR-EIS-78-08-FS.) Comments made by: DOI, DOC, State and local agencies. (EIS order No. 810037).

[FR Doc. 81-2531 Filed 1-22-81; 8:45 am]

BILLING CODE 6560-37-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Department of Labor

Coordination of Equal Employment Opportunity Programs; Memorandum of Understanding

AGENCIES: Equal Employment Opportunity Commission and Department of Labor.

ACTION: Final notice.

SUMMARY: The Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor have adopted as final a Memorandum of Understanding. The Memorandum contains provisions dealing with: sharing of equal employment opportunity information between the two agencies; development of procedures to notify each other and to consult on cases to minimize duplication; establishment of Compliance Coordinating Committees; establishment of an interagency task group to advise on the development of standards and procedures for both agencies; and a provision for handling of employment discrimination complaints. The Memorandum replaces a Memorandum signed on September 11, 1974.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: Francesta E. Farmer, Director, Office of Interagency Coordination, EEOC, 2401 E Street NW., Washington, D.C. 20506, Area Code (202) 634-6915 or James Cisco, Director, Division of Program Policy, OFCCP, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20210, Area Code (202) 523-9426.

SUPPLEMENTARY INFORMATION: The new Memorandum of Understanding was proposed in response to a reexamination of the 1974 Memorandum and the agencies' experience under it; the substantial reorganizations which have occurred in both agencies' programs since 1974 and in recognition of EEOC's role as lead agency in coordination of equal employment opportunity programs under Executive Order 12067 (Providing for the Coordination of Federal Equal Employment Opportunity Programs).

The agencies published a proposed notice on April 22, 1980 and invited public comment. Comments were received from employers, groups representing persons protected by civil rights laws, two Federal agencies, a university, two individuals and a State Fair Employment Practices agency.

Most commentors praised the agencies for proposing a new Memorandum and supported the idea of greater communication and coordination between the two agencies. Specific topics presented by the commentors, suggested changes and the agencies' response to them are discussed below. Two of the commentors misread the proposed notice by concluding that EEOC meant to conduct investigations of complaints filed against Federal agencies.

One commentor opposed the Memorandum on the grounds that there should only be one Federal EEO agency.

Information Exchanges Between the Agencies

One commentor observed that the type of information to be exchanged between the two agencies is broader in the new Memorandum than in the 1974 Memorandum. The 1974 Memorandum had specified that a request for information must be premised on the existence of a charge. This limitation was removed in the new Memorandum. It now permits exchanging of information about employers in the absence of any specific charge to permit both agencies to do a better job of coordinating and planning reviews and investigations. The emphasis on better planning is also found, among other places, in the list of tasks of the interagency task group which calls for the development of "criteria and mechanisms for selecting industries and organizations for review and investigation."

The commentor argued for the 1974 limitation because it would provide grounds for objection on the part of employers seeking to limit the type of information exchanged between the agencies to protect against the sharing of irrelevant information. The commentor also suggested that the agencies adopt a policy of providing notice to employers in each instance of a request from the other agency in order to allow employers an opportunity to

show cause why the request should not be granted.

The agencies have balanced the need for better planning based on the exchange of as much information as possible, especially in light of E.O. 12067, against the remote possibility that some harm could come to an employer by the exchange of irrelevant information and concluded that the broader standard is more appropriate given the emphasis of the new Memorandum on joint scheduling to avoid duplicative reviews of the same employer.

Third Party Requests for Information

The new Memorandum makes a change in the policy contained in the 1974 Memorandum and in EEOC's previous Freedom of Information Act (FOIA) regulations which had provided that requests for information from third parties would be referred to the agency which initially compiled or collected the information. Since 1974, EEOC has changed its FOIA regulations to conform to prevailing case law which requires that the agency holding the information make a determination to disclose or not disclose as opposed to routinely referring the request to the compiling agency. The new Memorandum instead requires the agencies to coordinate their response with the agency which initially compiled or collected the information.

Several commentors preferred the previous policy and urged the agencies to return to it by requiring each to apply the policy of the compiler notwithstanding the change in FOIA's policy. We reject this position, regarding it as legally indefensible and conflicting with our FOIA policies.

Requirement That 706 Agencies Get Permission of OFCCP Before Disclosing Information Compiled by OFCCP

Paragraph 5(b) of the new Memorandum provides that EEOC will supply information compiled by OFCCP to State or local agencies designated as 706 agencies by EEOC with whom EEOC has a current charge resolution contract and a work sharing agreement which contains provisions requiring that the State or local agency will not make public information which it receives from EEOC. Such agencies will not disclose any information from OFCCP which was given to them by EEOC without the written approval of the Director of OFCCP.

Several commentors thought that the clarification was useful since under previous policy it was unclear whether the State or local agencies had to request the information from OFCCP directly.

Several commenters suggested that OFCCP should state a policy in the new Memorandum or elsewhere as to which information from OFCCP could not be made public to avoid needless delays in routine instances. As the agencies pointed out in their April 22, 1980 proposed notice discussion, the Supreme Court has remanded *Chrysler Corp.* v. *Brown*, 99 S. Ct. 1705 (1979) to determine whether certain disclosures of information held by OFCCP are "authorized" by law. The court has not rendered its decision and OFCCP considers it appropriate to delay further action on this issue until the decision is rendered.

The State agency commentor requested that the agencies adopt a policy that OFCCP originated information could be used in a proceeding under State law as it incorrectly assumed it could do with information received from EEOC. In fact, State or local agencies are not free to use EEOC information since EEOC information may not be disclosed prior to the institution of litigation under Title VII. Even then, conciliation materials may not be used in a proceeding without the written consent of the parties.

One commentor suggested that EEOC seek inclusion of specific language in each charge resolution contract and work sharing agreement with State or local agencies to ensure their compliance with the terms of paragraph 5(b). EEOC will do so.

Investigation of Systemic or Class Charges by OFCCP

Although the Supplementary Information discussion in the agencies' proposed notice of April 22, 1980 stated that, "OFCCP has traditionally investigated and resolved certain complaints, especially those of a systemic or class nature and will continue to do so", several commentors argued that a statement to that effect be made in the text of the Memorandum itself as opposed to in the Supplementary Information discussion on the grounds that this would enhance the likelihood that future administrations would continue the practice. The agencies have no objections to putting the commitment by OFCCP in the text since it does not represent a change in policy.

In response to these comments, the agencies have added new language to the end of paragraph 7 which reads: "OFCCP shall normally retain, investigate and resolve all complaints of a systemic or class nature which it receives. However, in appropriate cases the EEOC may request that it be referred complaints so as to avoid duplication and assure effective law enforcement."

The agencies also added a clarifying sentence to the language which previously appeared in the Supplementary Information discussion to state that EEOC may request an opportunity to handle some systemic or class complaints received by OFCCP. The purpose of the clarifying sentence is to avoid the impression that the agencies intended that only OFCCP would do systemic or class investigations and to provide a means for forestalling duplicative investigations when EEOC already has a proceeding underway or planned which involves the same subject matter. This notion may not have been adequately conveyed in the April 22, 1980 discussion.

Investigation of All Charges by EEOC

Several commentors recommended that EEOC investigate all complaints received by OFCCP to remove the possibility that both agencies would investigate the same employer based on two different charges, a possibility that was presented in the proposed notice when it may not have adequately conveyed the notion that EEOC could request an opportunity to handle some systemic or class complaints received by OFCCP when duplication would result. Beside systemic or class complaints there are other circumstances in which OFCCP would investigate other complaints it receives such as those enumerated in the April 22, 1980 proposed notice, such as charges by third parties who do not claim to be aggrieved or when the complaint is that the contractor's affirmative action plan is deficient. In these instances only OFCCP has authority to investigate. Another example of such differences in authority is the fact that EEOC has no authority to investigate complaints under Section 503 of the Rehabilitation Act and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 and OFCCP has no authority to investigate charges under the Age Discrimination in Employment Act.

Given differences in the responsibilities of the two agencies, there is virtually no way in which EEOC and OFCCP can absolutely guarantee that both agencies will never conduct complaint investigations of the same employer.

The Memorandum does not intend to make EEOC the sole charge investigating agency. Instead it represents an effort to *minimize* duplication where the agencies are able to do so.

Inclusion of More Operational Details in the Memorandum

One commentor suggested that the agencies include more operational specifics and more detailed statements of responsibility on the grounds that the new Memorandum is without effect until operating instructions are issued to the staff of both agencies. The commentor sought to have included more details: For example, the membership, structure and procedures of the interagency task group; specifics on the membership and duties of the Headquarters Compliance Coordinating Committee; and statement of the procedures for notification and consultation on cases in the Memorandum itself to substitute for the commitments to develop such procedures currently contained in the Memorandum.

The agencies are keenly aware of the need for operating instructions to implement the commitments contained in the Memorandum and have designated staff and made other necessary arrangements to issue operating instructions soon after the Memorandum goes into effect.

The Memorandum commits EEOC and OFCCP to take action on such topics as procedures for information exchanges; the agencies sought to place only the most important operational details into the Memorandum itself. However, a comparison to other interagency agreements of this nature including the 1974 Memorandum between the two agencies indicates that this Memorandum contains considerably more detail than is customarily contained in other Memoranda of Understanding of this nature.

In one instance, the agencies concluded that an inappropriate level of detail was contained in the proposed Memorandum when it specified that the Field Compliance Coordinating Committees should be composed of specific officials in the OFCCP organization and seemed to set a limitation on the number of EEOC staff members. The sentence has been eliminated in the final Memorandum because upon staff review it became apparent that the two agencies' field organizations are too dissimilar to permit such specificity. Exact membership of Field Compliance Coordinating Committees may vary depending on whether both agencies have staff in the same city and other operational considerations.

In another instance, the agencies decided to add an operational detail by adding the phrase "in appropriate instances" to paragraph 6(c). This paragraph states a commitment to develop procedures for notification by EEOC to OFCCP when conciliation of a cause finding is unsuccessful and EEOC does not plan to file a law suit. The agencies anticipate that in certain circumstances this notification may be inappropriate such as when the respondent is not a contractor or when OFCCP lacks jurisdiction for other reasons. Additionally, EEOC may have plans to conduct a more comprehensive enforcement action such as identifying the respondent for possible issuance of a more broadly based Commissioner Charge.

Accordingly, the two agencies adopt as final this Memorandum of Understanding.

Memorandum of Understanding

This Memorandum of Understanding between the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) is being implemented to further the objectives of Congress under Section 715 of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; of Executive Order 12067, 43 FR 28967; and Section 6 of Reorganization Plan No. 1 of 1978 (43 FR 19807). These objectives are to develop and implement agreements, policies and practices designed to maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions to the parties of the Memorandum.

The parties to this Memorandum agree as follows:

1. The OFCCP shall make available to the appropriate requesting official of the EEOC or his or her designee for inspection and copying and/or loan, any documents in its possession pertaining to the effective enforcement or administration of (a) Title VII of the Civil Rights Act of 1964, as amended; or (b) Reorganization Plan No. 1 of 1978 and Executive Order 12067. All documents will be made available within ten days of such request. Disclosure of such material by EEOC shall be in accordance with para. 5 of this Agreement.

2.a. The EEOC shall make available to the appropriate requesting offficial of the OFCCP or his or her designee for inspection and copying and/or loan any documents pertaining to the enforcement and administration of Executive Order 11246; Section 402 of the Vietnam Era Veterans Readjustment Assistance Act; Section 503 of the Rehabilitation Act of 1973; and Executive Order 12067. All documents in its possession (or to which it has access through a work-sharing agreement as described in para. 5(b) of this Agreement) will be made available within ten days of such request.

b. Disclose of such material by OFCCP shall be in accordance with para. 5 of this Agreement.

3. "Appropriate Requesting Officials" shall for the purpose of the Agreement, include the following officials, or their successors, or their designees:

a. For the EEOC:

1. The Chair
2. The Executive Director
3. The General Counsel
4. Any Regional Attorney
5. Assistant and Associate General Counsel
6. Any District or Area Office Director
7. Director, Office of Systemic Programs
8. Director, Office of Interagency Coordination
9. Director, Office of Field Services
10. Director, Office of Policy Implementation

b. For the OFCCP:

1. The Secretary of Under Secretary of Labor
2. The Solicitor of Labor
3. Assistant Secretary for Employment Standards
4. The Director or Deputy Director, OFCCP
5. Associate Solicitor of Labor
6. Any ESA Assistant Regional Administrator for OFCCP
7. Any Area Office Director
8. Any Regional Solicitor of Labor
9. Any OFCCP Division Director

4. Requests directed to a Headquarters Office of one agency from a field office of the other shall first be forwarded through the headquarters of the requesting agency. Responses to all requests for information shall be made to the official making such request, or his/her designee.

5a. All requests by third parties for disclosure of information shall be coordinated with the agency which initially compiled or collected the information.

b. Subparagraph 5(a), above, is not applicable to requests for data in EEOC files made be any state or local agency designated as a 706 agency with whom EEOC has a current charge resolution contract and a work-sharing agreement containing provisions required by Sections 706 and 709 of Title VII of the Civil Rights Act of 1964, as amended. Provided, however, that any such agency shall not disclose any of the information, initially compiled by OFCCP, to the public without express written approval by the Director of OFCCP.

6. EEOC and OFCCP shall establish procedures for notification and consultation at various stages of their respective compliance activities in order to increase efficiency and ensure coordination and minimize duplication. Such procedures shall include:

a. Establishment of an ongoing Compliance Coordination Committee (CCC) which shall meet at least quarterly to review pending and future compliance plans, the selection of establishments for review, potential Commissioner Charges, and potential litigation, and to take such other steps as may be appropriate to increase efficiency and eliminate competition and duplication. Such committees shall be established both in headquarters and in the field. At the conclusion of each quarterly meeting each field CCC shall forward to the Director, Office of Field Services, EEOC and The Director, Division of Program Operations, OFCCP, a report of the results of such meeting.

b. Contact by each agency at the commencement of and during a field investigation or compliance review where appropriate to obtain information in the possession of the agency on the employer being investigated.

c. Notification to OFCCP, in appropriate instances, when EEOC has made a finding of cause and has determined that attempts at conciliation are unsuccessful and that no lawsuit will be filed by EEOC.

d. Consultation with the appropriate field office of OFCCP when an EEOC field office is contemplating recommending a Commissioner Charge or litigation, and coordination of its activities.

e. Consultation with the appropriate field office of EEOC when an OFCCP Regional Office is contemplating recommending the issuance of an administrative complaint, and coordination of its activities.

7. Complaints filed with OFCCP within the jurisdiction of EEOC which OFCCP refers to EEOC shall be deemed charges filed jointly with EEOC. OFCCP shall promply transmit all such charges to the appropriate EEOC Field Office. For the purpose of determining the timeliness of the charge under statutes administered by EEOC the date the matter was received by OFCCP shall be deemed to be the date it was received by EEOC. OFCCP shall normally retain, investigate and resolve all complaints of a systemic or class nature which it receives. However, in appropriate cases the EEOC may request that it be referred complaints so as to avoid duplication and assure effective law enforcement.

8. OFCCP and EEOC seek to ensure consistent compliance and enforcement standards and procedures that will facilitate consistency of compliance determinations. The agencies also seek to make the most efficient use of their available resources through coordination. Accordingly, OFCCP and EEOC shall establish an interagency task group to advise in the development of standards and procedures for both agencies, including, but not limited to:

- Criteria and mechanisms for selecting industries and organizations for review and investigation;
- Procedures for routine exchanges of data, including, but not limited to, lists of proposed and completed compliance reviews, systemic, ELI and individual cases and conciliation agreements and settlements;
- Consistent analytical approaches to identifying and defining employment discrimination and determining appropriate remedies;
- Uniform training programs and training materials;
- Joint policy statements;
- Procedures for coordinated collection, sharing and analysis of data;
- Joint projects to develop consistent definitions and to share expertise, foster consistency, and reduce duplicative efforts in such areas as: analysis of employee selection procedures, labor market availability and use of employment statistics;
- Procedures to be utilized in obtaining compliance with OFCCP or EEOC requests for data and information, pursuant to investigations under either Title VII or Executive Order 11246.

9. EEOC and OFCCP shall conduct periodic reviews of the implementation of this agreement, on an ongoing basis.

This Memorandum of Understanding supersedes the agreement signed September 11, 1974.

Signed at Washington, D.C., this 16th day of January, 1981.

F. Ray Marshall,

Secretary of Labor.

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

[FR Doc. 81-2153 Filed 1-16-81; 12:25 pm]

BILLING CODE 4510-27-M

FARM CREDIT ADMINISTRATION

[Farm Credit Administration Order No. 829]

Authority Delegations; Authority of the Deputy Governor, Office of Supervision, and Order of Precedence of Certain Officers to Act as Deputy Governor, Office of Supervision (Revocation of FCA Order No. 825)

AGENCY: Farm Credit Administration.

ACTION: Notice.

SUMMARY: The Governor of the Farm Credit Administration issued Order No. 829 authorizing in the event the Deputy Governor, Office of Supervision is absent or unable to perform the duties of his office, certain officers are authorized to perform the necessary functions of the office. The text of the Order is as follows:

1. The Deputy Governor, Office of Supervision, shall, subject to the jurisdiction and control of the Governor of the Farm Credit Administration, executive and perform all power, authority, and duties relative to supervision of the credit, finance, and operation functions of the institutions of the Farm Credit System and to all matters incidental thereto, and to administration of all provisions of law pertinent to such supervision. Farm Credit Administration.

2. In the event the Deputy Governor, Office of Supervision, Farm Credit Administration, is absent or is not able to perform the duties of his office for any other reasons, the officer who is highest on the following list and who is available to act is hereby authorized to exercise and perform all functions, power, authority, and duties of the Deputy Governor, Office of Supervision, pertaining to the credit, finance and operation functions:

(a) Associate Deputy Governor, Office of Supervision.

(b) Director, Finance and Bank Services, Office of Supervision.

(c) Director, Western Division, Office of Supervision.

(d) Director, Eastern Division, Office of Supervision.

(e) Director, Central Division, Office of Supervision.

3. This order shall be effective on January 23, 1981 and revokes Farm Credit Administration Order No. 825, dated January 16, 1980, 45 FR 3970.

Carl T. Fredrickson,

Acting Governor.

[FR Doc. 81-2363 Filed 1-22-81; 8:45 am]

BILLING CODE 6705-01-M

FEDERAL COMMUNICATIONS COMMISSION

Advisory Committee on Radio Broadcasting and its Technical and Allocations Subgroups; Meeting

January 16, 1981.

The following open meeting will be held on Wednesday, February 18, 1981, at the time stated below, in Room A-110 of the FCC Annex, 1229 20th Street, N.W., Washington, D.C.:

A. The eleventh meeting of the Advisory Committee on Radio Broadcasting, starting at 9:30 a.m. The agenda will be:

1. Call to order by the Chairman;
2. Approval of minutes of previous meeting;
3. Recess for conduct of meetings of the Subgroups on Allocations and Technical Matters;
4. Reconvening of meeting of the Advisory Committee;
5. Receipt of reports by Allocations Subgroup;
6. Receipt of reports by Technical Subgroup;
7. Submission of reports to the FCC;
8. Other business;
9. Future meeting dates;
10. Adjournment.

B. The fourth meeting of the Subgroup on Radio Spectrum Allocations, starting after Item No. 3 of the Advisory Committee Agenda. The agenda for the subgroup will be:

1. Call to order;
2. Approval of minutes of previous meeting;
3. Reports on tasks performed by members of the Subgroup;
4. Assignment of further tasks to be performed and reported by designated persons;
5. Other business;
6. Next meeting date;
7. Adjournment.

C. The fourth meeting of the Subgroup on Technical Matters, starting upon conclusion of the fourth meeting of the Subgroup on Radio Spectrum Allocations. The agenda will be:

1. Call to order;
2. Approval of minutes of previous meeting;
3. Reports on tasks performed by members of the Subgroup;
4. Assignment of further tasks to be performed and reported to the Subgroup;
5. Other business;
6. Next meeting date;
7. Adjournment.

If it should not be possible to complete consideration of an entire agenda on the scheduled date, that meeting will be continued at an announced date and time.

All interested parties are invited to participate and may submit comments, addressed to Mr. Henry L. Baumann, Chairman, Advisory Committee on Radio Broadcasting, Federal Communications Commission, Washington, D.C. 20554.

Federal Communications Commission.

William J. Tricarico,

Secretary.

[FR Doc. 81-2360 Filed 1-22-81; 8:45 am]

BILLING CODE 6712-01-M

Beaufort County Broadcasting Co. and Barnacle Broadcast Ltd.; Hearing Designation Order

In the matter of applications of Carmen D. Trevitt and Calvin R. Means d.b.a. Beaufort County Broadcasting Company, Beaufort, South Carolina, Req: 104.9 MHz, Channel 285A, 3.0 kW (H & V), 144 feet (BC Docket Nos. 80-775 and 80-776; File Nos. BPH-790918AC) and Barnacle Broadcasting Ltd., Port Royal, South Carolina, Req: 104.9 MHz, Channel 285A, 3.0 kW (H & V), 295 feet (BC Docket No. 80-776, File No. BPH-800519AF) For a Construction Permit for a New FM Station.

Adopted: December 31, 1980.

Released: January 15, 1981.

By the Chief, Broadcast Bureau:

1. The Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority has under consideration: (1) the above-captioned mutually exclusive applications of Carmen D. Trevitt and Calvin R. Means d.b.a. Beaufort County Broadcasting Company (Trevitt) and Barnacle Broadcasting Ltd. (Barnacle) for a construction permit for a new FM station; (2) Barnacle's September 5, 1980 informal objection to Trevitt's application; [1] (3) Trevitt's October 2, 1980 petition for leave to amend its application; and (4) related pleadings.

2. A Notice of Proposed Rulemaking in BC No. 80-214 to replace channel 285A with either channel 261A or 259C is currently pending. Both applicants' proposed sites would meet the spacing requirements on channel 261A but would involve shortspacing with Station WDMG-FM on channel 259C. We will permit both applicants to retain their cutoff dates if either channel is substituted for channel 285A and, therefore, republication will not be required. We will grant leave to amend to both applicants to eliminate the shortspacing problem if channel 259C is chosen.

3. The facilities specified by Trevitt in its original September 7, 1979 application received a final determination of hazard to air navigation by the Federal Aviation Administration on May 7, 1980. The basis of Barnacle's informal objection is that Trevitt failed to notify the Commission of this adverse FAA determination. Trevitt countered in its opposition by contending that the Commission had independent knowledge of this development and that its amendment of October 2, 1980 corrected the air hazard problem. We in fact had received notice of the FAA's decision through our Field Operations Bureau on May 15, 1980. However, our independent notice does not relieve Trevitt of its responsibilities, and therefore an issue will be specified against Trevitt for its failure to keep the Commission informed of this decisionally significant development in its application within 30 days of May 7, 1980, as required by Section 1.65 of our Rules. *Harold James Sharp*, 56 FCC 2d 254, 35 RR 2d 464 (Rev. Bd. 1975) [2]

4. Trevitt filed a petition for leave to amend its application on October 2, 1980, beyond the August 28, 1980 date prescribed by the Commission permitting amendment as of right. The amendment consists of a lower antenna height specified by Trevitt in order to correct the aforementioned air hazard determination. Since this minor engineering amendment does not improve the applicant's comparative position, the petition for leave to amend will be granted and the corresponding amendment will be accepted under Section 73.3522(a)(2) of the Commission's Rules.

5. The respective proposals, although for different communities, would serve substantial areas in common. Consequently, in addition to determining, pursuant to Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service, a contingent comparative issue will also be specified.

6. The applicants are qualified to construct and operate as proposed. However, since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, it is ordered, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications are designated for hearing in a consolidated proceeding, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Carmen D. Trevitt and Calvin R. Means d.b.a. Beaufort County Broadcasting Company has failed to comply with Rule 1.65 by not reporting an adverse determination by the FAA as to its proposed tower and, if so, the effect of such

[1] We will consider Barnacle's petition as an informal objection pursuant to Section 73.3587 of the Rules because, although styled as a petition to deny or dismiss, it was filed beyond the applicable cutoff date for filing a petition to deny.

[2] We will specify the issue on a comparative basis only since there is no indication of deliberate concealment on the part of Trevitt. *Id.*

noncompliance on the applicant's comparative qualifications.

2. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

3. To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. It is further ordered, That a grant to either applicant is subject to the outcome of the rulemaking proceedings in BC Docket No. 80–214.

9. It is further ordered, That, in the event that either channel 261A or 259C is substituted for the present channel 285A both applicants will retain their present file numbers and cutoff dates.

10. It is further ordered, That, in the event that channel 259C is substituted for the present channel 285A, both applicants are granted leave to amend in order to specify transmitter sites that eliminate any shortspacing problems with Station WDMG–FM.

11. It is further ordered, That the petition for leave to amend filed by Trevitt IS GRANTED, and the corresponding amendment IS ACCEPTED.

12. it is further ordered, That, to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and to present evidence on the issues specified in this Order.

13. It is further ordered, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing (either individually or, if feasible and consistent with the Rules, jointly) within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

Federal Communications Commission.

Larry Eads,

Acting Chief, Broadcast Facilities Division, Broadcast Bureau.

[FR Doc. 81–2359 Filed 1–22–81; 8:45 am]

BILLING CODE 6712–01–M

FEDERAL MARITIME COMMISSION

Independent Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as independent ocean freight forwarders pursuant to section 44(a) of the Shipping Act, 1916 (75 Stat. 522 and U.S.C. 841(c)).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to communicate with the Director, Bureau of Certification and Licensing, Federal Maritime Commission, Washington, D.C. 20573.

Jose V. Medrana, 160 Clinton Avenue, Staten Island, NY 10301.

Nationwide Freight Forwarder (Kuo-Kuang Yu, d.b.a.), 102–A S. Orange Avenue, Monterey Park, CA 91754.

James R. Bagley, 3309 Rochdale, Houston, TX 77025.

Gallipoli International Shipping Service (Fernando Casalino, d.b.a.), 7206 Bayside Court, McLean, VA 22101.

By the Federal Maritime Commission.

Dated: January 19, 1981.

Francis C. Hurney,

Secretary.

[FR Doc. 81–2441 Filed 1–22–81; 8:45 am]

BILLING CODE 6730–01–M

[Independent Ocean Freight Forwarder License No. 2143]

Woodfab Forwarding (Wood Fabricating Company, Inc., d.b.a.); Order of Revocation

On December 8, 1980, Woodfab Forwarding (Wood Fabricating Company, Inc., d.b.a.), 6700 Chase Road, Dearborn, MI 48126, surrendered its Independent Ocean Freight Forwarder License No. 2143 for revocation.

Therefore, by virtue of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order No. 201.1 (Revised), section 5.01(c), dated August 8, 1977;

It is ordered, that Independent Ocean Freight Forwarder License No. 2143 issued to Woodfab Forwarding (Wood Fabricating Company, Inc., d.b.a.), be and is hereby revoked effective December 8, 1980, without prejudice to reapplication for a license in the future.

It is further ordered, that a copy of this Order be published in the **Federal Register** and served upon Woodfab Forwarding (Wood Fabricating Company, Inc., d.b.a.).

Daniel J. Connors,

Director, Bureau of Certification and Licensing.

[FR Doc. 81–2361 Filed 1–22–81; 8:45 am]

BILLING CODE 6730–01–M

FEDERAL PREVAILING RATE ADVISORY COMMITTEE

Open Committee Meetings

Pursuant to the provisions of section 10 of the Federal Advisory Committee Act (Pub. L. 92–463), notice is hereby given that meetings of the Federal Prevailing Rate Advisory Committee will be held on:

Thursday, February 5, 1981.
Thursday, February 19, 1981.
Thursday, February 26, 1981.

These meetings will convene at 10 a.m., and will be held in Room 5A06A, Office of Personnel Management Building, 1900 E Street, NW, Washington, D.C.

The Federal Prevailing Rate Advisory Committee is composed of a Chairman, representatives of five labor unions holding exclusive bargaining rights for Federal blue-collar employees, and representatives of five Federal agencies. Entitlement to membership of the Committee is provided for in 5 U.S.C. 5347.

The Committee's primary responsibility is to review the prevailing rate system and other matters pertinent to the establishment of prevailing rates under subchapter IV, chapter 53, 5 U.S.C., as amended, and from time to time advise the Office of Personnel Management thereon.

These scheduled meetings will convene in open session with both labor and management representatives attending. During the meeting either the labor members or the management members may caucus separately with the Chairman to devise strategy and formulate positions. Premature disclosure of the matters discussed in these caucuses would impair to an unacceptable degree the ability of the Committee to reach a consensus on the matters being considered and disrupt substantially the disposition of its business. Therefore, these caucuses will be closed to the public on the basis of a determination made by the Director of the Office of Personnel Management under the provisions of Section 10(d) of

the Federal Advisory Committee Act (Pub. L. 92–463) and 5 U.S.C., section 552b(c)(9)(B). These caucuses may, depending on the issues involved, constitute a substantial portion of the meeting.

Annually, the Committee publishes for the Office of Personnel Management, the President, and Congress a comprehensive report of pay issues discussed, concluded recommendations thereon, and related activities. These reports are also available to the public, upon written request to the Committee Secretary.

Members of the public are invited to submit material in writing to the Chairman concerning Federal Wage System pay matters felt to be deserving of the Committee's attention. Additional information concerning these meetings may be obtained by contacting the Committee Secretary, Federal Prevailing Rate Advisory Committee, Room 1340, 1900 E Street, NW, Washington, D.C. 20415 (202–632–9710).

Jerome H. Ross,

Chairman, Federal Prevailing Rate Advisory Committee.

January 14, 1981.

[FR Doc. 81–2383 Filed 1–22–81; 8:45 am]

BILLING CODE 6325–01–M

FEDERAL RESERVE SYSTEM

European American Bancorp; Proposed Acquisition of Axinn Life Reinsurance Corp.

European American Bancorp, New York, New York, has applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.4(b)(2) of the Board's Regulation Y (12 CFR 225.4(b)(2)), for permission to acquire voting shares of Axinn Life Reinsurance Corp., Phoenix, Arizona.

Applicant states that the proposed subsidiary would engage in the activity of underwriting, as reinsurer, credit life insurance directly related to extensions of credit by European American Bank and Trust Company. These activities would be performed from offices of Applicant's subsidiary in Phoenix, Arizona, and the geographic areas to be served are New York City, Long Island, Southern Connecticut, and Northern and Central New Jersey. Such activities have been specified by the Board in § 225.4(a) of Regulation Y as permissible for bank holding companies, subject to Board approval of individual proposals in accordance with the procedures of § 225.4(b).

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 interests, or unsound banking practices." Any request for a hearing on this question must be accompanied by a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of the proposal.

The application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank of New York.

Any person wishing to comment on the application should submit views in writing to the Reserve Bank to be received not later than February 13, 1981.

Board of Governors of the Federal Reserve System, January 16, 1981.

Jefferson A. Walker,

Assistant Secretary of the Board.

[FR Doc. 81–2354 Filed 1–22–81; 8:45 am]

BILLING CODE 6210–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control

Annual Report; Availability of Filing

Notice is hereby given that pursuant to Section 13 of Public Law 92–463 (5 U.S.C. Appendix I), the fiscal year 1980 annual report for the following Federal advisory committee utilized by the Centers for Disease Control has been filed with the Library of Congress.

Mine Health Research Advisory Committee

Copies are available to the public for inspection at the Library of Congress, Newspaper and Current Periodical Reading Room, Room 1026, Thomas Jefferson Building, Second Street and Independence Avenue, SE., Washington, D.C. (telephone 202/287–6310). Additionally, on weekdays between 9:00 a.m. and 4:30 p.m. copies will be available for inspection at the Department of Health and Human Services, Department Library, HHS North Building, Room 1436, 300 Independence Avenue, SW., Washington, D.C. (telephone 202/245–6791).

Dated: January 16, 1981.

J. D. Millar, M.D.,

Acting Director, Centers for Disease Control.

[FR Doc. 81–2418 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–86–M

Assessment of Occupational Health Hazard Control Technology for the Manufacture and Industrial Use of Adhesives: Open Meeting

The following meeting will be convened by the National Institute for Occupational Safety and Health of the Centers for Disease Control and will be open to the public for observation and participation, limited only by space available:

Assessment of Occupational Health Hazard Control Technology for the Manufacture and Industrial Use of Adhesives

Date: February 12, 1981.
Time: 9:30 a.m. to 3:00 p.m.
Place: Room 4022, Federal Office Building, 550 Main Street, Cincinnati, Ohio
Purpose: To discuss protocol and objectives for the control technology study of occupational exposure to chemical and physical agents associated with the manufacture and industrial use of adhesives.

Additional information may be obtained from: Mr. Vincent D. Mortimer, Jr., Division of Physical Sciences and Engineering, National Institute for Occupational Safety and Health, Centers for Disease Control, 4676 Columbia Parkway, Cincinnati, Ohio 45226; Telephone: (513) 684–4295.

Dated: January 15, 1981.

William H. Foege, M.D.,

Director, Centers for Disease Control.

[FR Doc. 81–2419 Filed 1–22–81; 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 Loren Y. Johnson, District Director, Philadelphia District Office, Philadelphia, PA.

DATE: The meeting will be held at 12:30 p.m., Thursday, February 19, 1981.

ADDRESS: The meeting will be held at the Federal Bldg., Rm. 2214, 1000 Liberty Ave., Pittsburgh, PA 15222.

FOR FURTHER INFORMATION CONTACT: Louise A. Dvorchak, Consumer Affairs Officer, Food and Drug Administration,

7 Parkway Center, Rm. 645, Pittsburgh, PA 15220, 412–644–2858.

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 14, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-2057 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

[FDA-225-81-6000]

Radiation Emergency Response Planning and Action; Memorandum of Understanding With the Centers for Disease Control

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is publishing a memorandum of understanding between FDA and the Centers for Disease Control. The purpose of the understanding is to describe the responsibilities of each agency in the event of peacetime radiological emergencies. It sets forth how emergency planning and action will be coordinated with regard to radiological accidents that may have an impact on public health and safety.

DATE: This memorandum of understanding became effective November 26, 1980.

FOR FURTHER INFORMATION CONTACT: Michael S. Terpilak, Office of the Director, Bureau of Radiological Health (HFX–1), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–2850.

SUPPLEMENTARY INFORMATION: FDA's policy is to publish in the **Federal Register** all agreements and memoranda of understanding between FDA and others as stated in 21 CFR 20.108(c). The agency is publishing the following memorandum of understanding:

Memorandum of Understanding Between the Centers for Disease Control and the Food and Drug Administration for Radiation Emergency Response Planning and Radiation Emergency Response Action

Preamble

Over the past year, the Centers for Disease Control (CDC) and the Food and Drug Administration (FDA) have taken cooperative action to implement the Assistant Secretary for Health's (ASH) May 30, 1979, directive designating CDC as the lead agency within the Public Health Service (PHS) for health management of toxic environmental emergencies. This directive facilitates intramural communications and liaison with outside groups and ensures a prompt coordinated Federal response to environmental emergencies that endanger public health and safety.

CDC's lead responsibility encompasses emergencies involving potential exposure to radiation, e.g., the accident at Three Mile Island. In a September 5, 1979, memorandum to the then Acting Commissioner of Food and Drugs, the Assistant Secretary for Health endorsed an active role for the Bureau of Radiological Health (BRH) of the FDA in radiation emergencies because of its specialized expertise for radiation emergency response planning.

Purpose and Scope

The purpose of this Memorandum of Understanding (MOU) is to identify the respective responsibilities of each agency with regard to peacetime radiological emergencies and how emergency planning and action will be coordinated. This document is concerned with radiological accidents which might have an impact on public health and safety. It does not include the recovery phase of the operation or the non-emergency environmental radiation problems (e.g., foreign atmospheric nuclear testing, dose determination and assessment of Project Smokey and Portsmouth Naval Shipyard).

Authority

FDA and CDC shall continue to act under existing delegations of authority, and no transfer of statutory junctions or authority is implied by this MOU.

1. Both CDC and FDA derive authority from the Public Health Service Act, 42 U.S.C., 241, et seq., which provides authority for the conduct of health studies and the provision of guidance, assistance, and information on both health matters and for health emergencies. The Secretary of HHS is authorized to provide for cooperative planning to cope with health problems resulting from disasters, for participation in carrying out such planning, and, at the request of State and local authorities, in meeting health emergencies.

2. The FDA is responsible for enforcement of the Federal Food, Drug, and Cosmetic Act (U.S.C. Title 21), the Radiation Control for Health and Safety Act (42 U.S.C. 263b, et seq.), the Public Health Service Act as it pertains to Regulation of Biological Products (U.S.C. 262, et seq.), other sections of the PHS Act, and other laws. In fulfilling its responsibility under these laws, FDA protects the public health and safety by, inter alia, preventing the adulteration of or controlling adulterated products such as foods, drugs, cosmetics, medical devices, animal feeds, and human biologicals. It also protects the public from the dangers of electronic product radiation.

3. On December 7, 1979, the President directed the Federal Emergency Management Agency (FEMA) to head up all activities associated with the off-site planning and response to all peacetime radiological accidents at nuclear reactor facilities. Because of its leadership role, he further directed FEMA to undertake a series of activities including the development and issuance of updated interagency assignments delineating respective agency capabilities and responsibilities. FEMA outlined such responsibilities in a draft **Federal Register** publication in December 1979.

FDA Responsibilities

1. Response Planning

FDA will be responsive to CDC's request for representation on task forces and coordinating committees relating to FEMA's Radiological Emergency Response Plan (RERP).

FDA will serve as the PHS representative on and participate in the Interagency Radiological Assistance Plan (IRAP).

FDA will coordinate the development of FEMA guidance for HHS responsibilities that clearly fall under FDA's jurisdiction and expertise. Specifically, maintain the responsibility for the following:

A. Provide guidance to State and local governments on the use of radioprotective substances (e.g., thyroid blocking agents) to include dosage and also projected radiation doses at which such drugs should be used.

B. Provide guidance to State and local governments on protective action guides for foods and animal feeds.

FDA will keep CDC regularly informed, and CDC will be requested to provide, as deemed appropriate, review and comments on the overall PHS perspective on the items mentioned above.

FDA will in cooperation with CDC work with Regional Advisory Committees to provide appropriate technical review and comment in areas of FDA responsibility for all RERP's.

FDA will provide technical assistance to CDC in developing and implementing HHS Radiological Emergency Preparedness Training Programs.

2. Emergency Response Actions

When FDA is alerted to a radiation emergency, it will immediately alert CDC.

In accordance with specific State, regional, or national plans,[1] this MOU, and specific requests by CDC, FDA will:

A. As part of the HHS team, participate in the radiological emergency exercises, tests, and responses.

B. Establish appropriate emergency response liaison with the on-site CDC designated coordinator and keep CDC headquarters advised.

C. Provide technical support to State, local, and other Federal agencies.

FDA will implement and coordinate its own Emergency Response Procedures as set forth in Chapter 5–10 of the FDA Regulatory Procedures Manual. Radiological emergency response includes such actions as:

A. Environmental monitoring and sampling of milk, foods, and animal feed following a radiological incident.

B. Analysis and interpretation of food and environmental monitoring data.

C. Taking appropriate compliance actions and implementing protective actions for contaminated food and feed under the statutory authority of the Federal Food, Drug, and Cosmetic Act and other Acts administered by FDA.

FDA will provide technical support to CDC for the preparation of HHS news releases, for coordination with other agencies, and for working with public media in informing the public about health significance of a radiological incident.

FDA will give CDC emergency contact telephone numbers for maintaining close liaison in case an emergency response action becomes necessary and for implementing HHS resources.

CDC Responsibilities

1. Response Planning

CDC has the lead role within PHS for planning the HHS role in the FEMA national response to radiation emergencies. This includes the following activities:

A. CDC is responsible for arranging HHS representation on the Federal Interagency Central Coordinating Committee for RERP and designating HHS lead agency membership on relevant RERP subcommittees (e.g., FDA to represent HHS on the task force for 1) training and exercises, and 2) off-site instrumentation).

B. CDC arranges for appropriate PHS representation at meetings of all Regional Advisory Committees (RAC).

C. CDC participates in FEMA activities related to planning for radiation emergencies including coordinating the HHS response to review of FEMA documents relating to radiation emergencies.

D. CDC arranges for consultations between appropriate HHS components and State and local agencies and officials to help them plan for radiation emergencies in their jurisdiction.

E. CDC has the lead role for developing specific PHS response for implementation of the national radiation emergency response plan.

2. Emergency Response Actions

CDC has the PHS lead role to coordinate PHS response to radiological emergencies.

When notified of radiological emergency, CDC:

A. Obtains sufficient information to allow a determination to be made of whether or not an emergency requiring HHS action exists.

B. Alerts all appropriate HHS agencies.

C. Consults with other HHS agencies to determine availability of resources required under the FEMA national contingency plan.

D. Requests mobilization of resources of PHS agencies.

CDC serves as the focal point for communication and coordination of information within PHS and between PHS and other Federal agencies, including designation of an onsite PHS coordinator at the scene of the emergency.

CDC develops and maintains epidemiological surveillance of populations exposed to radiological accidents and emergencies at local, State, and national levels for purposes of disease prevention.

As coordinator for PHS emergency response and liaison with FEMA, CDC consults with other HHS agencies, State and local authorities to:

A. Identify segments of the population which may be at high risk of harm from exposure (e.g., people with predisposing clinical conditions, children, pregnant women, the elderly).

B. Arrange for collection and analysis of appropriate biological specimens.

C. Consult on recommendations for decontamination and prophylactic procedures.

Names and Addresses of Participating Agencies:
Centers for Disease Control, 1600 Clifton Road, N.E., Atlanta, Georgia 30333.
Food and Drug Administration, 5600 Fishers Lane, Rockville, Maryland 20857.

Liaison Officers:
CDC: Director, Chronic Diseases Division, Bureau of Epidemiology.
FDA: Senior Health Physics Advisor, Office of Director, Bureau of Radiological Health.

Approved and Accepted for the Centers for Disease Control:
s/ *William C. Watson, Jr.*
Title: Deputy Director
Centers for Disease Control
Date: *November 12, 1980.*

Approved and Accepted for the Food and Drug Administration:
s/ *Joseph P. Hile*
Title: Associate Commissioner for Regulatory Affairs
Food and Drug Administration
Date: *November 26, 1980.*

Effective date. This memorandum of understanding became effective November 26, 1980.

Dated: January 13, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–2049 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

[1] Plans as defined in NUREG–0654, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants."

[Docket No. 77C–0385]

Color Additives; Denial of Request for Formal Evidentiary Public Hearing

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is denying a request for a formal evidentiary public hearing on an objection to the agency's denial of a color additive petition concerning the use of color additives in pet food.

FOR FURTHER INFORMATION CONTACT: Gerad L. McCowin, Bureau of Foods (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, D.C. 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of December 23, 1977 (42 FR 64440) that a petition (CAP 8CP0134) had been filed by Glenn M. W. Scott, 6211 Orion Rd., Louisville, KY 40222, proposing to amend certain color additive regulations by prohibiting the use of color additives in dog and cat food. The petition asserted that the use of color additives in dog and cat food is deceptive. Specifically, the petitioner contended that color additives disguise the true quality and value of pet food products and mask the extent to which these

products contain meat and meat byproducts.

On May 15, 1979, FDA issued a notice in the **Federal Register** (44 FR 28418) denying CAP 8CP0134. The agency denied the petition on the following grounds:

1. The use of color additives in dog and cat food is not deceptive if, as required by section 403(k) of the Federal Food, Drug, and Cosmetic Act, the label of the pet food product discloses the presence of artificial coloring, and if the artificial coloring does not conceal damage to, or inferiority of, the product. Specifically, the agency interpreted the term "deception" in section 706 of the act in accordance with Congressional intent as manifested by the legislative history of the 1960 Color Additive Amendments.

2. No evidence was submitted to demonstrate that the use of color additives in dog and cat food disguises the extent to which these products contain meat and meat byproducts, if, as required by § 501.4(a) (21 CFR 501.4(a)), the label of the product lists the ingredients in descending order of predominance by weight.

In response to the agency's denial of CAP 8CP0134, the petitioner, on June 12, 1979, filed a timely objection and requested a formal evidentiary public hearing. The objection stated that the agency, in denying CAP 8CP0134, misread the statute, illogically interpreted the legislative history, ignored evidence supporting the petitioner's position, and erroneously interpreted the term "deception of the consumer". Further, the objection contended that the term "deception" in section 706 of the act should be broadly defined to allow for general public opinion on the use of color additives to make nonmeat ingredients in pet food appear like meat.

The agency has completed its review of the petitioner's objection and accompanying request for a hearing and concludes that the objection is based on disagreement with the agency's interpretation of the intent of the statute. As such, the objection is an issue of law, not an issue of fact, and therefore does not justify granting a hearing under the provisions of § 12.24(b)(1) (21 CFR 12.24(b)(1)).

Therefore, in accordance with § 12.28 (21 CFR 12.28), FDA is denying in its entirety the petitioner's request for a formal evidentiary public hearing on the use of color additives in dog and cat food. This notice constitutes final agency action as defined in § 12.28(d).

Dated: January 14, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-2142 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

[Docket No. 80P-0158]

Finessa Corp.; Approval of Variance for Kreis Microwave Tunneloven

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) announces that a variance from the performance standard for microwave ovens has been approved by the Bureau of Radiological Health for the Kreis Microwave Tunneloven, model 7800-03/15, distributed by Finessa Corp. The tunneloven is a conveyorized microwave oven used for commerical heating of fool or other suitable products on a continuous basis.

DATES: The variance became effective November 4, 1980 and ends November 4, 1982.

ADDRESS: The application and all correspondence on the application have been placed on display 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.

FOR FURTHER INFORMATION CONTACT: Melvyn R. Altman, Bureau of Radiological Health (HFX-460), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3426.

SUPPLEMENTARY INFORMATION: Under 21 CFR 1010.4, Finessa Corp., 3 Neshaminy Interplex, Threvos, PA 19047, has been granted a variance from § 1030.10(c)(2)(iv) and (vi), (c)(3)(iii) and (iv), (c)(4)(iii), (c)(5)(iii), and (c)(6)(i) (21 CFR 1030.10(c)(2)(iv) and (vi), (c)(3)(iii) and (iv), (c)(4)(iii), (c)(5)(iii), and (c)(6)(i)) of the performance standard for microwave ovens. The variance permits the manufacturer to introduce into commerce the mirowave oven known as the Kreis Microwave Tunneloven, model 7800-03/15. The tunneloven is a conveyorized microwave oven which can heat food or other suitable products on a continuous basis. The main application is intended to be in hospital or hotel kitchens to reconstitute chilled food. Suitable means of radiation protection will be provided by conditions imposed on the manufacturer in the letter of approval of the variance. The tunneloven shall bear variance No. 80P-0158.

By letter of November 4, 1980, the Director of the Bureau of Radiological Health, approved the requested variance which terminates on November 4, 1982.

In accordance with § 1010.4 (21 CFR 1010.4), the application and all correspondence (including the written notice of approval) on the application have been placed on public display in the Dockets Management Branch, Food and Drug Administration (address above), and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

Dated: January 14, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-2140 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

[FDA-225-80-4001]

Monitoring and Investigation of Foodborne Illnesses; Memorandum of Understanding With the State of Illinois Department of Public Health

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) has executed a memorandum of understanding with the Illinois Department of Public Health. The purpose of the memorandum of understanding is to set forth cooperative working arrangements covering the monitoring and investigation of foodborne illnesses within the State of Illinois.

DATE: The Memorandum of Understanding became effective on May 5, 1980.

FOR FURTHER INFORMATION CONTACT: Walter J. Kustka, Intergovernmental and Industry Affairs Staff (HFC-50), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-1583.

SUPPLEMENTARY INFORMATION: FDA's policy is to publish in the **Federal Register** all agreements and memoranda of understanding between FDA and others (21 CFR 20.108(c)). Therefore, the agency is publishing the following memorandum of understanding:

Memorandum of Understanding Between the State of Illinois Department of Health and the Region V, Chicago District U.S. Food and Drug Administration

I. Purpose

It is the purpose of this agreement to establish a cooperative program between the State of Illinois Department

of Public Health, (IDPH), and the Food and Drug Administration (FDA), relative to monitoring and the investigation of foodborne illnesses within the State of Illinois.

II. Background

The Illinois Department of Public Health [1] is authorized by the Illinois Revised Statutes, Chapter 111½, Paragraph 22 to investigate the causes of dangerously contagious or infectious diseases and take the means to suppress the same; this function is performed by the Division of Disease Control. The Department is authorized by the Illinois Food, Drug and Cosmetic Act, Section 522, to inspect, sample and test foods in intrastate distribution for adulteration, misbranding, safety, and wholesomeness; this is performed by the Division of Food and Drugs and is a counterpart function to that of the Federal FDA which has the same responsibility in interstate commerce.

The Food and Drug Administration (FDA) of the Department of Health, Education, and Welfare is charged with the enforcement of the Federal Food, Drug and Cosmetic Act. In fulfilling these responsibilities under the Act, FDA directs its activities toward the protection of the public health of the Nation by ensuring that foods distributed in interstate commerce are safe and wholesome. The authority to perform the necessary investigations and examinations of manufacturers, repackers, and distributors, towards that end, is granted under Sections 702(a) and 704 of the Act.

In order to reduce duplication of resources in the investigation of the causes of foodborne illnesses, sample collection, analysis and regulatory follow-up, these two agencies entered into an informal verbal agreement in 1972, as to the responsibilities of each party as they related to the investigation of said foodborne illnesses.

However, the increase in the number and complexities of such investigations, makes it increasingly necessary that the responsibilities of each agency be specifically delineated in a formal agreement.

The two agencies have certain common or related objectives in carrying out their respective regulatory and service activities. This Memorandum of Understanding sets forth the working arrangements which are to be followed or adopted to enable each agency to discharge, as effectively as possible, its responsibilities related to the investigational and inspectional activities as they relate to foodborne investigations.

III. Substance of Agreement

A. The IDPH will:

(1) Perform epidemiologic investigations, when indicated, of reported foodborne illnesses brought to its attention.

(2) Inform the Food and Drug Administration of any and all such foodborne illnesses as expeditiously as possible, involving commercially prepared food products subject to the jurisdiction of that agency.

(3) Transmit as expeditiously as possible, within the restrictions provided by existing State statute and implementing regulations, copies of records pertaining to the foodborne epidemiology investigation.

(4) Transmit as expeditiously as possible, analytical results and records which bear upon the causes of the foodborne illness.

(5) Serve as fact and/or expert witnesses when needed in regulatory litigation initiated and carried out by the FDA.

B. The Chicago District, FDA, will:

(1) Inform the Division of Disease Control, IDPH, of any reported or suspect foodborne illnesses which are reported to this agency, or which may be disclosed during its routine establishment inspections, or consumer complaints.

(2) Carry out inspections and investigations as authorized by Section 702(a) of the Act of commercial processors of food implicated in the foodborne illness. Where the firm may currently be subject to the Division of Food and Drugs, Illinois Department of Public Health, the agency will coordinate its activities with that unit.

(3) Transmit, as expeditiously as possible, the establishment inspection report, commensurate with the statute and implementing regulations, to Division of Disease Control.

(4) Transmit, as expeditiously as possible, the analytical results and records of samples collected during the inspections of these firms.

(5) Serve as fact and/or expert witnesses in regulatory litigation initiated by the State.

(6) Volunteer, within available resource limitation, analytical and investigational assistance as, and when needed by the State to expedite and complete a foodborne disease investigation.

C. Both agencies will:

(1) Evaluate the agreement on a yearly basis, and

(2) Maintain, alter, amend, or append the agreement as required.

IV. Name and Address of Participating Activities

A. State of Illinois Department of Public Health, Division of Disease Control, 535 W. Jefferson Street, Springfield, Illinois 62761.

B. Food and Drug Administration, 433 West Van Buren Street, Chicago, Illinois 60607.

V. Liaison Officers

A. Carl Langkop, Coordinator, Communicable Disease Control Program, Division of Disease Control, Illinois Department of Public Health, 535 West Jefferson Street, Springfield, Illinois 62761.

B. Phillip Sheeler, Director Compliance Branch Food and Drug Administration 433 West Van Buren Street Chicago, Illinois 60607

VI. Period of Agreement

A. This agreement is effective upon acceptance by both parties and will expire on the last day of the 12th month following the date of signing by both parties unless renewed and signed by both parties to continue it in effect for another 12 months.

B. This agreement in its entirety, or in part, may be revised by mutual consent, or it may be terminated upon 30 days written notice by either party.

Approved and Accepted for the State of Illinois Department of Public Health.

William L. Kempiners,

Acting Director, Illinois Department of Public Health.

Date May 5, 1980.

Approved and Accepted for the Food and Drug Administration.

Lloyd R. Claiborne,

Regional Director, FDA Region V.

Date May 5, 1980.

EFFECTIVE DATE. The Memorandum of Understanding became effective on May 5, 1980.

Dated: January 14, 1981.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-2141 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

[1] The Illinois Department of Public Health accomplishes its responsibilities in investigating communicable disease through recognized local health departments in cities and counties where local health departments have been established. In other areas of the State, the Illinois Department of Public Health has direct responsibility for investigating communicable disease.

Advisory Committee; 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:

General Hospital and Personal Use Device Section of the General Medical Devices Panel

Date, time, and place. February 9, 9 a.m., Room 1207, 8757 Georgia Ave., Silver Spring, MD.

Type of meeting and contact person. Closed presentation of data, 9 a.m. to 10 a.m.; open public hearing, 10 a.m. to 11 a.m.; open committee discussion, 11 a.m. to 4:30 p.m.; Robert R. Gatling, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

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—Closed presentation of data. The sponsor of premarket approval application P800032 will discuss this device and respond to questions from the Section members. This portion of the meeting will be closed to permit discussion of trade secret data (5 U.S.C. 552b(c)(4)).

Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the Committee. Those desiring to make formal presentations should notify the contact person by January 26, 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, and an indication of the approximate time required to make their comments.

Open committee discussion. The Section will review and discuss the safety and effectiveness data in premarket approval application P800032. The Section will also make classification recommendations on the following devices: infusion stand; patient isolation chamber (portable and stationary); intravascular infusion controller (active and passive); hot water pasteurization device; allergen and vaccine delivery system; wound shield; and oral administration set.

Applications for reimbursement. Must be received by January 28, 1981.

Each public advisory committee meeting listed above 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. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of 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.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA), as amended by the Government in the Sunshine Act (Pub. L. 94–409), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of person privacy; investigatory files compiled for law enforcement purposes; information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters.

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosures is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative sessions to formulate advice and recommendations to the agency on matters that that do not independently justify closing.

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 meeting announced in this notice. The Office of Consumer Affairs, FDA, will file any application for reimbursement for participation in the meeting announced in this notice in the docket for this notice.

Dated: January 15, 1981.

Jere E. Goyan,

Commissioner of Food and Drugs.

[FR Doc. 81–2362 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

[Docket No. 80N–0520]

Aflatoxin-Contaminated Corn; Limited Exemptions From Prohibition of Interstate Shipment and Blending

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: This document announces that limited exemptions have been granted to the State of North Carolina and South Carolina and the Commonwealth of Virginia from the Food and Drug Administration's (FDA's) prohibition of interstate shipment and blending of corn containing aflatoxin in excess of the agency's action level of 20 parts per billion (ppb). Corn containing up to 100 ppb aflatoxin may be shipped in interstate commerce under plans which were developed by the three States and approved by FDA. The plans assure that such corn does not contain more than 100 ppb aflatoxin and is not diverted for uses other than as feed for mature, nonlactating livestock and mature poultry. Blending of corn to achieve levels of no more than 100 ppb aflatoxin is permitted under certain controlled conditions. These exemptions were granted to avert a substantial adverse impact on the national food supply.

EFFECTIVE DATES: October 9, 1980—North and South Carolina; November 5, 1980—Virginia.

EXPIRATION DATE: The exemptions apply only to the 1980 corn crop in North Carolina, South Carolina, and Virginia, and shall remain in effect until January 1, 1982.

FOR FURTHER INFORMATION CONTACT: Taylor M. Quinn, Bureau of Foods (HFF–300), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–245–1243.

SUPPLEMENTARY INFORMATION: In response to requests from the States of North Carolina and South Carolina and the Commonwealth of Virginia, FDA is establishing limited exemptions to its prohibition of interstate shipment and blending of corn containing aflatoxin above its action level of 20 ppb. These exemptions apply only to the 1980 corn crop harvested in the States of North Carolina and South Carolina and the Commonwealth of Virginia and allow the interstate shipment of corn containing up to 100 ppb aflatoxin to be used only for feed for mature, nonlactating livestock and mature poultry. These exemptions do not apply to corn or mixed feeds used for rations for lactating dairy animals, or starter rations for very young animals, or to corn for human consumption. Corn containing more than 20 ppb may be blended with less contaminated corn to achieve a total aflatoxin level of no more than 100 ppb.

Any food that contains aflatoxin in excess of 20 ppb (FDA Administrative Guidelines Manual, 7420.01 (5/16/79)) is considered by FDA to be adulterated under section 402(a)(1) of the Federal Food, Drug, and Cosmetic Act, (21 U.S.C. 342(a)(1)), and therefore may not be shipped in interstate commerce. Also, use of an adulterated food as an ingredient in another food causes the finished food to be deemed adulterated, even if the finished food itself does not violate an established action level.

The 20 ppb action level for aflatoxin applies only to unavoidable contamination of food. Thus, the intentional blending of a violative food with an uncontaminated food is not authorized by the action level.

FDA's regulations on unavoidable contaminants in animal food and food-packaging material, 21 CFR 509.8, provide for exemptions from regulatory action if the Commissioner of Food and Drugs determines that (1) based on all available evidence, the food is safe for consumption, that is, a significant health hazard is not involved, and (2) destruction or diversion of the food involved would result in a substantial adverse impact on the national food supply.

The agency has reviewed all available evidence concerning the effects on the health of animals consuming aflatoxin contaminated corn and humans consuming food derived from these animals. The agency has determined that the limited exemptions specified in this notice will not result in any adverse effects to the health of mature, nonlactating livestock and mature poultry fed such corn, and will not pose a significant health hazard or even a significant increase in risk to humans consuming edible products derived from these animals.

The agency has determined that the destruction or diversion of corn that would be required by the continued prohibition of interstate shipment and blending of the subject feed corn would result in a substantial adverse impact on the national food supply.

In the **Federal Register** of April 4, 1978 (43 FR 14122) FDA established a limited exemption to its prohibition against blending corn containing aflatoxin above its action level of 20 ppb with less contaminated corn to achieve a mixture below 20 ppb. The exemption applied only to corn harvested in 1977 in the southeast United States and was granted to avert a substantial adverse impact on the national food supply. In the 1978 notice, FDA stated that it had advised the States in the southeastern United States that "intrastate corn containing up to 100 ppb aflatoxin may be used safely for animal feed for mature poultry and swine, and mature, non-milk-producing beef cattle" if the State could ensure that the corn would not be diverted to other uses. FDA explained that the exemption required that the corn contain no more than 20 ppb after blending rather than 100 ppb "because FDA cannot monitor the flow of corn in interstate commerce to the extent necessary to ensure that the corn is used in accordance with the terms of the exemption. Permitting corn containing up to 100 ppb aflatoxin to be shipped in interstate commerce would present an unreasonable risk that the corn would be used to feed dairy animals or very young animals, or that it would be used for food for human consumption."

Analyses of samples of the 1980 corn crop from the States of North Carolina and South Carolina and the Commonwealth of Virginia reveal that aflatoxin contamination in those States is at least as great as, if not greater than, the aflatoxin contamination in the 1977 corn crop harvested in parts of the southeast United States. North Carolina, South Carolina, and Virginia, estimate that 63, 73, and up to 23 percent of their 1980 corn crop, respectively, may contain more than 20 ppb aflatoxin and therefore may not be shipped in

interstate commerce for food or feed use.

As part of their requests for exemptions from the current action level of 20 ppb aflatoxin, North Carolina, South Carolina, and Virginia have submitted to FDA detailed control plans to ensure that corn containing up to 100 ppb aflatoxin when shipped in interstate commerce is not diverted for uses other than as feed for mature, nonlactating livestock and mature poultry. Accordingly, FDA has agreed to permit (1) the shipment in interstate commerce of corn from the 1980 crop and which contains up to 100 ppb aflatoxin when such corn is shipped in accordance with those plans and (2) the blending of corn to achieve levels of aflatoxin of up to 100 ppb when such blending is done under certain controlled conditions. FDA anticipates that permitting the interstate shipment and blending of corn under the terms of the exemptions stated in this notice will increase the marketable feed corn crop in North Carolina, South Carolina, and Virginia. This increase is estimated at 101.4 million bushels, valued at 319.5 million dollars at current market prices.

The agency has determined that it will not recommend regulatory action for violation of the Federal Food, Drug, and Cosmetic Act with respect to the interstate shipment of corn from the 1980 crop harvested in North Carolina, South Carolina, and Virginia and which contains no more than 100 ppb aflatoxin; or with respect to the blending of corn to achieve a level of no more than 100 ppb aflatoxin, provided the conditions set out in this notice are met. FDA emphasizes, however, that it is not altering the agency's longstanding positions that it is unlawful to ship in interstate commerce corn containing more than 20 ppb aflatoxin and that it is unlawful to blend corn containing more than 20 ppb aflatoxin with less contaminated corn and ship the blended corn in interstate commerce. The agency is permitting the exemptions set out in this notice on a one-time basis for the 1980 corn crop harvested in North Carolina, South Carolina, and Virginia only because of the severity of this emergency situation.

Therefore, the Commissioner gives notice pursuant to § 509.8 (21 CFR 509.8) of the following exemptions:

Notice of Exemptions

a. The Food and Drug Administration will not recommend regulatory action against corn from the 1980 corn crop harvested in North Carolina, South Carolina, and Virginia and which contains between 20 ppb and 100 ppb aflatoxin or corn blended to achieve a level of no more than 100 ppb aflatoxin for violation of the Federal Food, Drug, and Cosmetic Act, provided the following terms and conditions of plans submitted to FDA by the three States have been met:

1. All corn handled in the manner described in the States' plans shall be used only for feeding of mature, nonlactating livestock and mature poultry.

2. Upon notification by a firm of its intention to ship in interstate commerce corn containing between 20 ppb and 100 ppb aflatoxin, the State of origin's Department of Agriculture shall obtain from the intended shipper a history of the corn and shall collect samples of all lots of the corn.

3. The lot (i.e, individually-characterized mass of corn, compartmentalized and ready for shipment to purchaser) of corn shall either be stream-sampled at intervals during the entire loading process to obtain at least a ten-pound sample or randomly-sampled with appropriate-size commercial grain probes to obtain at least a ten-pound sample that is representative of the lot.

4. The entire sample shall be ground, mixed, and analyzed by the State laboratories as prescribed in the "Official Methods of Analyzed of the Association of Official Analytical Chemists," 13th ed. 1980.

5. The test acceptance level for each lot shall be 80 ppb or less. For stream-sampled corn, a single analysis is sufficient; for randomly sampled corn, a duplicate analysis shall be performed, the average result of which may not exceed the 80 ppb level. Under this system, there is a 95 percent or greater probability that a lot of corn which contains a true mean of 100 ppb or more aflatoxin will be rejected.

6. Each lot of corn shall be labeled at all times with the name and address of the purchaser and of the seller, the aflatoxin content, and the phrase "To be fed only to nonlactating mature livestock and/or mature poultry". Any invoice and bill of lading shall also be marked with this information. In addition, the bill of lading shall bear the seal numbers or other identification to relate the bill of lading to the lot.

7. The Department of Agriculture of the State of origin shall maintain records for a period of at least one year after obtaining the samples. Such records shall include, but not be limited to information showing: the origin of the corn, the date sampled, the aflatoxin content, the destination, how the corn shipped from the State of origin to the receiving State was controlled to prevent diversion (e.g., railcar seals), and the intended use of the corn at its destination.

8. The State of origin shall have a prearranged agreement with the appropriate regulatory agency in the State to which corn is to be shipped. This agreement shall specify the means by which the designated regulatory agency in the receiving State intends to assure proper disposition of the corn. As a part of the agreement, the receiving State shall written notification from each buyer (ultimate user) that the corn shall be fed only to mature nonlactating livestock or mature poultry. The State of origin shall also notify FDA of each lot of corn to be shipped and the destination of each lot. The receiving State shall agree to notify the State of origin and FDA when such shipments are received. The receiving State shall maintain records documenting the final and proper disposition of the corn by the ultimate user.

9. Before a lot of "blended" corn (i.e., corn which because of its high aflatoxin content has been mixed with other corn to reduce its aflatoxin content below 100 ppb) is shipped in interstate commerce, the responsible firm shall submit to the Department of Agriculture of the State of origin a plan that describes how uniform blending is to be accomplished, the aflatoxin content of the contaminated corn and the blended corn, methods to be used for sampling and analysis, and the moisture content of both lots of corn. The State Department of Agriculture shall review and, if appropriate, approve the plan, and notify the firm of any changes which must be made. The State Department of Agriculture shall forward a copy of the approved plan to the appropriate FDA Regional Office, and maintain records for inspection by FDA. The final lots shall be sampled and analyzed by the Department of Agriculture of the State of origin as outlined in Steps 3 and 4 above and 11 below.

10. Corn in excess of 400 ppb aflatoxin shall not be used for blending.

11. Two ten-pound samples shall be randomly and representatively drawn from any lot of aflatoxin-contaminated corn which has been blended with other corn to achieve a level below 100 ppb aflatoxin. Both samples shall be analyzed in duplicate. The average of the duplicate analysis of the two ten-pound samples may not differ more than 50 ppb aflatoxin. The average four analysis may not exceed 80 ppb aflatoxin. If either of the assay criteria for blended corn is not met, the blending shall be classified as unacceptable. Reblending will be permitted.

12. Certification of the aflatoxin content of any lot of corn by the State or origin shall be made before interstate shipment.

13. Copies of the approved State plans for carrying out the FDA exemptions shall be distributed to all elevators merchandising corn in the affected States.

b. In all other cases the FDA's prohibition of interstate shipment and blending of corn containing aflatoxn in excess of the agency's 20 ppb action level will be applied.

All correspondence between the States of North Carolina and South Carolina and the Commonwealth of Virginia and FDA, including the State plans; and assessments of safety and impact on the national food supply, including references and supporting data upon which this notice is based, are on file with the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

Public comment is invited on this notice and the Commissioner's determinations herein. Comments may be sent to the Dockets Management Branch (address above) and will be received while this notice remains in effect.

This notice shall remain in effect until January 1, 1982.

Dated: January 19, 1981.

Joseph P. Hile,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–2604 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

Health Care Financing Administration

Privacy Act of 1974; System of Records and Notice of Proposed Routine Uses

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notice of new system of records.

SUMMARY: This Notice describes a new system of records, Medicare/Medicaid Hospice Demonstration, HCFA No. 09–70–0024, in accordance with the requirements of the Privacy Act of 1974. The purpose of this system of records is to provide billing, cost, and service data necessary to reimburse and evaluate the care received by terminally ill Medicare beneficiaries, Medicaid recipients, and their families from hospice organizations selected to participate in the demonstration. In addition, the system will furnish information necessary to evaluate the services received by three other groups of terminally ill patients and their families: 1) patients who are served by the participating hospices but are neither Medicare beneficiaries nor Medicaid recipients, 2) a selected comparison group of patients served by hospices outside the demonstration, and 3) another selected comparison group of patients served by hospitals and cancer centers which provide conventional medical care. There is a more detailed explanation of both the demonstration and the records system under the section entitled "Supplementary Information." HCFA invites public comments with respect to routine uses of the system.

DATES: HCFA filed a new system report with the Speaker of the House, the President of the Senate, and the Director, Office of Management and Budget (OMB) on January 16, 1981. The new system of records will be effective 60 days from the date submitted to OMB. Routine uses will become effective March 17, 1981, unless HCFA receives comments which would result in a contrary determination.

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: Thomas M. Kickham, Ph.D., Chief, Long Term Care Reimbursement Branch, Division of Long Term Care Experimentation, Office of Demonstrations and Evaluation, Office of Research, Demonstrations and Statistics, Health Care Financing Administration, Room 1–E–3 Oak Meadows Building, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone: (301) 594–7621.

SUPPLEMENTARY INFORMATION: The Health Care Financing Administration (HCFA) Department of Health and Human Services, proposes to initiate a new system of collecting data under the authority of section 402 of the 1967 amendments to the Social Security Act, as amended by section 222(b) of the 1972 amendments to the Social Security Act, and section 1115(a) of the Social Security Act, as amended by section 404 of the Social Security Amendments of 1977.

Under the Medicare/Medicaid Hospice Demonstration, HCFA will reimburse for services provided to Medicare beneficiaries by 26 hospice organizations selected to participate in the demonstration. For 24 of these hospices, Medicaid State Agencies have also agreed to participate in the project and will reimburse for services to Medicaid recipients. (The 26 hospice organizations are identified under Appendix A, and the 14 participating Medicaid State Agencies are listed under Appendix B.) HCFA will permit payment to these hospices for a number of services which are not currently covered under the Medicare and Medicaid programs (such as outpatient prescription drugs which are now excluded under Medicare), and will not apply certain other requirements and restrictions of these programs (for example, the requirement that Medicare beneficiaries pay deductibles and coinsurance). To accomplish this, HCFA will "waive," or temporarily not enforce, certain provisions of the Medicare and Medicaid laws for the 26 participating hospices and the 14 Medicaid State Agencies. (The authorities for the demonstration waivers are cited in the first paragraph above.)

Payment for the waivered services will only be made for patients served by the participating hospices who meet the following requirements for participation: (1) a life expectancy of 6 months or less, (2) a "primary care giver," such as a relative, friend, or paid attendant who is available to provide simple personal care and emotional support on an around-the-clock basis, and (3) entitlement to Hospital Insurance Benefits (Medicare Part A) and Supplementary Insurance Benefits (Medicare Part B) and/or eligibility under Medicaid.

While the waivers will permit payment to all 26 hospices for certain non-covered services, not all hospices will offer the same services. Nor are these hospices organized and staffed in the same way. At present, there is no commonly accepted definition of "hospice." Generally, however, a hospice is considered to be a centrally administered program which provides physical, psychological, social, and spiritual care for terminally ill persons, as well as a variety of social, psychological and supportive services for their families.

The hospice concept views the patient and family as a single unit of care. Particularly in the United States, hospices focus on providing care in the patient's home, although some hospices also offer inpatient services. A medically supervised interdisciplinary team of professionals and volunteers provides the hospice services, which are available on a 24-hour basis. Hospices stress palliative care—that is, control of pain and other symptoms of terminal illness—in order to maximize the

patient's comfort and ability to function. After a patient dies, hospices continue to provide care to the family, including emotional support, during the bereavement period.

The purpose of this new system of records is to provide the billing, cost, and service data needed to reimburse and evaluate the care received by the terminally ill Medicare beneficiaries, Medicaid recipients, and their families served by the 26 participating hospices. However, to more clearly understand the effects of hospice care and of reimbursement for hospices care, HCFA will also gather comparable, person-specific information on three other groups of terminally ill patients and families: 1) patients served by the 26 demonstration hospices who are neither Medicare beneficiaries nor Medicaid recipients, or who otherwise do not meet the requirements for participation in the demonstration, 2) a selected comparison group of patients served by hospices outside the demonstration, and 3) another selected comparison group of patients served by hospitals and cancer centers which provide conventional medical care. Since patients in these comparison groups may not reside in the same States where the participating hospices are located, HCFA may request some billing and service information from non-participating Medicaid State Agencies.

HCFA will obtain the written informed consent of every individual from whom information is solicited or whose records are abstracted for purposes of the demonstration or its evaluation.

To distinguish among the different patient categories, this Notice will refer to Medicare beneficiaries and Medicaid recipients served by the 26 participating hospices as "patient participants" and to patients served by the participating hospices who are neither Medicare beneficiaries nor Medicaid recipients as "non-participating patients." Persons served by the hospices and hospitals outside the demonstration will be called "comparison patients" or the "patient comparison groups." Likewise, the hospices and hospitals which voluntarily cooperate with HCFA in identifying appropriate samples of their patients for the patient comparison groups will be identified as the "comparison hospices and hospitals."

Through this demonstration, HCFA will attempt to answer several basic questions:

1. What are the medical, social, psychological and other services that hospice patients and their families use, and at what costs?

2. Is hospice care used in addition to, or instead of, conventional care (that is, care provided by hospitals, cancer centers and other traditional providers of care)? How does the cost of hospice care compare to that of conventional care for terminally ill persons?

3. How does the quality of care, and patient and family satisfaction with care, provided by hospices compare with that provided through conventional care settings?

4. What would be the likely effects on hospices, hospice care, and demand for such care if coverage under the Medicare and Medicaid programs and private insurance plans were expanded to include hospice care?

In order to answer these questions, the demonstration and its evaluation will try to capture information on the complete range of services received by patient participants, non-participating patients, and comparison patients during their last months of life, from whatever source of care and whether reimbursed by Medicaid, Medicare, private insurors, or the patients themselves.

The evaluation of this demonstration will be jointly supported by HCFA, the Robert Wood Johnson Foundation, and the John A. Hartford Foundation. To assist in this effort, HCFA has selected a grantee, Brown University, who will conduct an independent study of the project in terms of cost, use, and quality, and acceptability of care provided to terminally ill persons and their primary care givers.

With the assistance of Brown University, HCFA will identify approximately six hospitals or cancer centers and six hospices not participating in the demonstration who will be invited to cooperate voluntarily in selecting appropriate samples of their patients and in providing data on services to their patients. Those patients who give their consent will become members of the patient comparison groups for purposes of data collection and evaluation.

Billing data in the demonstration records system concerning services received by participating patients will have the combined purposes of bill processing, reimbursement, and evaluation. HCFA and Brown University will use the additional information provided by other billing records in the system, the patient/primary care giver profiles, patient discharge forms, service utilization abstracts, the patient and family attitude survey, and the master demonstration file for purposes of evaluation. Results of the evaluation will assist the Department of Health and Human Services and the Congress in determining whether and to what extent hospice care should be covered under the Medicare and Medicaid programs.

Further, information collected for evaluation purposes will have an added use during the demonstration of monitoring the acceptability and appropriateness of the hospice services provided to patients and families. This function to important because hospices regard the home care they provide as an alternative to institutional care of dying patients. While the appropriateness of care offered by hospitals is usually reviewed by local Professional Standards Review Organizations (PSRO's), no equivalent review exists for home health care.

The fiscal intermediary for Medicare payments under the demonstration will be the Division of Health Services Studies (DHSS), Office of Direct Reimbursement, Bureau of Support Services, HCFA. Medicaid State Agencies may continue to use their regular fiscal agents, or may request DHSS to serve in this capacity.

Dated: January 16, 1981.

Howard Newman,

Administrator, Health Care Financing Administration.

09-70-0024

SYSTEM NAME:

Medicare/Medicaid Hospice Demonstration, HHS/HCFA/ORDS

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

Health Care Financing Administration, Bureau of Support Services, Office of Health Program Systems, Program Support Branch, Operations Building, 6401 Security Boulevard, Baltimore, Maryland 21235.

Health Care Financing Administration, Bureau of Support Services, Office of Direct Reimbursement, Division of Health Services Studies, 6401 Security Boulevard, Baltimore, Maryland 21235.

Washington National Records Center, Reference Branch, 4205 Suitland Road, Suitland, Maryland 20409.

Brown University, Division of Biology and Medicine, Arnold Lab Building, 97 Waterman Street, Providence, Rhode Island 02912.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Terminally ill Medicare beneficiaries and their primary care givers (that is, a family member, a friend, or an attendant paid by the patient or family) who receive hospice

services from the 26 participating hospices and who have given written informed consent to participate in the demonstration. These patients will be called "patient participants" in this Notice (Requirements for patient participation are listed at the end of this section);

2. Terminally ill Medicaid (Medi-Cal) recipients and their primary care givers who receive hospice services at 24 of the participating hospices under the 14 participating State Medicaid programs, and who have given written informed consent to participate in the demonstration. These patients also will be called "patient participants;"

3. Terminally ill patients and their primary care givers who receive services in the 26 participating hospices, but who are neither Medicare beneficiaries nor Medicaid recipients, or who otherwise do not meet the requirements for participation in the demonstration. Individuals in this category must give a written informed consent in order to be covered by this record system. These patients will be called "nonparticipating patients;"

4. Terminally ill patients and their primary care givers served by selected hospices outside the demonstration, and who have given a written informed consent to be covered by this record system. These individuals will be called "comparison patients" or members of the "patient comparison groups" in this Notice;

5. Terminally ill patients and their primary care givers who receive conventional care from selected hospitals or cancer centers, and who have given a written informed consent to be covered by this record system. These individuals also will be called "comparison patients" or members of the "patient comparison groups" in this Notice.

In order to participate in the demonstration, patients must have: (1) a life expectancy of 6 months or less as certified by a physician, (2) a primary care giver, such as a relative, friend, or paid attendant who is available to provide simple personal care and emotional support on an around-the-clock basis, and (3) entitlement to Hospital Insurance Benefits (Medicare Part A) and Supplementary Medical Insurance Benefits (Medicare Part B) and/or eligibility under Medicaid. The Health Care Financing Administration (HCFA) will "waive," or temporarily not enforce, some provisions of the Medicare and Medicaid laws in order to permit payment for certain hospice services which are not now covered under these two programs. HCFA will reimburse for waivered services provided only to patient participants and their primary care givers (the first two categories above).

CATEGORIES OF RECORDS IN THE SYSTEM:

1. Bills for hospice-type services waivered or currently covered by Medicare, which are submitted to HCFA by the 26 participating hospices. Billing and service information will show patient names and health insurance claim numbers (HI claim numbers);

2. Quarterly service utilization reports produced by HCFA from billing records. These reports will show Medicare services, by patient name and HI claim number, for which payment was made under the demonstration;

3. Billing information on hospice-type services waivered or currently covered by Medicaid, which is submitted by the participating hospices to participating Medicaid State Agencies or to HCFA. These records will show patient names and unique numberical identifiers;

4. Billing information on other non-waivered services received by patient participants, non-pariticipating patients, or comparison patients from the participating hospices, the comparison hospices and hospitals, or other sources of care. This category of records will include hard copy or magnetic tapes of billing and service data supplied by participating and non-participating Medicaid State Agencies and cooperating private insurors, as well as information extracted from selected Medicare claims and enrollment files that are covered by existing systems notices;

5. Patient/primary care giver profile forms which will show patient name and HI claim number or other unique identifier. These hospice forms will provide information such as the patient's current status and prognosis, the array of patient/family needs, and appropriateness of hospice care for these needs. In addition, the profile forms will supply a variety of demographic, financial, and insurance data, including whether or not the patient is receiving Social Security disability benefits;

6. Patient discharge data forms which will show patient name and HI claim number of other unique identifier. These forms will provide information on total days of services received in inpatient and home care settings, reason for discharge, and place of death;

7. Service utilization abstracts which will show patient name and HI claim number of other unique identifier. These records will be updated periodically for all categories of individuals in the system and will document services provided to each patient and primary care giver, time required for each service, and type of professional (or volunteer) providing the services. The abstracts will also document bereavement services to the primary care giver following the patient's death;

8. Survey on the "Impact of Hospice Care on Patient and Family." Survey forms will show patient name and HI claim number or other unique identifier. This survey will be a major source of information for the independent evaluator in determining the quality and acceptability of services provided to terminally ill patients. The questions will focus on the patient's experience of pain and other symptoms, functional and emotional status of the patient, and patient and primary care giver attitudes toward care received.

9. Master demonstration file, indexed by patient name and HI claim number or other unique identifier, containing all billing, service, and evaluation data included in the other system of records listed above.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 402 of the Social Security Amendments of 1967, Public Law 90–248, as amended by section 222(b) of the Social Security Amendments of 1972, Public Law 92–603, and section 1115(a) of the Social Security Act, as amended by section 404 of the Social Security Amendments of 1977, Public Law 95–216.

PURPOSE(S):

The purpose of this system of records is: (1) to provide billing, cost, and service data necessary to reimburse and evaluate the care received by terminally ill Medicare beneficiaries, Medicaid recipients, and their primary care givers from hospice organizations selected to participate in the demonstration; (2) to furnish information necessary to evaluate the services received by other groups of terminally ill patients and their families; (3) to develop national policy recommendations to the Congress; (4) to validate the work of the independent evaluator; (5) to provide national data projections as a basis for actuarial estimates of the cost of the hospice program and the cost of terminal illness in general; and (6) for additional internal analyses.

HCFA may also provide information from the record of an individual to other agencies of the Department of Health and Human Services, such as the Social Security Administration.

HCFA will obtain the written informed consent of every individual from whom information is solicited or whose records are abstracted for

purposes of the demonstration or its evaluation.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

1. Brown University will receive all information in the system from billing, service utilization, patient/primary care giver profile and patient/family attitude records, either in hard copy, magnetic tape, or flexible diskette form, and store it in the master demonstration file, a magnetic tape. The evaluator will use this information to assess the cost, use, quality and acceptability of care provided to terminally ill patients in both the demonstration and comparison groups;

2. HCFA may disclose a record from this system of records as a "routine use" to an individual or organization for a research, evaluation, or epidemiological project related to the prevention of disease or disability, or the restoration or maintenance of health if HCFA:

a. determines that the use or disclosure does not violate legal limitations under which the record was provided, collected, or obtained;

b. determines that the purpose for which the disclosure is to be made:

(1) cannot be reasonably accomplished unless the record is provided in individually identifiable form,

(2) is of sufficient importance to warrant the effect and/or risk on the privacy of the individual that additonal exposure of the record might bring, and

(3) there is reasonable probability that the objective for the use would be accomplished;

c. requires the information recipient to:

(1) establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and

(2) remove or destroy the information that allows the individual to be identified at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the project, unless the information recipient presents an adequate justification of a research or health nature for retaining such information, and

(3) make no further use or disclosure of the record except:

(a) in emergency circumstances affecting the health or safety of any individual,

(b) for use in another research project, under these same conditions, and with written authorization of HCFA,

(c) for disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or

(d) when required by law;

d. secures a written statement attesting to the information recipient's understanding of and willingness to abide by these provisions.

3. HCFA may make disclosures to a congressional office from the record of an individual in response to an inquiry which the congressional office makes at the request of that individual;

4. 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;

5. HCFA may make disclosures to a participating Medicaid State Agency from the record of a Medicaid recipient who resides in that State.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Participating hospices will transmit hard copy or tapes of billing information for services that are waivered or currently covered by Medicare to Division of Health Services Studies, Office of Direct Reimbursement (DHSS/ODR), HCFA. This Office will serve as the fiscal intermediary for Medicare payments under the demonstration. DHSS/ODR will transfer this information to an automated record system using flexible diskettes. After the operational phase of the demonstration, this information will be transferred to magnetic tape.

Some participating Medicaid State Agencies have also chosen to use DHSS/ODR as their fiscal intermediary for the demonstration. In these States, participating hospices will also submit Medicaid bills to DHSS/ODR. Other Medicaid State Agencies which use their regular intermediaries for the demonstration will transmit billing information to the independent evaluator.

Besides Medicaid bills, Brown University will also receive copies of all other records in the system, whether generated by DHSS/ODR, Medicaid State Agencies, or cooperating private insurors. From these records and from information extracted from Medicare claims and enrollment files, Brown University will create a master demonstration file (a magnetic tape). HCFA will hold a duplicate of this master file.

HCFA and Brown University will store records in hard copy, flexible diskette and magnetic tape form.

RETRIEVABILITY:

(a) HCFA will store and retrieve Medicare and Medicaid billing data by beneficiary name and HI claim number or other unique identifier.

(b) HCFA will retrieve data from the master demonstration file by patient name and HI claim number or other unique identifier.

SAFEGUARDS:

HCFA and Brown University will maintain all records in secure storage areas accessible only to authorized employees and will notify all employees having access to records of criminal sanctions for unauthorized disclosure of information on individuals. For computerized records, HCFA and Brown University will initiate automated data processing (ADP) systems security procedures required by the Department's ADP Systems Manual, Part 6, ADP Systems Security. As examples of system safeguards, DHSS/ODR, which will process the majority of bills submitted by the participating hospices, will store all magnetic tapes in a locked tape library in a locked computer room. The mini-computer used by DHSS/ODR is not linked to any outside terminals and so there is no access to the system beyond the secured computer room. Moreover, only specific personnel may enter this room. The building housing this system is guarded during non-work hours.

RETENTION AND DISPOSAL:

HCFA and Brown University will retain these records for the life of the demonstration and the evaluation. HCFA then will destroy all information in records from the demonstration and evaluation which contain personal identifiers, whether in hard copy records or on magnetic tapes or flexible diskettes. The sole exception will be the hard copy Medicare billing records. Upon completion of the evaluation, these billing records will be sent to the

Washington National Records Center in Suitland, Maryland. Records on bills for the Hospital Insurance Program will be destroyed 8-years after payment is made, and records on bills for the Supplementary Medical Insurance Program will be destroyed 5-years after payment is made.

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:

Individuals should address inquiries and request concerning system records to the system manager, indicated above, specifying name, approximate date of service (if known), and hospice or hospital. An individual who requests notification or access to a medical record shall, at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents at the representative's discretion. These notification and access procedures are in accordance with Department Regulations (45 CFR 5b).

RECORD ACCESS PROCEDURE:

Individuals who participating in the demonstration project may request their data records in writing. Access procedure is the same as the notification procedure. Requestor should reasonably specify the record contents being sought. These access procedures are in accordance with Department Regulations (45 CFR 5b).

CONTESTING RECORD PROCEDURES:

An individual who wishes to contest the contents of any record in this system should contact the system manager, reasonably identify the record, and specify the information to be contested and the reason for contesting it, e.g., why it is inaccurate or incomplete. These procedures are in accordance with Department Regulations (45 CFR 5b).

RECORD SOURCE CATEGORIES:

Sources of information contained in this record system include individual patients and primary care givers, the participating hospices, the comparison hospices and hospitals, participating and selected non-participating Medicaid State Agencies, cooperating private insurors, and selected HCFA enrollment and claims files.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Appendix A—Participating Hospices

Genesee Region Home Care Association, 311 Alexander Street, Rochester, New York 14604.

Connecticut Hospice, Inc., 61 Burban Drive, Branford, Connecticut 06405.

Overlook Hospital, Division of Community Health, 193 Morris Avenue, Summit, New Jersey 07901.

Medical College of Virginia, Box 37, MCV Station, Richmond, Virginia 23298.

Visiting Nurse Association of Dallas, 4606 Greevnille Avenue, Dallas, Texas 75206.

Hospital Home Health Care, 400 Walter N.E., Suite 316, Albuquerque, New Mexico 87102.

Hospice Care, Inc., 8891 78th Avenue, North, Seminole, Florida 33543.

Providence Medical Center, 700 N.E. 47th Avenue, Portland, Oregon 97213.

Bethesda Lutheran Medical Center, 559 Capitol Boulevard, St. Paul, Minnesota 55103.

Bellin Memorial Hospital, P.O. Box 1700, 744 South Webster Avenue, Green Bay, Wisconsin 54305.

Community Home Health Care, 2627 Eastlake Avenue East, Seattle, Washington 98102.

Cabrini Medical Center, 227 East 19th Street, New York, New York 10003.

San Diego County Hospice Corporation, 3134 El Cajon Boulevard, San Diego, California 92104.

Hospice of Northern Virginia, Inc., 4715 North 15th Street, Arlington, Virigina 22205.

Santa Barbara Visting Nurse Association, 133 East Haley Street, Santa Barbara, California 93101.

Boulder County Hospice, 2118 14th Street, Boulder, Colorado 80302.

University of Massachusetts Medical Center, Palliative Care Service, Inc., 55 Lake Avenue, North, Worcester, Massachusetts 01605.

Hospital Home Health Care Agency of California, 23228 Hawthorne Bouldevard, Torrance, California 90505.

San Pedro Peninsula Hospital, 1300 West Seventh Street, San Pedro, California 90732.

St. Benedict Hospital and Nursing Home, Johnson at South Alamo, San Antonio, Texas 78204.

Hospice, Inc., 111 N.W. 10th Avenue, Miami, Florida 33128.

Hospice of the Good Shepherd, Inc., P.O. Box 144, Waban, Massachusetts 02168.

Visiting Nurse Association, Inc., 260 College Street, Burlington, Vermont 05401.

Hospice of Marin, 77 Mark Drive, #6, San Rafael, California 94903.

Rogers Memorial Hospital, Inc., 34810 Pabst Road, Oconomowoc, Wisconsin 53066.

Luthern Medical Center, Continuing Care Unit, 2639 Miami Street, St. Louis, Missouri 63118.

Appendix B—Participating Medicaid State Agencies

Colorado Department of Social Services, 1574 Sherman Street, Denver, Colorado 80203.

New Jersey Department of Human Services, 324 East State Street, Trenton, New Jersey 08625.

Department of Social Welfare, State Office Building, Monpelier, Vermont 05602.

Department of Social and Health Services, Division of Medical Assistance LK–11, Office of Medical Policy and Procedure, Olympia, Washington 98504.

Department of Human Services, Income Support Division, P.O. Box 2348, Santa Fe, New Mexico 87503.

Department of Health Services, 714 P Street, Sacramento, California 95814.

Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301.

New York State Department of Social Services, 40 North Pearl Street, Albany, New York 12243.

Department of Health, 109 Governor Street, Richmond, Virginia 23219.

Department of Health and Social Services, Room 643, 1 West Wilson Street, Madison, Wisconsin 53702.

Department of Income Maintenance, 110 Bartholomew Avenue, Hartford, Connecticut 06115.

Department of Public Welfare, Income Maintenance Division, 690 North Robert Street, St. Paul, Minnesota 55164.

Department of Public Welfare, 600 Washington Street, Boston, Massachusetts 02111.

Texas Department of Human Resources, P.O. Box 2960, Austin, Texas 78769.

[FR Doc. 81-2360 Filed 1-22-81; 8:45 am]
BILLING CODE 4110-35-M

Privacy Act of 1974; Report of New System

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: Notification of new system of records.

SUMMARY: In accordance with the requirements of the Privacy Act of 1974, we are proposing to establish a new system of records:

Evaluation of the Home Dialysis Aide Demonstration HCFA No. 09–70–0023.

We have provided background information about the proposed system in the "Supplementary Information" section below. HCFA invites public comments with respect to routine uses of the system.

DATES: HCFA has sent a report of the new system to the Speaker of the House of Representatives, the President of the Senate and the Director, Office of Management and Budget, on January 16, 1981. HCFA has requested that OMB

grant a waiver of the usual requirement that a new 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 new system will be effective on the date of the waiver except for the routine uses. The routine uses will become effective as proposed without further notice on March 17, 1981, provided HCFA does not receive comments which would result in a contrary determination or when the system becomes effective, whichever is later.

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. Spike Duzor, Office of Research, Demonstrations and Statistics, Room 1–E–6, Oak Meadows Building, 6340 Security Boulevard, Baltimore, Maryland 21207, Telephone (301) 597–2367.

SUPPLEMENTARY INFORMATION: HCFA proposes to initiate a new system of collecting data under the authority of Section 402 of the Social Security Amendments of 1967, Public Law 90–248, as amended by Section 222(b) of the Social Security Amendments of 1972, Public Law 92–603, and Pub. L. 95–292.

During 1978, HCFA initiated three demonstration projects to test changes in Medicare program policies in the area of ESRD. These changes in Medicare policies are intended to affect decisions regarding the location in which hemodialysis (the major treatment for ESRD) is performed. Since the start of the ESRD program, the proportion of patients dialyzing at home has decreased significantly. Many experts believe home dialysis is less expensive, of equal medical care quality and may provide intangible benefits to the patient in comparison to dialysis in an ESRD facility, but that current policies may contain disincentives for home dialysis.

This new system of records will provide the utilization, attitude, cost, and quality of care data necessary to evaluate the dialysis care received by patients in both the experimental and control facilities under the three demonstrations. Persons served by selected experimental facilities will receive additional Medicare benefits, and may choose to dialyze at home, with or without an aide, or in a facility as an outpatient. Persons served by control facilities within the demonstrations will receive no additional Medicare esrd benefits. Thus, comparison patients may decide to dialyze at home, with or without an aide, or receive treatments in a dialysis facility.

If home dialysis can be definitely demonstrated to be cheaper and at the same time not adversely affect the quality of care, the Medicare program may be able to save a significant proportion of ESRD funds.

The Orkand Corporation will be conducting the evaluation of the Home Aide Demonstrations. In conducting the evaluation, we propose to survey patients and staff participating in the demonstration. Specifically, these survey activities will include:

- ESRD Patient Survey

Personal interview with a sample of home and facility patients who are participating in the demonstration. Data will be gathered on patient attitudes regarding modality of dialysis, health status and health care cost.

- Home Dialysis Aide

Personal interviews with a sample of aides participating in the demonstration. Data will be gathered on aide attitudes concerning training techniques, job satisfaction and patient relationships.

- ESRD Physicians

Personal interviews with a sample of physicians participating in the demonstration. Data will be gathered on physician attitudes regarding criteria for selecting appropriate patient modalities and experiences of utilizing paid aides.

- Home Training Nurses

Personal interviews with all nurses home training coordinators for the demonstration. Data will be gathered to solicit nurses views for home training procedures and the viability of paid aides.

Dated: January 16, 1981.

Howard Newman,

Administrator, Health Care Financing Administration.

SYSTEM NAME:

Evaluation of Home Dialysis Aide Experiment, HHS/HCFA/ORDS.

SECURITY CLASSIFICATION:

None.

SYSTEM LOCATION:

The Orkand Corporation, 8630 Fenton Street, Suite 938, Silver Spring, Maryland 20910.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

1. Chronically ill Medicare beneficiaries with end-stage renal disease (ESRD) who dialyze at home, with or without a dialysis aide, or who dialyze in a facility as an outpatient; who receive dialysis services from participating experimental facilities; and who have signed the informed consent form for the demonstration and evaluation. (Note: For purposes of the demonstrations and the evaluation, dialysis aides have been defined as: Partner—a paid or non-paid family member; Assistant—a paid or non-paid, non-family member; Aide—generic term for either of the above.) The Health Care Financing Administration (HCFA) will permit payment for certain dialysis services (aide service and/or equipment) provided to these individuals and their aides which are not now covered under Medicare. These patients will be called "experimental patients" in this Notice.

2. Chronically ill Medicare beneficaries with end-stage renal disease who dialyze at home, with or without an aide, or who dialyze in a facility as an outpatient; who receive dialysis services from participating control facilities; and who have signed the informed consent form for the evaluation. These patients will be called "control patients" in this Notice.

CATEGORIES OF RECORDS IN THE SYSTEM:

1. Patient questionnaires administered to approximatley 1,500 patients, both home and in-facility, at both experimental and control facilities. These questionnaires will provide sociodemographic information on each patient; patient dialysis history and experience; out-of-pocket expenses incurred; and patient attitudes towards dialysis, training, aides, location of dialysis and a comparison of home to facility dialysis. Questionnaires will show patient name and health insurance claim number (HI claim number).

2. Aide questionnaires will show name and identify the aide's sociodemographic characteristics and employment experience as a dialysis aide and in other jobs. The questionnaire focuses on job attitudes, satisfaction with home training, responsibilites involved, facility support activities, and the job itself.

3. Aide record abstracts will identify aides by name and provide sociodemographic characteristics, occupational background, home training experience, employment history, amount of time spent in assisting patients with dialysis, and number of patients served.

4. Training records will identify patients by name and HI claim number and aides by name. Data will be provided on length of training, testing frequency and results, and retraining needed.

5. Medical records for both home and in-facility patients selected will identify

patients by name and HI claim number. Data will be provided on adverse dialysis events, monitoring and support services received, underlying diagnosis of renal disease, type of treatment received, and cause of death, if applicable.

6. Patient billing records will identify patients by name and HI claim number and will provide information on charges for specific dialysis services to Medicare, Medicaid, third party payors, and to the patient. Information will also be provided on payments made by various payors, amount disallowed by Medicare, and amount not paid.

7. Demonstration contractor data will also be entered into the system and identify patient by name and HI claim number. Demographic information will be provided and a breakdown of dialysis sessions recorded, type of aide, type of treatment, location of dialysis, and date of transplant, transfer, or death.

8. Information on patients will also be obtained from the supplemental Medicare billing forms. This data will be linked to other sources of data through a patient's HI claim number. Information to be provided includes patient history and treatment plan (HCFA 2742), outpatient dialysis service information (HCFA 2743), and death notification (HCFA 600-2).

9. Master magnetic tape file containing all utilization, quality, attitude, and cost data included in the other system records listed above.

10. HCFA will obtain written informed consent of every individual from whom information is solicited or whose records are abstracted for purposes of the demonstrations and evaluation.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Section 402 of the Social Security Amendments of 1967, Public Law 90-248, as amended by Section 222(b) of the Social Security Amendments of 1972, Pub. L. 92-603, and Pub. L. 95-292.

PURPOSE(S):

To provide utilization, attitude, cost, and quality data necessary to evaluate the dialysis care received by patients who dialyze at home, with or without an aide, or in-facility, and who are served by selected facilities participating in three demonstration projects sponsored by HCFA. The participating experimental facilities are identified in Appendix A and the participating control facilities are identified in Appendix B.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSE OF SUCH USES:

1. The independent evaluator will receive all information in the system from patient questionnaires, aide questionnaires, patient records, aide records, facility records, demonstration contractor records, intermediaries, and selected HCFA files either in hard copy, magnetic tape, or cards and store it in a master file. The independent evaluator will use this information to evaluate the cost, quality, attitudes, and utilization of dialysis care provided to home and in-facility patients in both the experimental and control facilities participating in the Home Dialysis Aid demonstrations. Once patient questionnaire information is linked to patient billing and medical records, all personal identifiers will be removed from the file.

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.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

The independent evaluator will store records in hard copy and magnetic tape form.

RETRIEVABILITY:

Records are indexed by HI claim number or other unique identifier.

SAFEGUARDS:

The independent evaluator will maintain all records in secure storage areas accessible only to authorized employees and will notify all employees having access to records of criminal sanctions for unauthorized disclosure of information on individuals. Authorized HCFA representatives will upon request, be granted access to premises where records are kept for the purpose of inspecting physical security arrangements. However, no data will be released with identifying information. For computerized records, the independent evaluator will initiate automated data processing (ADP) system security procedures required by the Department's ADP Systems Manual, Part 6, ADP Systems Security, e.g. use of passwords.

RETENTION AND DISPOSAL:

The independent evaluator will hold hard-copy records, magnetic tapes, and cards until patient and aide-specific data are received and compiled. All identifying information and hard-copy will then be destroyed, thus protecting the confidentiality of all information collected. The Orkand Corporation will retain all records for the life of the evaluation (September 30, 1982) and then these records will become the custody of the Office of Research, Demonstrations and Statistics, HCFA. The independent evaluator will not retain any patient-based files. Data supplied to HCFA will not include patient identifiers. No data which would possibly identify an individual will be supplied.

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:

Individuals should address inquires and requests concerning system records to the system manager indicated above, specifying name, approximate date of service (if known), and ESRD facility. An individual who requests notification or access to a medical record shall, at the time the request is made, designate in writing a responsible representative who will be willing to review the record and inform the subject individual of its contents at the representative's discretion. These notification and access procedures are in accordance with Department Regulations (45 CFR 5b).

RECORD ACCESS PROCEDURES:

Individuals participating in the demonstrations and the evaluation may request their data records in writing. Access procedure is the same as the notification procedure. Requestor should reasonably specify the record contents being sought. (These access procedures are in accordance with Department Regulations (45 CFR 5b).)

CONTESTING RECORD PROCEDURES:

An individual who wishes to contest the contests of any record in this system should contact the system manager and reasonably identify and specify the information to be contested and reason for contesting, why it is inaccurate or incomplete. (These procedures are in accordance with Department Regulations (45 CFR 5b).)

RECORD SOURCE CATEGORIES:

Sources of information contained in this record system include individual patients and dialysis aides, participating experimental and control facilities, demonstration contractors, cooperating intermediaries, and selected HCFA files.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

None.

Appendix A

I. University of Utah—Experimental Facilities

1. American Medical Supply, Inc., Denver, CO.
2. Bio-Medical Applications of Fort Collins, Fort Collins, CO.
3. Ogden Limited Care Dialysis Center, Ogden, UT.
4. Pike's Peak Dialysis Center, Colorado Springs, CO.
5. Maintenance Hemodialysis Unit, Presbyterian Medical Center, Denver, CO.
6. Rocky Mountain Kidney Center, Denver, CO.
7. St. Mary Corwin Hospital Hemodialysis Unit, Pueblo, CO.
8. Hemodialysis Unit, St. Mary's Hospital, Grand Junction, CO.
9. Home Training Center, University of Colorado Medical Center, Denver, CO.
10. Dialysis Training Center, University of Utah, Salt Lake City, UT.
11. Utah Dialysis Training Center, University of Utah, Salt Lake City, UT.

II. System Sciences, Inc.—Experimental Facilities

1. Baumritter Kidney Center, Bronx, NY.
2. Downstate Dialysis Center, Brooklyn, NY.
3. El Camino Hospital, Mountain View, CA.
4. Kidney Care, Inc., Jackson, MS.
5. Kidney Care of Florida, Inc., Tampa, FL.
6. Regional Kidney Disease Program, Minneapolis, MN.
7. St. Joseph's Hospital Hemodialysis Center, Orange, CA.
8. The Kidney Center, Boston, MA.

III. Research Triangle Institute—Experimental Facilities

1. A. J. Tannenbaum Medical Associates, Greensboro, NC.
2. Asheville Kidney Center, Asheville, NC.
3. Bowman Gray School of Medicine, Winston-Salem, NC.
4. Carolina Clinic, Inc., Dialysis Unit, Winston, NC.
5. Duke University Medical Center, Durham, NC.
6. Greenville Dialysis Center, Greenville, NC.
7. Nalle Clinic Kidney Center, Charlotte, NC.
8. North Carolina Memorial Hospital, Chapel Hill, NC.
9. Southeastern Kidney Center, Wilmington, NC.

Appendix B

I. University of Utah—Control Facilities

1. Holt-Krock Dialysis Center, Ft. Smith, AR.
2. Hemodialysis Unit, Jewish Hospital of St. Louis, St. Louis, MO.
3. Hemodialysis Unit, Baptist Unit, Baptist Medical Center, Oklahoma City, OK.
4. Hemodialysis Unit, Clinton Regional Hospital, Clinton, OK.
5. Sayre Memorial Hospital, Sayre, OK.
6. Renal Department, Hillcrest Medical Center, Tulsa, OK.

II. System Sciences, Inc.—Control Facilities

1. Bio-Medical Applications of Tampa, Tample, FL.
2. Bio-Medical Applications of Dallas, Dallas, TX.
3. Dade Dialysis Center, Miami, FL.
4. Mt. Diablo Medical Center, Concord, CA.
5. North Central Dialysis Center, Chicago, IL.
6. Northwest Kidney Center, Seattle, WA.
7. Rogosin Kidney Center, New York, NY.
8. UCSD Hemodialysis Unit, San Diego, CA.

III. Research Triangle Institute—Control Facilities

1. Dialysis Clinic, Inc., Nashville, TN.
2. Dialysis Clinic, Inc., Knoxville, TN.
3. Dialysis Clinic, Inc., Chattanooga, TN.
4. Rhea County Hospital, Dayton, TN.
5. Fort Sanders Kidney Center, Inc., Knoxville, TN.
6. Baptist Memorial Hospital, Memphis, TN.
7. East Tennessee Dialysis Center, Johnson City, TN.

[FR Doc. 81-2381 Filed 1-22-81; 8:45 am]
BILLING CODE 4110-35-M

Medicare and Medicaid Programs; Schedules of Limits on Home Health Agency Costs Per Visit, Hospital Inpatient General Routine Operating Costs, and Skilled Nursing Facility Inpatient Routine Service Costs

AGENCY: Health Care Financing Administration (HCFA), HHS.

ACTION: General Notice.

SUMMARY: This document corrects three notices published in the **Federal Register** this year. These notices set forth schedules of limits on costs for home health agencies, hospitals, and skilled nursing facilities. In deriving these limits, we used a wage index to reflect differences in costs that are correlated with area wage differences. Tables of wage index values for urban and rural areas were published in each notice.

Due to a reporting error, we used incomplete data to calcualate the wage index values for three New England areas. We have since obtained corrected data, and have used this to recalculate the wage index values for these areas. This document sets forth the corrected wage index values.

EFFECTIVE DATES: The Schedule of Limits on Home Health Agency Costs Per Visit (45 FR 38014) and the Schedule of Limits on Hospital Inpatient General Routine Operating Costs (45 FR 41868) are effective for cost reporting periods beginning on or after July 1, 1980. The Schedule of Limits on Skilled Nursing Facility Inpatient Routine Service Costs (45 FR 58699) is effective for cost reporting periods beginning on or after October 1, 1980.

FOR FURTHER INFORMATION CONTACT: Carl Slutter, 301-594-9344.

SUPPLEMENTARY INFORMATION: Section 1861(v)(1) of the Social Security Act (42 U.S.C. 1395x(v)(1)) as amended by section 223 (Limitation on Coverage of Costs) of Pub. L. 92-603, the Social Security Amendments of 1972, authorizes the Secretary to set prospective limits on the costs that are reimbursed under Medicare. These limits may be applied to the direct or indirect overall costs or to costs incurred for specific items or services furnished by a Medicare provider, and may be based on estimates of the cost necessary in the efficient delivery of needed health services.

Regulations implementing this authority are set forth at 42 CFR 405.460. Under this authority, we published the following final notices:

(1) Schedule of Limits on Home Health Agency Costs Per Visit for Cost Reporting Periods Beginning on or after July 1, 1980 (45 FR 38014; published June 5, 1980);

(2) Schedule of Limits on Hospital Inpatient General Routine Operating Costs for Cost Reporting Periods Beginning on or after July 1, 1980 (45 FR 41868, published June 20, 1980); and

(3) Schedule of Limits on Skilled Nursing Facility Inpatint Routine Service Costs for Cost Reporting Periods Beginning on or after October 1, 1980 (45 FR 58699, published September 4, 1980).

To derive and apply each cost limit schedule, we use a wage index to account for provider cost differences that are correlated with area wage differences. We developed this wage index from hospital wage data obtained from the Bureau of Labor Statistics (BLS). The data used are those for the "hospital industry," a standard BLS reporting category. The tables of wage index values published in each notice were based on data for 1978, which are the latest available data.

Due to a reporting error, data on wages and numbers of employees for Federal, State, and local governmental hosptials in New Hamphire were not included in the BLS records, and thus were not used in calculating the wage index in the published notices. Based on corrected BLS data that includes data from governmental hospitals in New Hampshire, we have recomputed the wage index values for all New Hampshire areas. Because Rockingham County, NH, is included in the Boston New England County Metropolitan Area (NECMA), inclusion of the corrected data has also resulted in a change in the wage index value for the Boston

NECMA. The revised index values are as follows:

	Previous index value	Revised index value
Urban areas:		
Manchester-Nashua NH	.8699	.9590
Boston-Lowell-Brockton-Lawrence-Haverhill MA-NH	1.1337	1.1339
Rural area:		
Rural New Hamphire	1.0673	1.0674

The Medicare intermediaries will use these revised wage index values to calculate the cost limits for individual providers in the affected areas, and will notify each provider of its new limit. For hospitals and home health agencies, this will change the cost limits for cost reporting periods beginning on or after July 1, 1980. For skilled nursing facilities, this will change the cost limits for cost reporting periods beginning on or after October 1, 1980.

(Sections 1102, 1814(b), 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: December 23, 1980.

Earl M. Collier, Jr.,

Acting Administrator, Health Care Financing Administration.

Approved: January 16, 1981.

Patricia Roberts Harris,

Secretary.

[FR Doc. 81-2355 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-35-M

Health Services Administration

Project Grants for Genetic Diseases Testing and Counseling Services and Sickle Cell Screening and Education Clinics

AGENCY: Health Services Administration, HHS.

ACTION: Notice of Availability of Grants.

SUMMARY: The Health Services Administration (HSA) announces that applications are being accepted for: (1) voluntary comprehensive genetic diseases testing and counseling services project grants, and (2) sickle cell screening and education services project grants which were funded in the previous fiscal year. Awards will be made under the authority of section 1101 of the Public Health Service (PHS) Act (42 U.S.C. 300b(a)).

Section 1101(a) authorizes the Secretary to make grants to public and nonprofit private entities for projects to plan, establish, and operate voluntary genetic diseases testing and counseling services programs. Section 1104(c) requires that, in doing so, the Secretary give special consideration to previously funded sickle cell screening and education clinics. The regulations implementating these authorities are set forth at 42 CFR Part 51f (44 FR 23837–43).

DATE: Completed applications must be received by 5:00 p.m., April 10, 1981.

ADDRESS: Grants Management Branch, Bureau of Community Health Services, Parklawn Building, Room 6–49, 5600 Fishers Lane, Rockville, Maryland 20857. Telephone number 301 443–1440.

SUPPLEMENTARY INFORMATION: Genetic Diseases Testing and Counseling Services.

A continuing resolution for fiscal year (FY) 1981 (Pub. L. 96–526, effective through June 5, 1981) makes $11.5 million available for operation of this program (Federal Catalog of Domestic Assistance, Number 13.980). Of this amount, it is anticipated that approximately $2.3 million will be available for 15 noncompeting, continuation awards for comprehensive broad-based genetic diseases projects. Approximately $6.0 million will be available to support 19 competing renewals and/or new, competing comprehensive genetic diseases projects. Priority will be afforded to renewal applications from currently funded projects which have performed satisfactorily. The average amount of an award to these broad-based projects will be approximately $230,000.

The Secretary will make grants to eligible applicants for projects which will, in the Secretary's judgment, best promote the purposes of section 1101(a) the Act. Factors which will be considered by the Secretary for approval of awards for comprehensive, broad-based genetic diseases services projects include:

1. The extent to which the project would meet the requirements set forth in 42 CFR 51f.106(a);

2. The number of persons proposed to be served and the extent to which rapid and effective use of funds would be made;

3. The comprehensiveness of the proposed project, with particular attention to the number of genetic diseases with respect to which the applicant intends to provide, either directly or indirectly, screening and testing services;

4. The feasibility of the plan in the application for providing services;

5. The degree to which the project will be operated in conjunction with programs supported under Title V of the Social Security Act, relating to Maternal and Child Health and Crippled Children's Services;

6. The extent to which the project proposes to coordinate its activities with the activities of other health services and genetic disease-related programs, including federally-assisted sickle cell projects, in the service area;

7. Whether the project is or proposes to be a part of a network of services covering the entire service area;

8. The capability of the applicant to provide sound financial management; and

9. The applicant's plans for evaluation in such areas as management efficiency, effectiveness of services, and the degree to which project goals will be met.

To be approved, an applicant must propose to serve an area no smaller than a State unless the Secretary waives this requirement because the applicant demonstrates good cause to serve a smaller area. See 42 CFR 51f.106(a)(2).

The Secretary will give priority to applicants for comprehensive genetic diseases services projects in areas which the Secretary determines have the greatest number of persons who may benefit from and are in need of genetic diseases testing and counseling services. This determination will be based on the size of the general population of the proposed service area and the extent to which available resources are insufficient to meet the needs of that population for these services.

Sickle Cell Screening and Education Services

Of the $11.5 million made available under the continuing resolution for FY 1981, Pub. L. 96–526, it is anticipated that $2.1 million will be used for noncompeting, continuation awards for previously funded sickle cell screening and education clinics which were supported under section 301 of the PHS Act in FY 1979 and were subsequently supported under section 1101 of the Act in FY 1980. The Secretary may support these projects under section 1101 beyond FY 1980 if no areawide network of genetic disease services exists, or if coordination with an existing network could not, in the Secretary's judgment, reasonably have been accomplished within these 2 years. Grants may be awarded to projects which will, in the judgment of the Secretary, best promote the purposes of the Act, taking into account:

1. The extent of the unmet need for sickle cell-related services in the service area;

2. The effectiveness of the project's previous performance with respect to use of funds and provision of services;

3. The effectiveness of the applicant's plan and the soundness of its management;

4. Whether an areawide plan to cover a broad range of genetic diseases has been developed and will be implemented in a service area which includes the service area of the applicant, during the project year for which the applicant requests funding;

5. The effectiveness of the applicant's plan to become a service component in an areawide network of services within the project year, if an areawide network exists;

6. Whether the provision of sickle cell services would be terminated or rendered ineffective if funding were not approved; and

7. The extent to which the project would meet the requirements set forth in § 51f.107 of the regulations.

Health Planning Requirements

All new and competing renewal applications as well as all continuing applications which propose a substantive change in the scope of the project must be submitted to the appropriate A–95 Clearinghouse Agency(s) (see Office of Management and Budget Circular A–95, Revised). A–95 Clearinghouses must have 60 days after receipt of notification from the applicant before the deadline for receipt of applications by the Department of Health and Human Services (HHS). Applicants requesting grant support for new, competing renewals, or continuation projects proposing substantive changes also must submit their applications to the appropriate Health Systems Agency(s) at least 67 days before the due date for completed applications to HHS. (See 42 CFR Part 122).

Application Information

Application kits, including all necessary forms, instructions, and a copy of the program regulations, may be obtained upon written request to the Grants Management Branch, Bureau of Community Health Services, Room 6–49, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Telephone number 301 443–1440. Completed applications must be returned to the same office.

Consultation and technical assistance regarding the development of an application are available from Audrey F. Manley, M.D., Office for Maternal and Child Health, Bureau of Community Health Services, Room 7–49, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857. Telephone number 301 443–1080.

Dated: January 13, 1981.

George I. Lythcott,

Administrator.

[FR Doc. 81-2401 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-84-M

Office of Human Development Services White House Conference on Aging, Technical Committee; Change in Meeting

AGENCY HOLDING THE MEETING: Department of Health and Human Services, Office of Human Development Services, White House Conference on Aging, Technical Committee on Older Persons as a Growing National Resource.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 46 FR 2721, January 12, 1981.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: Tuesday, January 27, 1981 from 9:30 am until 3:30 pm at the HHS–North Bldg., 330 Independence Avenue, SW., Washington, D.C. 20201 in Room 5542.

CHANGES IN THE MEETING: The room number has been changed to Room 4758.

Dated: January 19, 1981.

Mamie Welborne,

HDS Committee Management Officer.

[FR Doc. 81-2518 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-92-M

Office of the Secretary

Social Security Administration; Statement of Organization, Functions and Delegations of Authority

The Home Energy Assistance Act of 1980 (Title III of Pub. L. 96–223) provides for making energy assistance available to low-income households. Certain households receiving food stamps, Aid to Families with Dependent Children payments, various Veterans benefits or Supplemental Security Income payments, or whose income is at or below the Bureau of Labor Statistics lower living standard, will be eligible for assistance. Benefits will be made available through block grants to States, territories and Indian tribal organizations. To qualify for block grants, these entities must have approved plans for furnishing home energy assistance.

The Secretary of Health and Human Services (The Secretary) has responsibility for carrying out the provisions of the Home Energy Assistance Act of 1980. Under section 313(a)(1) of the Act, the Secretary may delegate any functions contained in the Act, except the making of regulations.

In order to administer the Low Income Energy Assistance program, the Secretary delegates to the Commissioner of Social Security the following authorities:

1. Authority to establish criteria and standards for State plan requirements and authority to approve or disapprove plans submitted by States, territories[1] and Indian tribal organizations for the distributtion of energy assistance funds.

2. Authority to render decisions that constitute final administrative action on appeals of prior Social Security Administration (SSA) disapprovals of energy assistance plans.

3. Authority to waive one or more of the requirements for State plans outlined in section 308(b) of the Home Energy Assistance Act of 1980, to the extent and period necessary to enable a State to administer its program, after determining that a waiver is likely to assist in promoting the objectives of the Act.

4. Authority to approve or disapprove block grants to States, territories and Indian tribal organizations for energy assistance.

5. Authority to reallocate funds where it is determined that the full State allotment will not be required for the period such allotment is available.

6. Authority to approve or disapprove quarterly estimates and reports of final expenditures of funds for energy assistance submitted by States, territories and Indian tribal organizations.

7. Authority to approve or disapprove applications and awards for incentive grants to States that have energy assistance programs serving the same kinds of households as set out in section 305 of the Home Energy Assistance Act of 1980.

8. Authority to withhold payment of funds to States and Indian tribal organizations that fail to substantially comply with any provisions set forth in their plans approved under section 308 of the Home Energy Assistance Act of 1980.

9. Authority to enter into agreements with States to provide payment status data on Supplemental Security Income (SSI) beneficiaries or to arrange for direct payment by SSA of energy assistance benefits to SSI recipients.

10. Authority to certify energy assistance payments to the Department of the Treasury for disbursement to recipients of SSI benefits.

[1] Includes the Commonwealth of Puerto Rico and the insular areas of Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands and the Trust Territory of the Pacific Islands.

11. Authority, under section 306(b)(1)(B) of the Home Energy Assistance Act of 1980, to transfer funds each fiscal year to the Director of the Community Services Administration for energy crisis activities.

12. Authority to perform all other administrative functions (except for promulgation of regulations) necessary to effectuate the Low Income Energy Assistance program, including authority to: Establish uniform standards for data collection by the States; monitor State program administration; utilize the services and facilities of public agencies and institutions and to pay for such services; coordinate the administration of the Low Income Energy Assistance Program with programs authorized by the Economic Opportunity Act of 1964 and other Federal energy programs; establish procedures for referrals for participation in Federal weatherization programs and develop and implement the capacity for estimating total annual energy expenditures of low income households in each State.

These delegations to the Commissioner are effective on January 23, 1981. The Commissioner may redelegate these authorities to the Associate Commissioner for Family Assistance. If the Commissioner or the delegate of the Commissioner exercises any of these authorities before this notice is published in the **Federal Register**, his or her actions are affirmed and ratified.

Dated: December 31, 1980.

Patricia Roberts Harris,

Secretary of Health and Human Services.

[FR Doc. 81-2521 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-12-M

Public Health Service

Health Maintenance Organizations

AGENCY: Public Health Service, HHS.

ACTION: Notice, Continued Regulation of Health Maintenance Organizations: Determination of Noncompliance.

SUMMARY: On November 30, 1979, the Office of Health Maintenance Organizations determined that Connecticut Health Plan (CHP), 4000 Park Avenue, Bridgeport, Connecticut 06606, a federally qualified health maintenance organization (HMO), was not in compliance with the assurances if had provided to the Secretary that it would maintain a fiscally sound operation, and satisfactory administrative and managerial arrangements. The determination of noncompliance does not itself affect the status of CHP as a federally qualified HMO. Rather, CHP has, in fact, initiated corrective action to bring itself into compliance with the assurances it gave the Secretary.

FOR FURTHER INFORMATION CONTACT: Howard R. Veit, Director, Office of Health Maintenance Organizations, Park Building, 3rd Floor, 12420 Parklawn Drive, Rockville, Maryland 230857, 301/443-4106.

SUPPLEMENTARY INFORMATION: Under Section 1312(b)(1) of the Public Health Service Act (42 U.S.C. 300e-11(b)(1)) (the Act), if the Secretary makes a determination under Section 1312(a) that a qualified HMO which provided assurances to the Secretary under section 1310(b)(1) is not organized or operated in the manner prescribed by section 1301(c), then she shall (1) notify the HMO in writing of the determination, (2) direct the HMO to initiate such action as may be necessary to bring it into compliance with the assurances, and (3) publish the determination in the **Federal Register.**

On October 24, 1980 OHMO notified CHP that it had reestablished compliance with the assurances that it had given the Secretary that it would maintain a fiscally sound operation and satisfactory administrative and managerial arrangements.

Dated: January 12, 1981.

Howard R. Veit,

Director, Office of Health Maintenance Organizations.

[FR Doc. 81-2357 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-85-M

DEPARTMENT OF AGRICULTURE

Forest Service

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

Coal Unsuitability Recommendations for Federal Coal Emergency Lease Application; Meeting

AGENCY: U.S. Forest Service, Agriculture. Bureau of Land Management, Interior.

ACTION: Notice of public meeting.

SUMMARY: Notice is hereby given that the following public participation meeting will be held to discuss the coal unsuitability recommendations for a federal coal emergency lease application (No. U-47080) by Coastal States Energy Company of Houston, Texas. The meeting will be held on February 10, 1981, at 10:00 a.m. in the Sevier County Courthouse Auditorium, Richfield, Utah. Coal unsuitability criteria for the Fishlake Forest and Resource Management Plan will also be discussed at the meeting.

DATE: Comments by February 16, 1981.

FOR FURTHER INFORMATION CONTACT: Andrew E. Godfrey, Forest Planning Staff Officer, U.S. Forest Service, 170 North Main, Richfield, Utah 84701 (801) 896-4491, or Donald L. Pendleton, District Manager, Bureau of Land Management, 150 East 900 North, Richfield, Utah 84701 (801) 896-8221.

SUPPLEMENTARY INFORMATION: Before action can be taken on the request of Coastal States Energy Company for a federal coal emergency lease application, the process of applying the coal unsuitability criteria must be completed.

The following is the legal description of the area (1,158.05 acres) for which Coastal States Energy Company has requested that a federal coal emergency lease application be issued.

T21S, R4E, S.L.M.
Section 25, All
Section 36 N½
T21S, R5E, S.L.M.
Section 30, Lots 2, 3, and 4, W½SE¼

Dated: January 14, 1981.

Jeff M. Sirmon,

Regional Forester.

[FR Doc. 81-2420 Filed 1-22-81; 8:45 am]

BILLING CODE 3410-11-M
BILLING CODE 4310-84-M

DEPARTMENT OF THE INTERIOR

Nevada State Office; Protests to Final Intensive Wilderness Inventory Decisions

The Bureau of Land Management, Nevada State Office, announced its final intensive wilderness inventory decisions in the November 14, 1980 **Federal Register** on pages 75594-75597. The formal protest period to these decisions announced in that publication has been concluded.

The decisions issued on the following inventory units which were identified as Wilderness Study Areas have been protested:

Unit No.	Unit name	Acres in unit
Elko District:		
NV-010-027	Bluebell	66,130
NV-010-033	Goshute Peak	101,340
NV-010-035	South Pequop	46,660
NV-010-106	Owyhee Canyon	17,520
NV-010-132	Little Humboldt River	96,320
NV-010-151	Rough Hills	6,300
NV-010-184	Bad Lands	72,480
Winnemucca District:		
NV-020-006-A/ CA-020-914	East Fork High Rock Canyon	53,920

Unit No.	Unit name	Acres in unit
NV-020-007	High Rock Lake	72,396
NV-020-008/CA-020-913.	Little High Rock Canyon	53,573
NV-020-012/CA-020-621/618.	Poodle Mountain	137,160
NV-020-014	Fox Mountain Range	81,424
NV-020-019	Calico Mountains	67,931
NV-020-200	Selenite Mountain	34,731
NV-020-201	Mt. Limbo	24,512
NV-020-406	Tobin Range	86,872
NV-020-600	Blue Lakes	33,224
NV-020-603	South Jackson Mountains.	69,314
NV-020-606	North Jackson Mountains	26,423
NV-020-620	Black Rock Desert	55,300
NV-020-621	Pahute Peak	55,472
NV-020-622	North Black Rock Range	94,356
NV-020-637	McGee Mountain	25,406
NV-020-827	N. Fork Little Humboldt	114,021
NV-020-859/OR-3-153/OR-2-78.	Disaster Peak	37,335
Carson City District:		
NV-030-102	Clan Alpine Mountains	257,000
NV-030-104	Stillwater Range	113,310
NV-030-108	Augusta Mountains	96,000
NV-030-110	Desatoya Mountains	78,160
NV-030-122	Job Peak	115,120
NV-030-407	Gabbs Valley Range	81,120
NV-030-430	Basalt	55,450
NV-030-432	Hontone Mine	2,570
NV-030-525A	Burbank Canyons	14,490
NV-030-531/CA-010-105.	Slinkard	5,440
NV-030-532	Carson-Iceburg	550
Ely District:		
NV-040-015	Goshute Canyon	190,660
NV-040-086/UT-050-029.	Granite Spring	93,100
NV-040-154	Park Range	50,800
NV-040-168	Riordan's Well	190,700
NV-040-197	Table Mountain	57,260
NV-040-202/UT040-216.	White Rock Range	33,370
NV-040-242	Worthington Mountains	62,400
NV-040-246	Weepah Spring	191,700
Las Vegas District:		
NV-050-0131	East Pahranagat	152,458
NV-050-0132	South Pahrocs/Hiko	71,055
NV-050-0154	Medsger Pass	11,462
NV-050-0165	Lower Pahranagat Lake	3,350
NV-050-0338	Silver Peak Range North	72,779
NV-050-0350	Pigeon Spring	6,977
NV-050-0354	Queer Mountain	88,729
NV-050-0355	Bonnie Claire Flat	81,776
NV-050-0368	Porter Mine	8,689
NV-050-0369	Amargosa	12,526
NV-050-0370	Nothing Flats	12,055
NV-050-03R-22	Gem	2,193
NV-050-0401	Mountain Stirling	203,000
NV-050-0414	Pine Creek	34,761
NV-050-0460	Resting Springs Range	21,058
Battle Mountain District:		
NV-060-019	Kawich	39,000
NV-060-059	Rawhide Mountain	75,400
NV-060-112	South Reveille	114,500
NV-060-142/162	Palisade Mesa	117,000
NV-060-158/199	Blue Eagle	72,900
NV-060-163	The Wall	43,300
NV-060-166	Grant Range	6,490
NV-060-190	Fandango	48,600
NV-060-191	Morey	29,700
NV-060-231/241	Antelope	148,300
NV-060-428	Simpson Park	51,500
NV-060-541	Roberts	57,800

	Units protested	Total acreage protested
Elko District	7	400,450
Winnemucca District	18	1,619,370
Carson City District	11	619,210
Ely District	8	869,810
Las Vegas District	15	780,868
Battle Mountain District	12	804,490
Statewide	71	5,294,198

The decisions issued on the following inventory units which were dropped from further consideration because of a lack of wilderness characteristics have been protested:

Unit No.	Unit name	Acres in unit
Elko District:		
NV-010-002	Maverick Springs	84,840
NV-010-002C	Maverick Springs	7,040
NV-010-002E	Maverick Springs	5,800
NV-010-002F	Maverick Springs	31,360
NV-010-016	Spruce Mountain	35,960
NV-010-017	Spruce Ridge	46,600
NV-010-110	Milligan Creek	121,360
NV-010-112	Bullhead	55,150
NV-010-130	Rock Creek	37,080
NV-010-197	Hank's Creek	6,300
Winnemucca District:		
NV-020-436	Granite Mountain	20,269
NV-020-621A	Pahute Peak	32,240
NV-020-641	Paiute Meadows	16,349
Carson City District:		
NV-030-323	Wassuk Range	57,600
NV-030-525	East Pine Nuts	38,785
NV-030-605	Virginia Mountains	89,275
Ely District:		
NV-040-021	Butte Mountains	47,860
NV-040-021A	Butte Mountains	33,460
NV-040-123	Martin Spring	24,800
NV-040-153	West Pancakes	317,820
NV-040-155	South Pancakes	140,400
NV-040-243	Garden Valley Reservoir	99,580
Las Vegas District:		
NV-050-0410	Shoemaker Spring	82,917
Battle Mountain District:		
NV-060-188	Morgan	9,000
NV-060-192	Slanted Buttes	23,900
NV-060-407	Bates Mountain	77,930
NV-060-461	South Fish Creek	104,500

	Units protested	Total acreage protested
Elko District	10	431,490
Winnemucca District	3	68,858
Carson City District	3	185,660
Ely District	6	663,920
Las Vegas District	1	82,917
Battle Mountain District	4	215,330
Statewide	27	1,648,175

The decisions issued on all inventory units that have not been protested are considered final. All Wilderness Study Areas and all inventory units protested will continue to be managed under provisions specified in the *Interim Management Policy and Guidelines for Lands Under Wilderness Review.*

A decision on each protest will be published in a future **Federal Register** notice. A thirty-day appeal period for all protest decisions will follow that announcement.

Dated: January 9, 1981.

Edward F. Spang,

State Director, Nevada.

[FR Doc. 81-1466 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

DEPARTMENT OF INTERIOR

Fort Union Regional Coal Team; Meeting

AGENCY: Bureau of Land Management, Interior Department.

ACTION: Notice of Regional Coal Team Meeting.

SUMMARY: Pursuant to the responsibilities set forth in 43 CFR 3400.4(b), the Montana State Office is issuing this notice to announce a Fort Union Regional Coal Team Meeting on February 18 and 19 in the large Conference Room (6th floor) of Granite Tower, 222 North 32nd Street, Billings, Montana. On both days, the meetings will begin at 9:00 a.m.

Some of the items on the agenda are as follows:

Summary of *West-Central North Dakota Management Framework Plan*

Status of Site Specific analysis and Facility Evaluation Reports

Results of Public Response on Information Brochure

Update on Unsuitability Criteria Application

Status of Social and Economic Work

Tract Delineation Reports: Redwater and Golden Valley MFP Areas

Recommended Areas for Tract Delineation: West-Central North Dakota MFP Area

Discussion of Tract Ranking Procedure

Leasing Targets and Production Goals

Discussion of Small Business Set-Aside

The public is welcome to attend. There will be time for questions and comments from the public.

FOR FURTHER INFORMATION AND FOR A COPY OF THE AGENDA, CONTACT: Bill Frey, Assistant Project Manager, Bureau of Land Management, Montana State Office, P.O. Box 30157, Billings, Montana 59107 (406) 657-6632.

Dated: January 13, 1981.

Kannon Richards,

Acting State Director.

[FR Doc. 81-2392 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

[1784]

Miles City, Montana, District Advisory Council; Meeting

Notice is hereby given, in accordance with Pub. L. 94-579 and 43 CFR Part 1780, that a meeting of the Miles City District Advisory Council will be held Friday, February 27, 1981, at 10:00 a.m. in the Conference Room at the Miles City District, Bureau of Land Management Office, West Highway 10-12, Miles City, Montana.

Agenda for the meeting will include:

1. Coal leasing program.
2. Public Service Program
3. Arrangements for next meeting.

The meeting is open to the public. Interested persons may make oral statements to the Council or file written statements for the council's consideration. Anyone wishing to make an oral statement must notify the District Manager at the Miles City District Office, P.O. Box 940, Miles City, Montana 59301 by February 20, 1981.

Summary minutes of the meeting will be maintained in the District Office and will be available for public inspection and reproduction during regular business hours within 30 days following the meeting.

Robert A. Teegarden,

Assistant District Manager.

[FR Doc. 81-2395 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

[1784]

Miles City, Montana, District Grazing Advisory Board; Meeting

Notice is hereby given in accordance with Pub. L. 92-463 that a meeting of the Miles City District Grazing Advisory Board will be held Thursday, February 26, 1981. The meeting will begin at 10:00 a.m. in the conference room at the Miles City District Bureau of Land Management Office, West Highway 10-12, Miles City, Montana.

The agenda is as follows:

1. Range Improvements
   (a) Reservoir and other water developments
   (b) Cooperative maintenance
   (c) Contracting methods.
2. Allotment Management Plans
   (a) The drought
   (b) Environment impacts.
3. Arrangements for the next meeting.

The meeting is open to the public. Interested persons may make oral statements for the board's consideration. Anyone wishing to make an oral statement must notify the District Manager, Bureau of Land Management, P.O. Box 940, Miles City, Montana, 59301 by February 20, 1981.

Depending on the number of persons wishing to make statements, a time limit may be established by the District Manager.

Summary minutes of the board meeting will be maintained in the District Office and be available for public inspection and reproduction (during normal business hours) within 30 days following the meeting.

Robert Teegarden,

Assistant District Manager.

[FR Doc. 81-2394 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-84-M

New Mexico; Intent To Prepare a Resource Management Plan

January 13, 1981.

The Department of the Interior, Bureau of Land Management (BLM), Las Cruces District, New Mexico will shortly begin preparation of a Resource Management Plan (RMP), including an Environmental Impact Statement (EIS) as an integral part of the planning process. The plan will make use and management decisions for resources on approximately 2.9 million acres of public land administered by the Bureau in the Las Cruces/Lordsburg Resources Area. The new planning start, under regulations in the code of Federal Regulations Title 43, Subpart 1601, will be the first in New Mexico. The public is invited to participate in the planning process, beginning with the identification of issues and planning criteria.

Geographic Area of the Plan

The plan will consider the public lands and Federal mineral ownership in Dona Ana, Luna, Hidalgo and Grant Counties as one planning unit. This encompasses approximately 2.9 million acres of BLM administered surface and 3.8 million acres of Federal minerals under Federal, State and private surface in the four county area.

Anticipated issues

Issues that may be addressed during development of the RMP include, but are not limited to, the following: (1) Vegetation allocation for livestock, watershed and wildlife. The issues of range improvements and management intensity will be a part of the vegetation allocation issue. The management of wildlife habitat and watershed are also a part of this issue. (2) Areas to be open or restricted to off-road vehicular use. (3) Determination of wilderness suitability or nonsuitability and the effects of eventual wilderness designation. (4) The need to manage and protect areas of critical environmental concern. (5) Need for public lands for community expansion and for designation of right-of-way corridors or windows. (6) Water needs for resource management projects. (7) Access needs for management and recreational opportunities. (8) Fire management in high threat areas and areas with high use or value. (9) The need for and management of minerals and energy resources, especially oil and gas and geothermal fields. (10) The need to protect and manage habitat for wildlife.

The public is invited to comment on these issues and to suggest other concerns, needs or opportunities for consideration during planning.

Resource Management Planning Process

The preparation or revision of an RMP includes the following steps:

1. *Identification of issues;* an action that gives the public, other Federal agencies and State and local governments an opportunity at the outset of planning to suggest concerns, needs and resource use, development and protection opportunities for consideration in the RMP.

2. *Development of planning criteria* to guide the development of the RMP to ensure that it is tailored to the issues previously identified and to ensure that unnecessary data collection is avoided; to guide the analysis of the management situation; to assist in the design and formulation of alternatives, and to estimate the effects of alternatives.

3. *Inventory data and information collection* (including resource, environmental, social and economic and institutional data).

4. *Analysis of the management situation* to determine the capability of public land resources to respond to needs, concerns and opportunities identified through public participation and coordination with other publics; issues identified earlier in the planning process; and national and State Director guidance.

5. *Formulation of management alternatives* for the resources in the Resource Area. Several complete, reasonable alternatives will be prepared for the Resource Area. One will be for no action, which means continuation of present levels or systems of resource use. The other alternatives will provide a range of choices from those favoring resource protection to those favoring resource production.

6. *Estimation of the effects of the alternatives.*

7. *Selection of a preferred alternatives,* which is incorporated into the draft plan and draft environmental impact statement.

8. *Development of a proposed RMP* and final environmental impact statement.

9. *Monitoring and evaluation* of plan implementation after approval, at intervals of not more than five years.

Key Dates for the Las Cruces/Lordsburg RMP

Approval of issues and criteria for the plan—April 1981
Completion of inventories and information collection—October 1982
Completion of the management situation analysis—February 1983
Completion of alternatives formulation—April 1983
Completion of estimation of effects of alternatives—May 1983
Selection of a preferred alternative—May 1983
Publication of draft RMP—November 1983
Publication of final RMP—July 1984
Approval and publication of decision—September 1984

Interdisciplinary Team

The RMP will be developed by an interdisciplinary team under the supervision of the Las Cruces District Manager. Individuals working on the plan full-time will be a team leader, a writer-editor, an economist, one specialist representing the renewable resource disciplines and another specialist representing the nonrenewable resource disciplines. Additional technical support will be provided by Area and District staff specialists as needed.

Public Participation Plan

A comprehensive public participation plan covering the period from October 1, 1980, through September 30, 1984, has been prepared. It is intended to involve interested or affected parties early and continuously throughout the planning process. An individual may protest approval of a final RMP only with respect to those items he submitted in writing to the District Manager during the planning process. The public participation plan is flexible and designed to accommodate the unique situations caused by the scattered nature of BLM's ownership pattern and the variety of affected publics. The plan generally follows a "grass roots" approach to public involvement, emphasizing localized, one-to-one contacts and extensive direct mailings, as well as continual coordination with local, State and other Federal agencies.

A booklet on the RMP has been scheduled to be mailed out during March 1981. The booklet is intended to introduce interested parties to the RMP process and to involve the public in the identification of issues and the development of planning criteria. The availability for comment of proposed issues and planning criteria developed as a result of initial public involvement will be announced in the **Federal Register** before formal approval and use in planning.

Public Meetings and Formal Notices

Workshops, briefings and group discussions will be scheduled in conjunction with meetings of the District Advisory Council and the Grazing Advisory Board, to assure full representation and participation of interested and affected publics. Additional **Federal Register** notices and news releases will accompany publication of the draft RMP and environmental impact statement (upon which there will be a 90-day review and comment period) in November 1983, publication of the final RMP and environmental impact statement (which will trigger a 30-day opportunity for protest) in July 1984, and the final decision in September 1984.

This schedule is tentative, and may be changed as the planning process unfolds. Complete records of all public participation events will be available for public review throughout development of the RMP. Records pertaining to the analysis and conclusions reached by the District Manager and staff throughout the planning and environmental analysis process will also be maintained and will be available for inspection on request.

Additional Information

For information about resource management planning in the Las Cruces District—to review planning maps and narratives, to be placed on the mailing list, to obtain copies of the public participation plan or other information, or to offer data or assistance—contact one of the following individuals:

William J. Harkenrider, Jr., Las Cruces/Lordsburg Area Manager,

or

Diana Edwards, Public Affairs Officer,

U.S. Bureau of Land Management, 1705 N. Valley Drive, P.O. Box 1420, Las Cruces, New Mexico 88001, Telephone: (505) 523–5571; FTS 572–0257.

Larry Woodard,

Acting New Mexico State Director.

[FR Doc. 81–2393 Filed 1–22–81; 8:45 am]

BILLING CODE 4310–84–M

DEPARTMENT OF THE INTERIOR

Geological Survey

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that Gulf Oil Exploration and Production Company has submitted a Development and Production Plan describing the activities it proposes to conduct on Lease OCS–G 3593, Block 195, South Timbalier Area, offshore Louisiana.

The purpose of this Notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendments of 1978, that the Geological Survey is considering approval of the Plan and that it is available for public reviews at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S. Geological Survey, 3301 North Causeway Blvd., Metairie, Louisiana 70002.

FOR FURTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m., 3301 North Causeway Blvd., Room 147, Matairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981.

E. A. Marsh,

Staff Assistant for Operations.

[FR Doc. 81–2406 Filed 1–22–81; 8:45 am]

BILLING CODE 4310–31–M

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that McMoRan Offshore Exploration Company has submitted a Development and Production Plan describing the activities it proposes to conduct on Lease OCS–G 2359, Block A–446, High Island Area, offshore Texas.

The purpose of this Notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendments of 1978, that the Geological Survey is considering approval of the Plan and that it is available for public review at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S.

Geological Survey, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana 70002.

FOR FURTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m., 3301 North Causeway Blvd., Metairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979 (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981.

E. A. Marsh,

Staff Assistant for Operations.

[FR Doc. 81-2409 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-31-M

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that Pennzoil Company has submitted a Development and Production Plan describing the activities it proposes to conduct on Lease OCS–G 2439, Block 535, East Cameron Area, offshore Louisiana.

The purpose of this Notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendments of 1978, that the Geological Survey is considering approval of the Plan and that it is available for public review at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S. Geological Survey, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana 70002.

FOR FURTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m., 3301 North Causeway Blvd., Metairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981.

E. A. Marsh,

Staff Assistant for Operations.

[FR Doc. 81-2410 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-31-M

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that Placid Oil Company has submitted a Supplemental Development and Production Plan describing the actitivies it proposes to conduct on Lease OCS–G 2600, Block 281, South Marsh Island Area, offshore Louisiana.

The purpose of this notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendment of 1978, that the Geological Survey is considering approval of the Plan and that is available for public review at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S. Geological Survey, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana 70002.

FOR FUTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m., 3301 North Causeway Blvd., Metairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981

E. A. Marsh,

Staff Assistant for Operations.

[FR Doc. 81-2411 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-31-M

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that The Superior Oil Company has submitted a Development and Production Plan describing the activities it proposes to conduct on Leases OCS–G 4144 and 4379, Blocks 3 and 53, Sabine Pass and West Cameron Areas, respectively, offshore Louisiana.

The purpose of this Notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendments of 1978, that the Geological Survey is considering approval of the Plan and that it is available for public review at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S. Geological Survey, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana 70002.

FOR FURTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m. 3301 North Causeway Blvd., Metairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981

E. A Marsh,

Staff Assistant for Operations.

[FR Doc. 81-2412 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-31-M

Oil and Gas and Sulphur Operations in the Outer Continental Shelf

AGENCY: U.S. Geological Survey, Department of the Interior.

ACTION: Notice of the Receipt of a Proposed Development and Production Plan.

SUMMARY: Notice is hereby given that Texaco, Inc. has submitted a Development and Production Plan describing the activities it proposes to conduct on Lease OCS 0554, Block 57, Vermilion Area, offshore Louisiana.

The purpose of this Notice is to inform the public, pursuant to Section 25 of the OCS Lands Act Amendments of 1978, that the Geological Survey is considering approval of the Plan and that it is available for public review at the offices of the Conservation Manager, Gulf of Mexico OCS Region, U.S. Geological Survey, 3301 North Causeway Blvd., Room 147, Metairie, Louisiana 70002.

FOR FURTHER INFORMATION CONTACT: U.S. Geological Survey, Public Records, Room 147, open weekdays 9 a.m. to 3:30 p.m., 3301 North Causeway Blvd., Metairie, Louisiana 70002, Phone (504) 837–4720, Ext. 226.

SUPPLEMENTARY INFORMATION: Revised rules governing practices and procedures under which the U.S. Geological Survey makes information contained in Development and Production Plans available to affected States, executives of affected local governments, and other interested parties became effective December 13, 1979, (44 FR 53685). Those practices and procedures are set out in a revised Section 250.34 of Title 30 of the Code of Federal Regulations.

Dated: January 15, 1981.

E.A. Marsh,

Staff Asstistant for Operations.

[FR Doc. 81–2413 Filed 1–22–81; 8:45 am]

BILLING CODE 4310–31–M

National Park Service

Appalachian National Scenic Trail; Relocations of Rights-of-Way

The National Trails System Act became law on October 2, 1968. The Act created a system to identify and establish a National Trails System. It also established the Pacific Crest Trail and the Appalachian Trail as the initial National Scenic Trails.

Section 7 of the National Trails System Act created a process for the administration and development of National Scenic Trails. This process included the responsibility to select an initial right-of-way for the National Scenic Trails and to publish notice of this right-of-way in the **Federal Register** "together with appropriate maps and descriptions." In selecting this right-of-way, the Secretary was required to obtain the advice and assistance of the states, local governments, private organizations, and landowners and land users concerned. For a two-year period after selection, he was also required to withhold federal action and to encourage the states or local governments involved (1) to enter into written cooperative agreements with landowners, private organizations and individuals to provide the necessary Trail right-of-way, or (2) to acquire such lands or interests therein to be utilized as segments of the National Scenic Trail. These responsibilities for the Appalachian Trail have been completed. A preliminary right-of-way and Trail route was selected after compliance with the consultation requirements of the Act and published in the **Federal Register**, Vo. 36, No. 197, Saturday, October 9, 1971, and the states and local governments have subsequently had the opportunity to act to protect the Trail.

Changes in the Trail route within the previously established right-of-way are routinely made. Section 7 also established a process for necessary relocations of the right-of-way after publication of notice in the **Federal Register.** This process inclues the responsibility to relocate segments of a National Scenic Trail right-of-way if such a relocation is necessary to preserve the purpose for which the Trail was established.

On March 21, 1978, Pub. L. 95–248 was enacted amending the original National Trails System Act. The thrust of this Amendment was to further the federal protection efforts under the original legislation, calling for an immediate federal land acquisition program. It also directed that this program be substantially completed within three years of September 30, 1978.

The original Act was further amended by Pub. L. 95–625 dated November 10, 1978. This Act eliminated the requirement for the Federal Government to wait two years after notice of selection of the right-of-way before acquisition could be initiated. We are kept advised on any action by states or localities to protect the Trail where relocations are involved.

As a part of this program to protect and establish an Appalachian Trail corridor, the Department of the Interior has determined that where the Trail is now along roads, close to houses or otherwise poorly located, the National Park Service will seek an alternative location, wherever possible, either pursuant to a change in Trail route, if feasible, within the existing right-of-way, or pursuant to the process outlined above by publishing a notice of right-of-way relocation in the **Federal Register** after appropriate consultation.

Consistent with this decision, the rights-of-way for the following sections of the Appalachian National Scenic Trail will be relocated outside of the originally designated rights-of-way to facilitate revised Trail routes that take advantage of the terrain, remove the Trail from roads, and/or moved the Trail away from houses so that these portions of the Trail meet the criteria and the purpose for which this Trail was established:

Beginning at the most Eastern part of Crawford Pond, just West of Jo-Mary Mountain, Piscataquis County, Maine and ending just South of Little Boardman Mountain, on the East Branch River, Piscataquis County, Maine, as indicated in Panels 28A.

Beginning on West Peak, West of Hay Mountain and East of Gulf Hagas Mountain, Piscataquis County, Maine and ending just South of Pugwash Pond, on the West Branch Pleasant River, as indicated in Panels 35A, 36A and 37A.

Beginning just North of the Northern tip of Pleasant Pond, Somerset County, Main and ending just East of Kennebec River, on Holly Brook, Somerset County, Maine, as indicated in Panels 63A and 64A.

Beginning on Maine State Route (4) just South of Sandy River Ponds, Franklin County, Maine and ending just East of Sabbath Day Pond, Franklin County, Maine, as indicated in Panels 93A, 94A, 95A and 96A.

Beginning on Bemis Mountain, Franklin County, Maine and ending just South of Surplus Pond, Oxford County, Maine, as indicated in Panels 103A, 104A, 105A and 106A.

Beginning at the Northern tip of Dream Lake, Coos County, New Hampshire and ending at or near the most Eastern corner of Leadmine, State Forest boundary, Coos County, New Hampshire, as indicated in Panels 121A and 122A.

Beginning at or near Mt. Mist, just South of Wachipauka Pond, White Mountain National Forest, Grafton County, New Hampshire and ending on the peak of Mount Cube, Grafton County, New Hampshire, as indicated in Panels 165A, 166A, 167A and 168A.

Beginning on the North Branch, just East of Quinttown, Grafton County, New Hampshire and ending just North of Smarts Mountain, Grafton County, New Hampshire, as indicated in Panel 170A.

Beginning on the Southern end of Lambert Ridge, Grafton County, New Hampshire and ending on State Route (113 A) just East of Lyme Center, Grafton County, New Hampshire, as indicated in Panel 177B.

Beginning just Southwest of Holts Ledge, Grafton Counry, New Hampshire and ending on the Northern end of Moose Mountain, Grafton County, New Hampshire, as indicated in Panel 178B.

Beginning on Connecticut Route (7), just South of Falls Village, Canaan Township, Litchfield County, Connecticut, proceeding in a southerly direction and ending on Connecticut Route (4), just west of Cornwall Bridge, Cornwall Township, Litchfield County, Connecticut, as indicated in Panels 277A, 278A and 279A.

Beginning near the South peak of Hammersly Ridge, just West of Quaker Lake, in the Town of Pawling, Dutchess County, New York and ends near the Pawling—Dover—Beekman Town Corner just northeast of Nuclear Lake, Dutchess County, New York, as indicated in Panels 295B and 296B.

Beginning just East of Dogtail Corners, Fairfield County, Connecticut and ending just

South of Wingdale, Dutchess County, New York, as indicated in Panels 293A and 294A.

Deletion of Panel 330, beginning just West of Lakeside, Sussex County, New Jersey and ending just East of Parker Lake, Sussex County, New Jersey. This is not a relocation. This action is necessary to correct a mapping error in original publication.

Beginning East of Maple Grange, Sussex County, New Jersey, on Wawayanda Mountain and ending at Pochuck Mountain just East of Owens, Sussex County, New Jersey, as indicated in Panels 335A and 336A.

Beginning near the Wallkill River, just Northwest of Owens, Sussex County, New Jersey, and running along the State line of New York and New Jersey and ending South of Unionville, Orange County, New York, but staying in the State of New Jersey, as indicated in Panel 338A.

Beginning just North of Mt. Salem, Sussex County, New Jersey and ending near High Point State Park, Sussex County, New Jersey just North of Radio Towers on Kittatinny Mountain, Sussex County, New Jersey, as indicated in Panel 341A.

Beginning at a point on the top of Sinking Creek Mountain, Simmonsville Magisterial District, Craig County, Virginia, proceeding in a northwesterly direction, crossing Virginia Route (42), and ending at a point on top of Clover Hollow Mountain, northwest of Huffman, Simmonsville Magisterial District, Craig County, Virginia, as indicated in Panel 590A.

Beginning on Brushy Mountain, near the Falls of Dismal in Jefferson National Forest, Giles County, Virginia and heading in a Southwesterly direction on Brushy Mountain, Giles and Bland County, Virginia and ending just north of Mechanicsburg, Bland County, Virginia, as indicated in Panel 613A.

Beginning just North of Crandon, Bland County, Virginia on Brushy Mountain, Jefferson National Forest and ending just North of the corner of Smyth County, Bland County and Wythe County, Virginia, as indicated in Panels 615A, 616A, 617A, 618A, 619A, 620A, 621A, 622A, 623A, 624A, 625A, 626A, 627A and 628A.

Appropriate maps, as designated above, are provided as an appendix to this notice to indicate the revised rights-of-way and the Trail routes within those rights-of-way. These changes are in compliance with provisions of Section 7 of the National Trails System Act, as amended, as discussed above.

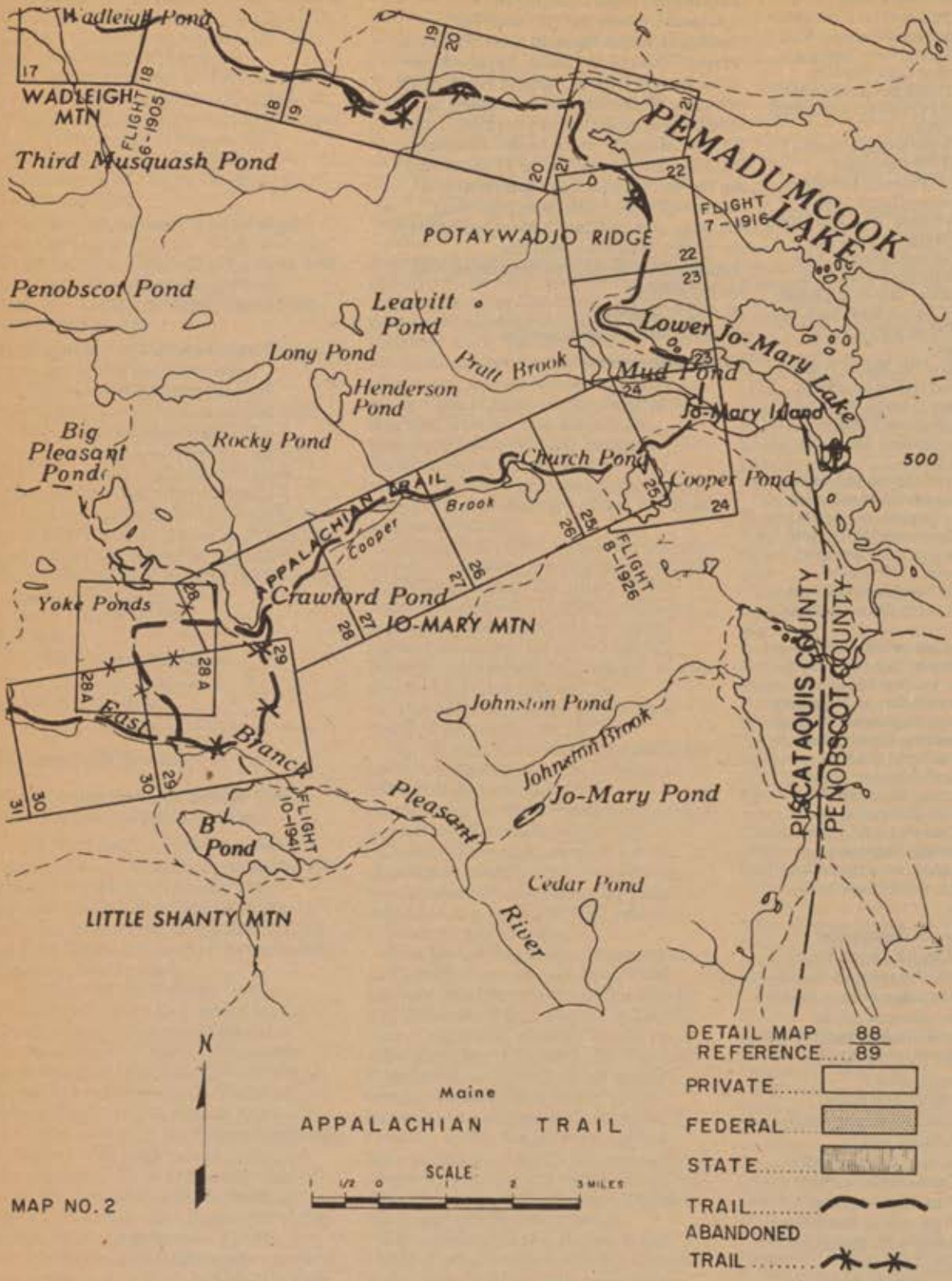
Affected landowners have been contacted and afforded an opportunity to provide us their advice and assistance in selection of the revised rights-of-way and Trail routes within those rights-of-way. In addition, the rights-of-way and Trail routes have been selected in consultation with members of the Advisory Council for the Appalachian National Scenic Trail and with state and local officials.

The purpose of this notice is to request further public comment in the proposed relocation of the trail right-of-way and trail routes. An environmental assessment report relating to each relocation where the National Park Service is acquiring land is on file in the Project Manager's Office, Appalachian Trail Project Office, Harpers Ferry, West Virginia 25425. Comments concerning relocations may also be provided to the Project Manager on or before February 23, 1981. Following review of comments on the environmental assessment and the relocations, a decision regarding findings of significant impact pertaining to these relocations, and the implementation of the relocations, will be published.

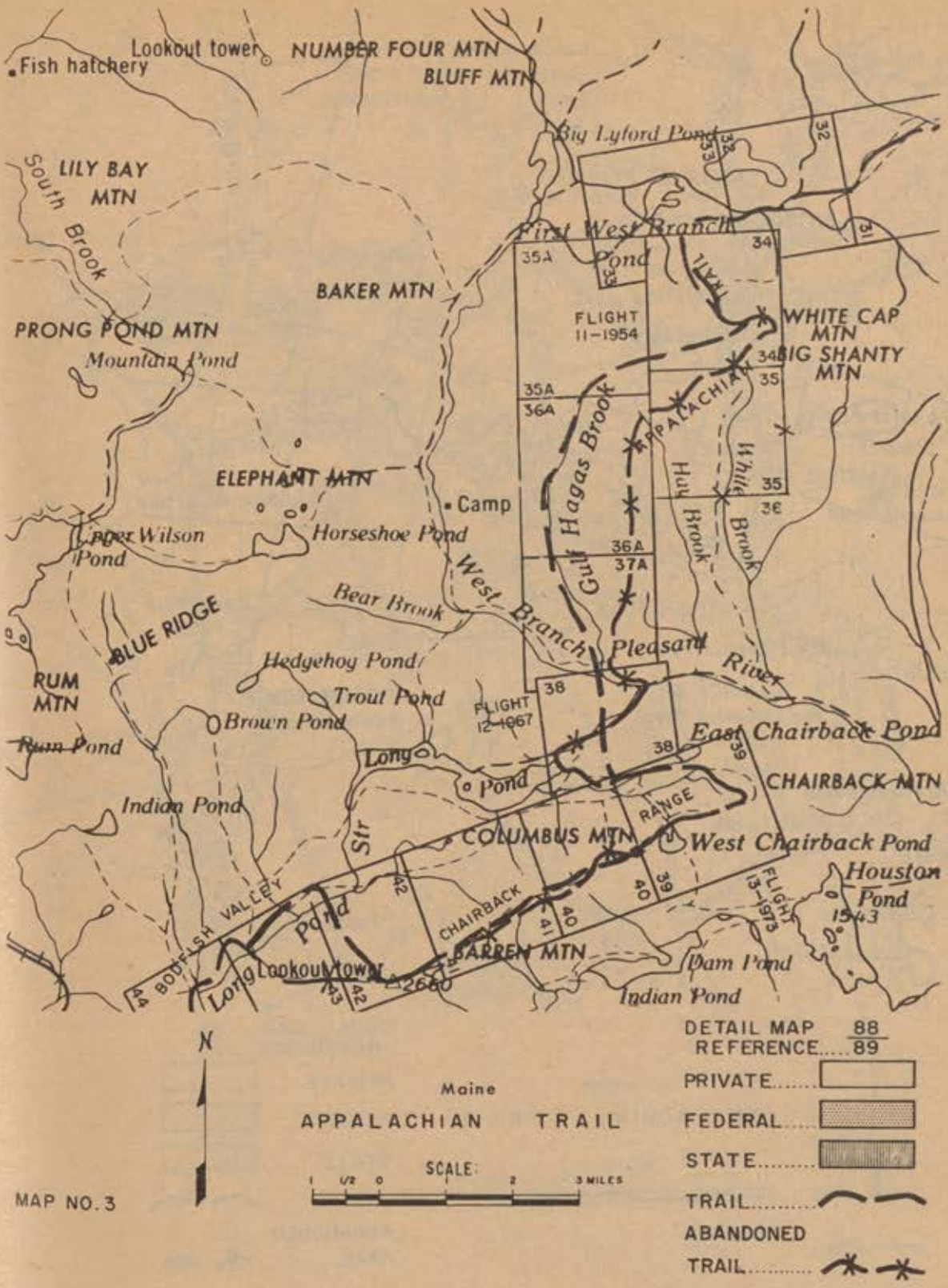
Russell E. Dickinson,

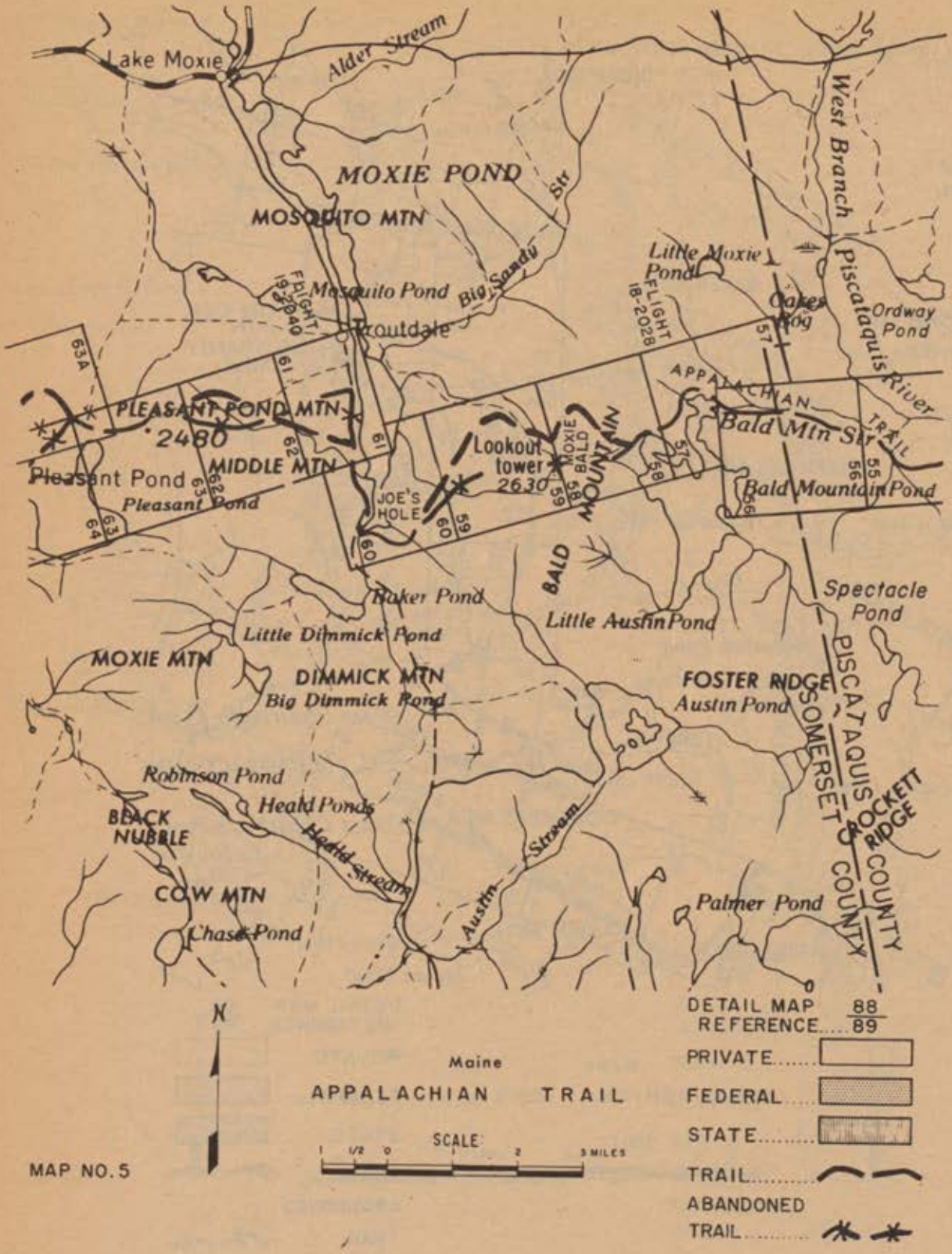
Director, National Park Service.

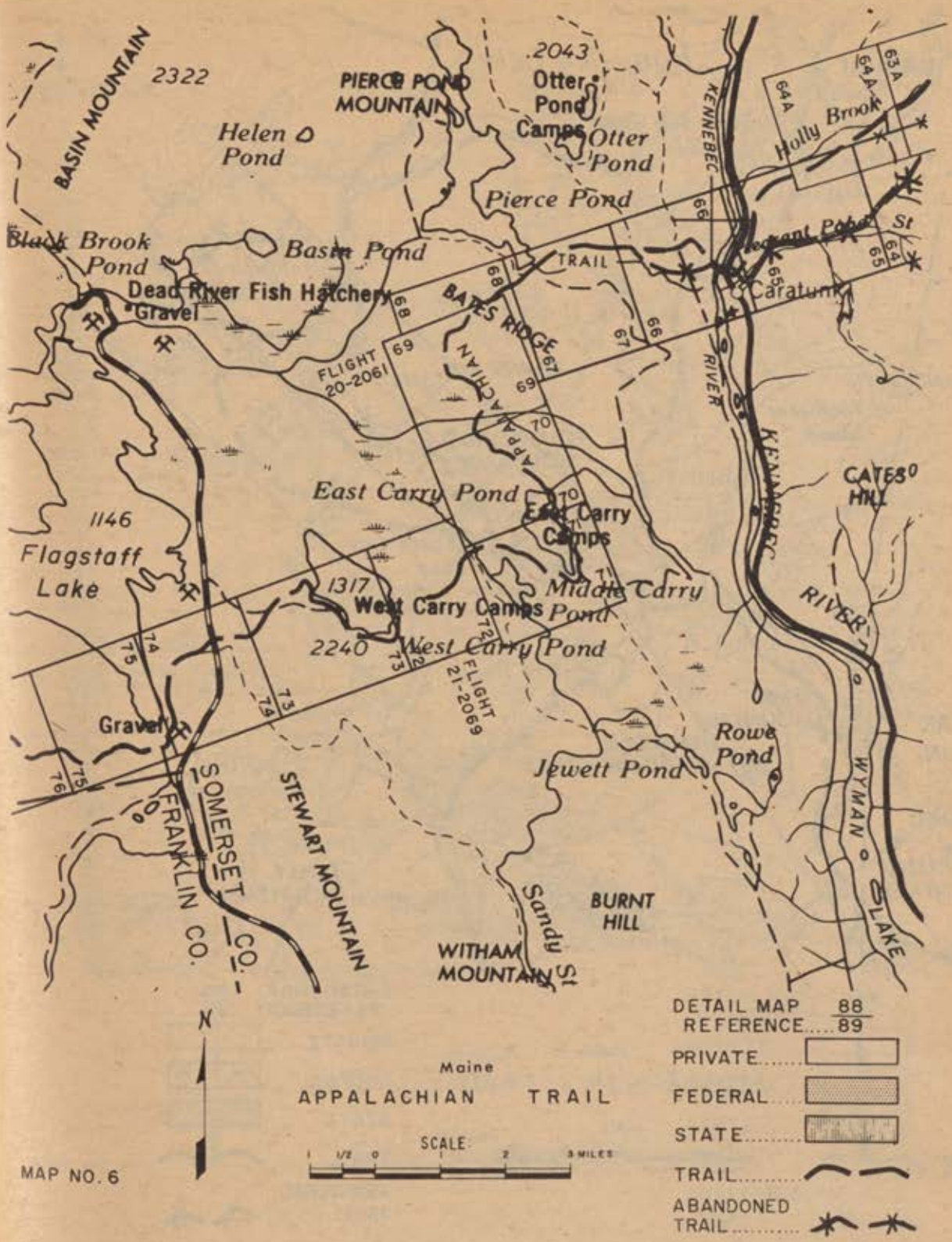
BILLING CODE 4310-70-M

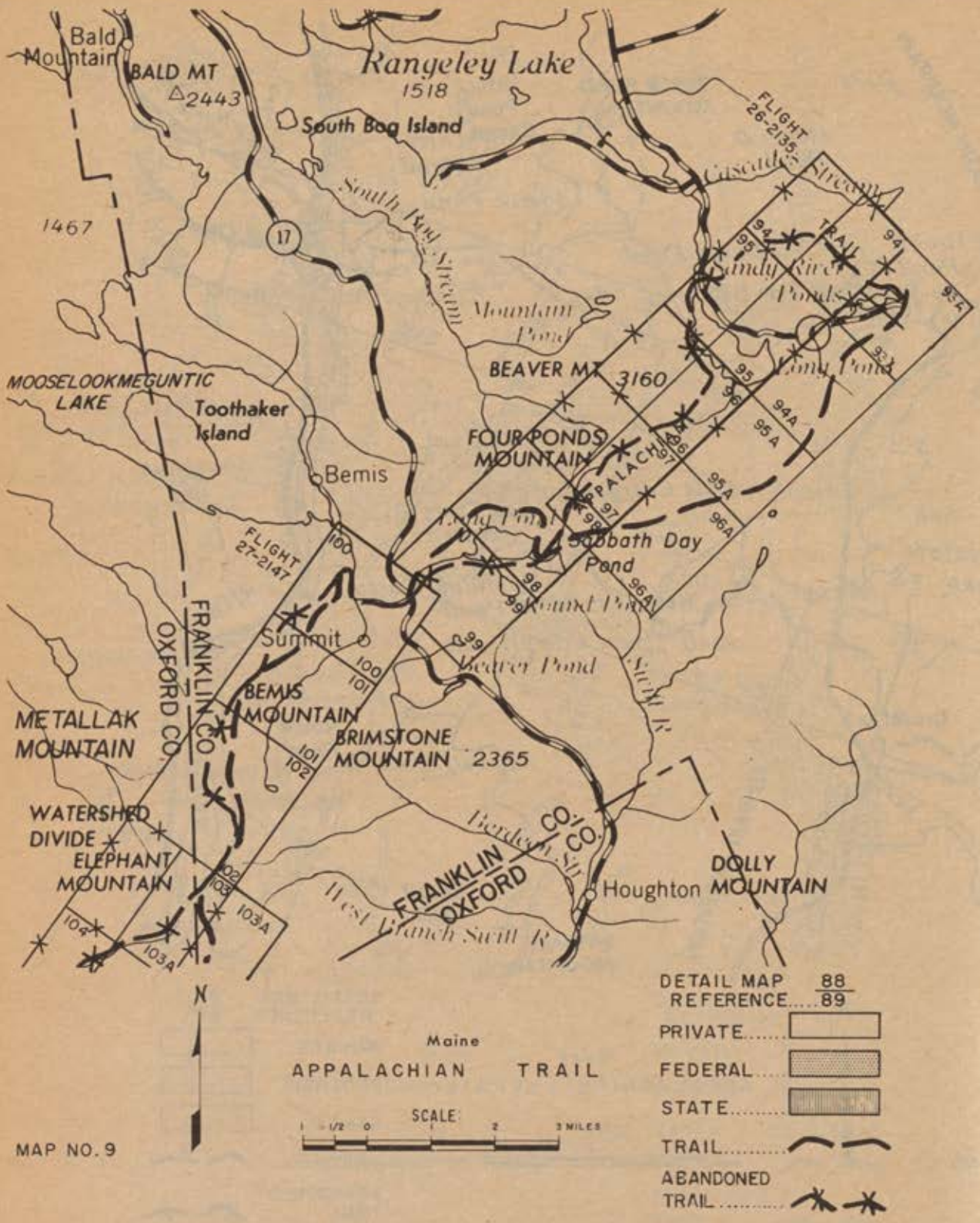

Wadleigh Pond
WADLEIGH MTN
FLIGHT 6-1905
Third Musquash Pond
PEMADUMCOOK LAKE
FLIGHT 7-1916
POTAYWADJO RIDGE
Penobscot Pond
Leavitt Pond
Lower Jo-Mary Lake
Long Pond
Pratt Brook
Mud Pond
Henderson Pond
Jo-Mary Island
Big Pleasant Pond
Rocky Pond
Church Pond
Cooper Pond
500
APPALACHIAN TRAIL
Cooper Brook
FLIGHT 8-1926
Yoke Ponds
Crawford Pond
JO-MARY MTN
PISCATAQUIS COUNTY
PENOBSCOT COUNTY
Johnston Pond
EAST Branch
Johnson Brook
Jo-Mary Pond
Pleasant
FLIGHT 10-1941
B Pond
Cedar Pond
LITTLE SHANTY MTN
River
N
Maine
APPALACHIAN TRAIL
SCALE
1 1/2 0 1 2 3 MILES
DETAIL MAP REFERENCE 88/89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL

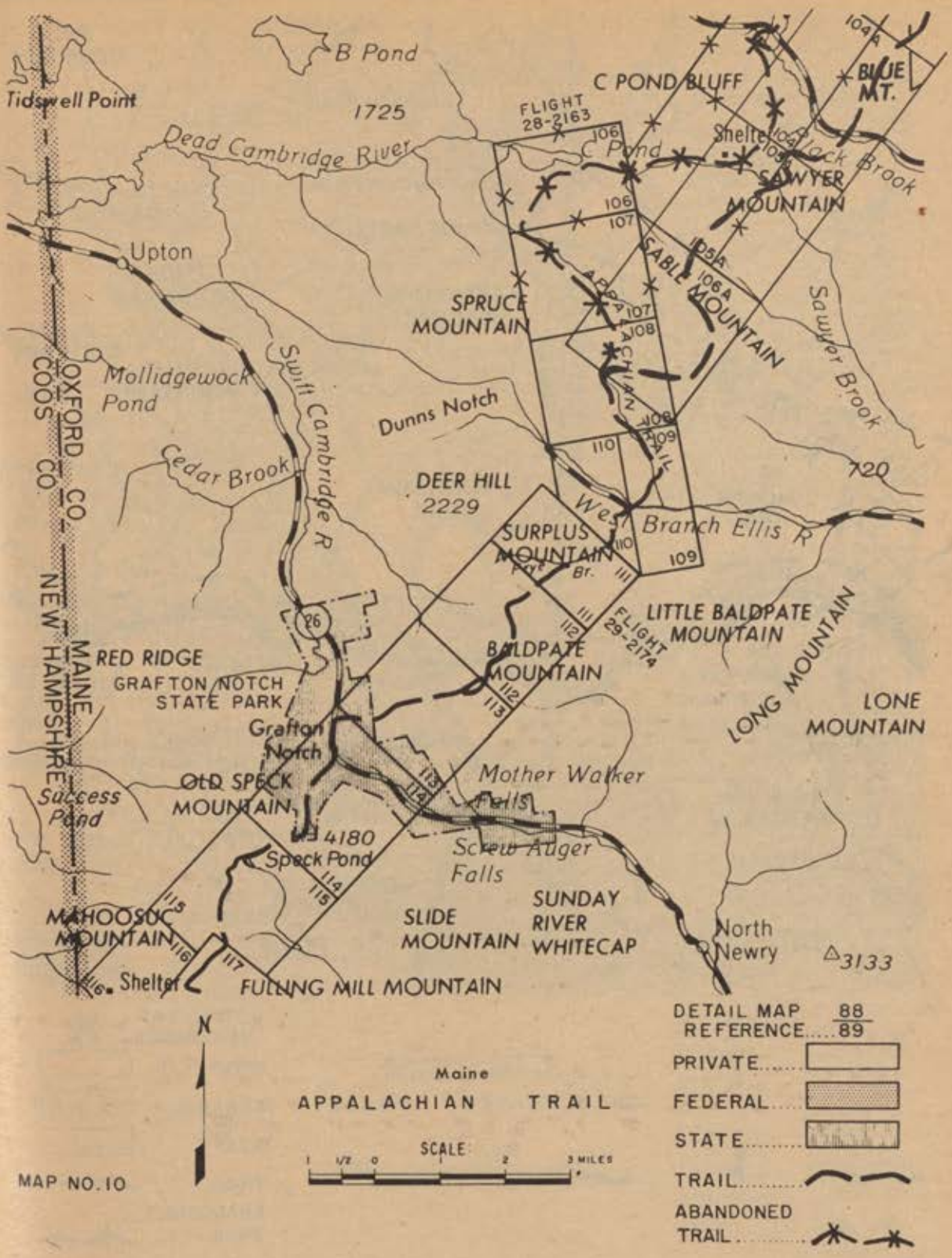
MAP NO. 2

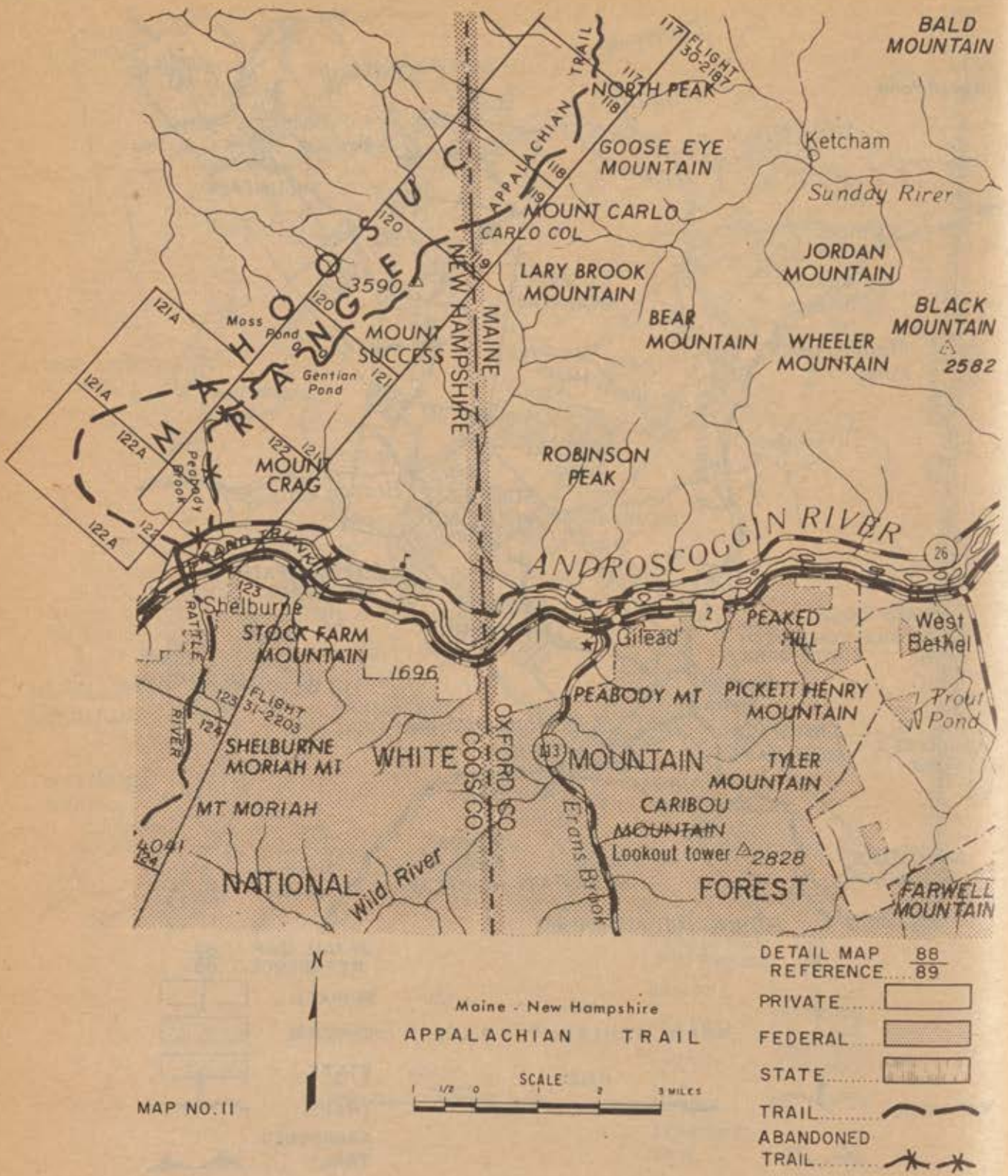

Lookout tower
Fish hatchery
NUMBER FOUR MTN
BLUFF MTN
Big Lyford Pond
LILY BAY MTN
South Brook
First West Branch Pond
BAKER MTN
PRONG POND MTN
Mountain Pond
FLIGHT 11-1954
WHITE CAP MTN
BIG SHANTY MTN
APPALACHIAN TRAIL
Gulf Hagas Brook
Hay Brook
White Brook
ELEPHANT MTN
Camp
Lower Wilson Pond
Horseshoe Pond
West Branch Pleasant River
Bear Brook
BLUE RIDGE
Hedgehog Pond
Trout Pond
RUM MTN
Brown Pond
FLIGHT 12-1967
East Chairback Pond
Rum Pond
Long Pond
CHAIRBACK MTN
Indian Pond
COLUMBUS MTN
RANGE
West Chairback Pond
Houston Pond
1543
BOTTLESH VALLEY
Long Pond
CHAIRBACK
FLIGHT 13-1973
Lookout Tower
2660
BARREN MTN
Dam Pond
Indian Pond
N
Maine
APPALACHIAN TRAIL
SCALE:
1 1/2 0 2 3 MILES
MAP NO. 3
DETAIL MAP REFERENCE 88 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL

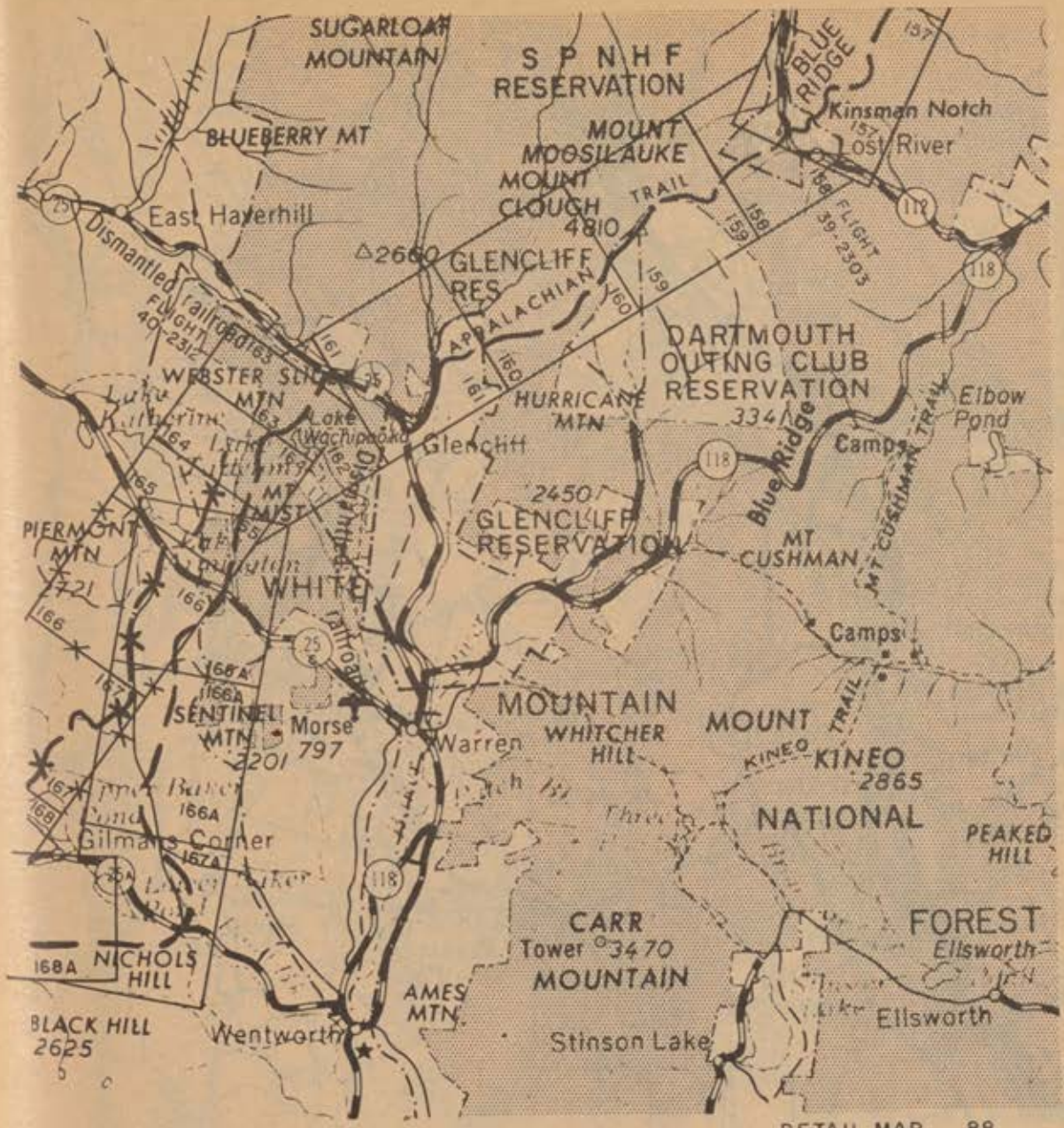

Lake Moxie
Alder Stream
MOXIE POND
MOSQUITO MTN
Mosquito Pond
Big Sandy Str
Little Moxie Pond
West Branch
Piscataquis River
Ordway Pond
Baker Bog
FLIGHT 18-2040
FLIGHT 18-2028
Trautdale
PLEASANT POND MTN
2480
MIDDLE MTN
Pleasant Pond
Pleasant Pond
APPALACHIAN TRAIL
Bald Mtn Str
Bald Mountain Pond
Lookout tower 2630
BALD MOUNTAIN
JOE'S HOLE
Baker Pond
Little Dimmick Pond
Little Austin Pond
Spectacle Pond
MOXIE MTN
DIMMICK MTN
Big Dimmick Pond
FOSTER RIDGE
Austin Pond
PISCATAQUIS & SOMERSET COUNTY
CROCKETT RIDGE
Robinson Pond
Heald Ponds
Heald Stream
BLACK NUBBLE
COW MTN
Chase Pond
Austin Stream
Palmer Pond
61
62
63
63A
64
59
60
57
58
55
56
DETAIL MAP REFERENCE 88/89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL
N
Maine
APPALACHIAN TRAIL
SCALE
1 1/2 0 2 3 MILES
MAP NO. 5

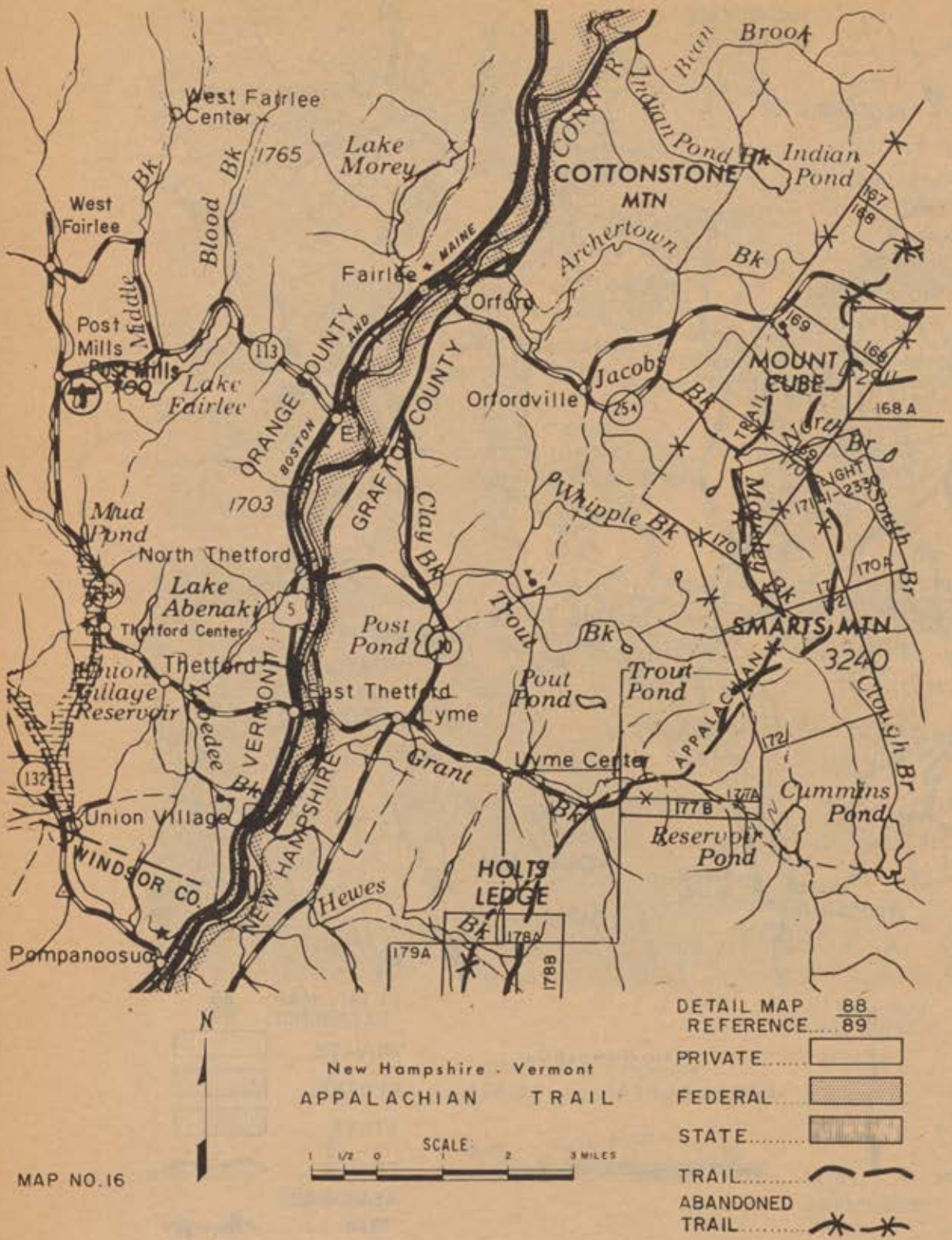

BASIN MOUNTAIN
2322
PIERCE POND MOUNTAIN
2043
Otter Pond Camps
Otter Pond
Helen Pond
Pierce Pond
KENNEBEC
Holly Brook
64A
63A
Black Brook Pond
Basin Pond
TRAIL
Dead River Fish Hatchery
Gravel
BATES RIDGE
APPALACHIAN
FLIGHT 20-2061
Caratunk
RIVER
KENNEBEC
CATES HILL
East Carry Pond
East Carry Camps
1146
Flagstaff Lake
1317
West Carry Camps
Middle Carry Pond
2240
West Carry Pond
FLIGHT 21-2069
RIVER
Gravel
SOMERSET CO.
FRANKLIN CO.
STEWART MOUNTAIN
Rowe Pond
Jewett Pond
WYMAN LAKE
Sandy R.
BURNT HILL
WITHAM MOUNTAIN
N
Maine
APPALACHIAN TRAIL
SCALE
1 1/2 0 1 2 3 MILES
DETAIL MAP REFERENCE 88/89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL
MAP NO. 6

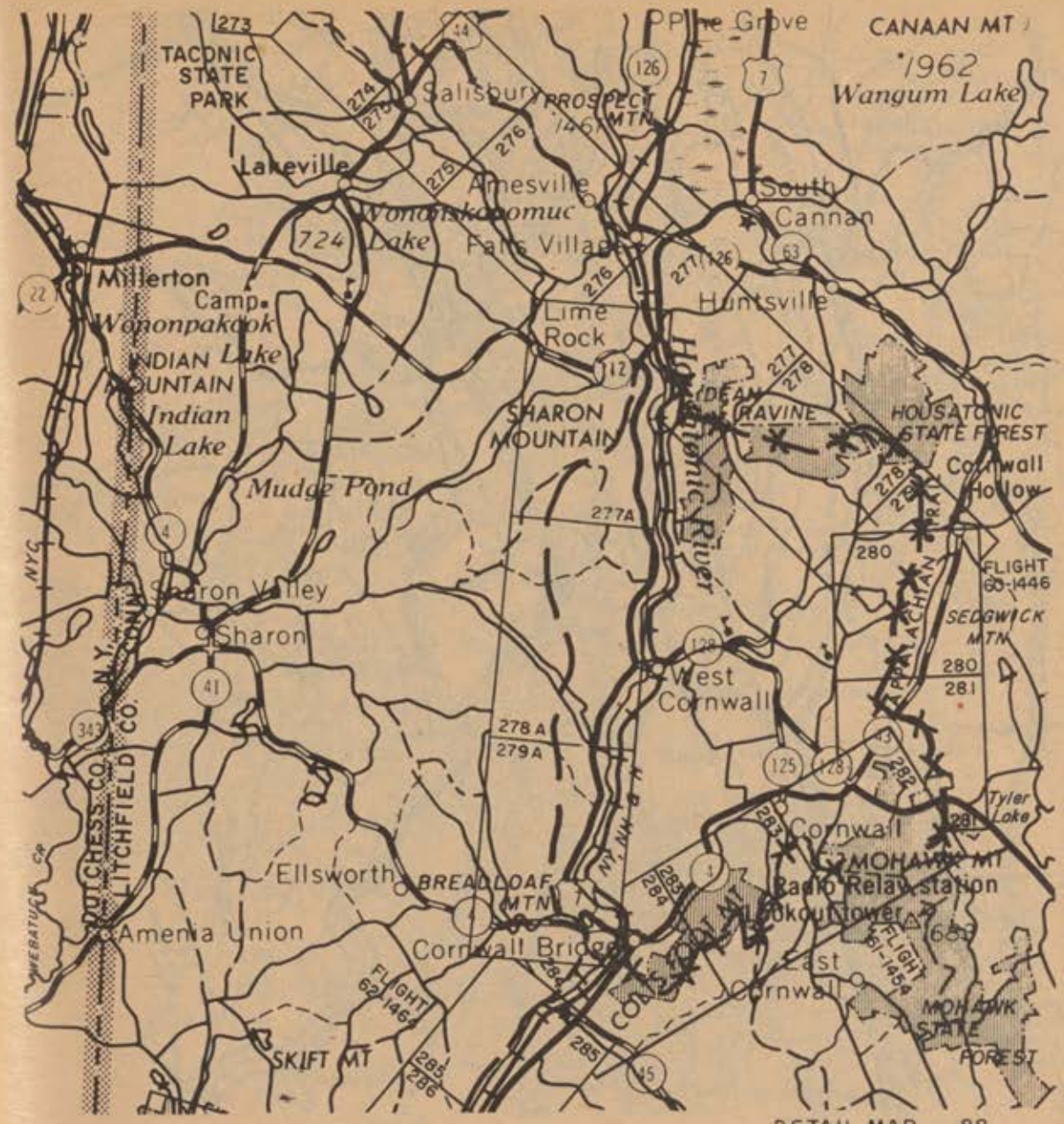

Bald Mountain
BALD MT
△2443
Rangeley Lake
1518
South Bog Island
FLIGHT 26-2135
Cascade Stream
1467
17
South Bog Stream
Mountain Pond
TRAIL
Cranberry Pond
BEAVER MT
3160
MOOSELOOKMEGUNTIC LAKE
Toothaker Island
FOUR PONDS MOUNTAIN
APPALACHIAN
Bemis
FLIGHT 27-2147
Sabbath Day Pond
Round Pond
Summit
Beaver Pond
OXFORD CO.
FRANKLIN CO.
BEMIS MOUNTAIN
BRIMSTONE MOUNTAIN
2365
METALLAK MOUNTAIN
WATERSHED DIVIDE
ELEPHANT MOUNTAIN
Berdeen Sti
West Branch Swift R
FRANKLIN CO.
OXFORD CO.
Houghton
DOLLY MOUNTAIN
N
Maine
APPALACHIAN TRAIL
SCALE:
1 1/2 0 1 2 3 MILES
MAP NO. 9
DETAIL MAP REFERENCE 88/89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL


B Pond
1725
Tidswell Point
Dead Cambridge River
C POND BLUFF
FLIGHT 28-2163
C Pond
Shelter
Black Brook
BLUE MT.
SAWYER MOUNTAIN
Upton
SABLE MOUNTAIN
SPRUCE MOUNTAIN
Sawyer Brook
Mollidgewock Pond
Swift Cambridge R
Dunns Notch
Cedar Brook
DEER HILL
2229
West Branch Ellis R
720
SURPLUS MOUNTAIN
LITTLE BALDPATE MOUNTAIN
FLIGHT 29-2174
BALDPATE MOUNTAIN
LONG MOUNTAIN
LONE MOUNTAIN
OXFORD CO.
COOS CO.
NEW HAMPSHIRE
MAINE
RED RIDGE
GRAFTON NOTCH STATE PARK
Grafton Notch
Mother Walker Falls
OLD SPECK MOUNTAIN
4180
Speck Pond
Success Pond
Screw Auger Falls
SUNDAY RIVER WHITECAP
SLIDE MOUNTAIN
MAHOOSUC MOUNTAIN
North Newry
△3133
Shelter
FULLING MILL MOUNTAIN
N
Maine
APPALACHIAN TRAIL
SCALE
1 1/2 0 2 3 MILES
MAP NO. 10
DETAIL MAP REFERENCE 88 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL


BALD MOUNTAIN
NORTH PEAK
APPALACHIAN TRAIL
FLIGHT 30-2187
GOOSE EYE MOUNTAIN
Ketcham
Sunday River
MOUNT CARLO
CARLO COL
JORDAN MOUNTAIN
LARY BROOK MOUNTAIN
BEAR MOUNTAIN
WHEELER MOUNTAIN
BLACK MOUNTAIN
2582
3590
MOUNT SUCCESS
Moss Pond
Gentian Pond
NEW HAMPSHIRE
MAINE
MOUNT CRAG
ROBINSON PEAK
ANDROSCOGGIN RIVER
Shelburne
STOCK FARM MOUNTAIN
1696
Gilead
PEAKED HILL
West Bethel
PEABODY MT
PICKETT HENRY MOUNTAIN
Trout Pond
FLIGHT 31-2203
SHELBURNE MORIAH MT
WHITE MOUNTAIN
TYLER MOUNTAIN
MT MORIAH
CARIBOU MOUNTAIN
Lookout tower
2828
Wild River
Evans Brook
NATIONAL FOREST
FARWELL MOUNTAIN
OXFORD CO
COOS CO
N
Maine - New Hampshire
APPALACHIAN TRAIL
SCALE
1/2 0 1 2 3 MILES
MAP NO. II
DETAIL MAP REFERENCE 88 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL


SUGARLOAF MOUNTAIN
S P N H F RESERVATION
BLUE RIDGE
Kinsman Notch
BLUEBERRY MT
MOUNT MOOSILAUKE
MOUNT CLOUGH 4810
TRAIL
East Haverhill
Dismantled railroad
FLIGHT 39-2303
△2660
GLENCLIFF RES
APPALACHIAN
DARTMOUTH OUTING CLUB RESERVATION
WEBSTER SLIDE MTN
HURRICANE MTN
Elbow Pond
Glencliff
Blue Ridge
Camps
2450
GLENCLIFF RESERVATION
MT CUSHMAN
MT CUSHMAN TRAIL
PIERMONT MTN
WHITE
MOUNTAIN
WHITCHER HILL
MOUNT KINEO
KINEO 2865
SENTINEL MTN
Morse 797
Warren
NATIONAL
PEAKED HILL
Gilman's Corner
CARR MOUNTAIN
Tower 3470
FOREST
Ellsworth
NICHOLS HILL
AMES MTN.
BLACK HILL 2625
Wentworth
Stinson Lake
Ellsworth
N
New Hampshire
APPALACHIAN TRAIL
SCALE
MAP NO. 15
DETAIL MAP REFERENCE 88 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL


West Fairlee Center
Lake Morey
COTTONSTONE MTN
Indian Pond
West Fairlee
Fairlee
Orford
Post Mills
Lake Fairlee
Orfordville
MOUNT CUBE
Mud Pond
North Thetford
Lake Abenaki
Thetford Center
Post Pond
Pout Pond
Trout Pond
SMARTS MTN
3240
East Thetford
Lyme
Lyme Center
Union Village
Reservoir Pond
Cummins Pond
HOLTS LEDGE
Hewes
Pompanoosuc
VERMONT
NEW HAMPSHIRE
ORANGE COUNTY
GRAFTON COUNTY
Clay Brk
Whipple Brk
Trout Brk
Archertown Brk
Blood Brk
Middle Brk
Grant Brk
Jacobs Brk
Mowry Brk
Clough Br
South Br
APPALACHIAN TRAIL
WINDSOR CO.
1765
1703
167
168
168A
169
170
170A
171
172
177A
177B
178A
178B
179A
113
25A
132
5
91
N
New Hampshire - Vermont
APPALACHIAN TRAIL
SCALE
1 1/2 0 2 3 MILES
MAP NO. 16
DETAIL MAP REFERENCE 88 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL



N

Connecticut

APPALACHIAN TRAIL

SCALE

1 1/2 0 1 2 3 MILES

MAP NO. 28
REVISED NOVEMBER 13, 1980

DETAIL MAP REFERENCE 88/89

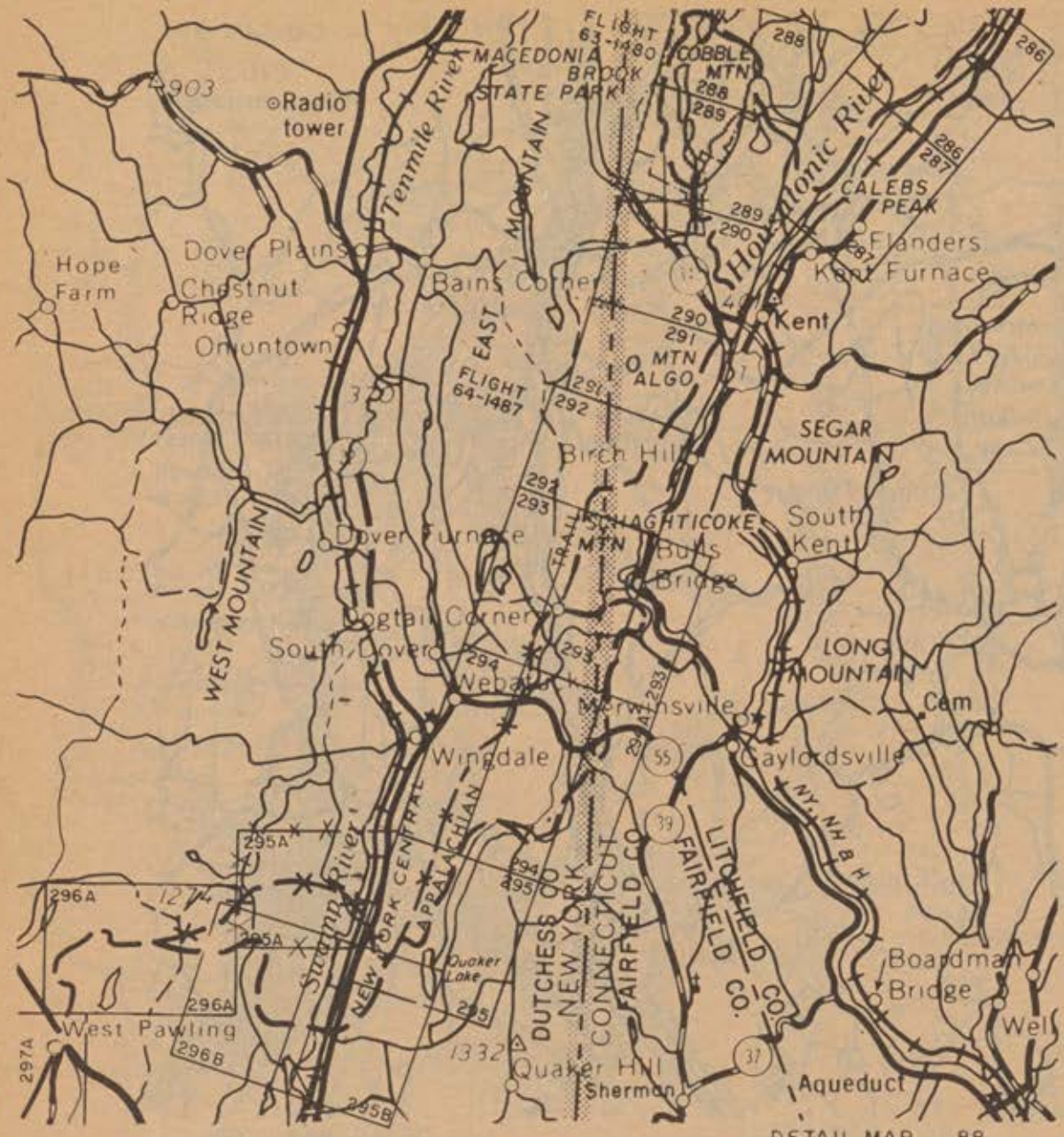
PRIVATE

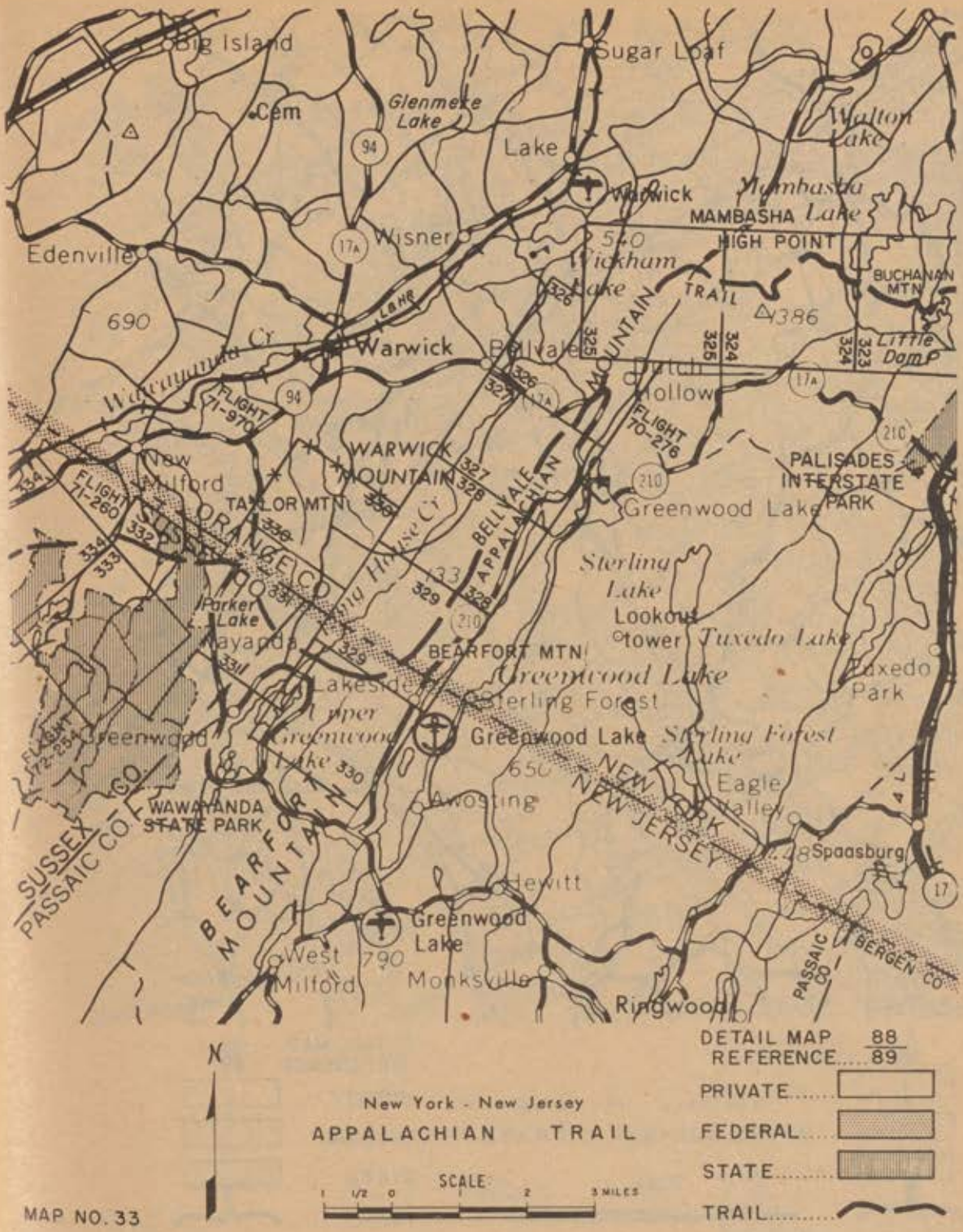
FEDERAL

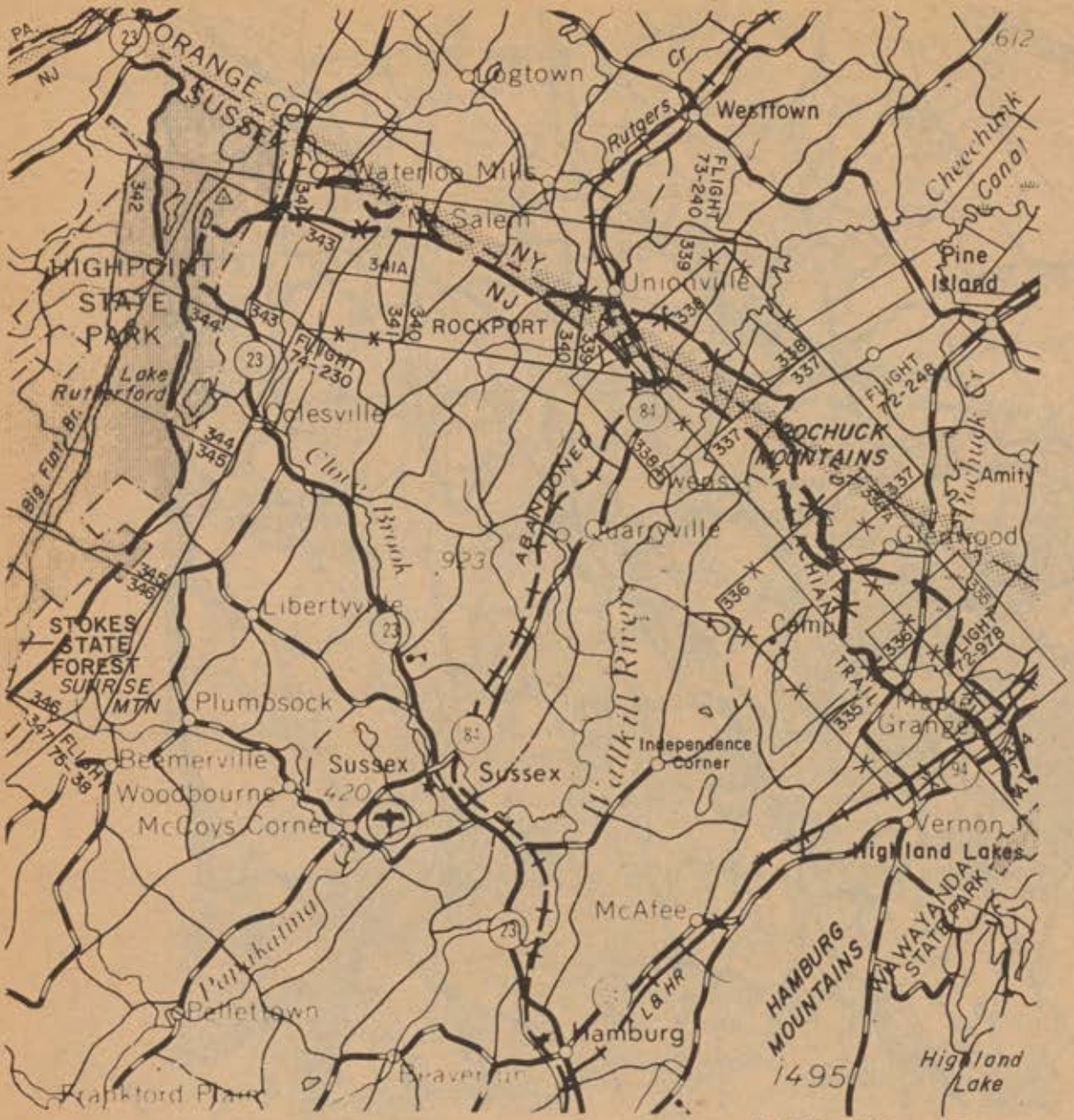
STATE

TRAIL

ABANDONED TRAIL


FLIGHT 63-1480
MACEDONIA BROOK STATE PARK
COBBLE MTN
Housatonic River
CALEBS PEAK
Radio tower
Tenmile River
EAST MOUNTAIN
Hope Farm
Dover Plains
Chestnut Ridge
Ononntown
Bains Corner
Flanders
Kent Furnace
Kent
MTN ALGO
FLIGHT 64-1487
SEGAR MOUNTAIN
Birch Hill
SCHAGHTICOKE MTN
South Kent
Bulls Bridge
Dover Furnace
Dogtail Corner
South Dover
WEST MOUNTAIN
LONG MOUNTAIN
Cam
Webatuck
Wingdale
Gaylordsville
NY, NH & H
NEW YORK CENTRAL
APPALACHIAN
Stissing River
Quaker Lake
DUTCHESS CO
NEW YORK
CONNECTICUT
FAIRFIELD CO
LITCHFIELD CO
Boardman Bridge
West Pawling
Quaker Hill
Sherman
Aqueduct
Wel
N
Connecticut - New York
APPALACHIAN TRAIL
SCALE
1 1/2 0 1 2 3 MILES
MAP NO. 29
REVISED MAY 16, 1980
DETAIL MAP REFERENCE 88 / 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL


Big Island
Sugar Loaf
Glenmere Lake
Cem
Lake
Walton Lake
Warwick
Mombasha Lake
MAMBASHA
HIGH POINT
Wisner
Edenville
Wickham Lake
BUCHANAN MTN
TRAIL
690
Warwick
Bellvale
Little Dam
Hollow
FLIGHT 71-970
WARWICK MOUNTAIN
FLIGHT 70-276
PALISADES INTERSTATE PARK
New Milford
FLIGHT 71-260
TAYLOR MTN
Greenwood Lake
Sterling Lake
Lookout tower
Tuxedo Lake
Parker Lake
BEARFORT MTN
Greenwood Lake
Sterling Forest
Tuxedo Park
Lakeside
Upper Greenwood Lake
Eagle Valley
WAWAYANDA STATE PARK
SUSSEX CO.
PASSAIC CO.
NEW YORK
NEW JERSEY
Spaasburg
Hewitt
Greenwood Lake
West Milford
Monksville
Ringwood
BERGEN CO.
PASSAIC CO.
BEARFORT MOUNTAIN
APPALACHIAN TRAIL
N
New York - New Jersey
APPALACHIAN TRAIL
SCALE
1 1/2 0 1 2 3 MILES
MAP NO. 33
DETAIL MAP 88
REFERENCE 89
PRIVATE
FEDERAL
STATE
TRAIL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SUSSEX CO
Hogtown
Rutgers Cr
Westtown
Waterloo Mine
Chee-chunk Canal
Pine Island
Unionville
HIGHPOINT STATE PARK
Lake Rutherford
ROCKPORT
FLIGHT 73-240
FLIGHT 74-230
FLIGHT 72-248
ROCHUCK MOUNTAINS
Amity
Glenwood
Libertyville
STOKES STATE FOREST
SUNRISE MTN
Plumbsock
Beemerville
Woodbourne
McCoys Corner
Sussex
Independence Corner
Vernon
Highland Lakes
McAfee
Pellettown
Hamburg
HAMBURG MOUNTAINS
WAWAYANDA STATE PARK
Highland Lake
1495
ABANDONED
Wallkill River
Big Flat Br.
Clove Brook
Pochuck
NY
NJ
PA
DETAIL MAP REFERENCE 88 / 89
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL
New York - New Jersey
APPALACHIAN TRAIL
SCALE
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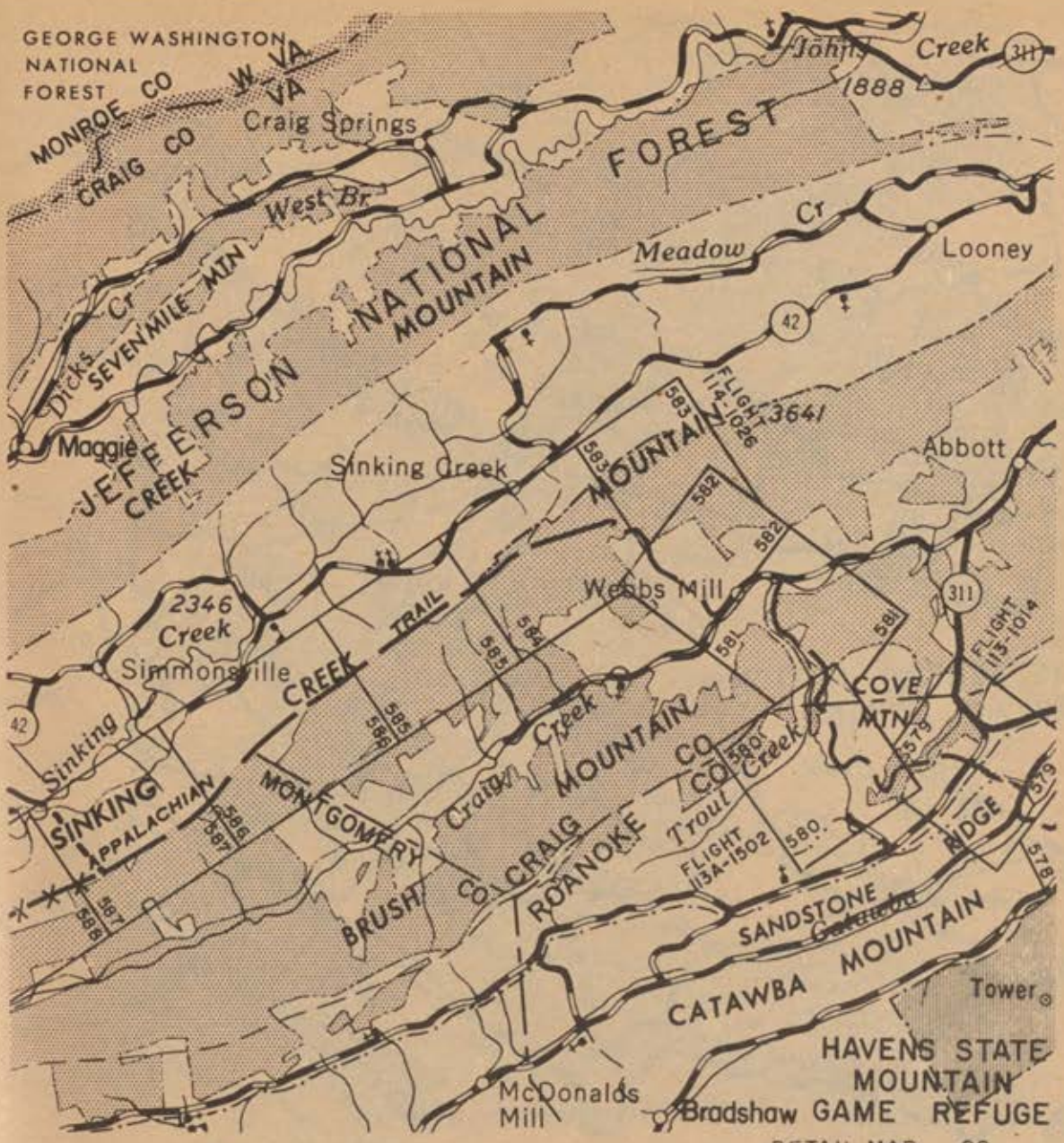
MAP NO. 34


GEORGE WASHINGTON NATIONAL FOREST
MONROE CO
W VA
VA
CRAIG CO
Craig Springs
Johns Creek
1888
311
FOREST
NATIONAL
JEFFERSON
MOUNTAIN
West Br
Dicks Cr
SEVENMILE MTN
Meadow Cr
Looney
42
Maggie
CREEK
Sinking Creek
583
FLIGHT 13A-1026
13641
MOUNTAIN
Abbott
582
Webbs Mill
2346
Creek
TRAIL
Simmonsville
CREEK
585
586
581
COVE MTN
FLIGHT 13-1014
Sinking
Craig Creek
MOUNTAIN
579
SINKING
APPALACHIAN
MONTGOMERY
CO
CRAIG
ROANOKE CO
Trout Creek
580
FLIGHT 13A-1502
RIDGE
578
BRUSH
SANDSTONE
CATAWBA MOUNTAIN
Tower
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McDonalds Mill
Bradshaw
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Virginia
APPALACHIAN TRAIL
SCALE
1 1/2 0 2 3 MILES
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REVISED NOVEMBER 21, 1980
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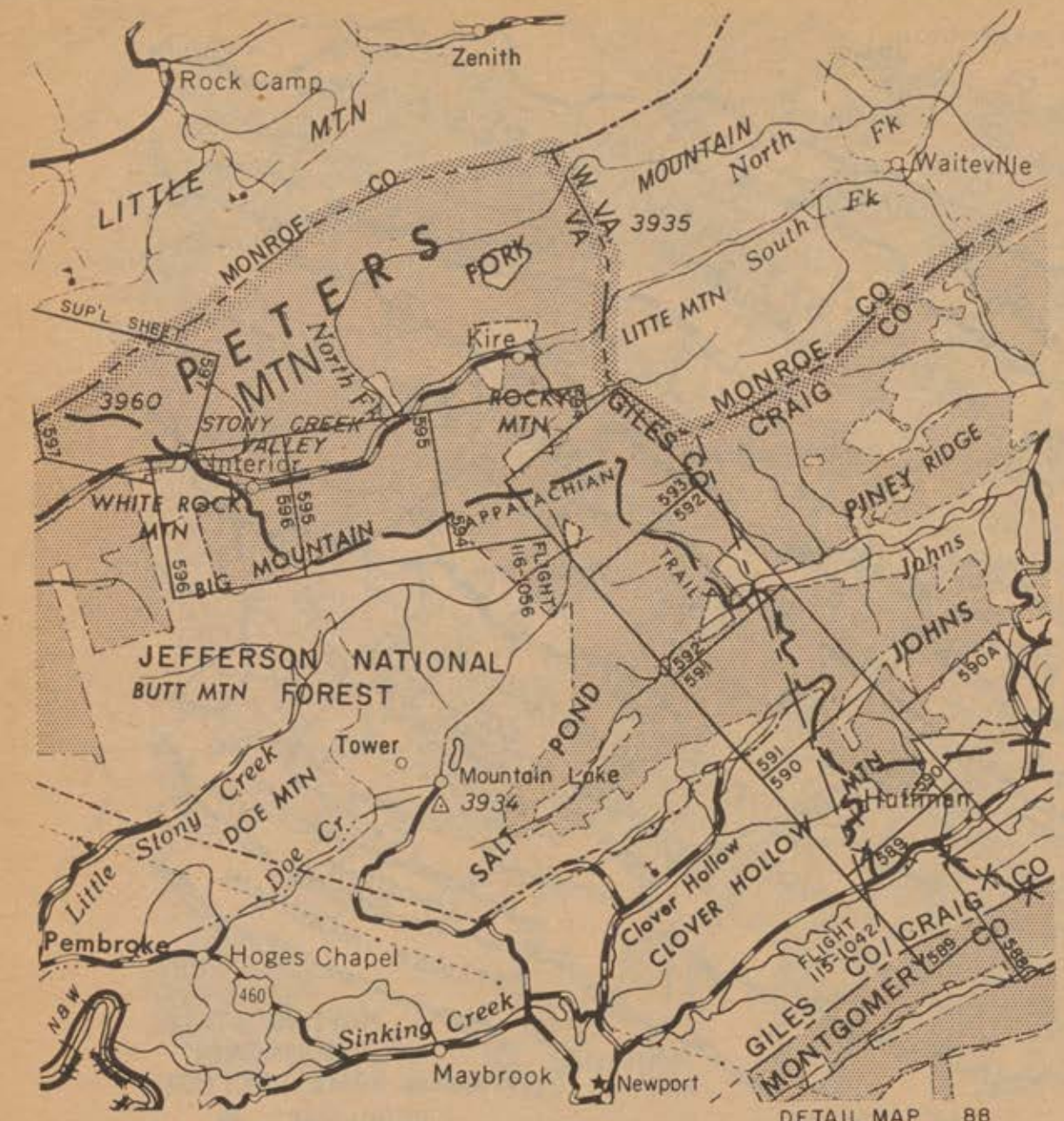
PRIVATE
FEDERAL
STATE
TRAIL
ABANDONED TRAIL



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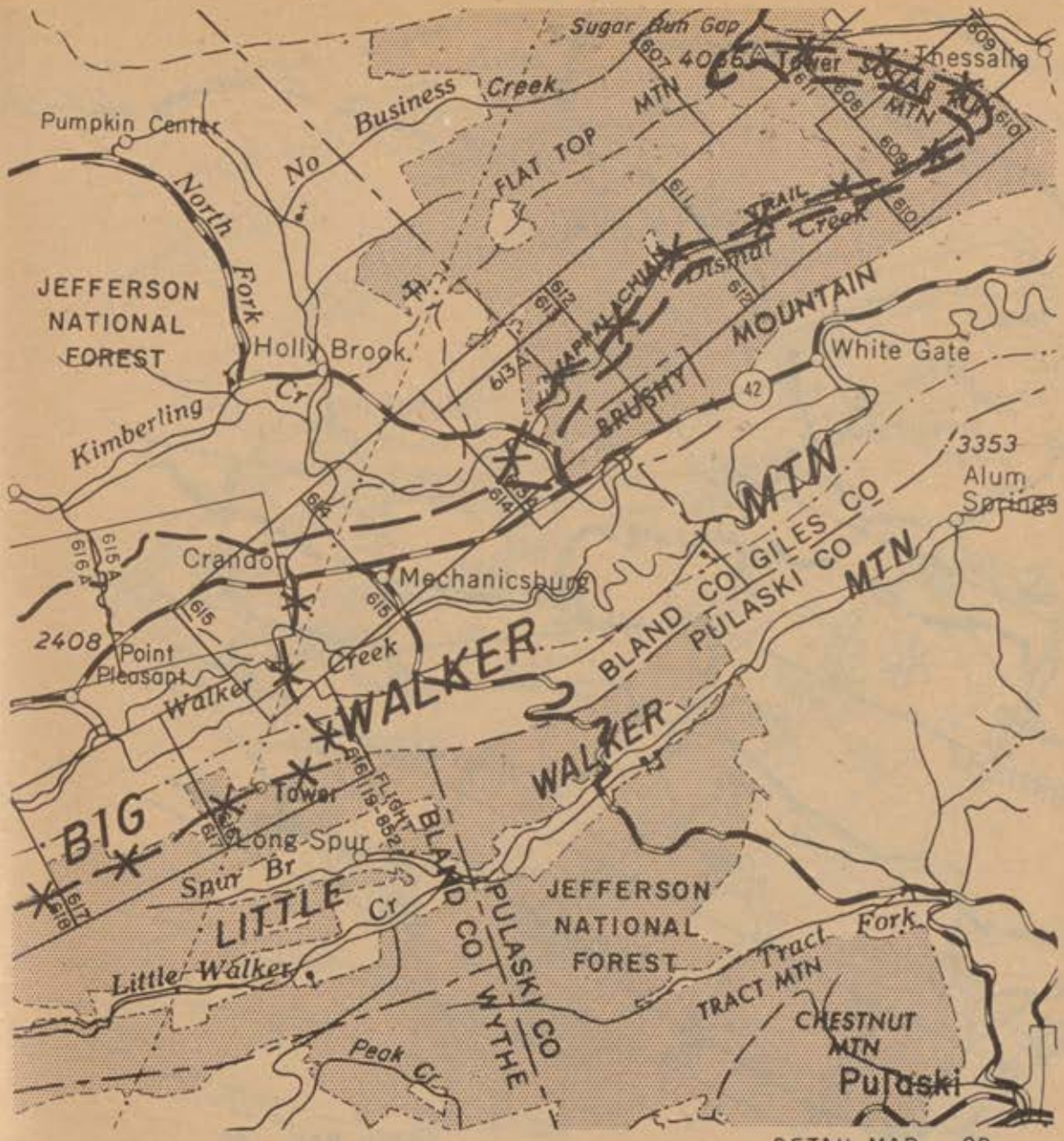
REVISED NOVEMBER 21, 1980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Tower
Thessalia
Pumpkin Center
No Business Creek
FLAT TOP MTN
SUGAR KNOB
MTN
North Fork
JEFFERSON NATIONAL FOREST
Holly Brook
Cr
Kimberling
APPALACHIAN TRAIL
Elisha Creek
MOUNTAIN
White Gate
42
BRUSHY
MTN
3353
Alum Springs
Crandon
Mechanicsburg
2408
Point Pleasant
Walker Creek
WALKER
BLAND CO
GILES CO
PULASKI CO
MTN
Tower
Long Spur
Spur Br
LITTLE
BIG
FLIGHT 119-852
BLAND CO
WALKER
JEFFERSON NATIONAL FOREST
Little Walker
Fork
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TRACT MTN
CHESTNUT MTN
PULASKY CO
WYTHE CO
Peak Cr
Pulaski
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APPALACHIAN TRAIL
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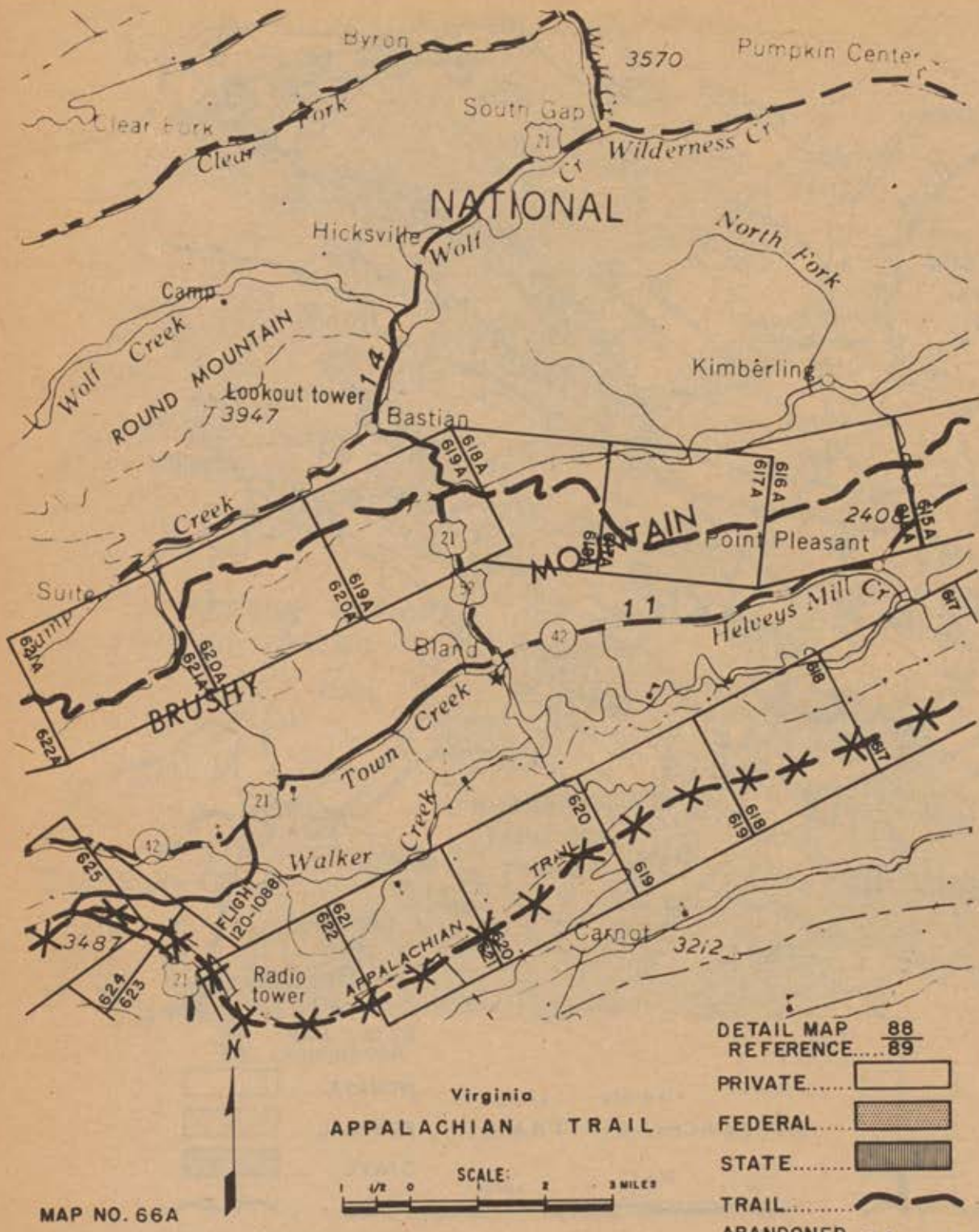
ABANDONED TRAIL


Byron
3570
Pumpkin Center
Clear Fork
Clear Fork
South Gap
Wilderness Cr
NATIONAL
Hicksville
Wolf
North Fork
Camp
Wolf Creek
ROUND MOUNTAIN
Lookout tower
3947
Bastian
Kimberling
Creek
MOUNTAIN
Point Pleasant
2406
Suite
Jump
Helveys Mill Cr
Bland
BRUSHY
Town Creek
Walker
Creek
TRAIL
FLIGHT 120-1088
APPALACHIAN
Radio tower
3487
Carnot
3212
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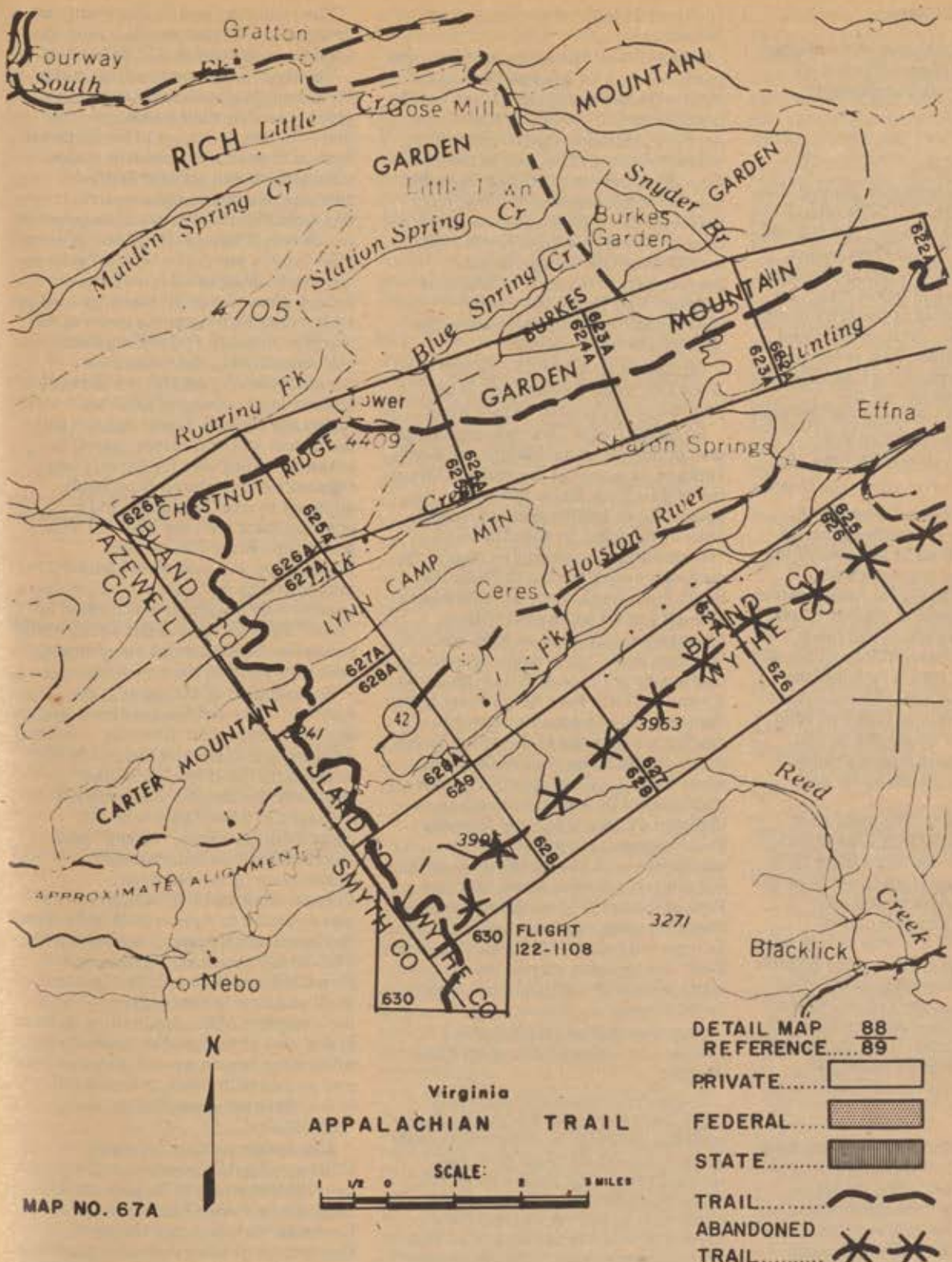
TRAIL
ABANDONED TRAIL
Virginia
APPALACHIAN TRAIL
SCALE:
MAP NO. 66A



[FR Doc. 81-2374 Filed 1-22-81; 8:45 am]
BILLING CODE 4310-70-C

Office of the Secretary

Approval for Inclusion in the National Wild and Scenic Rivers System as State Administered Components

AGENCY: Interior.

ACTION: Notice.

Pursuant to the authority granted the Secretary of the Interior by Section 2 of the Wild and Scenic Rivers Act (82 Stat. 906 16 U.S.C. 1273), and upon proper application of the Governor of the State of California, five California rivers are hereby designated as State administered components of the National Wild and Scenic Rivers System. This action is based on the designation of the rivers by the State of California and the protections offered these rivers and their immediate environments by and pursuant to applicable State laws and regulations.

On July 18, 1980, the Governor of California petitioned the Secretary of the Interior to add all or portions of the Eel, Smith, Trinity, Klamath and American Rivers to the National System. (See **Federal Register** of August 7, 1980, page 52459.) These rivers had been designated in the State Wild and Scenic Rivers System in 1972. The following river segments are now components of both the California and National Wild and Scenic Rivers Systems and will continue under State administration except for adjacent Federal lands:

(a) *Klamath River.* The main stem from 3600 feet below Iron Gate Dam to the Pacific Ocean; the Scott River from the mouth of Shackleford Creek west of Fort Jones to the river mouth near Hamburg; the Salmon river from Cecilville Bridge to the river mouth near Somesbar; the North Fork of the Salmon river from the intersection of the river with the south boundary of the Marble Mountain Wilderness Area to the river mouth; Wooley Creek, from the western boundary of the Marble Mountain Wilderness Area to its confluence with the Salmon River.

(b) *Trinity River.* The main stem from 100 yards below Lewiston Dam to the river mouth at Weitchpec; the North Fork of the Trinity from the intersection of the river with the southern boundary of the Salmon-Trinity Primitive Area downstream to the river mouth at Helena; New River from the intersection of the river with the Southern Boundary of the Salmon Trinity Primitive Area downstream to the river mouth near Burnt Ranch; South Fork of the Trinity from the junction of the river with State Highway 36 to the river mouth near Salyer.

(c) *Eel River.* The main stem from 100 yards below Van Arsdale Dam to the Pacific Ocean; the South Fork of the Eel from the mouth of Section Four Creek near Branscomb to the river mouth below Weott; Middle Fork of the Eel from the intersection of the river with the southern boundary of the Middle Eel-Yolla Bolly Wilderness Area to the river mouth at Dos Rios; North Fork of the Eel from Old Gilman Ranch downstream to the river mouth near Ramsey; Van Duzen river from Dinsmores Bridge downstream to the river mouth near Fortuna.

(d) *American River.* The Lower American from Nimbus Dam to its junction with the Sacramento River.

(e) *Smith River.* The main stem from the confluence of the Middle and South Forks to its mouth at the Pacific Ocean, the Middle Fork Smith River from its source about 3 miles south of Sanger Lake as depicted on 1956 USGS 15' "Preston Peak" topographic map to the confluence with the South Fork;, the South Fork Smith River from its source about 0.5 miles southwest of Bear Mountain as depicted on 1956 USGS 15' "Preston Peak" topographic map to the confluence with the Middle Fork Smith River; the North Fork Smith River from the California-Oregon boundary to the confluence with the Middle Fork Smith River; the Siskiyou Fork of the Smith River from its source about 0.7 miles southeast of Broken Rib Mountain as depicted on 1956 USGS 15' "Preston Peak" topographic map to the confluence with the Middle Fork of the Smith River, and the South Siskiyou Fork of the Smith River from its source about 0.6 miles southwest of Buck Lake as depicted on 1956 USGS 15' "Preston Peak" topographic map to the confluence with Siskiyou Fork of the Smith River.

Also included are the following smaller tributaries in the Smith River System:

Rowdy Creek, Dominie Creek, Savoy Creek, Little Mill Creek, Mill Creek, Lower West Branch of Mill Creek, East Fork of Mill Creek, Bummer Lake Creek, Still Creek, Diamond Creek, High Plateau Creek, Bear Creek, North Fork Diamond Creek, Myrtle Creek, Kelly Creek, Patrick Creek, Shelly Creek, East Fork Patrick Creek, West Fork Patrick Creek, Monkey Creek, Packsaddle Creek, Griffin Creek, Knopki Creek, Craigs Creek, Coon Creek, Rock Creek, Gordon Creek, Canthook Creek, Goose Creek, East Fork of Goose Creek, Hurdygurdy Creek, Jones Creek, Muzzleloader Creek, Buck Creek, Quartz Creek, Eight Mile Creek, Williams Creek, Prescott Fork Smith River.

The beginning and ending points for designation of these smaller tributaries shall be as defined in INT FEIS 80-53.

The river resources involved in the State's application are protected to a great extent by their inclusion in the State System. Inclusion in the National System as well will have two major effects: (1) It will prevent Federal participation and assistance in the development of water resource projects which would have a direct and adverse effect on the values for which the rivers have been designated (anadromous fishery resources in all cases, as well as whitewater boating in the cases of the North Fork Smith and Middle Fork Eel and recreation in the case of the American River), and (2) it will require Federal land-managing agencies (primarily the U.S. Forest Service and the Bureau of Land Management) to reassess management policies, plans, regulations and contracts on lands adjacent to river segments, and to conform them with the intent of Wild and Scenic River designation. Designation will also prohibit new mining claims on Federal lands within a quarter mile of segments classified as "wild" and will impose environmentally protective conditions on other mining operations within river corridors.

For purposes of inclusion in the National Wild and Scenic Rivers System and as management direction to Federal agencies administering Federal lands adjacent to the above-described segments, the designated rivers will be managed in accordance with the classifications "wild," "scenic" and "recreational" as determined appropriate by the Heritage Conservation and Recreation Service and as stated in Appendix D of the Final Environmental Impact Statement, INT FEIS 80.53, "Proposed Designation of Five California Rivers in the National Wild and Scenic Rivers System" with the exception of the Smith River System. In the case of the smaller Smith River tributaries, beginning with Rowdy Creek and ending with Prescott Fork Smith River, these are classified as "recreational."

This action is taken following substantial public involvement and consultation with the Department of Agriculture, Federal Energy Regulatory Commission, U.S. Army Corps of Engineers and other Federal agencies as required by Section 4(c) of the Wild and Scenic Rivers Act. Public scoping meetings to identify important issues which needed to be covered in the environmental impact statement were held in four California locations in August. Public meetings were held in

five California locations in October to receive comments on the adequacy of the draft environmental statement and the merits of the Governor's proposal. All comments received throughout the application process have been carefully considered.

Notice is hereby given that effective upon this date, the above-described rivers and river segments are approved for inclusion in the National Wild and Scenic Rivers System as wild, scenic and recreational river areas to be administered by the State of California except for affected Federal lands.

The primary author of this notice is John Haubert, Heritage Conservation and Recreation Service, Department of the Interior, Washington, D.C. 20243, phone 202/343–4793.

Dated: January 19 1981, 7:45 p.m. E.S.T.

Cecil D. Andrus,

Secretary of the Interior.

[FR Doc. 81-2557 Filed 1-21-81; 8:45 am]

BILLING CODE 4310-03-M

[516 DM 6, Appendix 2]

National Environmental Policy Act; Revised Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of final revised instructions for the United States Geological Survey.

SUMMARY: This notice announces a final Appendix to the Department's NEPA procedures for the U.S. Geological Survey. The final Departmental procedures were published in the **Federal Register** on April 23, 1980 (45 FR 27541).

DATE: The Appendix was adopted January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240; telephone (202) 343–3891, FTS 343–3891. For Geological Survey, contact Priscilla Woll, telephone (703) 860–7455.

SUPPLEMENTARY INFORMATION: This Appendix to the Departmental Manual (516 DM 6, Appendix 2) provides more specific NEPA compliance guidance to the U.S. Geological Survey (GS). In particular it provides information about GS organizational responsibilities for NEPA compliance, advice to applicants, actions normally requiring the preparation of an environmental impact statement (EIS), and categorical exclusions. The Appendix must be taken in conjunction with the Departmental procedures (516 DM 1–6) and the CEQ regulations (40 CFR 1500–1508). In addition, the Survey will prepare a handbook(s) or other technical guidance on how to apply these procedures to its principal programs.

Response to comments. The proposed Appendix was published in the **Federal Register** on November 14, 1980 (45 FR 75336) and comments were received from two oil companies and one in behalf of the North Slope Borough in Alaska. As a result of these comments and other internal review, several technical and clarifying changes were made to improve the instructions. Responses to comments are as follows:

Major Actions Normally Requiring an EIS. There has been some confusion about Section 2.3 and the purpose it serves. It must be read in conjunction with Sections 1501.4 and 1507.3 of the CEQ regulations and Sections 516 DM 2.3E and 6.5A(3) of the Departmental Manual. Actions listed in this section neither require the preparation of an EIS in all cases nor do they prevent the preparation of an EIS when other factors are present. The actions listed are merely thresholds which would normally lead to the preparation of an EIS. Their listing allows GS to bypass the preparation of an environmental assessment (EA), and informs the public that if an EIS is not prepared an EA will be prepared for public review prior to a decision.

The commentor in behalf of the North Slope Borough requested that paragraph 2.3A(2) be revised to include the approval of all OCS oil and gas development and production plans in all OCS areas or regions other than Gulf of Mexico. In contrast, an oil company commentor requested that the paragraph be revised to include only the approval of the first such plan in a frontier area. We have not adopted either approach and will continue to follow the environmental review process established for the GS in 30 CFR 250.34–4. Accordingly, we will, prior to approval of a development and production plan, review the environmental impacts of the activities proposed to determine if approval constitutes a major Federal action significantly affecting the quality of the human environment and, if so determined, we will prepare an EIS for such a plan. In conjunction with this we will, in any area or region of the OCS, except in the western Gulf of Mexico, prepare at least one development/production plan EIS pursuant to subsection 25(e) of the OCS Land Act Amendments of 1978.

In addition we have revised the wording of paragraph 2.3A(2) in order to follow more precisely the language of the OCS Land Act Amendments.

Another commentor from an oil company felt the 640 acre thresholds identified for surface mines (paragraph 2.3A(3)) and underground uranium mines (paragraph 2.3A(5)) were unwarranted and that EAs should suffice. He felt that this was establishing an arbitrary limitation which would require extended delays in preparing EISs. We would remind the commentor that the NEPA criteria for preparing an EIS is not changed by these paragraphs. As stated earlier these are thresholds to provide guidance to GS personnel, applicants and the public. We believe that the effects of one square mile (640 acres) of surface disturbance and the subsurface and surface effects of the development of and production from an underground uranium mine of 640 acres are normally significant. If, in a given case, these effects are not considered significant, and EA will be prepared in accordance with paragraph 2.3B.

Format.

Chapter 6 (516 DM 6) Managing the NEPA Process

Appendix 2 Geological Survey

2.1 NEPA Responsibility
2.2 Guidance to Applicants
2.3 Major Actions Normally Requiring an EIS
2.4 Categorical Exclusions

Other Bureaus. Final Appendices have been published in the **Federal Register** as follows:

1. Fish and Wildlife Service (45 FR 47941)
3. Heritage Conservation and Recreation Service (45 FR 76801)
4. Bureau of Indian Affairs (in publication)
6. Bureau of Mines (45 FR 85528)
7. National Park Service (46 FR 1042)
8. Office of Surface Mining (in publication)
9. Water and Power Resources Service (45 FR 47944)

Proposed Appendices have been published for the following: 5. Bureau of Land Management, December 15, 1980 (45 FR 82367)

Dated: January 19, 1981.

Cecil S. Hoffman,

Special Assistant to Assistant Secretary of the Interior.

Appendix 2

[516 DM 6]

Geological Survey

2.1 NEPA Responsibility

A. *Director* is responsible for NEPA compliance for U.S. Geological Survey (GS) activities.

B. *Assistant Director, Resource Programs,* is responsible for approving

or concurring with all EISs for GS actions. The Assistant Director is also responsible for approving reviews of environmental documents prepared by other agencies.

C. *Chief, Environmental Affairs Office* (Reston, VA), is the focal point for all NEPA matters and develops NEPA-related policy and guidance for the GS. The Chief is responsible for: assuring the quality control of environmental documents; monitoring Survey-wide activities to ensure NEPA compliance; reviewing and commenting on other bureaus' and agencies' environmental documents; managing GS personnel assigned to other agencies' EISs; preparing environmental documents at the request of other agencies, assisting in the performance of specialized studies in support of ongoing environmental analyses; and conducting research to improve the NEPA process. Information about GS environmental documents or the NEPA process can be obtained by contacting this office.

D. *Chiefs of Divisions* and *Independent Offices* are responsible within their respective organizations for ensuring compliance with NEPA and other environmental review and consultation requirements.

2.2 Guidance to Applicants

The following regulations and documents of the Survey include information to applicants as to the environmental information required to be submitted as part of or to accompany their applications relating to Federal or Indian mineral leases. The regulations and documents are available upon request from the appropriate regional Conservation Manager.

A. *Oil and Gas*

(1) Onshore—Notice to Lessees and Operators: NTL–6 (Approval of Operations)
(2) Offshore—30 CFR 250.34
—30 CFR 251.6–2
—Guidelines for Preparing Outer Continental Shelf (OCS) Environmental Reports

B. *Geothermal Resources*

—30 CFR 270.34
—Geothermal Resources Operational Order: GRO–4 (General Environmental Protection Requirements)

C. *Coal*

—30 CFR 211.10

D. *Solid Minerals (except coal)*

—30 CFR 231.10

2.3 Major Actions Normally Requiring an EIS

A. The following proposals will normally require the preparation of an EIS:

(1) Approval of studies and investigations that would result in liberation of radioactive tracer materials, or nuclear stimulation.

(2) Approval of an OCS oil and gas development and production plan in any area or region of the OCS, other than the Gulf of Mexico, when the plan is declared to be a major Federal action in accordance with Section 25 of the OCS Land Act Amendments of 1978 (30 CFR 250.34–4).

(3) Approval of a new non-coal surface mine plan which would disturb a total of 640 acres or more.

(4) Approval of a new commercial surface oil shale mine plan, regardless of size.

(5) Approval of a new underground uranium mine plan in which 640 acres or more would be mined.

B. If, for any of these actions, it is proposed not to prepare an EIS, an EA will be prepared and handled in accordance with Section 1501.4(e)(2).

2.4 Categorical Exclusions

In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which the Survey also performs, the following GS actions are designated categorical exclusions unless the action qualifies as an exception under 516 DM 2.3A(3):

A. *Internal Program Initiatives*

(1) Topographic, land use and land cover, geologic, mineralogic, resource evaluation, and hydrologic mapping activities including aerial topographic surveying, photography, and geophysical surveying.

(2) Rendering formal classification of Federal lands in the United States as to their mineral character and waterpower and waterstorage values.

(3) Collection of data and samples for geologic, paleontologic, mineralogic, geochemcical and geophysical investigations, and resource evaluation, including contracts therefor.

(4) Acquisition of existing geological or geophysical data from otherwise private exploration ventures.

(5) Well logging, aquifer response testing, digital modeling, inventory of existing wells and water supplies, water-sample collection, operation/installation of water-level recording devices in wells, and installation and operation of stream-gaging stations and telemetry systems, including contracts therefor.

(6) Establishment of survey marks, emplacement and operation of field instruments, and installation of any research/monitoring devices.

(7) Exploratory or observation groundwater well drilling operations, including contracts therefor.

(8) Establishment of seasonal and temporary field camps.

(9) Digging of exploratory trenches.

(10) Offroad travel to drilling or data collection or observation sites.

(11) Test or exploration drilling and downhole testing included in a project previously subject to the NEPA process.

(12) Hydraulic fracturing of rock formations included in a project previously subject to the NEPA process.

B. *Permit and Regulatory Functions*

(1) *Administrative and General*

(a) Issuance and modification of regulations, Orders, Standards, Notices to Lessees and Operators, and field rules where the impacts are obviously limited to administrative, economic or technological effects and the environmental impacts are minimal.

(b) Development of reporting forms to collect data required by regulations.

(c) Inspections and investigations.

(d) Decisions made and enforcement actions taken as a result of inspections made to ensure compliance with the applicable laws and regulations, Orders, lease terms, and all requirements imposed as conditions of approval.

(e) Approval of production measurement methods, facilities and procedures.

(f) Approval of off-lease storage in existing facilities.

(g) Determination and designation of logical mining units (LMU's).

(h) Approval of unitization agreements, pooling or communitization agreements.

(i) Approval for commingling of production.

(j) Approval of suspensions of operations and suspensions of production.

(k) Approval of royalty payment procedures and determinations concerning royalty quantities and values, such as audits, royalty reductions, collection procedures, cash handling procedures, reporting procedures, and any actions taken with regard to royalty collections (including similar actions relating to net profit and windfall profit taxes).

(l) Approval of applications for pricing determinations under the Natural Gas Policy Act.

(m) Administrative decisions and actions and recordkeeping, such as:

(i) Approval of royalty oil contracts.

(ii) Approvals of underground gas storage agreements from a presently or formerly productive reservoir.

(iii) Issuance of paying well determinations and participating area approvals.

(iv) Issuance of drainage determinations.

(n) Reports to Surface Management agencies concerning mineral appraisals and applications for rights-of-way, small tract leases, lease consolidation applications, lease assignments, and bond termination.

(o) Other actions where GS has concurrence or coapproval with another bureau and the action is a categorical exclusion for that bureau.

(2) *Onshore Oil and Gas*

(a) Approval of an Application for Permit to Drill (APD) for exploratory oil and gas wells prior to the first confirmation drilling.

(b) Approval of minor modifications to or minor variances from activities described in approved development/production plans, such as the relocation of a drill site(s).

(c) Approval of an APD for oil and gas wells subsequent to the first confirmation drilling for which an environmental document is required.

(d) Approval of wells as capable of producing in paying quantities.

(e) Approval of an APD for a new injection or withdrawal well pursuant to an approved gas storage project.

(f) Approval of an APD or equivalent proposal for the enhanced recovery of proven oil and gas resources.

(g) Approval of an APD for a well or approval of a surface facility for the disposal of produced water meeting the standards of NTL–2B (Disposal of Produced Water).

(h) Approval of conversion of an existing oil and gas well for disposal of produced water meeting the standards of NTL–2B.

(i) Approval of an APD for a new water source or observation well.

(j) Approval of conversion of an unsuccessful oil and gas well or an exhausted producer to a water source or observation well.

(k) Approval of Sundry Notices and Reports on Wells.

(3) *Offshore Oil and Gas*

(a) Approval of OCS geological and geophysical exploration activities, except where the proposed activity includes the drilling of deep stratigraphic test holes.

(b) Approval of an OCS exploration or development/production plan in the western Gulf of Mexico (30 CFR 250.2) which does not require an environmental report from an operator pursuant to item 3 of NTL 80–6.

(c) Approval of minor revisions of or minor variances from activities described in an approved OCS exploration or development/production plan.

(d) Approval of an Application for Permit to Drill (APD) an OCS oil and gas exploration or development well when said well and appropriate mitigation measures are described in an approved exploration plan, development plan, or production plan.

(e) Other applicable actions included in paragraph (2) above.

(4) *Geothermal Resources*

(a) Approval of geophysical exploration for geothermal resources.

(b) Approval of a plan of operation for geothermal exploration or development when an environmental document has been prepared at the leasing stage.

(c) Approval of a plan for geothermal production when derived from a plan of utilization which has been covered by an environmental document.

(d) Approval of a plan for injection of geothermal fluids meeting the requirements of GRO–4 (Environmental Protection Requirements).

(e) Approval of conversion of an unsuccessful geothermal well or an exhausted producer to a water source or observation well.

(5) *Minerals*

(a) Approval of a mineral exploration plan on Federal or Indian lands where the preceding permit, lease, or contract has been covered by an environmental document.

(b) Approval of minor modifications to or minor variances from activities described in an approval mineral exploration plan.

(c) Approval of minor modifications to or minor variances from activities described in an approved underground or surface mine plan.

(d) Findings of completeness (30 CFR 211.10) furnished to the Office of Surface Mining for coal mining and operation plans filed under the Surface Mining Control and Reclamation Act.

[FR Doc. 81-2541 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-31-M

[516 DM 6, Appendix 8]

National Environmental Policy Act; Revised Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of final revised instructions for the Office of Surface Mining.

SUMMARY: This notice announces a final appendix to the Department's NEPA procedures for the Office of Surface Mining. The final Departmental procedures were published in the **Federal Register** on April 23, 1980 (45 FR 27541).

DATE: The appendix was adopted January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240; Telephone (202) 343–3891, FTS 343–3891. For Office of Surface Mining, contact Frank Anderson, Telephone (202) 343–5287, FTS 343–5287.

SUPPLEMENTARY INFORMATION: This appendix to the Departmental Manual (516 DM 6, Appendix 8) provides more specific NEPA compliance guidance to the Office of Surface Mining (OSM). In particular it provides information about OSM organizational responsibilities for NEPA compliance, advice to applicants, actions normally requiring the preparation of an EIS, and categorical exclusions. The Appendix must be taken in conjunction with the Departmental procedures (516 DM 1–6) and the CEQ regulations (40 CFR 1500–1508). In addition, the Office will prepare a handbook(s) or other technical guidance on how to apply these procedures to its principal programs.

Response to Comments. The proposed Appendix was published in the **Federal Register** on February 14, 1980 (45 FR 10043) and one comment was received. As a result of this comment and other internal review, several changes were made to improve the instructions as follows:

Major Actions Normally Requiring and EIS. There has been some confusion about paragraphs 8.3A (3) and (4) [originally 10.3C] and the purpose that they serve. They must be read in conjunction with Sections 1501.4 and 1507.3 of the CEQ regulations and Sections 516 DM 2.3E and 6.5A(3) of the Departmental Manual. Actions listed in these paragraphs neither require the preparation of an environmental impact statement (EIS) in all cases nor do they prevent the preparation of an EIS when other factors are present. The actions listed are merely thresholds which would *normally* lead to the preparation of an EIS. Their listing allows OSM to bypass the preparation of an environmental assessment (EA), and informs the public that if an EIS is not prepared, an EA will be prepared for public review prior to a decision. Paragraph 8.3B has been added to clarify this.

We have reviewed other factors that normally would lead to the preparation of an EIS and have included these in paragraph 8.3A(3). We welcome further

comments on these and any others that the public may propose.

The commentor was concerned that the expansion of existing mines could have the same impacts as new mines. We agree and have deleted the word "new" from paragraph 8.3A(4). In addition the commentor felt the language would exempt the preparation of EISs for underground mines, for small surface mines, and for portal and ancillary facilities. This is not the case. All actions of these types will require the preparation of an EA, and if the proposal is a major Federal action significantly affecting the quality of the human environment an EIS will be prepared.

Based on the comment received and our internal review, we have further modified paragraph 8.3A(4) to refine the thresholds for surface mines in order to better relate them to environmental factors. It is our intent not to prepare an EIS for mining and reclamation plans when the impacts are adequately covered in an EIS at an earlier stage (e.g., leasing) and subparagraph (4)(a) has been added to cover this. We have established a 1280 acre threshold in subparagraph (4)(b) because it is easily measure on Federal lands, and 2 square miles is a substantial area of surface disturbance. We have added a production threshold of 5 million tons/year in subparagraph (4)(b) as a measured of construction, transportation, environmental and socio-economic effect. In addition, we have included a threshold of 15 years of mining in subparagraph (4)(c) to distinguish those mines that have long-term effects. The Department has prepared EISs for 34 surface coal mining plans over the past 10 years and these thresholds were met or exceeded for 29 of them. Thus, we believe that they provide reasonable guidance for determining those surface coal mining plans normally requiring an EIS.

The commentor also proposed that we include in paragraph 8.3A the redesignation of lands as suitable for mining where some or all of the lands have previously been designated by OSM as unsuitable for mining. The rationale is that, whereas the designation as unsuitable has no environmental impact, a petition to redesignate is a reversal of a previous decision and will allow mining impact. We do not agree with the rationale. We believe that both designations and redesignations may have significant environmental impact and that these impacts depend upon the specific lands, resources, and values affected by the petition. This is best handled by the EA procedure on a case-by-case basis, and we have not adopted this suggestion.

Categorical Exclusions. The commentor took exception to subparagraph 8.4B(11) which excludes five-year permit renewals on life-of-mine plans. He felt that the exclusion should be categorical only upon certification by a competent official that the effects of renewal will not be significant, are not unknown, and were not precedent setting. We do not believe that such a certification is necessary and that the exceptions listed in 516 DM 2.3A(3) are sufficient.

In addition the commentor indicated that it was inappropriate to limit subparagraph 8.4B(11) to changes in the method of operations and to the area of the original permit, because there may be changed conditions both inside and outside the area. We agree in general with this comment, but it should be remembered that environmental documents prepared for life-of-mine plans consider the impacts over the full life of the mining and reclamation plans. We would also point out that, if a life-of-mine plan is substantially modified, such modification would be subject to the NEPA process. We have revised the language to better reflect this.

The commentor also pointed out that subparagraph 8.4B(22) was incorrectly drafted as it pertains to Section 523(d) of SMCRA. We thank him and have corrected it.

Lastly, we have deleted the exclusion for emergency projects (formerly 8.4B(8)) because it is adequately handled in Section 1506.11 and 516 DM 5.8, and added subparagraphs 8.4B (27), (28), and (29) pertaining to proposing legislation for Indian regulation of surface mining, certifying and training blasters, and approving State Reclamation Plans for abandoned mine lands. Comments are welcome on these additions.

Format

Chapter 6 (516 DM 6)—Managing the NEPA Process

Appendix 8—Office of Surface Mining

8.1 NEPA Responsibility
8.2 Guidance to Applicants
8.3 Major Actions Normally Requiring an EIS
8.4 Categorical Exclusions

Other Bureaus

Final Appendices for other bureaus have been published in the **Federal Register** as follows:

1. Fish and Wildlife Service (45 FR 47941)
3. Heritage Conservation and Recreation Service (45 FR 76801)
6. Bureau of Mines (45 FR 85528)
7. National Park Service (46 FR 1042)
9. Water and Power Resources Service (45 FR 47944)

Proposed Appendices have been published for the following bureaus:

2. Geological Survey, November 14, 1980 (45 FR 75336)
4. Bureau of Indian Affairs, July 24, 1980 (45 FR 49368)
5. Bureau of Land Management, December 15, 1980 (45 FR 82367).

Dated: January 19, 1981.

Cecil S. Hoffmann,

Special Assistant to Assistant Secretary of the Interior.

Appendix 8

[516 DM 6]

OFFICE OF SURFACE MINING

8.1 NEPA Responsibility

A. *Director.* Is responsible for NEPA compliance for Office of Surface Mining (OSM).

B. *Assistant Directors.*

(1) Are responsible to the Director for supervision and coordination of NEPA activities in their program areas of responsibility.

(2) Are responsible, within their program areas, for OSM Headquarters review of EISs for compliance with program area policy guidance.

(3) Are responsible for assuring that environmental concerns are identified early in the planning stages and appropriate policy and program guidance is disseminated.

C. *Regional Directors.*

(1) Are responsible to the Director for integrating the NEPA process into all Regional activities and for NEPA compliance activities in their Regions.

(2) Will designate a staff position to be responsible to the Regional Director for the consistency, adequacy, and quality of all NEPA documents prepared by the Region's staff. The position will also be responsible to the Regional Director for providing information, guidance, training, advice, and coordination on NEPA matters, and for oversight of the Region's NEPA process.

D. *Chief, Branch of Environmental Analysis (Washington).* Is designated by the Director to be responsible for overall policy guidance for NEPA compliance for OSM. Information about OSM NEPA documents or the NEPA process can be obtained by contacting this Branch.

8.2 Guidance to Applicants

OSM personnel are available to meet with all applicants for permits on Federal lands or under a Federal program for a State to provide guidance on the permitting procedures. Permit applications under approved State

programs are excluded from NEPA compliance. In addition, OSM's regulations implementing the Surface Mining Control and Reclamation Act of 1977 (SMCRA) provide requirements for applicants to submit environmental information. The following parts of the regulations (30 CFR) describe the information requirements.

A. Parts 770 and 771 outline the content requirements of permit applications on Federal lands or under a Federal program for a State, including: the procedures for coal exploration operations required by 30 CFR 776; the permit application contents for surface coal mining activities required by 30 CFR 778, 779, and 780; the permit application contents for underground coal mining required by 30 CFR 782, 783, and 784; the requirements for special categories of surface coal mining required by 30 CFR 785; and the procedures for review, revision, and renewal of permits and for the transfer, sale, or assignment of rights granted under permits, as required by 30 CFR 788.

B. Part 776 identifies the minimum requirements for coal exploration activities outside the permit area. Part 776 is complemented by Part 815 of Subchapter K which provides environmental protection performance standards applicable to these operations.

C. Part 778 provides the minimum requirements for legal, financial, compliance, and general nontechnical information for surface mining activities applications. Information submitted in permit applications under Part 778 will ber used primarily to enable the regulatory authority and interested members of the public to ascertain the particular nature of the entity which will mine the coal and those entities which have other financial interests and public record ownership interests in both the mining entity and the property which is to be mined.

D. Part 779 establishes the minimum standards for permit applications regarding information on existing environmental resources that may be impacted by the conduct and location of the proposed surface mining activities. With the information required under Part 779, the regulatory authority is to utilize information provided in mining and reclamation plans under Part 780, in order to determine what specific impacts the proposed surface mining activities will have on the environment.

E. Part 780 establishes the heart of the permit application: the mining operations and reclamation plan for surface mining activities. The regulatory authority will utilize this information, together with the description of the existing environmental resources obtained under Part 779, to predict whether the lands to be mined can be reclaimed as required by the Act.

F. Part 782 contains permit application requirements for underground mining activities. This corresponds to Part 778 for surface mining. As such, Part 782 sets forth the minimum requirements for general, legal, financial, and compliance information required to be contained in applications for permits.

G. Part 783 describes the minimum requirements for information on existing environmental resources required in the permit application for underground mining and corresponds to Part 779 for surface mining activities.

H. Part 784 contains a discussion of the minimum requirements for reclamation and operation plans related to underground mining permit applications and corresponds to Part 780 for surface mining activities.

I. Part 785 contains requirements for permits for special categories of mining, including anthracite, special bituminous, experimental practices, mountainstop removal, steep slope, variances from approximate original contour restoration requirements, prime farmlands, alluvial valley floors, augering operation, and in-situ activities. The provisions of Part 785 are intereulated to the performance standards applicable to the special categories covered in Subchapter K and must be reviewed together with the preamble and text for Parts 818 through 828 of Subchapter K.

J. Part 788 specifies the responsibilities of persons conducting surface coal mining and reclamation operations with respect to changes, modifications, renewals, and revisions of permits after they are originally granted, and of persons who attempt to succeed to rights granted under permits by transfer, sale, or assignment of rights.

8.3 Major Actions Normally Requiring an EIS

A. The following OSM actions will normally require the preparation of an EIS:

(1) Approval of the Abandoned Mine Lands Reclamation Program, (SMCRA, Title IV). *Completed in March 1980.*

(2) Promulgation of the permanent regulatory program for surface coal mining and reclamation operations (SMCRA, Title V). *Completed in February 1979.*

(3) Approval of a proposed mining and reclamation plan that includes any of the following:

(a) Mountaintop removal operations.

(b) Mining within high use recreation areas.

(c) Mining that will cause population increases that exceed the community's ability to absorb the growth.

(d) Mining that would require a major change in existing coal transportation facilities.

(4) Approval of a proposed mining and reclamation plan for a surface mining operation that meets the following:

(a) The environmental impacts of the proposed mining operation are not adequately analyzed in an earlier environmental document covering the specific leases or mining activity; and

(b) The area to be mined is 1280 acres or more, or the annual full production level is 5 million tons or more; and

(c) Mining and reclamation operations will occur for 15 years or more.

B. If for any of these actions it is proposed not to prepare an EIS, an EA will be prepared and handled in accordance with Section 1501.4(e)(2).

8.4 Categorical Exclusions

A. The following OSM actions are deemed not to be major Federal actions within the meaning of Section 102(2)(C) of NEPA under Sections 501(a) or 702(d) of the SMCRA. They are hereby designated as categorical exclusions from the NEPA process and are exempt from the exceptions under 516 DM 2.3A(3):

(1) Promulgation of interim regulations.

(2) Approval of State programs.

(3) Promulgation of Federal programs where a State fails to submit, implement, enforce, or maintain an acceptable State program.

(4) Promulgation and implementation of the Federal lands program.

B. In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which OSM also performs, the following OSM actions (SMCRA sections are in parentheses) are designated categorical exclusions unless the actions qualify as an exception under 516 DM 2.3A(3):

(1) Monetary allotments to States for mining and mineral resources institutes (301).

(2) Allocation of research funds to institutes (302).

(3) Any research effort associated with ongoing abandoned mine land reclamation projects where the research is coincidential to the reclamation (401(c)(6)).

(4) Collection of reclamation fees from operators (402(a)).

(5) Findings of fact and entries on land adversely affected by past coal mining (407(a)).

(6) Acquisition of particular parcels of abandoned mine lands for reclamation (407(c)).

(7) Filing liens against property adversely affected by past coal mining (408).

(8) Interim regulatory grants (502(e)(4)).

(9) Disapproval of a proposed State program (503(c)).

(10) Review of permits issued under a previously approved State program (504(d)).

(11) Five-year permit renewal on life-of-mine plans under the Federal lands program or the Federal program for a State where the environmental impacts of continued mining are adequately analyzed in a previous environmental document for the mining operation (506(d)).

(12) Small operator assistance program (507(c)).

(13) Issuance of public notices and holding public hearings on permit applications invovling Federal lands or under a Federal program for a State (513).

(14) Routine inspection and enforcement activities (517).

(15) Conflict of interest regulations (517(g)).

(16) Assessment of civil penalties (518).

(17) Releases of performance bonds or deposits for mining on Federal lands or under a Federal program for a State (519).

(18) Issuance of cessation orders for coal mining and reclamation operations (521(a)(2) and (3)).

(19) Suspension or revocation of permits (521(a)(4)).

(20) Federal oversight and enforcement of ineffective State programs (521(b)).

(21) Cooperative agreements between a State and the Secretary to provide for State regulation of surface coal mining and reclamation operations on Federal lands (523(c)).

(22) Development of a program to assure that, with respect to the granting of permits, leases, or contracts for Federally-owned coal, no one shall be unreasonably denied purchase of the mined coal (523(d)).

(23) Annual grants programs to States for program development, administration, and enforcement (705(a)).

(24) Assistance to States in the development, administration, and enforcement of State programs (705(b)).

(25) Increasing the amount of annual grants to States (705(c)).

(26) Submission of the Secretary's annual report to the Congress (706).

(27) The proposal of legislation to allow Indian tribes to regulate surface coal mining on Indian lands (710(a)).

(28) The certification and training of blasters (719).

(29) Approval of State Reclamation Plans for abandoned mine lands (405).

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BILLING CODE 4310-05-M

[516 DM 6, Appendix 4]

National Environmental Policy Act; Revised Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of final revised instructions for the Bureau of Indian Affairs.

SUMMARY: This notice announces a final appendix to the Department's NEPA procedures for the Bureau of Indian Affairs. The final Departmental procedures were published in the **Federal Register** on April 23, 1980 (45 FR 27541).

DATE: The appendix was adopted January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240; Telephone (202) 343-3891, FTS 343-3891. For Bureau of Indian Affairs, contact George Farris, Telephone (202) 343-4004, FTS 343-4004.

SUPPLEMENTARY INFORMATION: This appendix to the Departmental Manual (516 DM 6, Appendix 4) provides more specific NEPA compliance guidance to the Bureau of Indian Affairs. In particular it provides information about Bureau organizational responsibilities for NEPA compliance, advice to applicants, actions normally requiring the preparation of an EIS, and categorical exclusions. The Appendix must be taken in conjunction with the Departmental procedures (516 DM 1-6) and the CEQ regulations (40 CFR 1500-1508). In addition, the Bureau will prepare a handbook(s) or other technical guidance on how to apply these procedures to its principal programs.

The proposed Appendix was published in the **Federal Register** on July 24, 1980 (45 FR 49368) and no comments were received. As a result of internal review, several changes and additions have been made to improve the instructions for technical and consistency purposes. The principal changes appear in paragraphs 4.3A, 4.4F, and 4.4G. Further comments are welcome and will be considered in periodic revisions of the Appendix.

Format

Chapter 6 (516 DM 6) Managing the NEPA Process

Appendix 4. Bureau of Indian Affairs

4.1 NEPA Responsibility
4.2 Guidance to Applicants and Tribal Governments
4.3 Major Actions Normally Requiring an EIS
4.4 Categorical Exclusions

Other Bureaus

Final Appendices for other Bureaus have been published in the **Federal Register**. as follows:

1. Fish and Wildlife Service (45 FR 47941).
2. Heritage Conservation and Recreation Service (45 FR 76801).
6. Bureau of Mines (45 FR 85528).
7. National Park Service (46 FR 1042).
9. Water and Power Resources Service (45 FR 47944).

Proposed Appendices have been published for the following Bureaus:

2. Geological Survey, November 14, 1980 (45 FR 75336).
5. Bureau of Land Management, December 15, 1980 (45 FR 82367).
8. Office of Surface Mining, February 14, 1980 (45 FR 10043).

Dated: January 19, 1981.

Cecil S. Hoffmann,

Special Assistant to Assistant Secretary of the Interior.

4.1 NEPA Responsibility

A. *Commissioner of Indian Affairs.* As chief executive officer, the Commissioner is responsible for the NEPA compliance of Bureau of Indian Affairs (BIA) activities.

B. *Director, Office of Trust Responsibilities,* is responsible for oversight of the BIA program for achieving compliance with NEPA. The Director shall determine the adequacy of all EISs which come before the Commissioner.

C. The *Environmental Services Staff* (Washington), in the Office of Trust Responsibilities, is the focal point for NEPA matters within BIA and is responsible for advising and assisting Area Directors and field support personnel in their environmental activities and acting as the Central Office's liaison with Indian tribal governments on environmental matters. Information about BIA NEPA documents or the NEPA process can be obtained by contacting this staff.

D. Other *Central Office Directors* are responsible for ensuring that the programs and activities within their directorate comply with NEPA.

E. *Area Directors* and *Project Officers* are responsible for conducting all activities under their jurisdiction in compliance with NEPA and providing advice and assistance to Indian tribes on environmental matters; and will provide sufficient staff assistance to ensure that these responsibilities are fulfilled.

F. *Agency Superintendents and Field Unit Supervisors* are responsible, as directed and delegated by the Area Directors, for implementation and enforcement of the Bureau's environmental policy at the Agency or field unit level, including the field

inspection, preparation, and approval of environmental documents.

4.2 Guidance to Applicants and Tribal Governments

A. *Relationship with Applicants and Tribal Governments.*

(1) *Types of Applicants.* An "applicant" is any entity which proposes to undertake an activity which will at some point require BIA action. These may include tribal governments, private entities, State and local governments, or Federal agencies.

(2) *Tribal Governments.*

(a) Tribal governments are accorded a special status by BIA. This relationship requires close cooperation and consultation. Tribal governments may be applicants, and/or be affected by a proposed action of BIA or another applicant. In the preparation of environmental documents, tribal governments will be consulted and, if they desire, be a cooperating agency.

(b) Tribal actions that do not require BIA or other Federal approval are not subject to the NEPA process.

B. *Prepared Program Guidance.* Program guidance for surface mining is found in 25 CFR 177 (Surface Exploration, Mining, and Reclamation of Land).

C. *Other Guidance.* Other programs under 25 CFR for which BIA has not yet issued regulations or directives for environmental information from applicants are listed below. These programs may or may not require environmental documents and could involve submission of applicant information. Applicants for these types of programs should contact the nearest affected BIA office for information and assistance:

(1) Indian Business Development Program (25 CFR 80)

(2) Loans to Indians from the Revolving Loan Fund (25 CFR 91)

(3) Loan guaranty, insurance, and interest subsidy (25 CFR 93)

(4) Leasing and permitting (Lands) (25 CFR 131)

(5) Preservation of antiquities (25 CFR 132)

(6) General forest regulations (25 CFR 141)

(7) Sale of lumber and other forest products by Indian enterprises from the forests of Indian reservations (25 CFR 142)

(8) Sale of forest products, Red Lake Indian Reservation, Minn. (25 CFR 144)

(9) General grazing regulations (25 CFR 151)

(10) Navajo grazing regulations (25 CFR 152)

(11) Grazing regulations for former Navajo-Hopi joint use area lands (25 CFR 153)

(12) Rights-of-way over Indian lands (25 CFR 161)

(13) Roads of the Bureau of Indian Affairs (25 CFR 162)

(14) Leasing of tribal lands for mining (25 CFR 171)

(15) Leasing of allotted lands for mining (25 CFR 172)

(16) Leasing of lands on Crow Indian Reservation, Montana, for mining (25 CFR 173)

(17) Leasing of restricted lands of members of Five Civilized Tribes, Oklahoma, for mining (25 CFR 174)

(18) Leasing of Osage Reservation, Oklahoma, lands for mining, except oil and gas (25 CFR 175)

(19) Lead and zinc mining operations and leases, Quapaw Agency (25 CFR 176)

(20) Leasing of Osage Reservation lands for oil and gas mining (25 CFR 183)

(21) Leasing of certain lands in the Wind River Indian Reservation, Wyoming, for oil and gas mining (25 CFR 184)

(22) Concessions, permits, and leases on lands withdrawn or acquired in connection with Indian irrigation projects (25 CFR 203)

(23) Electric power system—Colorado River Irrigation Project, Arizona (25 CFR 231)

(24) Electric power system—Flathead Indian Irrigation Project, Montana (25 CFR 232)

(25) Off-reservation treaty fishing (25 CFR 256)

(26) Contracts under Indian Self-Determination Act (25 CFR 271)

(27) Grants under the Indian Self-Determination Act (25 CFR 272)

(28) School construction contracts or services for tribally operated previously private schools (25 CFR 274)

(29) School construction contracts for public schools (25 CFR 277)

4.3 Major Actions Normally Requiring an EIS

A. The following BIA actions normally require the preparation of an EIS:

(1) Proposed mining contracts (for other than oil and gas), or the combination of a number of smaller contracts comprising a mining unit, for:

(a) new mines of 640 acres or more, other than surface coal mines.

(b) new surface coal mines of 1,280 acres or more, or having an annual full production level of 5 million tons or more.

(2) Proposed water development projects which would, for example, inundate more than 1,000 acres, or store more than 30,000 acre-feet, or irrigate more than 5,000 acres of undeveloped land.

B. If, for any of these actions, it is proposed not to prepare and EIS, an EA will be prepared and handled in accordance with section 1501.4(e)(2).

4.4 Categorical Exclusions

In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which the BIA also performs,the following BIA actions are designated as categorical exclusions unless the action qualifies as an exception under 516 DM 2.3A(3):

A. *Operation, maintenance, and replacement of existing facilities.* Examples are renovation of buildings, renovation of existing roads, and rehabilitation of irrigation structures.

B. *Transfer of Existing Federal Facilities to Other Entities.* Transfer of the operations and maintenance activities of Federal facilities to tribal groups, water user organizations, or other entities where the anticipated operation and maintenance activities are agreed to in a contract, follow BIA policy, and no major change in operations or maintenance is anticipated.

C. *Human resource programs having primarily socio-economic effects.* Examples are social services, education services, employment assistance, tribal operations, law enforcement, and credit and financing activities.

D. *Administrative actions and other activities relating to trust resources.* Examples are management of trust funds; issuance of such documents as certificates of competency, allotments, and fee patents; renewal of agricultural and other leases when environmental impacts are addressed in an earlier environmental document; and routine research and investigation activities regarding trust resources.

E. *Self-Determination Act Grants and Contracts.*

(1) Self-Determination Act grants.

(2) Self-Determination Act contracts for BIA programs which are listed as categorical exclusions, or for programs in which environmental impacts are adequately addressed in an earlier environmental document.

F. *Rights-of-way.*

(1) Rights-of-way inside another right-of-way or amendments to rights-of-way where minor deviations from or additions to the original right-of-way are involved and where there is an existing environmental document covering the same or similar impacts in the right-of-way area.

(2) Right-of-way for a single-poled power or telephone line to an individual residence, building or well from an existing line where installation will involve no clearance of vegetation from the right-of-way other than for placement of the poles.

G. *Mineral Resources.*

(1) Approval of a mineral prospecting permit or exploration plan when an environmental document has been prepared for the exploration or mining contract.

(2) Approval of minor modifications to or variances from activities described in an approved underground or surface mine plan.

(3) Approval of geophysical exploration for oil and gas and geothermal resources.

(4) Approval of minor modifications to or variances from activities described in an approved oil and gas or geothermal exploration or development/production plan, such as the relocation of a drill site(s).

(5) Approval of an Application for Permit to Drill (APD) exploratory oil and gas wells prior to the first confirmation drilling.

(6) Approval of an APD for exploratory oil and gas wells subsequent to the first confirmation drilling for which an environmental document is required.

(7) Approval of an APD for a new water source or observation well.

(8) Approval of an APD for a new injection or withdrawal well pursuant to an approved gas storage project.

(9) Approval of an APD or equivalent proposal for the enhanced recovery of proven oil and gas resources.

(10) Approval of conversion of an unsuccessful oil and gas or geothermal well or an exhausted producer to a water source well or observation well.

(11) Approval of conversion of an existing oil and gas well for disposal of produced water meeting the standards of NTL-2B (Disposal of Produced Water).

(12) Approval of surface facilities and wells for the disposal of produced water meeting the standards of NTL–2B.

(13) Approval of a plan for geothermal exploration or development.

(14) Approval of a plan for geothermal production when derived from a plan of utilization previously covered by an environmental document.

(15) Approval of a plan for injection of geothermal fluids meeting the requirements of GRO–4 (Environmental Protection Requirements).

(16) Approval of utilization agreements, pooling or communitization agreements.

(17) Other actions where BIA has concurrence or co-approval with another bureau and the action is a categorical exclusion for that bureau.

[FR Doc. 81-2539 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-02-M

[516 DM 6, Appendix 5]

National Environmental Policy Act; Revised Implementing Procedures

AGENCY: Department of the Interior.

ACTION: Notice of final revised instructions for the Bureau of Land Management.

SUMMARY: This notice announces a final Appendix to the Department's NEPA procedures for the Bureau of Land Management. The Departmental procedures were published in the **Federal Register** on April 23, 1980 (45 FR 27541).

DATE: The appendix was adopted January 19, 1981.

FOR FURTHER INFORMATION CONTACT: Bruce Blanchard, Director, Office of Environmental Project Review, Office of the Secretary, Department of the Interior, Washington, D.C. 20240, Telephone: (202) 343–3891. For Bureau of Land Management, contact Bruce Bandurski, Telephone: 343–7417.

SUPPLEMENTARY INFORMATION: This Appendix to the Departmental Manual (516 DM 6, Appendix 5) provides more specific NEPA compliance guidance to the Bureau of Land Management (BLM). In particular it provides information about BLM organizational responsibilities for NEPA compliance, advice to applicants, actions normally requiring the preparation of an environmental impact statement (EIS), and categorical exclusions. The Appendix must be taken in conjunction with the Departmental procedures (516 DM 1–6) and the CEQ regulations (40 GFR 1500–1508). In addition, the Bureau will prepare a handbook(s) or other technical guidance on how to apply these procedures to its principal programs.

The proposed Appendix was published in the **Federal Register** on December 15, 1980 (45 FR 82367) and six comments were received from an energy corporation, an environmental organization, three officials from two professional geologist organizations, and a Federal agency. As a result of these comments and internal review, changes have been made to improve the instructions, including many minor changes for technical, clarifying and consistency reasons. Responses to comments are as follows:

Major Actions Normally Requiring an EIS

One commenter felt that regional coal lease sales schedules [5.3A(4)], OCS oil and gas lease sales [5.3A(5)], and major energy facility sites and rights-of-way [5.3A(6)] should be excluded from EIS requirements whenever prior environmental documents have been prepared covering the same or similar activities affecting the same area. Certainly, EISs will not be prepared for an action already covered by an EIS. In addition, the CEQ regulations allow the adoption and/or incorporation, by reference of relevant portions of applicable EISs. However, NEPA requires that there be a proposed action in an EIS rather than an analysis of a similar activity. We have not changed these paragraphs because actions of these types, if not covered by an earlier EIS, will normally require the preparation of an EIS.

Another commenter agreed with and supported all of the listed types of actions and suggested expanding the list to include actions affecting lands or items enumerated in paragraph 516 DM 2(A)(3). That paragraph enumerates our exceptions to categorical exclusions, which in term are derived from the definition of significance in Section 1508.27 of the CEQ regulations. We have not adopted this suggestion, because in essence it would merely restate the CEQ regulations in section 1502.3; i.e., major actions significantly affecting the quality of the human environment.

Two issues were raised about Section 5.3A(7). One commenter questioned the 5000 acre threshold for withdrawals from mineral entry because of the high value of some small mineral deposits. Another commenter supported it, but also wanted to include the termination of such withdrawals, where minerals are known to be present, but without any acreage threshold. We have adopted neither of these suggestions. We believe that the section as written reflects the importance the Congress placed on reviewing withdrawals over 5000 acres and requiring the Secretary to review withdrawals from mineral entry under the mining laws. We believe that the normal case-by-case NEPA review process of preparing an environmental assessment (EA) to determine whether to prepare an EIS will fully consider the other situations.

Categorical Exclusions

We have deleted the paragraph, formerly 5.A(1), which categorically excluded certain program guidance decisions and, to the extent they apply, BLM will use the Department-wide exclusions listed in Appendix 1 to 516 DM 2.

§ *5.4A(5).* We have added a general consistency exclusion for an action requiring the approval of more than one bureau. This will particularly facilitate working arrangements between BLM and the Geological Survey.

§ *5.4B(1), (2), and (3).* One commentor felt that these withdrawal continuations and extensions should be excluded only upon public notice and no adverse public response. Public notice is provided in these cases, but we do not believe that adverse comments in and of themselves are sufficient reason to require an EA. We believe our exceptions in 516 DM 2.3A(3) to be adequate safeguard to ensure an EA when significant environmental factors are present.

We have deleted the paragraph, formerly 5.4B(2), excluding withdrawal continuations and extensions involving less than 160 acres pending operating experience under this Appendix.

§ *5.4B(7).* A commentor objected to excluding all withdrawal terminations which would open lands to discretionary land laws notwithstanding the fact that the NEPA process would apply to any subsequent discretionary action. We have retained the exclusion because we believe that our exceptions to the exclusions will require an EA whenever there is any evidence of significant impact at the time of their termination.

§ *5.4B(8).* There was support for this exclusion of withdrawal terminations which would open lands to the mining laws, when minerals are not present. However, a commentor felt that if any minerals were found in the future the land should be retroactively withdrawn regardless of whether the mineral extraction involves discretionary or non-discretionary duties on the part of BLM. We believe this would lead to unacceptable uncertainties in managing the public lands. Moreover, there are no provisions for retroactive application of withdrawals in FLPMA. We have not adopted this suggestion.

Another commentor indicated that the interest expressed in mineral development should be a serious interest as reflected by parties having mineral competence or mining capability. We agree with this suggestion and have modified the language here and in two other places in the Appendix (paragraph 5.3A(7) and 5.4B(3)).

§ *5.4B(9).* One commentor believed that there was some element of discretion in almost all cases where the Secretary had a mandatory duty to terminate a withdrawal. This may be true in some cases, but we leave this to a case-by-case determination. The language has been modified to improve its clarity.

§ *5.4B(14).* A commentor requested us to define "minor actions" and opposed excluding the actual conveyance of the mineral estate. We have changed the wording to make it clear that we are excluding the conveyance, but only when it would be consistent with surrounding land uses or would cause only minimal environmental impact.

§ *5.4B(16).* An objection was expressed because these disclaimers could lead to situations having unacceptable environmental impact. This may be the case in isolated situations, but our actions under Section 315 are narrow legal determinations. We have not changed this section.

§ *5.4B(21).* Another commentor recommended that this exclusion be expanded to include adjacent rights-of-way. We did not accept the recommendation, but did change it to include minor deviations from the right-of-way.

§ *5.4B(23).* A commentor was concerned that this section could include upgrading power lines to 765-kV. We do not agree. This exclusion refers to poles and not towers.

§ *5.4B(24).* The commentor felt that this exclusion would omit well fields associated with coal slurry pipelines. We have clarified the language that we are excluding a single-poled line to an individual residence, building or well.

A commentor recommended that we add an exclusion which would cover all modifications to major energy facilities and rights-of-way which were covered in an existing document. To the extent they are covered, a categorical exclusion is not required (see 516 DM 3.2A), otherwise we believe an EA is appropriate. Another suggestion was to exclude all oil, gas, and coal lease sales within or adjacent to areas where an existing environmental document was prepared covering the same or similar activities. This is similar to a comment about removing these types of actions from the category normally requiring an EIS. We have not adopted this suggestion for the same reasons that we stated earlier.

Another commentor requested that we add an exclusion for terminating withdrawals proposed by another Federal agency. This is not necessary because we will use the environmental document which accompanies the Federal agency's proposal. A further suggestion was made to exclude land transfers to Federal agencies pursuant to Sections 205(c) and 206(c) of FLPMA. We have adopted this suggestion and it appears in Section 5.4B(10).

§ *5.4D(1).* There was opposition to the exclusion of the issuance of mineral patents because there may be discretionary actions at earlier stages of the issuance process, and, further, the Secretary has an obligation to protect surrounding public lands. We do not believe that this Appendix is the place to argue this issue. To the extent discretion exists, it is not excluded under this section; for we are only excluding the issuance of a mineral patent which the courts have determined is non-discretionary.

§ *5.4D(3).* Several commentors were concerned that this section implied that permits were always required for such mapping, inventory, reconnaissance and collecting. This is not the case. This section only excludes the approval of those activities for which BLM permits are required. It does not apply to those academic, scientific and casual activities that do not require permits.

§ *5.4D(4).* One commentor questioned our exclusion of individual upland oil and gas leases, because they are discretionary duties. We have revised the language to exclude only non-competitive leases because over the past ten years we have issued over 100,000 such leases and our tens of thousands of EAs have not even lead to one EIS. We believe our exceptions to the exclusions listed in 516 DM 2.3A(3) will capture those few non-competitive leases that may have some impact. Another commentor recommended that we expand this section to include geothermal leases. We have not done so because the lease stage is the first significant level of commitment towards the development of these resources. We may revise this for non-competitive leases at some time in the future when we have more experience with this program.

§ *5.4D(6 and 7).* A commentor opposed categorically excluding geophysical exploration for oil and gas and geothermal resources, and another commentor requested that we include shallow temperature gradient holes in the exploration of geothermal resources. Our experience in operating under the pre-leasing exploration regulations (43 CFR 3045 and 43 CFR 3209) generally reveals negligible environmental impacts and we have revised these to reference the regulations. Further our exceptions to the exclusions will require EAs whenever significant impacts may result.

We have added consistency provisions for geothermal and coal mining activities involving joint activities with the Geological Survey and the Office of Surface Mining in Section 5.4D(7–11).

§ *5.4E(3).* A suggestion was made to define "small sales." We do not believe this is necessary here and we leave it to the field-level decisionmaker. In any case the exceptions to the exclusion apply.

One commentor requested that we exclude all actions involving coal and off-shore oil and gas leasing and all major energy facilitites and rights-of-way not requiring EISs. We have not adopted this request and believe that these are best handled in the normal EA process.

Several new exclusions have been added as Sections 5.4E(5–10) for certain grazing, forestry and wildlife activities. Comments are welcome and will be considered in periodic revisions to the Appendix.

Format

Chapter 6 (516 DM 6) Managing the NEPA Process

Appendix 5. Bureau of Land Management

5.1 NEPA Responsibility

5.2 Guidance to Applicants

5.3 Major Actions Normally Requiring an EIS

5.4 Categorical Exclusions

Other Bureaus

Final Appendices have been published in the **Federal Register** for all other bureaus as follows:

1. Fish and Wildlife Service (45 FR 47941).
2. Geological Survey (in publication).
3. Heritage Conservation and Recreation Service (45 FR 76801).
4. Bureau of Indian Affairs (in publication).
6. Bureau of Mines (45 FR 85528).
7. National Park Service (46 FR 1042).
8. Office of Surface Mining (in publication).
9. Water and Power Resources Service (45 FR 47944).

Dated: January 19, 1981.

Cecil S. Hoffmann,

Special Assistant to Assistant Secretary of the Interior.

[516 DM 6]

Appendix 5—Bureau of Land Management

5.1 NEPA Responsibility

A. The *Director/Associate Director* are responsible for NEPA compliance for Bureau of Land Management (BLM) activities.

B. The *Deputy Director for Lands and Resources* is responsible for policy interpretation, program direction, leadership, and line management for BLM environmental policy, coordination, and procedures.

(1) *Office of Planning, Inventory and Environmental Coordination.* Although this Office reports to the Deputy Director for Lands and Resources, it has Bureauwide NEPA responsibilities. These include providing program direction and procedures for implementing NEPA, and insuring the incorporation and integration of the NEPA process into BLM management systems and decision processes.

(2) The *Branch of Environmental Coordination,* within the Office of Planning, Inventory and Environmental Coordination, serves as the BLM focal point for all NEPA matters and provides advice to the Director and other BLM decisionmakers on NEPA related activities. It is responsible for oversight of BLM's compliance with NEPA, monitoring the preparation and status of NEPA documents, and coordinating the review of non-BLM environmental documents. Information about BLM environmental documents or the NEPA process can be obtained by contacting this Branch.

C. The *Deputy Directors for Policy, Program, and Budget and for Services* are responsible for cooperating with the Deputy Director for Lands and Resources to insure that the NEPA process operates as prescribed within their areas of responsibility. This includes managing and insuring the quality of environmental analyses, environmental documents and records of decision.

D. *State Directors* are responsible to the Director/Associate Director for overall direction and integration of the NEPA process into their activities and for NEPA compliance in their States. The Planning and Environmental Coordination (P&EC) unit provides major staff support and is the key focal point for NEPA matters at the State level.

(1) *District Managers* are responsible for implementing the NEPA process at the District level. The P&EC unit provides major support and is the key focal point for NEPA matters at the District level.

(2) *Area Managers* are responsible for implementing the NEPA process at the Resource Area level.

E. *Outer Continental Shelf (OCS) Managers* are responsible to the Assistant Director for Energy and Mineral Resources for insuring that the NEPA process operates as prescribed within their areas of responsibility. This includes managing and insuring the quality of environmental analyses, environmental documents and assigned environmental reviews.

F. *Office of Coal Management,* which reports to the Director/Associate Director, is responsible for insuring that the NEPA process operates as prescribed in its area of responsibility. This includes managing and insuring the quality of environmental analyses, environmental documents and assigned environmental reviews.

G. *Office of Special Projects,* which reports to the Director/Associate Director, is responsible for insuring that the NEPA process operates as prescribed in its area of responsibility. This includes the organization for and preparation of environmental documents for major inter-State, non-BLM initiated development proposals and other major projects in accordance with established procedures or as assigned.

5.2 Guidance to Applicants

A. General

(1) Applicants should make initial contact with the line manager (Resource Area Manager, District Manager, State Director or OCS Office Manager) of the office where the affected public lands are located.

(2) If the application will affect responsibilities of more than one State Director (or OCS Office Manager) an applicant may contact any State Director (or OCS Office Manager) whose jurisdiction is involved. In such cases, the Director may assign responsibility either to the Headquarters office (e.g., Office of Special Projects) or to one of the State Offices (or OCS Offices) at his discretion. From that point, the applicant will deal with the designated lead office.

(3) Potential applicants may secure from State Directors and OCS Office Managers a list of program regulations or other directives/guidance providing advice or requirements for submission of environmental information. The purpose of making these requirements known to potential applicants, in advance, is to assist them in presenting a detailed, adequate and accurate description of the proposal and alternatives when they file their application and to minimize the need to request additional information. This is a minimum list and additional requirements may be identified after detailed review of the formal submission and during scoping.

(4) Since much of an applicant's planning may take place outside of BLM's Planning System, it is important for potential applicants to advise BLM of their planning at the earliest possible stage. Early communication is necessary to conduct properly our stewardship role on the public lands and to seek solutions to situations where private development decisions may conflict with public land use decisions. Early contact will also allow the determination of basic data needs concerning environmental amenities and values, potential data gaps that could be filled by the application and a modification of the list of requirements to fit unique local situations. Scheduling of the environmental analysis process can also be discussed, as well as various ways of preparing any environmental documents.

B. *Regulations.* The following partial list provides guidance to applicants on program regulations which may apply to a particular application. Many other regulations deal with proposals affecting public lands, some of which are specific to BLM, while others are applicable across a broad range of Federal programs (e.g., Protection of Historic and Cultural Programs, 36 CFR 800).

(1) Management of Rights-of-way and Related Facilities on Public Lands and Reimbursement of Costs (43 CFR 2800).

(2) Roads and Highways (43 CFR 2820).

(3) Rights-of-way Under the Mineral Leasing Act (43 CFR 2880).

(4) Surface Management Requirements (43 CFR 3109).

(5) Surface Management Requirements; Special Requirements (43 CFR 3204).

(6) Outer Continental Shelf Mineral and Rights-of-way Management; General (43 CFR 3300).

(7) Coal Management; Federally Owned Coal (43 CFR 3400).

(8) Leasing of Minerals Other than Oil and Gas; General (43 CFR 3500).

(9) Exploration and Mining, Wilderness Review Program (43 CFR 3802) [see 45 FR 13968].

(10) Surface Management of Public Lands Under the U.S. Mining Laws (43 CFR 3809) [see 45 FR 78902].

5.3 Major Actions Normally Requiring an EIS

A. The following types of BLM proposals will normally require the preparation of an EIS:

(1) Approval of Resource Management Plans.

Note.—BLM land use plans, termed Management Framework Plans (MFP), for which EISs are not normally prepared, are based on a set of procedures being phased out during the 1979–1983 period. During this same period, land use plans prescribed by the Federal Land Policy and Management Act (FLPMA), termed Resource Management Plans (RMP) are being phased in.

(2) Approval of major activity plans, within MFP's, for grazing and timber management in accordance with criteria and schedule established in decrees and court orders.

Note.—To the extent practicable, these activity plans will be phased into RMPs in the future and their associated impacts will be included in the EISs under paragraph (1) above. This should substantially reduce or eliminate the need for separate EISs for activity plans.

(3) Recommendations for wilderness proposals to the Congress.

(4) Approval of regional coal lease sales schedules in a coal production region.

(5) Approval of OCS oil and gas lease sales.

(6) Approval of applications to BLM for major actions in the following categories:

(A) Sites for major steam-electric powerplants, petroleum refineries, synfuels plants, and industrial facilities.

(b) Rights-of-way for major reservoirs, canals, pipelines, transmission lines, highways and railroads.

(7) Withdrawals from mineral entry under U.S. Mining Laws of 5,000 acres or more of public lands where evidence indicates

minerals of more than nominal value are present or serious interest in mineral development has been expressed.

B. If, for any of these actions, it is proposed not to prepare an EIS, an EA will be prepared and handled in accordance with Section 1501.4(c)(2).

5.4 Categorical Exclusions

In addition to the actions listed in the Departmental categorical exclusions outlined in Appendix 1 of 516 DM 2, many of which the Bureau also performs, the following BLM actions are designated categorical exclusions unless the action qualifies as an exception under 516 DM 2.3A(3):

A. *General*

(1) Inventory, data and information collection.

(2) Placing of monitoring equipment (e.g., stream gages).

(3) Non-manipulative research.

(4) Minor routine or preventive operation and maintenance activities on BLM facilities, lands and resource developments.

(5) Actions where BLM has concurrence or co-approval with another bureau and the action is a categorical exclusion for that bureau.

B. *Realty*

(1) Withdrawal continuations or extensions which would merely establish a specific time period and where there would be essentially no change in use and continuation would not lead to environmental degradation.

(2) Withdrawal continuations or extensions for administrative sites, location of facilities, other proprietary purposes, and roadside areas and buffer zones for other bureaus and the Forest Service.

(3) Withdrawal continuations or extensions where a report has been prepared which determined that the land contains minerals of no more than nominal value and there has been serious interest in mineral development expressed, and no new uses would be permitted and existing uses would not lead to environmental degradation under the continuation.

(4) Withdrawal terminations, modifications or revocations if, because of other withdrawals, classifications, management decisions or administrative determinations that will survive the action, the status of the land, insofar as its availability for appropriation under the general land laws, will not be changed.

(5) Withdrawal terminations, modifications or revocations that, because of overlying withdrawals or statutory provisions, involve merely a record clearing procedure.

(6) Withdrawal revocations and opening orders for stock driveways.

(7) Withdrawal terminations, modifications or revocations and classification cancellations and opening orders where the land would be opened to discretionary land laws and where such future discretionary actions would be subject to the NEPA process.

(8) Withdrawal terminations, modifications or revocations and classification cancellations and opening orders where the land would be opened to the operation of mining laws, if the land does not contain minerals of more than nominal value, as determined in accordance with the established practices and procedures of BLM, and there has not been any serious interest in mineral development expressed.

(9) Withdrawal terminations, modifications or revocations and opening orders that the Secretary of the Interior is under a specific statutory directive to execute.

(10) Transfers of land or interest in land to other bureaus or the Secretary of Agriculture pursuant to Sections 205(c) or 206(c) of FLPMA when the land was acquired for that purpose and the acquisition was covered by an environmental document.

(11) All non-discretionary land actions in Alaska pursuant to the Alaska Native Claims Settlement Act (ANCSA), Alaska Statehood Act, and other statutes including:

(a) ANCSA grants
(b) Native allotments
(c) Trade and manufacturing sites
(d) Homesites
(e) Headquarters sites
(f) Homesteads
(g) State selections

(12) Administrativfe conveyances and leases to the State and Alaska to accommodate airports for which property rights existed prior to the enactment of NEPA.

(13) Continuations of Recreation and Public Purpose Act lands, small tract lands, or other land disposal classifications where the surface has been patented and the locatable minerals are reserved to the United States.

(14) Actions taken in conveying mineral interests under Section 209(b) of FLPMA where the intended land use by the non-Federal surface owner would be consistent with surrounding land uses or would cause only minimal environmental impact.

(15) Color of Title cases (Class one).

(16) Recordable disclaimers of interest under Section 315 of FLPMA.

(17) Corrections of patents and other conveyance documents under Section 316 of FLPMA and other applicable statutes.

(18) Assignment of land use authorization (to another party) where the assignment conveys no additinal rights beyond those granted in the original authorization.

(19) Transfer of use authorization from one agency to another when an action such as a boundary adjustment necessitates changing a right-of-way from one agency to another (e.g., Forest Service Special Land Use Permit to a BLM Title V right-of-way).

(20) Conversion of existing rights-of-way grants to title V of FLPMA grants where no new facilities or other changes are needed.

(21) Rights-of-way inside another right-of-way or amendments to rights-of-way where minor deviations from or additions to the original right-of-way are involved and where there is an existing environmental document covering the same or similar impacts in the right-of-way area.

(22) Buried power or telephone lines in an existing right-of-way using the split trench method.

(23) Upgrading or adding new lines (power or telephone) to existing pole(s) when there is no change in pole configuration.

(24) Right-of-way for a single-poled power or telephone line to an individual residence, building or well from an existing line where installation of the line will involve no clearance of vegetation from the right-of-way other than for placement of poles.

(25) Rights-of-way for overhead line (no pole or tower on BLM land) crossing over a corner of public land.

(26) Right-of-way which would add another radio transmitter to an approved communication site.

(27) Minor ancillary rights-of-way actions associated with the action of another bureau or Federal agency, and the action is a categorical exclusion for that bureau/agency, but only if a cooperative arrangement for the related actions provides for mutually acceptable mitigation measures.

C. *Transportation.*

(1) Placing of existing roads in BLM road net where no new facilities or other changes are needed.

(2) Installation of routine signs, markers or cattleguards on or adjacent to existing roads.

(3) Temporary road closures.

D. *Minerals*

(1) Issuance or mineral patents.

(2) Actions taken in conjunction with 43 CFR 3809 which do not require an EA, pursuant to Section 3809.2–1.

(3) Approval of permits for geologic and paleontologic mapping, inventory, reconnaissance and surface collecting.

(4) Issuance of individual non-competitive upland oil and gas leases.

(5) Conversion of an abandoned oil well to a water well if water facilities are established near the well site only.

(6) Establishment of terms and conditions in Notices of Intent to conduct geophysical explorations for oil and gas pursuant to 43 CFR 3045.

(7) Approval of Notices of Intent to conduct geothermal resources exploration operations pursuant to 43 CFR 3209.

(8) Approval of a plan of operation for geothermal exploration or development when an environmental document has been prepared at the leasing stage.

(9) Approval of a plan for injection of geothermal fluids meeting the standards of GRO–4 (Environmental Protection Requirements.)

(10) Approval of a plan for geothermal production when derived from a plan of utilization which has been covered by an environmental document.

(11) Findings of completeness furnished to the Office of Surface Mining for coal mining and operation plans filed under the Surface Mining Control and Reclamation Act.

e. *Other*

(1) Cadastral surveys.

(2) Issuance of special use or short term permits not entailing environmental disturbance.

(3) Small sales of sand and gravel, wood products,or other materials from authorized sale areas.

(4) Dispersed non-commercial recreation activities such as rock collection, Christmas tree cutting, and pine nut gathering.

(5) Issuance of grazing permits and leases and annual authorizations which are consistent with decisions covered by a grazing management EIS.

(6) Issuance of grazing permits and leases and annual authorizations in areas scheduled

for the preparation of a grazing management EIS which do not increase the level of use or continue unsatisfactory environmental conditions.

(7) Land cultivation activities in forest tree nurseries.

(8) Construction of guzzlers, spring developments, and other small water harvesting facilities for wildlife water.

(9) Modification of existing fences to provide improved wildlife ingress and egress.

(10) Reintroduction of endemic or native species into their historical habitats, other than endangered or threatened species.

[FR Doc. 81-2540 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-04-M

INTERNATIONAL DEVELOPMENT COOPERATION AGENCY

Agency for International Development

Joint Committee on Agricultural Development of the Board for International Food and Agricultural Development; Notice of Meeting

Pursuant to Executive Order 11769 and the provisions of Section 10(a), (2), P.L. 92-463, Federal Advisory Committee Act, notice is hereby given of the meeting of the Joint Committee on Agricultural Development (JCAD) of the Board for International Food and Agricultural Development (BIFAD) on February 9 and 10, 1981. (Joint Research Committee (JRC) and JCAD joint sessions on 2/10.)

The meeting on February 9, 1981 will convene from 9:00 a.m. to 12:00 p.m. in the form of Joint JCAD-JRC Regional Work Groups. Africa RWG in Room 2941, New State Department Building, Washington, D.C. 20523 (Mr. Lane E. Holdcroft, A.I.D. Federal Designee for this meeting can be contacted at (202/632-3650); Latin America RWG in Room 2242 New State Department Building (Mr. Albert Brown, A.I.D. Federal Designee for this meeting can be contacted at (202/632-8126); Near East RWG in room 6484 New State Department Building (Mr. Keith Sherper, A.I.D. Federal Designee for this meeting can be contacted at (202/632-9256); and the Asia RWG in Room 609 Rosslyn Plaza "C" Building, 1601 North Kent Street, Rosslyn, Virginia (Mr. David Lundberg, A.I.D.. Federal Designee for this meeting can be contacted at (703/235-8870).

The Joint JCAD-JRC Work Groups on Training and Education, Women in Development, and Procurement Process will convene from 2:00 p.m. to 4:30 p.m. in Room 1205, Room 1207, and Room 1408, respectively of the New State Department Building, Washington, D.C. 20523.

The full JCAD and JRC Committees will meet on February 10, 1981, from 9:00 a.m. to 11:45 a.m. to receive Reports from the Joint JCAD-JRC Work Groups, Title XII Regional Seminars, International Agricultural Research Centers and the A.I.D. Food Sector Strategy, National Academy of Sciences Research Grant Proposal to A.I.D. and up-date on Collaborative Research Support Program will be discussed. The full JCAD Committee will meet from 1:00 p.m. to 4:30 p.m. to receive reports from the JCAD Guidelines Revision Group and the Asia Agricultural Officers Meeting. These meetings will be held at the Holiday Inn, Dynasty Room, 1850 N. Fort Myer Drive, Arlington, Virginia 22209.

The meetings are open to the public. Any interested person may attend, may file written statements with the Committee before or after the meetings, or may present oral statements in accordance with procedures established by the Committee, and to the extent the time available for the meetings permit.

Mr. John C. Rothberg, BIFAD Support Staff, is designated A.I.D. Advisory Committee Representative at the February 9 and 10 meetings. It is suggested that those desiring further information write to him in care of the Agency for International Development, State Department, Washington, D.C. 20523, or telephone him at (202) 632-7937.

Dated: January 19, 1981.

John C. Rothberg,

A.I.D. Advisory Committee Representative, Joint Committee on Agricultural Development Board for International Food and Agricultural Development.

[FR Doc. 81-2526 Filed 1-22-81; 8:45 am]

BILLING CODE 4710-02-M

Joint Research Committee of the Board for International Food and Agricultural Development; Notice of Meeting

Pursuant to Executive Order 11769 and the provisions of section 10(a), (2), P.L. 92-463, Federal Advisory Committee Act, notice is hereby given of the thirty-seventh meeting of the Joint Research Committee (JRC) of the Board for International Food and Agricultural Development (BIFAD) on February 10 and 11, 1981.

The purpose of the meeting is to: (1) discuss in a joint session with the Joint Committee on Agricultural Development (JCAD) on February 10, 1981 from 9:00 a.m. to 11:45 a.m. to following topics: Plans for Title XII Regional Seminars; International Agricultural Research Centers; activities of the Joint JRC-JCAD Work Groups; A.I.D. Food Sector Strategy; and the Proposal from the National Academy of Sciences to A.I.D. on a research grants program; (2) discuss the following topics pertaining to the JRC: Activities of the JRC Work Group on research and research priorities, the Work Group on alternate contractual/grant models for A.I.D. sponsored Title XII collaborative research with U.S. and LDC institutions, the Work Group on LDC livestock research and other development needs, the Work Group on management structure and procedures on Collaborative Research Support Programs (CRSPs), and the Study Group on CRSP management structure; and to discuss operating organization and structure of the JRC.

The meeting will convene from 9:00 a.m. to 5:00 p.m. on Feb. 10, and 9:00 a.m. to noon on Feb. 11. The meeting will be held at the Holiday Inn, Dynasty Room, 1850 N. Fort Myer Drive, Rosslyn, Virginia 22209. The meeting is open to the public. Any interested person may attend, may file written statements with the Committee before or after the meeting, or may present oral statements in accordance with procedures established by the Committee, and to the extent the time available for the meeting permits.

Mr. William F. Johnson, BIFAD Support Staff is the designated A.I.D. Advisory Committee Representative at the meeting. It is suggested that those desiring further information write to him in care of the Agency for International Development, BIFAD Support Staff, Department of State, Washington, D.C. 20523 or telephone him at (202) 632-7935.

Dated: January 19, 1981.

William F. Johnson,

AID Advisory Committee Representative Joint Research Committee, Board for International Food and Agricultural Development.

[FR Doc. 81-2527 Filed 1-22-81; 8:45 am]

BILLING CODE 4710-02-M

INTERSTATE COMMERCE COMMISSION

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 9, 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 24, 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. OP4–197

Decided: January 14, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 21866 (Sub-187), filed December 18, 1980. Applicant: WEST MOTOR FREIGHT, INC., 740 S. Reading Ave., Boyertown, Pa 19512. Representative: Alan Kahn, 1430 Land Title Bldg., Philadelphia, Pa. 19110. Transporting (1) *household appliances, radios, televisions, sounds and video reproducing and recording equipment,* and *(2) materials, equipment, and supplies,* used in the manufacture and distribution of the commodities named in (1) above, between Louisville, KY, on the one hand, and, on the other, those points in the U.S. in and east of ND, SD, NE, KS, OK, and TX.

MC 48956 (Sub-20F), filed December 29, 1980. Applicant: JAMES FLEMING TRUCKING, INC., 761 East St., Suffield, CT 06078. Representative: S. Michael Richards, P.O. Box 225, Webster, NY 14580. Transporting *such commodities* as are dealt in or used by grocery and food business houses, and *materials, equipment, and supplies* used in the conduct of such business, between points in the U.S., under continuing contract(s) with The Great Atlantic & Pacific Tea Co., and Compass Foods, Inc., both of Montvale, NJ.

MC 61016 (Sub-59F), filed December 30, 1980. Applicant: PETER PAN BUS LINES, INC., 1776 Main St., Springfield, MA 01103. Representative: Ronald W. Malin, Bankers Trust Bldg., Jamestown, NY 14701. Transporting *passengers and their baggage,* in the same vehicle with passengers, in charter and special operations, (1) between points in CT, ME, MA, NH, NY, RI, and VT, and (2) beginning and ending at points named in (1) above and extending to points in the U.S. (including AK but excluding HI). Condition: Issuance of a certificate in this proceeding is subject to prior or coincidental cancellation at applicant's written request of MC–61016 (Sub-No. 48F), which authorizes the service requested above limited to transportation in vehicles with a seating capacity not to exceed 25 passengers.

MC 74416 (Sub-28F), filed December 29, 1980. Applicant: LESTER M. PRANGE, INC., Box 1, Kirkwood, PA 17536. Representative: Chester A. Zyblut, 366 Executive Bldg., 1030 15th St., N.W., Washington, DC 20005. Transporting (1) *such commodities* as are dealt in or used by the manufacturers and distributors of clay and refractory products (except in bulk), and (2) *materials and supplies* used in the manufacture of the commodities named above (except commodities in bulk), between points in York County, PA, on the one hand, and, on other, points in the U.S. (except AK and HI).

MC 78926 (Sub-1F), filed January 2, 1981. Applicant: CTC VAN LINES, INC., 134–41 Springfield Blvd., Springfield Gardens, NY 11413. Representative: Allan Schwartz (same address as applicant). Transporting *household goods,* between New York, NY, on the one hand, and, on the other points in VT, NH, RI, WV, NC, SC, GA, FL, AL, TN, KY, IN, MI, WI, IL, MS, LA, AR, MO, IA, MN, and TX.

MC 120616 (Sub-6F), filed December 24, 1980. Applicant: A. V. DEDMON TRUCKING, INC., Hwy 150 East, Shelby, NC 28150. Representative: John C. Bradley, Suite 1301, 1600 Wilson Blvd., Arlington, VA 22209. Transporting *general commodities* (except articles of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk and those requiring special equipment), between points in Burke, Catawba, Cleveland, Davidson, Gaston, Lincoln, Mecklenburg, and Rowan Counties, NC, on the one hand, and, on the other, points in Sullivan, Washington, Carter, Greene, Unicoi and Johnson Counties, TN.

MC 120636 (Sub-13F), filed January 2, 1981. Applicant: BRUNTON STORAGE & VAN CO., INC., Sixth and Locust Sts., Chatsworth, IL 60921. Representative: E. Stephen Heisley, 805 McLachlen Bank Bldg., 666 Eleventh St., N.W., Washington, DC 20001. Transporting *plastic articles,* and *materials, equipment, and supplies* used in the manufacture and distribution of plastic articles, between points in the U.S., restricted to the traffic originating at or destined to the facilities of Mobil Chemical Company.

MC 124236 (Sub-110F), filed December 22, 1980. Applicant: CHEMICAL EXPRESS CARRIERS, INC., 4645 No. Central Expressway, Dallas, TX 75205. Representative: Sam Hallman, 4555 First National Bank Bldg., Dallas, TX 75202. Transporting *potash,* from points in NM to points in LA, OK, and TX.

MC 136246 (Sub-43F), filed December 29, 1980. Applicant: GEORGE BROS., INC., P.O. Box 492, Sutton, NE 68979. Representative: Arlyn L. Westergren, Suite 201, 9202 West Dodge Rd., Omaha, NE 68114. Transporting (1) *grain bins, grain handling equipment, and metal buildings,* and (2) *materials, equipment, and supplies* used in the manufacture and erection of the commodities in (1) above, between points in York County,

NE, on the one hand, and, on the other, points in the U.S. Condition: Applicant seeks to convert its contract carrier authority to common, therefore, issuance of a certificate in this proceeding is subject to prior or coincidental cancellation, at applicant's written request, of Permit MC 141538 (Sub-1F).

MC 138036 (Sub-15F), filed December 29, 1980. Applicant: J & S, INC., P.O. BOX 288, Indianola, PA 15051. Representative: William A. Gray, 2310 Grant Bldg., Pittsburgh, PA 15219. Transporting *general commodities* (except household goods as defined by the Commission, and classes A and B explosives), between points in the U.S., under continuing contract(s) with J. C. Penney Company, Inc., of New York, NY.

MC 144546 (Sub-1F), filed December 24, 1980. Applicant: LAWYER TRUCKING, INC., Old State Road South, P.O. Box 186, Mooresville, IN 46158. Representative: Robert W. Loser II, 1101 Chamber of Commerce Bldg., 320 North Meridian St., Indianapolis, IN 46204. 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 Cellulose Manufacturing, Inc., of Mooresville, IN.

MC 150936 (Sub-1F), filed December 17, 1980. Applicant: HERMANN ASSOCIATES, INC., d.b.a. BANK DRAYAGE, 1405 Indiana St., San Francisco, CA 94107. Representative: Donald White (same address as applicant). Transporting (1) *bank equipment*, (2) *machinery*, (3) *museum fixtures and equipment*, (4) *art objects, displays, and exhibits*, and (5) *materials, equipment and supplies* used in the installation of the commodities in (1) through (4) above, between points in CA.

MC 152136 (Sub-1F), filed December 24, 1980. Applicant: DANE TRUCKING & CARTAGE CO., 7816 Noneman St., Fort Worth, TX 76180. Representative: Sam Hallman, 4555 First National Bank Bldg., Dallas, TX 75202. Transporting *rubber coated tire fabric*, between points in the U.S., under continuing contract(s) with Kelly Springfield Tire Company, of Cumberland, MD.

Volume No. OP4–198

Decided: January 14, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman. (Member Liberman not participating.)

MC 68997 (Sub-7F), filed December 24, 1980. Applicant: A. A. RABALAIS, INC., P.O. Box 10052, New Orleans, LA 70121. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities* (except household goods as defined by the Commission, and classes A and B explosives), between points in the U.S., under continuing contract(s) with Dan Kelly Warehouse, Inc., of Harahan, LA.

MC 70557 (Sub-43F), filed December 22, 1980. Applicant: NIELSEN BROS. CARTAGE CO., INC., 4619 W. Homer St., Chicago, IL 60603. Representative: Carl L. Steiner, 39 So. LaSalle St., Chicago, IL 60603. Transporting *paper and paper products*, between St. Louis, MO, on the one hand, and, on the other, points in AL, AR, FL, GA, KY, LA, MS, NC, OK, TN, TX, VA, and WA.

MC 123407 (Sub-658F), filed December 22, 1980. Applicant: SAWYER TRANSPORT, INC., Sawyer Center, Route 1, Chesterton, IN 46304. Representative: Sterling W. Hygema (same address as applicant). Transporting *glass, glass products, and materials, equipment supplies* used in the manufacture and distribution of glass and glass products (except commodities in bulk), between Lathrop, CA, on the one hand, and, on the other, those points in the U.S. in and west of ND, SD, NE, KS, OK, and TX.

MC 126327 (Sub-16F), filed December 22, 1980. Applicant: TRAILS TRUCKING, INC., 1825 De La Cruz Blvd., Suite 11, Santa Clara, CA 95050. Representative: Laura M. Robinson (same address as applicant). Transporting (1) *paper and paper products*, and (2) *materials, equipment, and supplies* used in the manufacture and distribution of the commodities named in (1) above (except commodities in bulk in tank vehicles), between points in AZ, CA, CO, ID, NV, NM, OK, OR, TX, UT and WA.

MC 128837 (Sub-27F), filed December 12, 1980. Applicant: TRUCKING SERVICE, INC., P.O. Box 229, Carlinville, IL 62626. Representative: Michael W. O'Hara, 300 Reisch Bldg., Springfield, IL 62701. Transporting *charcoal briquettes, paper bags*, and *sodium nitrate*, between points in the U.S.

MC 135827 (Sub-4F), filed December 22, 1980. Applicant: PANTIER, INC., 1501 Second St., Perry, IA 50220. Representative: William L. Fairbank, 1980 Financial Center, Des Moines, IA 50309. Transporting *chemicals* (except in bulk), between points in Polk and Dallas Counties, IA, on the one hand, and, on the other, points in IL, IN, KS, MI, MN, MO, NE, ND, SD, and WI.

MC 138686 (Sub-13F), filed December 16, 1980. Applicant: L.C.W. TRUCKING, INC., 101 Hampton Rd. East, Crowley, TX 76036. Representative: M. Ward Bailey, 2412 Continental Life Bldg., Fort Worth, TX 76102. Transporting *cheese and cheese products*, from points in WI, IL, IA, and MO, to points in TX.

MC 143127 (Sub-76F), filed December 22, 1980. Applicant: K. J. TRANSPORTATION, INC., 6070 Collett Rd., Victor, NY 14564. Representative: Linda A. Calvo (same address as applicant). Transporting *such commodities* as are dealt in or used by department store (except foodstuffs and commodities in bulk), between points in MI and NY, on the one hand, and, on the other, points in the U.S.

MC 145026 (Sub-11F), filed December 22, 1980. Applicant: NORTHEAST CORRIDOR EXPRESS, INC., Railroad Ave., Federalsburg, MD 21632. Representative: Dwight L. Koerber, Jr., P.O. Box 1320, 110 N. 2nd St., Clearfield, PA 16830. Transporting *such commodities* as are dealt in or used by grocery and food business houses, between points in PA, NJ, NY, RI, MA, NH, VT, ME, DE, MD, VA, and DC, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 145507 (Sub-3F), filed December 22, 1980. Applicant: TRUCKING SERVICES, INC., 26400 Van Born Rd., Dearborn Heights, MI 48125. Representative: John W. Bryant, 900 Guardian Bldg., Detroit, MI 48226. Transporting (1) *construction materials*, and (2) *lumber, wood, and metal products*, (a) between points in MI, OH, IN, IL, WI, KY, WV, PA, NY, NJ, DE, MD, VA, IA, MO, MN, ME, NH, VT, MA, RI, CT, ND, and DC, and (b) between the points in (1) above, on the one hand, and, on the other, points in NC, SC, GA, FL, TN, AL, MS, AR, and LA.

MC 151167 (Sub-1F), filed December 22, 1980. Applicant: MAILWAY TRUCKING CORP., 180 Winfred Ave., Yonkers, NY 10704. Representative: Harold L. Reckson, 33–28 Halsey Rd., Fair Lawn, NJ 07410. Transporting *furniture, machinery, laboratory equipment, electrical equipment, office equipment, and scrap metal*, between points in the U.S., under continuing contract(s) with Michael Schiavone & Sons, Inc. of North Haven, CT.

MC 151567 (Sub-1F), filed December 23, 1980. Applicant: VAN ECK & LOSITO TRUCKING, INC., 110 Ridge Plate, Wayne, NJ 07470. Representative: Harold L. Reckson, 33–28 Halsey Rd., Fair Lawn, NJ 07410. Transporting *materials, equipment, and supplies* used in the bottling and distribution of alcoholic beverages, between points in

the U.S., under continuing contract(s) with Black Prince Distillers, of Clifton, NJ.

MC 151857 (Sub-1F), filed December 18, 1980. Applicant: HARLIS R. ELLINGTON CONSTRUCTION, INC., State Road 100 West, Lake Butler, FL 32054. Representative: Dan R. Schwartz, 3100 University Blvd. S., Suite 225, Jacksonville, FL 32216. Transporting (1) *forest products and lumber,* 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 Lake Butler Sawmill of Owens-Illinois, Inc., of Lake Butler, FL.

MC 153426F, filed December 16, 1980. Applicant: JAMES M. KAUFFMAN, R.D. No. 1, Cochranville, PA 19330. Representative: John W. Metzger, 49 North Duke St., Lancaster, PA 17602. Transporting *agricultural limestone,* (1) from points in Lancaster County, PA, to points in NY, NJ, DE, MD, and VA, and (2) from Viola and Laurel, DE, to points in MD and VA.

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Decided: January 14, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 21866, (Sub-188F), filed January 2, 1981. Applicant: WEST MOTOR FREIGHT, INC., 740 S. Reading ave., Boyertown, PA 19512. Representative: Alan Kahn, 1430 Land Title Bldg., Philadelphia, PA 19110. Transporting *general commodities* (except classes A and B explosives) between points in Berks, Chester, Lancaster, Lebanon, Lehigh, Montgomery, Northampton and York Counties, PA, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 111936 (Sub-21F), filed January 2, 1981. Applicant: MURROW'S TRANSFER, INC., P.O. Box 4095, High Point, NC 27263. Representative: Wilmer B. Hill, 805 McLachlen Bank Bldg., 666 Eleventh St., NW., Washington, DC 20001. Transporting *plastic articles,* and *materials, equipment, and supplies* used in the manufacture and distribution of plastic articles, between the facilities of Mobil Chemical Co., in the U.S., on the one hand, and, on the other, points in the U.S.

MC 130356 (Sub-1F), filed December 22, 1980. Applicant: RAY DODD AND CHRISTINE DODD d.b.a. DODD TRAVELERS, 2111 Lindbergh, Tyler, TX 75703. Representative: Christine Dodd (same address as applicant). To operate as a broker at Tyler, TX, in arranging for the transportation by motor vehicle, of passengers and their baggage, in special and charter operations, between points in the U.S. (including AK and HI).

MC 133566 (Sub-172F), filed January 5, 1981. Applicant: GANGLOFF & DOWNHAM TRUICKING CO., INC., P.O. Box 479, Logansport, IN 46947. Representative: Daniel O. Hands, Suite 200, 205 W. Touhy Ave., Park Ridge, IL 60068. Transporting *food and related products,* and *materials, equipment, and supplies* used in the manufacture and distribution of food and related products, between points in Cumberland County, NE, and Marion County, MO, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 133566 (Sub-174F), filed January 5, 1981. Applicant: GANGLOFF & DOWNHAM TRUCKING CO., INC., P.O. Box 479, Logansport, IN 46947. Representative: Daniel O. Hands, 205 West Touhy Ave., Suite 200, Park Ridge, IL 60068. Transporting *food and related products* and *materials, equipment, and supplies* used in the manufacture of food and related products, between points in NY, WI, VA, FL, TN, CA, PA, OH, GA, and TX, on the one hand, and, on the other, points in the U.S.

MC 151666 (Sub-2F), filed January 2, 1981. Applicant: BARR FREIGHT SYSTEM, INC., 4109 West 52nd St., Chicago, IL 60632. Representative: Carl L. Steiner, 39 S. LaSalle St., Chicago, IL 60603. Transporting *chemicals,* between points in the U.S., under continuing contract(s) with DeSoto, Inc., of Des Plaines, IL.

MC 151846 (Sub-1F), filed January 2, 1981. Applicant: BEITLER TRUCKING, INC., 3379 Stafford St., Pittsburgh, PA 15204. Representative: William J. Lavelle, 2310 Grant Bldg., Pittsburgh, PA 15219. Transporting *general commodities* (except classes A and B explosives), between points in the U.S., under continuing contract(s) with W.J. Beitler Co., of Pittsburgh, PA.

MC 153416 (Sub-1F), filed January 6, 1981. Applicant: ACCORD SERVICE, INC., 9414 Lewis, Kansas City, MO 64138. Representative: Frank W. Taylor, Jr., 1221 Baltimore Ave., Suite 600, Kansas City, MO 64105. Transporting *general commodities* (except classes A and B explosives), between points in the U.S., under continuing contract(s) with Metro Park Warehouse, Inc., of Kansas City, KS.

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Decided: January 14, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 26396 (Sub-386F), filed December 29, 1980. Applicant: THE WAGGONERS TRUCKING, a corporation, P.O. Box 31357, Billings, MT 59107. Representative: Barbara S. George (same address as applicant). Transporting *general commodities* (Except classes A and B explosives, and household goods as defined by the Commission), between points in the U.S., restricted to traffic originating at or destined to the facilities of Olin Corporation.

MC 42487 (Sub-1014F), filed December 30, 1980. Applicant: CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, 175 Linfield Drive, Menlo Park, CA 94025. Representative: V. R. Oldenburg, P.O. Box 3062, Portland, OR 97208. Transporting *general commodities* (except household goods as defined by the Commission, and classes A and B explosives), serving points in Atlantic County, NJ, as off-route points in connection with carrier's otherwise authorized regular-route operations.

MC 111687 (Sub-40F), filed December 22, 1980. Applicant: BEN RUEGSEGGER TRUCKING SERVICE, INC., R No. 1, Kawkawlin, MI 48631. Representative: Benjamin H. Ruegsegger, 1754 Chip Rd., Kawkawlin, MI 48631. Transporting *malt beverages,* (1) from the facilities of the Miller Brewing Company, at Trenton, OH, to points in the lower peninsula of MI, and (2) from Minneapolis, MN, to points in MI (except Saginaw Bay City, and Flint).

MC 115917 (Sub-37F), filed December 24, 1980. Applicant: UNDERWOOD & WELD COMPANY, INC., P.O. Box 247, Crossnore, NC 28616. Representative: Wilmer B. Hill, 805 McLachlen Bank Bldg., 666 Eleventh St., N.W., Washington, DC 20001. Transporting (1) *olivine and olivine products,* between points in Jackson and Clay Counties, NC, and Skagit County, WA, on the one hand, and, on the other, points in the U.S. (except AK and HI), (2) *bentonite clay,* between points in Monroe and Tippah Counties, MS, and Crook County, WY, on the one hand, and, on the other, points in the U.S. (except AK and HI), (3) *foundry sand additives,* between points in Fulton and Wadsworth Counties, OH, and Boone County, IL, on the one hand, and, on the other, points in the U.S. (except AK and HI), and (4) *mica,* between points in Buncombe County, NC, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 120737 (Sub-75F), filed December 22, 1980. Applicant: STAR DELIVERY & TRANSFER, INC., P.O. Box 39, Canton, IL 61520. Representative: James C. Hardman, 33 N. LaSalle St., Chicago, IL 60602. Transporting *such commodities* as are dealt in or used by metal

fabricators and finishers (except commodities in bulk), from Auro, IL and York, PA, to points in the U.S. (except AK and HI).

MC 128117 (Sub-42F), filed January 2, 1981. Applicant: NORTON-RAMSEY MOTOR LINES, INC., P.O. Box 896, Hickory, NC 28601. Representative: Francis J. Ortman, 7101 Wisconsin Ave., N.W., Washington, DC 20014. Transporting (1) *new furniture and furniture parts*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1) above, (a) from Austin, TX and Arcadia, LA, to points in AL, AZ, AR, CA, CO, FL, GA, KY, KS, MS, MO, NE, NV, NM, NC, OK, SC, TN, VA, and UT, (b) from Austin, TX, to points in LA, (c) from Arcadia, LA, to points in TX, and (d) from Lynchburg, VA, and points in Caldwell, Rutherford, Alexander, and Catawba Counties, NC, and Washington, County, VA, to Austin, TX and Arcadia, LA.

MC 134197 (Sub-16F), filed January 2, 1981. Applicant: JACKSON & JOHNSON, INC., P.O. Box 327, Rt. No. 31, Savannah, NY 13146. Representative: Roy D. Pinsky, Suite 1020—State Tower Bldg., Syracuse, NY 13202. Transporting *foodstuffs*, between points in the U.S.

MC 147766 (Sub-4F), filed December 22, 1980. Applicant: COLORADO-DENVER/WAREHOUSE-DELIVERY, INC., 4902 Smith Rd., Denver, CO 80216. Representative: Edward C. Hastings, 653 Grant St., Denver, CO 80203. 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 Denver and Glenwood Springs, CO; from Denver over Interstate Hwy 70 and U.S. Hwy 6 to junction of CO Hwy 9, then over CO Hwy 9 to the junction of U.S. Hwy 40, then over CO Hwy 13 and 789, then over CO Hwys 13 and 789 to the junction of Interstate Hwy 70, then over Interstate Hwy 70 to Glenwood Springs, and return over the same route, serving the intermediate points of Steamboat Springs and Craig, CO, and the off-route point of Aspen, CO, and (2) between Gunnison and Delta, CO, over U.S. Hwy 50, serving all intermediate points.

MC 148647 (Sub-9F), filed January 2, 1980. Applicant: HI-CUBE CONTRACT CARRIER CORP., 5501 West 79th St., Burbank, IL 60459. Representative: Arnold L. Burke, 180 No. LaSalle St., Chicago, IL 60601. Transporting *general commodities* (except classes A and B explosives), between points in the U.S., under continuing contract(s) with Standard Brands Incorporated, of New York, NY.

MC 149167 (Sub-4F), filed January 2, 1981. Applicant: MAVERICK FREIGHTWAYS, INC., 105 Howell St., Jersey City, NJ 07306. Representative: Arthur J. Piken, 95–25 Queens Blvd., Rego Park, NY 11374. Transporting *bakery products*, between points in the U.S., under continuing contract(s) with Entenmann's, Inc., of Bay Shore, NY.

Volume No. OP4–204

Decided: January 16, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 21866 (Sub-190F), filed January 6, 1981. Applicant: WEST MOTOR FREIGHT, INC., 740 S. Reading Ave., Boyertown, PA 19512. Representative: Alan Kahn, 1430 Land Title Bldg., Philadelphia, PA 19110. Transporting *automotive parts*, and *materials, equipment, and supplies* used in the manufacture and distribution of automotive parts, between those points in the U.S. in and east of ND, SD, NE, KS, OK, and TX.

MC 21866 (Sub-191F), filed December 29, 1980. Applicant: WEST MOTOR FREIGHT, INC., 740 So. Reading Ave., Boyertown, PA 19512. Representative: Edward J. Kiley, 1730 M St. NW., Washington, D.C. Transporting *plastic and plastic products rubber and rubber products, and metal articles*, between points in Rockingham County, NH, on the one hand, and, on the other, points in the U.S.

MC 29856 (Sub-1F), filed December 29, 1980. Applicant: TRENTON MOTOR EXPRESS, INC., 1700 Columbia Ave., Trenton, NJ 08607. Representative: Harold L. Reckson, 32–28 Halsey Rd., Fair Lawn, NJ 07410. 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 Trenton, NJ, and points in Middlesex County, NJ, on the one hand, and, on the other, points in MD, PA, NY, NJ, and DE.

MC 67866 (Sub-39F), filed January 2, 1981. Applicant: FILM TRANSIT, INC., 3931 Homewood Rd., Memphis, TN 38118. Representative: Warren A. Goff, 2008 Clark Tower, 5100 Poplar Ave., Memphis, TN 38137. Transporting *general commodities* (except classes A and B explosives), between points in New Madrid County, MO, on the one hand, and, on the other points in LA, AR, MS, those in KY on and west of a line beginning at the IL–KY State line and extending along U.S. Hwy 68 to junction U.S. Hwy 641, then along U.S. Hwy 641 to the KY–TN State line, those in TN on and west of a line beginning at the KY–TN State line and extending along U.S. Hwy 31W to Nashville, then along U.S. Hwy 31 to Columbia, then along TN Hwy 50 to Lewisburg, then along U.S. Hwy 431 to the TN–AL State line, those in AL (a) on, west, and north of a line beginning at the TN–AL State line and extending along AL Hwy 17 to Hamilton, then along U.S. Hwy 78 to the AL–MS State line, and (b) on and south of a line extending from the MS–AL State line over U.S. Hwy 45 to Mobile, AL, then over Interstate Hwy 10 to the AL–FL State line, those in Washington, Mobile, and Baldwin Counties, AL, those in Escambia County, FL, those in MO on and south of a line beginning at the AR–MO State line and extending along U.S. Hwy 62 to New Madrid and the Mississippi River, those in OK on and east of a line beginning at the OK–TX State line and extending along U.S. Hwy 277 to junction U.S. Hwy 81, then north along U.S. Hwy 81 to the OK–KS State line, restricted against the transportation of (1) any package or article weighing more than 100 pounds, or exceeding 110 inches in length or 150 inches in length and girth combined, and (2) packages or articles weighing in the aggregate more than 500 pounds from one consignor to one consignee on any one day. Condition: Issuance of a certificate in this proceeding is subject to prior or coincidential cancellation, at applicant's written request, of Certificates MC–67866 Subs 36 and 37.

MC 118696 (Sub-47F), Filed January 6, 1981. Applicant: FERREE FURNITURE EXPRESS, INC., 252 Wildwood Rd., Hammond, IN 46324. Representative: John F. Wickes, Jr., 1301 Merchants Plaza, Indianapolis, IN 46204. Transporting (1) *new furniture*, (a) between points in Elkhart County, IN, on the one hand, and, on the other, those points in the U.S. in and east of ND, SD, NE, CO, OK, and TX, and (b) between points in Ouachita Parish, LA and Worchester County, MA, on the one hand, and, on the other, points in MO, IA, MN, WI, IL, IN, OH, and MI, (2) *insulation and insulation products*, between points in Rock County, WI, Washita County, OK, Warren and Huron County, OH, on the one hand, and, on the other, those points in the U.S. in and east of ND, SD, NE, KS, OK, and TX, (3) *urethane foam and urethane foam products*, between points in Green County, WI, on the one hand, and, on the other, those points in the U.S. in and east of ND, SD, NE, KS, OK, and TX, (4) *paper and paper articles*, between points in Grayson County, KY, on the

one hand, and, on the other, those points in the U.S. in and east of ND, SD, NE, KS, OK, and TX, and (5) *materials, equipment, and supplies* used in the manufacture and distribution of television picture tubes and television sets, (a) between points in Grant County, IN, on the one hand, and, on the other, points in Cook County, IL, Webb County, TX, and St. Francis County, AR, and (b) between points in Lackawanna County, PA, on the one hand, and, on the other, points in Wilson and Davidson Counties, TN.

MC 133566 (Sub-175F), filed January 6, 1981. Applicant: GANGLOFF & DOWNHAM TRUCKING CO., INC., P.O. Box 479, Logansport, IN 46947. Representative: Daniel O. Hands, 205 West Touhy Ave., Suite 200, Park Ridge, IL 60068. Transporting *general commodities* (except classes A and B explosives), between points in the U.S., restricted to traffic originating at or destined to facilities used by Quaker Oats Company.

MC 146646 (Sub-140F), filed January 6, 1981. Applicant: BRISTOW TRUCKING CO., INC., P.O. Box 6355A, Birmingham, AL 35217. Representative: James W. Segrest (same address as applicant). Transporting *general commodities* (except classes A and B explosives), between points in the U.S.

MC 146876 (Sub-3F), filed January 2, 1981. Applicant: WILLIAM W. EGGERS, d.b.a. CEDAR VALLEY TRANSPORT, R.R. Box 309, Webster City, IA 50595. Representative: Richard D. Howe, 600 Hubbell Bldg. Transporting *meats, meat products, meat byproducts, and articles distributed by meat packing-houses,* (1) between points in Lancaster, Saline, and Douglas Counties, NE, on the one hand, and on the other, points in IL, IA, KS, MN, MO, ND, SD, and WI, (2) between Carroll, Hardin, Polk, Webster, Cherokee, and Woodbury Counties, IA, on the one hand, and, on the other, points in IL, KS, MN, MO, NE, ND, SD, and (3) between points in Crawford County, IA, on the one hand, and, on the other, points in IL, KS, MN, MO, ND, and WI.

MC 151716 (Sub-2F), filed December 22, 1980. Applicant: AMERICAN CARGO EXPRESS, INC., 747 Glasgow Ave., Inglewood, CA 90301. Representative: Miles L. Kavaller, 315 S. Beverly Dr., Suite 315, Beverly Hills, CA 90212. Transporting *furniture,* between points in the U.S., under continuing contract(s) with Pacific Condi of Compton, CA.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2533 Filed 1-22-81; 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 9, 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 24, 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. OP1-009

Decided: January 16, 1981.

By the Commission, Review Board No. 1, Members Carleton, Joyce, and Jones.

MC 121060 (Sub-129F), filed October 9, 1980. Applicant: ARROW TRUCK LINES, INC., P.O. Box 1416, Birmingham, AL 35201. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities,* between Barnesburg, Brighton, Cheviot, Dent, Fernald, Miamitown, New Baltimore, Taylor's Creek, and Willy's Pit, 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 121060 (Sub-130F), filed October 10, 1980. Applicant: ARROW TRUCK LINES, INC., P.O. Box 1416, Birmingham, AL 35201. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities,* between Big Bend Bordelonville, Bunkie, Cottonport, Dupont, Evergreen, Hamburg, Legonier, Lettsworth, Longbridge, Mansura, Marksville, Moreauville, Plaucheville, Simmesport, and Torres, LA, 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 121060 (Sub-131F), filed October 22, 1980. Applicant: ARROW TRUCK LINES, INC., P.O. Box 1416, Birmingham, AL 35201. Representative: William P.

Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Calera, Columbiana, Shelby, Shelby Springs, and South Calera, AL, 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 121060 (Sub-132F), filed October 29, 1980. Applicant: ARROW TRUCK LINES, INC., P.O. Box 1416, Birmingham, AL 35201. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Black Bayou Junction, Minter City, Ryall Chapel, Somerville, Barto, Bear Town, Conerly, Davo, Dillon, Fernwood, Holmesville, Knoxo, Kokomo, Lehr, Lexie, McComb, Mesa, Rushing, Tylertown, Baird, Bellewood, Belzoni, Blaine, Caile, Castleman, Cottondale, Doddsville, Drew, Dwyer, Eastland, Fitzhugh, Goldfield, Indianaola, Inverness, Isola, Jaquith, Markham, Milroy, Minot, Parchman, Pentecost, Rome, Ruleville, Sunflower, Tutwiler, Vance, and Whitney, MS, 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 121060 (Sub-133F), filed October 21, 1980. Applicant: ARROW TRUCK LINES, INC., P.O. Box 1416, Birmingham, AL 35201. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Anniston, East Praire, Samos, Whiting, Wilson City, and Wyatt, MO, 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 136285 (Sub-38F), filed September 29, 1980. Applicant: SOUTHERN INTERMODAL LOGISTICS, INC., P.O. Box 1375, Thomasville, GA 31792. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities* between Black Bayou Junction, Minter City, Ryall Chapel, Someville, Barto, Bear Town, Conerly, Davo, Dillon, Fernwood, Holmesville, Knoxo, Kokomo, Lehr, Lexie, McComb, Mesa, Rushing, Tylertown, Baird, Bellewood, Belzoni, Blaine, Caile, Castleman, Cottondale, Doddsville, Drew, Dwyer, Eastland, Fitzhugh, Goldfield, Indianaola, Inverness, Isola, Jaquith, Markham, Milroy, Minot, Parchman, Pentecost, Rome, Ruleville, Sunflower, Tutwiler, Vance, and Whitney, MS, 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 136285 (Sub-39F), filed September 19, 1980. Applicant: SOUTHERN INTERMODAL LOGISTICS, INC., P.O. Box 1375, Thomasville, GA 31792. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Barnesburg, Brighton, Cheviot, Dent, Fernald, Miamitown, New Baltimore, Taylor's Creek, and Willy's Pit, 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 149563 (Sub-1F), filed September 29, 1980. Applicant: SUPER TRUCKERS, INC., 3900 Commerce Ave., Fairfield, AL 35064. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Barto, Bear Town, Conerly, Davo, Dillon, Fernwood, Holmesville, Knoxo, Kokomo, Lehr, Lexie, McComb, Mesa, Rushing, Tylertown, Black Bayou Junction, Minter City, Ryall Chapel, Somerville, Baird, Bellewood, Belzoni, Blaine, Caile, Castleman, Cottondale, Doddsville, Drew, Dwyer, Eastland, Fitzhugh, Goldfield, Indianaoloa, Inverness, Isola, Jaquith, Markham, Milroy, Minot, Parchman, Pentecost, Rome, Ruleville, Sunflower, Tutwiler, Vance, and Whitney, MS, Big Bend, Bordelonville, Bunkie, Cottonport, Dupont, Evergreen, Hamburg, Legonier, Lettsworth, Longbridge, Mansura, Marksville, Moreauville, Plaucheville, Simmesport, and Torres, LA, and Garciasville, Grulla, Hidalgo, Los Ebanos, Rio Grande City, Spaulding and Sullivan City, TX, 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 149563 (Sub-2F), filed September 19, 1980. Applicant: SUPER TRUCKERS, INC., 3900 Commerce Ave., Fairfield, AL 35064. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Barnesburg, Brighton, Cheviot, Dent, Fernald, Miamitown, New Baltimore, Taylor's Creek, and Willy's Pit, 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 149563 (Sub-3F), filed October 8, 1980. Applicant: SUPER TRUCKERS, INC., 3900 Commerce Ave., Fairfield, AL 35064. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Calera, Columbiana, Shelby, Shelby Springs, and South Calera, AL, 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 149565 (Sub-1F), filed October 1, 1980. Applicant: GARY L. DUNPHY, Embden, ME 04958. Representative: William P. Jackson, Jr., 3426 N. Washington Blvd., P.O. Box 1240, Arlington, VA 22210. Transporting *general commodities*, between Arnold Hill, Au Sable Forks, Black Brook, Clayburg, Clintonville, Harkness, Hawkeye, Keeseville, Lapham's Mills, North Pole, Otis Junction, Peasleeville, Peru, Plattsburgh, Rogers, Salmon River Junction, Schuyler Falls, South Junction, Swastika, Upper Jay, and Wilmington, NY, 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.

Volume No. OP4–200

Decided: January 14, 1981.

By the Commission, Review Board No. 2, Members Chandler, Eaton, and Liberman.

MC 140016 (Sub-12F), filed January 6, 1981. Applicant: TRANSPORTATION SERVICES, INC., 1320 East Glendale Ave., Sparks, NV 89431. Representative: Robert G. Harrison, 4299 James Dr., Carson City, NV 89701. 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 152476 (Sub-1F), filed January 2, 1981. Applicant: COMBINED TRANSPORTATION SERVICES, INC., 8300 Beltzer Rd., Baltimore, MD 21222. Representative: Barry Weintraub, Suite 800, 8133 Leesburg Pike, Vienna, VA 22180. As a *broker of general commodities* (except household goods), between points in the U.S.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2532 Filed 1-22-81; 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** of July 3, 1980, at 45 FR 45539.

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.gs., 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 protests in the form of verified statements filed on or before March 9, 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 notice that the decision-notice is effective. 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. OP3–132

Decided: January 2, 1981.

By the Commission, Review Board No. 2, Members Chandler, Liberman, and Eaton. (Member Liberman not participating.)

MC 89684 (Sub-116F), filed December 16, 1980. Applicant: WYCOFF COMPANY, INCORPORATED, P.O. Box 366, Salt Lake City, UT 84110. Representative: Peter A. Greene, 1920 N Street NW., Suite 700, Washington, DC 20036. 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), restricted to (1) the transportation of articles or packages weighing not more than 100 pounds over presently authorized routes in UT, NV, CA, ID, WY, and CO, and (2) the right to interline at Reno, NV, and Denver, CO.

Note.—Applicant already holds all of the authority set forth in this notice in MC–89684 Subs 49, 54, 57, 58, 63, 74, 78, 81, 85, 91, 92, 100, and 103, subject to a restriction against the transportation of shipments of packages or articles weighing more than 500 pounds in the aggregate from one consignor at one location to one consignee at one location during a single day. The purpose of this application is to eliminate that restriction. In addition, the authority sought herein would eliminate restrictions against commingling for-hire and private transportation operations which applicant considers to be obsolete since it is no longer engaged in any private transportation operations. The authority sought herein would also eliminate prohibitions against tacking or joinder to which certain of applicant's authorities are currently subject.

MC 153154F, filed December 12, 1980. Applicant: K & K TRUCKING, INC., P.O. Box 941, Dickinson, ND 58601. Representative: R. W. Wheeler, P.O. Box 773, Bismarck, ND 58502. Transporting (1) *lumber, wood products, forest products, shingles, and gypsum board*, from points in WA, OR, CA, ID, MT, UT, NV, CO, and WY, to points in CA, NV, CO, IL, WI, MI, OH, MO, TX, ND, SD, MN, IA, MT, WY, NE, and KS, (2) *knocked down steel buildings and parts and accessories for knocked down steel buildings*, from Pleasant City, IA, Spanish Fork, UT, and Columbus, NE, to points in ND, SD, MT, and MN, (3) *insulating materials and supplies, and roofing, and roofing materials and supplies*, from points in WY, SD, NE, MN, WI, and IL, to points in ND, (4) *drilling mud, drilling mud additives, and drilling fluids*, (a) from points in KS, OK, MO, TX, UT, CO, and WY, to points in ND, SD, MT, and WY, and (b) from ND to WY, and (5) *fabricated castings*, from Arlington, WA, to points in the U.S.

Volume No. OP3–135

Decided: January 6, 1981.

By the Commission, Review Board No. 3, Members: Parker, Fortier, and Hill. (Member Hill not participating.)

MC 2304 (Sub-42F), filed December 22, 1980. Applicant: THE KAPLAN TRUCKING COMPANY, a corporation, 6600 Bessemer Ave., Cleveland, OH 44127. Representative: James M. Burtch, 100 E. Broad St., Columbus, OH 43215. Transporting (1) *motor vehicle parts*, (2) *materials, equipment and supplies* used in the manufacture and sale of the commodities in (1), between points in IL, IN, MI, OH, PA, OK, TN and CA, on the one hand, and, on the other, points in IL, IN, KY, MI, NY, OH, PA, OK, TN and CA, restricted to traffic originating at or destined to the facilities of Excel Industries, Inc. and its subsidiary companies.

MC 3114 (Sub-42F), filed December 19, 1980. Applicant: T. H. COMPTON, INC., R.F.D. No. 1, Berkeley Springs, WV 25411. Representative: Herbert Alan Dubin, 818 Connecticut Ave., N.W., Washington, DC 20006. Transporting *petroleum products*, from points in Franklin, Bedford, and York Counties, PA, to points in Berkeley, Jefferson, and Morgan Counties, WV.

MC 67234 (Sub-34F), filed December 22, 1980. Applicant: UNITED VAN LINES, INC., One United Dr., Fenton, MO 63026. Representative: B. W. LaTourette, Jr., 11 S. Meramec, Suite 1400, St. Louis, MO 63105. Transporting *furniture* and *fixtures*, between Los Angeles, CA, on the one hand, and, on the other, points in the U.S.

MC 76074 (Sub-4F), filed December 22, 1980. Applicant: DEEHAN's EXPRESS, INC., 32 O'Brien Ave., Whitman, MA 02382. Representative: Frank J. Weiner, 15 Court Square, Boston, MA 02108. 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 points in MA, RI, and NH.

MC 77424 (Sub-54F), filed December 22, 1980. Applicant: WENHAM TRANSPORTATION, INC., 3200 East Seventy-Ninth Street, Cleveland, OH 44104. Representative: James Johnson (same address as applicant). Transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between points in DE, IL,

IN, IA, KY, MD, MI, MO, NJ, NY, OH, PA, RI, WV, and DC.

Note.—Issuance of a certificate in this proceeding is conditioned upon prior or coincidental cancellation of Certificates Nos. MC 77424 and subs thereunder, at applicant's written request.

MC 91725 (Sub-3F), filed December 23, 1980. Applicant: MANY'S EXPRESS, INC., P.O. Box 328, Old Route 9 and Croton River Bridge, Ossining, NY 10562. Representative: Roy A. Jacobs, 550 Mamaroneck Ave., Harrison, NY 10528. Transporting *household goods* as defined by the Commission, between points in Westchester County, NY, on the one hand, and, on the other, points in DE, ME, MD, NH, VT, VA, and DC.

MC 94265 (Sub-371F), filed December 29, 1980. Applicant: BONNEY MOTOR EXPRESS, INC., P.O. Box 305, Windsor, VA 23487. Representative: John J. Capo, P.O. Box 720434, Atlanta, GA 30328. Transporting (1) *foodstuffs* (except in bulk) and (2) *materials, equipment and supplies* used in the manufacture and distribution of foodstuffs, between points in the U.S. (except AK and HI).

MC 100315 (Sub-1F), filed November 6, 1980, previously published in **Federal Register** of December 2, 1980. Applicant: CASSERINO'S MOVING & STORAGE COMPANY, a corporation, 5 Pease Ave., Middletown, CT 06450. Representative: Sidney L. Goldstein, 109 Church St., New Haven, CT 06510. Transporting *household goods* as defined by the Commission, between points in Middlesex, Hartford, New London and New Haven Counties, CT, on the one hand, and, on the other, points in NH, ME, VT, PA, DE, VA, WV, MD, NJ, and DC.

Note.—This republication corrects the territorial description.

MC 106674 (Sub-518F), filed December 22, 1980. Applicant: SCHILLI MOTOR LINES, INC., P.O. Box 123, Remington, IN 47977. Representative: Jerry L. Johnson (same address as applicant). Transporting (1) *pesticides, fertilizer and agricultural chemicals* and (2) *applicators* of (1) above, and (3) *materials, equipment and supplies* used in the manufacture and distribution of the commodities in (1), between Bensonville, Danville, and E. St. Louis, IL, Ft. Madison, IA, Baltimore, MD, Springfield, MA, Maryland Hts., MO, Detroit, MI, Edison, Metuchen, and S. Plainfield, NJ, Lebanon, PA, Kenosha, WI, on the one hand, and, on the other, points in the U.S.

MC 116254 (Sub-320F), filed December 22, 1980. Applicant: CHEM-HAULERS, INC., P.O. Box 339, Florence, AL 35631. Representative: Hampton M. Mills (same address as applicant). Transporting *gloves, mittens, headwear, and yarn*, Appleton and Milwaukee, WI, to points in AR, CA, IL, IN, KY, ME, MA, MI, MO, NJ, NY, NC, OH, OR, PA, TN, and VA.

MC 121644 (Sub-7), filed November 20, 1980, previously noticed in the **Federal Resgister** issue of December 10, 1980. Applicant: S & W FREIGHT LINES, INC., 1136 Haley Rd., P.O. Box 667, Murfreesboro, TN 37130. Representative: Robert L. Baker, Sixth Floor, United American Bank Bldg., Nashville, TN 37219. Over regular routes, transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between Atlanta, GA and Bristol, VA, (1) from Atlanta over Interstate Hwy 85 to junction Interstate Hwy 26, then over Interstate Hwy 26 to junction Interstate Hwy 40, then over Interstate Hwy 40 to junction Interstate Hwy 81, then over Interstate Hwy 81 to Bristol, and return over the same route, serving all intermediate points, and serving all points in Hawkins, Sullivan, Cocke, Hamblen, Jefferson, Greene, Washington, Knox and Carter Counties, TN, Washington County, VA, and Anderson, Greeneville and Spartanburg Counties, SC, Buncombe County, NC, and Dade, Walker, Catoosa, Fulton, DeKalb, Cobb, Clayton, Douglas, Henry, Rockdale, Fayette and Gwinnett Counties, GA, as off-route points; (2) from Altanta over Interstate Hwy 75 to junction Interstate Hwy 40, then over Interstate Hwy 40 to junction Interstate Hwy 81, then over Interstate Hwy 81 to Bristol, and return over the same route, serving the intermediate points of Chattanooga and Knoxville, TN, and serving all other points in Cocke, Hamblen, Jefferson, Greene, Washington, Knox, and Carter Counties, TN, and Fulton, Dekalb, Cobb, Clayton, Douglas, Henry, Rockdale, Fayette and Gwinnett Counties, GA, as off-route points.

Note.—This republication indicates Washington County, VA as off-route points in lieu of Harrison County, VA in (1) above.

MC 126045 (Sub-33F), filed December 29, 1980. Applicant: ALTER TRUCKING AND TERMINAL CORP., 1010 South Farragut Street, Box 3122, Davenport, IA 52808. Representative: Edward G. Bazelon, 39 South La Salle Street, Chicago, IL 60603. Transporting (1) *cast iron products, and (2) materials, equipment and supplies* used in the manufacture and distribution of cast iron products (except commodities in bulk, in tank vehicles), between points in the U.S. (except AK and HI).

MC 135684 (Sub-165F), filed December 22, 1980. Applicant: BASS TRANSPORTATION CO., INC., P.O. Box 391, Flemington, NJ 08822. Representative: Herbert Alan Dubin, 818 Connecticut Ave., NW., Washington, DC 20006. Transporting (1) *Chemicals or allied products, rubber or miscellaneous plastic products, and hazardous materials* as described in Items (28), (30) and (49) respectively of the *Standard Transportation Commodity Code*, and (2) *materials, equipment and supplies* used in the manufacture and distribution of the commodities named in (1) above, between points in the U.S.

MC 136635 (Sub-48F), filed December 22, 1980. Applicant: WHITEFORD TRUCK LINES, INC., 640 W. Ireland Rd., South Bend, IN 46680. Representative: Donald W. Smith, P.O. Box 40248, Indianapolis, IN 46240. Transporting (1) *Air conditioners, cooling and freezing machines*, and (2) *materials, equipment, and supplies* used in the manufacture of air conditioners, cooling and freezing machines, between Evansville, IN, on the one hand, and, on the other, points in U.S.

MC 143434 (Sub-4F), filed December 12, 1980. Applicant: CHARLES McALPIN d.b.a. CHARLES McALPIN TRUCKING, 1420 Danville Road, S.W., Decatur, AL 35601. Representative: D. H. Markstein, Jr., 512 Nasset Bldg., Birmingham, AL 35203. Transporting (1) *paper and paper products*, and (2) *materials, equipment, and supplies* used in the manufacture, conversion and distribution of the commodities in (1), between the facilities of Champion Internation, at Lawrence County, AL, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 144115 (Sub-6F), filed December 22, 1980. Applicant: DIVERSIFIED CARRIERS, INC., 903 Sixth St., N.W., Rochester, MN 55901. Representative: Charles E. Dye, P.O. Box 971, West Bend, WI 53095. Transporting *general commodities* (except household goods as defined by the Commission and classes A and B explosives), between points in the U.S. (except AK and HI), restricted to traffic originating at or destined to the facilities of Economics Laboratory, Inc.

MC 146585 (Sub-2F), filed December 22, 1980. Applicant: DOUBLE DD TRUCK LINE, INC., P.O. Box 230, Canby, OR 97013. Representative: Jerry R. Woods, Suite 1600, One Main Pl., 101 SW Main St., Portland, OR 97204. Transporting *construction materials*, from points in OR and WA, to points in AR, AZ, CA, CO, KS, IA, ID, IL, KY, MO, MN, MT, ND, NE, NM, NV, OK, SD, TX, UT, WI, and WY.

MC 151585 (Sub-1F), filed December 29, 1980. Applicant: BEST TRUCKING COMPANY, INC., 2913 Halstead Rd., Richmond, VA 23235. Representative: Carroll B. Jackson, 1810 Vincennes Rd., Richmond, VA 23229. Transporting *general commodities* (except household goods as defined by the Commission and classes A and B exposives), between points in the U.S., under continuing contract(s) with United Paper Company and Best Products Company, Inc., both of Richmond, VA.

MC 151904 (Sub-1F), filed December 29, 1980. Applicant: D M B TRANSPORTATION CORP., 141 Provost St., Jersey City, NJ 07306. Representative: Robert B. Pepper, 168 Woodbridge Ave., Highland Park, NJ 08904. Transporting *such commodities* as are dealt in by retail department stores (except in bulk), between New York, NY, and points in Suffolk, Rockland, and Westchester Counties, NY, on the one hand, and, on the other, points in Philadelphia, PA, Baltimore, MD, Washington, DC, and NJ.

Volume No. OP 3–145

Decided: January 14, 1981.

By the Commission, Review Board No. 3; Members Parker, Fortier, and Hill (Member Hill dissenting).

MC 67234 (Sub-35F), filed December 19, 1980. Applicant: UNITED VAN LINES, INC., One United Drive, Fenton, MO 63026. Representative: B. W. LaTourette, Jr., 11 S. Meramec, Suite 1400, St. Louis, MO 63105. Transporting *machinery and supplies*, between points in the U.S.

MC 123744 (Sub-94F), filed December 22, 1980. Applicant: BUTLER TRUCKING CO., a corporation, P.O. Box 88, Woodland, PA 16881. Representative: Dwight L. Koerber, Jr., P.O. Box 1320, 110 N. 2nd St., Clearfield, PA 16830. Transporting (1) *iron and steel articles*, and (2) *materials and supplies* used in the manufacture and distribution of iron and steel articles, between points in the U.S. (except AK and HI).

MC 134755 (Sub-232F), filed December 23, 1980. Applicant: CHARTER EXPRESS, INC., P.O. Box 3772, Springfield, MO 65804. Representative: S. Christopher Wilson, P.O. Box 3772, Springfield, MO 65804. Transporting *building materials and supplies*, between points in the U.S.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2435 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 29487 (Sub-No. 1)]

Chicago and North Western Transportation Co.—Purchase (Portion)—Chicago, Milwaukee, St. Paul and Pacific Railroad Co.) Richard B. Ogilvie, Trustee)

AGENCY: Interstate Commerce Commission.

ACTION: Application accepted for consideration.

SUMMARY: The Commission is accepting for consideration the application of the Chicago and North Western Transportation Company (C&NW) to acquire and operate approximately 7.22 miles of railroad owned by the Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Richard B. Ogilvie, Trustee) (MILW) located between Marathon and Albert City, IA. The Commission is also setting an evidentiary schedule for the proceeding.

DATES: (1) Verified statements supporting or opposing the application are due February 13, 1981.

(2) Verified statements from the United States Secretary of Tranpsortation and the Attorney General of the United States are due February 20, 1981.

(3) Verified replies are due February 27, 1981.

ADDRESS: An original and 10 copies of all statements should refer to Finance Docket No. 29487 (Sub-No. 1) and be sent to: Section of Finance, Room 5414, Interstate Commerce Commission, Washington, D.C. 20423.

FOR FURTHER INFORMATION CONTACT: Ellen D. Hanson, (202) 275–7245.

SUPPLEMENTAL INFORMATION: On January 9, 1981, the C&NW filed an application under Section 5 of the Milwaukee Railroad Restructuring Act, 45 U.S.C. 904, for authority to acquire approximately 7.22 miles of railroad owned by the MILW. The line to be acquired is located between Marathon and Albert City in Buena Vista County, IA. The application will be handled under the special procedures set forth in *Acquisition Procedures for Lines of Railroads*, 360 I.C.C. 623 (1980) and published as Subpart B of 49 CFR 1111 at 45 FR 6107 (1980). In a decision in Finance Docket No. 29487, *Chicago and North Western Transportation Company—Petition* (not printed), served November 5, 1980, the Commission determined that this proposed acquisition is a minor transaction.

The application has been reviewed and found to comply with the information requirements of our regulations.

The MILW's Reorganization Court, in Order No. 428 issued December 15, 1980, directed the Commission to act upon this application within 90 days from its filing. To meet this deadline, we have established an expedited schedule.

Requests for copies of the application should be addressed to applicant's representative: Christopher A. Mills, Chicago and North Western Transportation Company, 400 West Madison St., Chicago, IL 60606.

A copy of any statement filed should be served on applicant's representative.

It is ordered: 1. The application is accepted for consideration.

2. The parties shall compy with all provisions stated above.

3. This decision shall be effective on January 21, 1981.

Dated: January 16, 1981.

By the Commission, Gary J. Edles, Director, Office of Proceedings.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2432 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

[Ex Parte No. 400]

Modification of Procedure for Handling Exemptions Filed Under 49 U.S.C. 10505

January 16, 1981.

AGENCY: Interstate Commerce Commission.

ACTION: Clarification of Prior Notice.

SUMMARY: On December 24, 1980, a notice was published at 45 FR 85180, indicating that the Interstate Commerce Commission is modifying its procedure for handling petitions for exemption under 49 U.S.C. 10505. The purpose of this notice is to clarify the scope of the new procedures.

FOR FURTHER INFORMATION CONTACT: Ellen D. Hanson, (202) 275–7245.

SUPPLEMENTARY INFORMATION:

A notice was published in the **Federal Register** on December 24, 1980 (45 FR 85180) indicating that the Commission is modifying its procedure for handling petitions to exempt rail matters under 49 U.S.C. 10505. The notice indicated that, except in the small number of cases where a potential for significant impact exists or where the impact is not readily ascertainable from the petition, the Commission would eliminate the current notice and comment procedure and issue a final decision based solely on the petition. Any exemption granted under the new procedure would become effective 30 days from the date of the decision's publication in the **Federal**

Register (except in unusual circumstances).

The purpose of this notice is to clarify that the new procedure discussed in the prior notice will apply only to petitions for exemption of rail matters which arise under 49 U.S.C. 10901, 10902, 10903, 10904, 10905, 10906, 11301, 11303, 11342, 11343, 11344, 11345, 11346, 11347, and 11348.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2433 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 47F)]

Seaboard Coast Line Railroad Co.—Abandonment—In Hillsborough County, FL; Findings

Notice is hereby given pursuant to 49 U.S.C. 10903 that by a Certificate and Decision decided January 16, 1981, a finding, which is administratively final, was made by the Commission, Review Board Number 5, stating that, the present and future public convenience and necessity permit the abandonment by the Seaboard Coast Line Railroad Company of a protion of a line railroad known as the Cosme Spur, Tampa Division, extending from railroad milepost SYA 856.32 near Tarpon Junction, FL, to milepost SYA 860.53 at Cosme, FL, a distance of 4.21 miles, in Hillsborough County, FL, subject to the conditions for the protection of employees discussed in *Oregon Short Line R. Co.-Abandonment Goshen*, 360 I.C.C. 91 (1979). A certificate of public convenience and necessity permitting abandonment was issued to the Seaboard Coast Line Railroad Company. Since no investigation was instituted, the requirement of § 1121.38(b) of the Regulations that production of notice of abandonment decisions in the **Federal Register** be made only after such a decision becomes administratively final was waived.

Upon receipt by the carrier of an actual offer of financial assistance, the carrier shall make available to the offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit I (Section 1121.45 of the Regulations). Such documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

The offer must be filed with the Commission and served concurrently on the applicant, with copies of Ms. Ellen Hanson, Room 5417, Interstate Commerce Commission, Washington, DC 20423, no later than February 2, 1981. The offer, as filed, shall contain information required pursuant to § 1121.38(b) (2) and (3), of the Regulations. If no such offer is received, the certificate of public convenience and necessity authorizing abandonment shall become effective 30 days from the service date of this certificate.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2431 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-55 (Sub-No. 46F)]

Seaboard Coast Line Railroad Co.—Abandonment—Near Spring Hope and Bunn, in Nash and Franklin Counties, NC; Findings

Notice is hereby given pursuant to 49 U.S.C. 10903 that by a Certificate and Decision decided January 16, 1981, a finding, which is administratively final, was made by the Commission, Review Board Number 5, stating that, the present and future public convenience and necessity permit the abandonment by the Seaboard Coast Line Railroad Company of a portion of a line of railroad known as the Nashville Subdivision of the Rocky Mount Division, extending from railroad milepost ABA-139.50 near Spring Hope, NC to milepost ABA-148.05 at Bunn, NC, a distance of 8.55 miles, in Nash and Franklin Counties, NC, subject to the conditions for the protection of employees discussed in *Oregon Short Line R. Co.-Abandonment Goshen*, 360 I.C.C. 91 (1979). A certificate of public convenience and necessity permitting abandonment was issued to the Seaboard Coast Line Railroad Company. Since no investigation was instituted, the requirement of § 1121.38(b) of the Regulations that publication of notice of abandonment decisions in the **Federal Register** be made only after such a decision becomes administratively final was waived.

Upon receipt by the carrier of an actual offer of financial assistance, the carrier shall make available to the offeror the records, accounts, appraisals, working papers, and other documents used in preparing Exhibit I (§ 1121.45 of the Regulations). Such documents shall be made available during regular business hours at a time and place mutually agreeable to the parties.

The offer must be filed with the Commission and served concurrently on the applicant, with copies to Ms. Ellen Hanson, Room 5417, Interstate Commerce Commission, Washington, DC 20423, no later than February 2, 1981. The offer, as filed, shall contain information required pursuant to § 1121.38(b) (2) and (3) of the Regulations. If no such offer is received, the certificate of public convenience and necessity authorizing abandonment shall become effective 30 days from the service date of the certificate.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2436 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

[Section 5b Application No. 2 [1]]

Western Railroads—Agreement

AGENCY: Interstate Commerce Commission.

ACTION: Notice of Postponement of Compliance Date.

SUMMARY: The January 15, 1981 compliance date is postponed to January 21, 1981. The interim approval of the current rate bureau agreements, entered October 26, 1976, in Ex Parte No. 297 (Sub-No. 1), is also similarly extended.

FOR FURTHER INFORMATION CONTACT: Richard B. Felder or Jane F. Mackall, (202) 275-7656.

SUPPLEMENTARY INFORMATION: In a notice at 45 FR 790994 (October 27, 1980), the Commission extended the compliance date in these proceedings to January 15, 1981, and extended interim approval of the present rate bureau agreements to the same date for purposes of requesting further comments on the impact of the Staggers Rail Act of 1980 on our prior decision in this proceeding at 364 I.C.C. 1 (1980). The comments have been received and are presently being evaluated. We will issue our decision on January 21, 1981. Interim antitrust immunity for current agreements is extended up to and including January 21, 1981.

This action does not affect the quality of the human environment or the conservation of energy resources.

Authority: 49 U.S.C. 10706.

Decided: January 15, 1981.

By the Commission, Darius W. Gaskins, Jr., Chairman.

Agatha L. Mergenovich,

Secretary.

[FR Doc. 81-2434 Filed 1-22-81; 8:45 am]

BILLING CODE 7035-01-M

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[1] This proceeding also embraces Section 5b Application No. 3, Eastern Railroads-Agreement and Section 5b Application No. 6, Southern Railroads Agreement.

Intent To Engage in Compensated Intercorporate Hauling Operations

This is to provide notice as required by 49 U.S.C. 10524(b)(1) that the named corporations intend to provide or use compensated intercorporate hauling operations as authorized in 49 U.S.C. 10524(b).

1. *Parent Corporation and Address of Principal Office:* Bill Burton & Sons Trucking, Inc., P.O. Box 404, Newberry, MI 49868.

2. *Wholly-Owned Subsidiaries Which Will Participate in the Operations and the Addresses of Their Respective Prinicpal Offices:* Newberry Redi-Mix, Division of Bill Burton & Sons Trucking, Inc., Newberry, MI; B. All Seasons Sports, Inc., Manistique, MI.

1. Parent corporation and principal office address: Carolina Steel Corporation, 1451 South Elm/Eugene Street, Greensboro, NC 27406.

2. Wholly owned subsidiary and its principal office: Arnold Erection Company, Sandy Ridge Road at U.S. 421, Colfax, NC 27236.

3. Divisions and their respective principal offices:

Arnold Stone Company, Sandy Ridge Road at U.S. 421, Colfax, NC 27236.
Carolina Steel Corporation, Augusta Service Center, 911 Hayes Drive, Augusta, GA 30901.
Carolina Steel Corporation, Charlotte Service Center, 4612 Rozzells Ferry Road, Charlotte, NC 28216.
Carolina Steel Corporation, Columbia Service Center, 801 Rosewood Drive, Columbia, SC 29201.
Carolina Steel Corporation, Lynchburg Service Center, Elon Industrial Park—VA Hwy. 1326, Lynchburg, VA 24504.
Carolina Steel Corporation, Richmond Service Center, Hammond Industrial Park, Charles City Road, Richmond, VA 23231.
Carolina Steel Corporation, Roanoke Service Center, 809 Wasena Avenue, SW, Roanoke, VA 24015.
Carolina Steel Corporation, Tri-Cities District Office, Highway 126 West, Blountville, TN 37617.
Carolina Steel Corporation, Wilson Service Center, 2711 Commerce Road, South, Wilson, NC 27893.
Cast-A-Stone Products Company, 1309 Kirkland Road, Raleigh, NC 27603.
Greenville Steel Company, 3216 Wade Hampton Blvd., Taylors, SC 29687.
Hickory Steel Company, 1115 Third Avenue, NW, Hickory, NC 28601.
Mecklenburg Iron Works, 12825 Sam Neely Road, Charlotte, NC 28210.
Salem Steel Company, 1720 Vargrave Street, Winston Salem, NC 27107.

1. Parent corporation and address of principal office: Furst-McNess Company, 120 East Clark Street, Freeport, Illinois 61032.

2. Wholly-owned subsidiary which will participate in the operations, and address of their principal office: W.E. Kautenberg Company, 1235 South Adams Avenue, Freeport, Illinois 61032.

1. Parent corporation and address of principal office: Justin Industries, Inc., Box 425, Fort Wortha, Texas 76101.

2. Wholly-owned subsidiaries which will participate in the operations, and address of their respective principal offices:

(a) Acme Brick Company, Box 425, Fort Worth, Texas 76101.
(b) Ceramic Cooling Tower Company, Box 425, Fort Worth, Texas 76101.
(c) The Featherlite Corporation, Featherlite Precast Corporation, Volcanic Cinder Company, Featherlite Precast Corporation, Box 425, Fort Worth, Texas 76101.
(d) H. J. Justin & Sons, Inc., Justin Belt Company, Justin Leathergoods Company, Box 548, Fort Worth, Texas 76101.
(e) Louisiana Concrete Products, Inc., 4747 Choctaw Drive, Baton Rouge, La. 70921.
(f) Northland Publishing Company, Inc., Box N, Flagstaff, Arizona 86002.
(g) Sanford Brick Corporation, Drawer 458, Sanford, NC 27330.

1. Parent corporation and address of the principal office is: Lousiana-Pacific Corporation, 1300 S.W. Fifth Avenue, Portland, Oregon, 97201.

2. Wholly-owned subsidiaries which will participate in the operations, and address of their respective principal offices are:

(a) H. C. Hodges Lumber Company of West Bay, Box 160, West Bay Station, Panama City, Florida 32407.
(b) H. C. Hodges Lumber Company, Inc., Box 688, Defuniak Springs, Florida 32433.
(c) Roy O. Martin Industries, Inc., Box 7796, Alexandria, Louisiana 71306.
(d) Pabco Insulation, Inc., Box 1367, Ruston, Louisina 71270.

1. Parent Corporation and Address of Principal Office: Sikes Corporation, 608 Prospect Street, Lakeland, Florida 33802.

2. Wholly Owned Subsidiaries Which Will Participate in the Operations and Address of Their Principal Office: Florida Tile Ceramic Centers, Inc., 608 Prospect Street, Box 447, Lakeland, Florida 33802.

1. The parent corporation and address of its principal office: Sperry Corporation, 1290 Avenue of the Americas, New York, NY 10104.

2. Divisions which will participate in the operations:

(a) Sperry New Holland Division, 500 Diller Avenue, New Holland, PA 17557.
(b) Sperry Division, Mail Station P-11, Great Neck, Long Island, NY 11020.
(c) Sperry Flight System Division, Post Office Box 21111, Phoenix, Arizona 85036.
(d) Sperry Univac Division, Post Office Box 500, Blue Bell, PA 19424.
(e) Sperry Vickers Division, 1401 Crooks Road, Troy, Michigan 48034.

1. Parent corporation and address of principal office: Thomas J. Lipton, Inc., 800 Sylvan Avenue, Englewood Cliffs, New Jersey 07632—Incorporated in Delaware.

2. Wholly-owned subsidiaries which will participate in the operations:

(i) Continental Foods, Inc.
(ii) Continental Foods, Inc. (S.A.)
(iii) Flemington Production, Inc.
(iv) Good Humor Corporation
(v) Knox Gelatine, Inc.
(vi) *Lawry's Foods, Inc.*—all incorporated in Delaware.
  (a) Krenz Enterprises, Inc.
  (b) Lawry's Foods International, Inc.—both incorporated in California.
(vii) *Lawry's Foods International, Inc.*—incorporated in California.
  (a) Alimentos Lawry's, S.A. de C.V.—incorporated in Mexico.
  (b) Lawry's Foods, Limited—incorporated in Canada.
  (c) Lawry's Foods Europe, Ltd.—incorporated in Ireland.
(viii) *Lipton Industries, Inc.*—incorporated in Delaware.
  (a) Lipton Pet Foods, Inc.—incorporated in Delaware.
(ix) Lipton Management, Inc.—incorporated in Delaware.
(x) Morton House Kitchens, Inc.—incorporated in Delaware.
(xi) Pennsylvania Dutch-Megs, Inc.—incorporated in Delaware.
(xii) A. Sahadi & Co., Inc.—incorporated in Delaware.
(xiii) TJL Properties, Inc.—incorporated in Delaware.

Agatha L. Mergenovich,
Secretary.

[FR Doc. 81-2437 Filed 1-22-81; 8:45 am]
BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

[AAG/A Order No. 60-81]

Privacy Act of 1974; Modified System of Records

Pursuant to the Privacy Act of 1974, 5 U.S.C. 552a(e)(4), the Department of Justice, Federal Bureau of Investigation (FBI) is republishing the following

system of records, which most recently was published on January 10, 1980 in the Department's annual publication of Privacy Act issuances in the **Federal Register**:

Identification Division Records System (Justice/FBI-009)

15 U.S.C. 78q, part of the Securities Acts Amendments of 1975, and 7 U.S.C. 12a, part of the Futures Trading Act of 1978, have been cited as additional authority for maintenance of the system.

All mention of the routine use pertaining to the Identification Division's Missing Persons Program has been deleted as that Program has been abolished and the records maintained in this system are no longer used in missing person cases.

28 CFR 20.33(a)(4) and 20.33(c) have been cited as additional guidelines applicable to the release of information to the news media.

The information under the caption "Storage" has been changed to more accurately describe the manner in which the system's records are stored. The January 10, 1980 notice indicated that some of the information was being stored electronically in converting the manual system to an automated system. This notice amplifies the 1980 notice by indicating the storage medium used.

Typographical errors under the caption "Systems exempted from certain provisions of the act" have been corrected. In addition, subsection "(m)" is being deleted from the Privacy Act provisions listed. A separate order on rulemaking is published in today's **Federal Register** to accomplish revocation of the exemption.

All the clarifications incorporated into the existing notice have been italicized for the convenience of the public. Since the modification to the system notice constitutes an amplification rather than an alteration or expansion of the system, the reporting criteria of Office of Management and Budget Circular A-108 do not require the filing of a report with the Office of Management and Budget and the Congress.

Pursuant to the authority vested in the Attorney General by 5 U.S.C. 552a, and delegated to me by Attorney General Order No. 793-78, the changes italicized below are hereby adopted.

Dated: January 13, 1981.

William D. Van Stavoren,

Acting Assistant Attorney General for Administration.

Justice/FBI-009

SYSTEM NAME:

Identification Division Records System.

SYSTEM LOCATION:

Federal Bureau of Investigation: > J. Edgar Hoover Bldg., 10th and Pennsylvania Avenue NW., Washington, D.C. 20535.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

A. Individuals fingerprinted as a result of arrest or incarceration.

B. Persons fingerprinted as a result of Federal employment applications, military service, alien registration and naturalization purposes and individuals desiring to have their fingerprints placed on record with the FBI for personal identification purposes.

CATEGORIES OF RECORDS IN THE SYSTEM:

A. Criminal fingerprint cards and related criminal justice information submitted by authorized agencies having criminal justice responsibilities.

B. Civil fingerprint cards submitted by Federal agencies and civil fingerprint cards submitted by persons desiring to have their fingerprints placed on record for personal identification purposes.

C. Identification records sometimes referred to as "rap sheets" which are compilations of criminal history information pertaining to individuals who have criminal fingerprint cards maintained in the system.

D. An alphabetical name index pertaining to *all individuals* whose fingerprints are maintained in the system. The criminal records and the civil records are maintained in separate files and each file has an alphabetical name index related to the data contained therein.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

The system is established, maintained and used under authority granted by 28 U.S.C. 534, *15 U.S.C. 78q, 7 U.S.C. 12a, and Pub. L. No. 92-544 (86 Stat. 1115).* The authority is also codified in 28 CFR 0.85 (b), and (j).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

The FBI operates the Identification Division Records System to perform identification and criminal history record information functions for federal, state, local, and foreign criminal justice agencies, and for noncriminal justice agencies, and other entities where authorized by Federal statute, state statute pursuant to Public Law 92-544 (56 Stat. 1115). Presidential executive order, or regulation of the Attorney General of the United States. In addition, identification assistance is provided in disasters and for other humanitarian *purposes.*

Release of information to the news media: *Guidelines applicable for the release of information to the news media and the public are set forth in 28 CFR 20.33(a)(4), 20.33(c), and 50.2.*

Release of information to Members of Congress: Information contained in systems of records maintained by the Department of Justice, not otherwise required to be released pursuant to 5 U.S.C. 552, may be made available to a Member of Congress or staff acting upon the Member's behalf when the Member or staff requests the information on behalf of and at the request of the individual who is the subject of the record.

Release of information to the National Archives and Records Service: A record from a system of records may be disclosed as a routine use to the National Archives and Records Service (NARS) in records management and inspections conducted under the authority of 44 U.S.C. 2904 and 2906.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM.

STORAGE:

Information in the system is stored manually in file cabinets either in its natural state or on microfilm. In addition, some of the information is stored *in computerized data storage devices.*

RETRIEVABILITY:

(1) All information in the system is retrievable by technical fingerprint classification and positive identification is effected only by comparison of the unique *identifying characteristics appearing in* fingerprint impressions submitted for search against the fingerprint cards maintained within the system.

(2) An auxiliary means of retrieval is through alphabetical *name* indexes which contain names of the individuals, their birth date, other physical descriptors, and the individuals' technical fingerprint classifications and FBI numbers, if such have been assigned.

SAFEGUARDS:

Information in the system is unclassified. Disclosure of information from the system is made only to authorized recipients upon authentication and verification of the right to access the system by such persons and agencies. The physical security and maintenance of information within the system is provided by FBI rules, regulations and procedures.

RETENTION AND DISPOSAL:

(1) The Archivist of the United States has approved the destruction of records maintained in the criminal file when the records indicate individuals have reached 80 years of age, and the destruction of records maintained in the civil file when the records indicate individuals have reached 75 years of age.

(2) Fingerprint cards and related arrest data in the system are destroyed seven years following notification of the death of an individual whose record is maintained *in* the system.

(3) Fingerprint cards submitted by state and local criminal justice agencies are returned upon *the request* of the submitting agencies. The return of a fingerprint card under this procedure results in the deletion from the system of all arrest information related to that fingerprint card.

(4) Fingerprint cards and related arrest data are removed from the Identification Division Records System upon receipt of Federal court orders for expunctions when accompanied by necessary identifying information. Recognizing lack of jurisdiction of local and state courts over an entity of the Federal Government, the Identification Division Records System, as a matter of comity, returns fingerprint cards and related arrest data to local and state criminal justice agencies upon receipt of orders of expunction directed to such agencies by local and state courts when accompanied by necessary identifying informations.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Federal Bureau of Investigation, 10th and Pennsylvania Avenue N.W., Washington, D.C. 20535.

NOTIFICATION PROCEDURE:

Address inquiries to the System Manager.

RECORD ACCESS PROCEDURES:

The Attorney General has exempted the Identification Division Records System from compliance with subsection (d) of the Act. However, pursuant to 28 C.F.R. 16.30–34, and Rules and Regulations promulgated by the Department of Justice on May 20, 1975 at 40 Fed. Reg. 22114 (Section 20.34) for Criminal Justice Information Systems, an individual is permitted access to his identification record maintained in the Identification Division Records System and procedures are furnished for correcting or challenging alleged deficiencies appearing therein.

CONTESTING RECORD PROCEDURES:

Same as the above.

RECORD SOURCE CATEGORIES:

See Categories of Individuals.

SYSTEMS EXEMPTED FROM CERTAIN PROVISIONS OF THE ACT:

The Attorney General has exempted this system from subsections *(c)(3) and (4); (d); (e)(1), (2), (3), (4)(G) and (H), (5) and (8); (f); and (g)* of the Privacy Act pursuant to 5 U.S.C. 552a(j). Rules have been promulgated in accordance with the requirements of 5 U.S.C. 553(b), (c) and (e) and have been published in the **Federal Register.**

[FR Doc. 81-2151 Filed 1-22-81; 8:45 am]

BILLING CODE 4410-02-M

Office of Juvenile Justice and Delinquency Prevention

Proposed OJJDP Guideline; Request for Comments

Action: Request for Comments on the Proposed OJJDP Guideline: Prevention of Juvenile Delinquency Through Capacity Building—Cycle II

Notice is hereby given that the Office of Juvenile Justice and Delinquency Prevention, pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5601, et. seq., proposes to issue a guideline.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is inviting interested persons to comment on the proposed guideline, Prevention of Juvenile Delinquency through Capacity Building—Cycle II, and will consider all such written comments before the final publication of this guideline. The period for public comment on this proposed guideline is 30 days. After development of the final guideline, which is expected to be published in the **Federal Register** on or about March 15, 1981, it is anticipated that applicants will have approximately 30 days to develop concept papers. This will permit award of funds on or about August 30, 1981.

This notice and opportunity to submit written views and comments is provided pursuant to Executive Order No. 12044, Improving Government Regulations, to ensure that interested organizations, agencies and individuals have an opportunity to review the proposed guideline. Interested persons are invited to submit written comments or suggestions to Ms. Roberta Dorn, Office of Juvenile Justice and Delinquency Prevention, 633 Indiana Avenue NW, Room 442, Washington, D.C. 20531, on or before March 2, 1981.

Ira M. Schwartz,

Administrator Office of Juvenile Justice and Delinquency Prevention.

Program Announcement

The Prevention of Juvenile Delinquency Through Capacity Building—Cycle II

A. Purpose

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) is sponsoring a second cycle of the Capacity Building Program. This cycle, Capacity Building II, is designed to increase the capacity of public and private not-for-profit youth serving agencies to better serve children and youth through the support and development of activities which will improve the effectiveness of the agencies involved.

B. Program Components

The Capacity Building strategies selected for funding under this initiative build upon the recommendations of the National Advisory Committee for Juvenile Justice and Delinquency Prevention as outlined in the recently issued *"Standards for the Administration of Juvenile Justice"*. Objectives sought by projects funded under this Guideline should be attainable within a 2 year period. Concept papers describing program activities incorporating one or more of the following strategies are invited:

1. Projects which seek to plan, coordinate and establish programs to utilize school facilities and resources by the local community during nonschool hours for the provision of delinquency prevention activities.

2. Projects which seek to increase the capacity of the schools to prevent delinquency by establishing school based programs to inform youth about juvenile law and increase awareness on the part of youth of the consequences of involvement with the juvenile justice system.

3. Projects which seek to enhance a public or private not-for-profit youth serving agency's capacity to serve youth through the use of adult and juvenile community volunteers to provide services, plan programs and monitor services provided by juvenile facilities.

4. Projects which seek to increase the capacity of agencies to provide effective participatory roles for youth in policy development and program implementation.

5. Projects which seek to improve the capacity of local public and private youth serving agencies to develop and implement management information

systems to improve the administration of youth services.

6. Projects which seek to increase the capacity of juvenile justice system agencies to identify, document and eliminate differential treatment of minority and female youth.

7. Projects which seek to enhance the capacity of an agency or group of agencies to better serve youth through the provision of intensive training of staff and volunteers in specialized areas of youth work such as gang intervention, teenage prostitution and monitoring of services provided by residential facilities. This does not include subsidy of academic education through degree granting educational institutions.

8. Projects which seek to increase the capacity of an agency or a group of agencies to serve youth by planning and implementing public awareness and education programs which will provide the community with timely and accurate information as to the need for youth services, and the role of community agencies in meeting those needs.

C. Dollar Range and Duration of Grants

1. The total amount of funds available for support of projects selected under this Guideline is 1.7 million dollars. Grants will be awarded for a one year period in amounts ranging from $50,000 to $150,000. Projects which perform satisfactorily in the first year will be considered for second year funding.

2. OJJDP will not fund projects beyond the two year project period and objectives sought should be attainable within this timeframe.

3. Applicants applying who have received OJJDP funds previously will be judged on the merits of the currently proposed concept paper and their performance under previously funded grants will be taken into consideration in making concept paper selections.

D. Eligible Applicants

Eligible applicants include all public and private youth serving agencies that have provided direct and indirect services to children and youth during the past two years.

E. Submission Requirements

1. *Procedures:* Concept papers must be submitted to the Office of Juvenile Justice and Delinquency Prevention in accordance with the following:

Deadline for Submission of Concept Papers: One original and two copies must be mailed or hand delivered to the Office of Juvenile Justice and Delinquency Prevention, LEAA, Room 442, 633 Indiana Avenue, NW., Washington, D.C. 20531 by midnight April 30, 1981. Concept papers sent by mail will be considered on time if sent by registered or certified mail as evidenced by the U.S. Postal Service postmark on the original receipt from the U.S. Postal Service.

2. Concept papers need not be submitted to the State Criminal Justice Councils or the A–95 Clearinghouses. If, the concept paper is selected for full application development, the applicant will be required to submit the application for comment to the appropriate State Criminal Justice Council and A–95 Clearinghouse.

3. *Concept Paper Narrative Requirements:* The concept paper should not exceed fifteen single spaced typed pages. The paper should provide a discussion of the proposed capacity building strategy following the outline below:

1. Purpose (Goals and Objectives).
2. Methodology (Strategy).
3. Need (Justification for the implementation of the proposed project by discussion or documentation).
4. Management and Staffing.

4. *Budget Requirements:* A one page budget estimate should be attached to the concept paper. The estimate should be broken out into two annual periods and reflect the following categories:

1. Personnel.
2. Fringe Benefits.
3. Travel.
4. Equipment.
5. Supplies.
6. Contractual.
7. Other.

F. Selection Procedures

Concept papers will be reviewed and selected for full application development by a panel. The authors of concept papers selected for application development will be contacted by OJJDP and will be provided with further instructions regarding final application submission requirements and procedures. The selection of a concept paper does not guarantee funding and each final application will be judged on competitive merit and in relation to its ability to fully and satisfactorily develop the concept presented and to meet all applicable OJJDP fiscal and programmatic application requirements.

G. Selection Criteria

1. Concept papers must propose projects to implement one or more of the capacity building strategies listed in Section B. The criteria which will be used to evaluate the concept papers are:

a. Responsiveness of the concept to the outlined strategies.

b. Clarity of the goals and objectives.

c. Clarity and practicality of the methodology.

d. Clarity and persuasiveness of the statement of need.

e. Potential for the capacity building activities to result in measurable improvements in the effectiveness of the youth serving agency and its capacity to provide service to youths.

f. Indications that agency may become self-sustaining after grant period.

g. Priority consideration to projects which have multiple or cooperative funding arrangements (i.e., private foundations, United Ways, etc.).

2. Not more than two concept papers from any single state will be selected for application development.

3. The decision of OJJDP regarding the selection of concept papers will be final and no further programmatic review of concept papers not selected for application development will occur following the notification of finalists.

H. Definitions

1. *Capacity Building:* A systematic approach which maximizes the ability of a group, agency, or organization to provide youth services relevant to the needs of youth and the degree to which the activities and services can be expanded and sustained.

2. *Public Youth Serving Agency:* Any agency, organization, or institution which functions as a part of a unit of government and is supported by public revenue, for the purpose of providing services to youth.

3. *Private Not-for-Profit Youth Serving Agency:* Any agency, organization, or institution with experience in serving youth, designated tax exempt by the Internal Revenue Service under Section 501(c)(3) of the IRS Code.

4. *Youth:* Youth are defined by each jurisdiction's definition as contained in the relevant welfare and juvenile codes.

5. *Management Information Systems:* Policies and procedures for the periodic collection and analysis of data on project activities designed for use in program management and decision making.

I. For Further Information

For further information or clarification regarding this Guideline, please contact: Ms. Roberta Dorn, Juvenile Justice Specialist, (202) 724–7755.

[FR Doc. 81–2530 Filed 1–22–81; 8:45 am]

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DEPARTMENT OF LABOR

Office of Pension and Welfare Benefit Programs

[Prohibited Transaction Exemption 81-8]

Class Exemption Covering Certain Short-Term Investments

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This exemption permits employee benefit plans to engage in transactions involving certain short-term investments notwithstanding the prohibited transaction restrictions of the Employee Retirement Income Secrity Act of 1974 (ERISA or the Act). The exemption will affect participants and beneficiaries of employee benefit plans, persons who manage the assets of such plans, and other persons who provide services to such plans.

EFFECTIVE DATE: January 1, 1975. (Certain conditions to the availability of the exemption are effective April 23, 1981).

FOR FURTHER INFORMATION CONTACT: William A. Schmidt, Plan Beneftis Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-8610. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On April 25, 1980, notice was published in the **Federal Register** (45 FR 28017) of the pendency before the Department of Labor (the Department) of a proposed class exemption from the restrictions of section 406(a)(1) (A), (B), and (D) of the Act and from the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A), (B) and (D) of the Code. The proposed class exemption was requested in two applications for class exemption—one filed by the American Bankers Association,[1] and the other filed jointly by six insurance companies.[2] In addition, the proposed exemption also related to certain matters that were raised in an application for individual exemption filed by E. I. du Pont de Nemours and Company.[3] Public comments were received pursuant to the provisions of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).[4]

Discussion

The Department received eleven comments regarding the proposed exemption. All of the commentators generally supported the exemption, but each comment also suggested changes to it. The Department has made substantial changes to the proposed exemption in response to these suggestions, and these changes, together with the specific issues raised by the commentators, are discussed below. The discusion deals first with the three kinds of short-term investment covered by the proposed exemption—banker's acceptances, commercial paper, and repurchase agreements—and then deals with several issues raised by the commentators that relate to the scope of the exemption.

I. *Banker's Acceptances.* Two commentators suggested that the exemption for banker's acceptances be expanded to include banker's acceptances issued by foreign banks. According to these commentators, the fact that a bank is subject to supervision by the United States or a State would seem to have little bearing on a determination whether a transaction involves the types of conflict of interest abuses that the prohibited transaction provisions were designed to preclude, and it is unlikely that a foreign bank would be a party in interest. In addition, one commentator asserted that a determination to invest in instruments issued by a foreign bank involves questions of purdence which should be left to the plan fiduciary making the investment deceision on behalf of the plan.

The Department has retained as a condition of the exemption as applied to banker's acceptances the requirement that the banker's acceptance be issued by a bank that is supervised by the United States or a State. The condition was included in the proposed exemption because the Department believed that the existance of state or Federal regulation of a bank would provide at least some independent protection of the interests of the plan acquiring the investment. Although a foreign bank may also be subject to regulatory supervision that is at least as strict as that to which a domestic bank is subject, the commentators provided no indication of the kinds of foreign banks from which a plan might acquire a banker's acceptance or the regulation to which such banks are subject. Therefore, the Department does not believe that it has a sufficent basis for concluding that the acquisition of such instruments from a party in interest would be in the interest of affected plans or protective of such plans and their participants and beneficiaries. However, because retroactive applicaiton of the condition would apparantly disrupt existing transactions, the condition will apply only to transactions occurring on and after a date 90 days from the date of this exemption.

One commentator also requested that the Department expand the scope of the exemption to include banker's acceptances issued by agencies of banks. In connection with this point, the commentator expressed particular concern that the exemption extend to banker's acceptances that are issued by "Edge corporations"—*i.e.* corporations organized under Federal Law (12 U.S.C. 611-631) "for the purpose of engaging in international or foreign banking or foreign financial operaitons, or in banking or other financial operaitons in a dependency or insular possession of the United States . . ."

In the Departemnt's view, a banker's acceptance issued by an Edge corporation is within the scope of the exemption because such corporations are organized pursunt to provisions of the National Banking Act, and, although they engage primarily in foreign banking transactions, they are required to file periodic reports with the Board of Governors of the Federal Reserve System and are subject to examination by examiners apponted by the body.[5]

Another commentator requested that the Department either clarify that the exemption extends to secondary market transactions involving banker's acceptances or that the exemption be extended to include such transactions. In this regard, the Department believes that the exemption for banker's acceptances extends to secondary market transactions if the conditions of the exemption are met.

Finally, the Department has added a condition to the final exemption which provides that the purchase, sale or disposition of the banker's acceptance must be as favorable to the plan as an arm's length transaction with an unrelated party would be. This condition

[1] Exemption Application No. D-653.

[2] Exemption Application No. D-1204. The exemption requested by the insurance companies covers short-term investment of plan assets as well as a wide range of other transactions with periods who provide services to plans. This class exemption is not intended to deal with those other transactions. They will be addressed separately.

[3] Exemption Application No. D-1294.

[4] The applications for exemption were filed with the Internal Revenue Service, pursuant to Rev. Proc. 75-26, 1975-1 C.B. 722, as well as with the Department. However, the notice of proposed exemption was issued, and the exemption is being granted, solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue this type of exemption to the Secretary of Labor.

[5] 12 CFR 211.7(b), (c).

is included as an additional protection to plans and their participants and beneficiaries.

II. *Commercial Paper.*

A. *Guarantees of Commercial Paper.* One commentator requested that the Department modify the proposed exemption to make it clear that commercial paper that is guaranteed by a party in interest, but issued by another person, is covered by the exemption. With respect to this request, the commentator stated that a company may guarantee commercial paper that is issued by another company and this commercial paper might be purchased by an employee benefit plan with respect to which the guarantor is a party in interest. According to the commentator, there is little or no potential for abuse with respect to a plan's acquisition of such commercial paper in the circumstances contemplated by the exemption, and, if the exemption is not modified to clearly cover commercial paper guaranteed by a party in interest, many subsidiaries of large, reputable corporations, as well as other issuers, would be unable to borrow funds in the commercial paper market because many of the same problems exist in determining the existence of a prohibited transaction with respect to a guarantee of commercial paper as exist in connection with the mere issuance of commercial paper. The Department has modified the exemption in response to the commentator's request to make it clear that the exemption contemplates a plan's acquisition, holding or disposition of commercial paper that is guaranteed by a party in interest, provided the other conditions to the exemption are satisfied.

B. *The rating requirement.* A condition to the proposed exemption provided that an acquisition, holding or disposition of commercial paper would be subject to the exemption only if the commercial paper involved in the transaction were ranked in the highest category by at least two nationally recognized statistical rating services. Several commentators noted that commercial paper that does not meet the requirements of this condition may nonetheless be an acceptable investment for employee benefit plans and that, because the rating of an issue of commercial paper reflects the relative "riskiness" of the investment, higher rated paper generally carries relatively lower interest rates, and a lower rating will result in higher interest rates. According to the commentators, the rating requirement of the proposed exemption would have the practical effect of limiting employee benefit plans to investments *only* in commercial paper given the highest ranking by two nationally recognized rating services because the nature of the commercial paper market, in many cases, makes it impossible for a fiduciary or issuer to determine whether a transaction is prohibited under section 406(a) of ERISA.[6] Therefore, the commentators state, the imposition of a rating requirement would have the practical effect of preventing a plan fiduciary from making an independent judgment regarding appropriate commercial paper investments for the plan, and would limit the potential return that might be available to the plan with respect to such investments. Finally, one commentator also noted that commercial paper may be offered in a private transaction, and, even though such commercial paper may be an attractive investment for an employee benefit plan, it would not be rated by a nationally recognized rating service.

The Department has modified, but has not deleted, the rating condition in response to the comments summarized above. As modified, the condition requires that, with respect to transactions occurring on or after a date 90 days from the date the exemption is granted, commercial paper must be ranked in one of the three highest rating categories by at least one nationally recognized statistical rating service. This modification is intended to allow fiduciaries who make investment decisions regarding the short-term investments of a plan to choose from a broad range of issues of commercial paper while assuring that the quality of the issue has been assessed by an independent party. However, the Department does not intend to suggest that, merely because commercial paper may be acquired by a plan pursuant to the exemption, such an acquisition would necessarily be an appropriate investment for an employee benefit plan; that determination must be made by the responsible plan fiduciaries, taking into account all the relevant facts and circumstances.

With respect to unrated issues of commercial paper that are sold in a private offering, the extent to which commercial paper is issued in the ordinary course of business without being rated by an independent rating agency is unclear, and the comments received did not provide the Department with a basis for concluding that unrated private offerings of commercial paper have such protective characteristics that affected plans would not need the independent safeguards that the rating condition is intended to provide.

C. *The section 13 filing requirement.* Several commentators objected to the requirement contained in a condition of the proposed exemption that commercial paper be issued by a company required to file reports under section 13 of the Securities Exchange Act of 1934 (the 1934 Act). These commentators note that many insurance companies do not file periodic reports under section 13(a) of the 1934 Act because they are specifically exempt under section 12(g)(2)(G) of the 1934 Act from the registration requirements of section 12 of that act, and are not otherwise required to file such reports.[7]

In addition these commentators noted that the filing requirements of other paragraphs of section 13 of the 1934 Act—*i.e.* sections 13(d) and 13(g) (Generally applicable to purchasers and holders of more than five percent of a class of equity securities registered under section 12 of the 1934 Act), 13(e) (relating to registered issuers that purchase their own shares), and 13(f) (relating to institutional investment

[6] As described in the notice of proposed exemption, the applicants for the exemption stated in their application that in view of the nature of the short-term investment market and the way the investment decision making process in large plans is structured, it is not feasible for trustees and investment managers of these plans to know, or determine prior to consummation of the transaction, whether the issuer of an obligation is a party in interest or disqualified person with respect to a plan for which the acquisition is contemplated. The comments received by the Department also made this point. *See* comments of the American Bankers Association, dated June 24, 1980, and comments made on behalf of six life insurance companies and the American Council of Life Insurance, dated June 24, 1980.

[7] Section 12(g)(2)(G) of the 1934 Act states:

(2) The provisions [requiring registration] shall not apply in respect of—

* * *

[G] any security issued by an insurance company if all of the following conditions are met:

(i) Such insurance company is required to and does file an annual statement with the Commissioner of Insurance (or other officer or agency performing a similar function) of its domiciliary State, and such annual statement conforms to that prescribed by the National Association of Insurance Commissioners or in the determination of such State commissioner, officer or agency substantially conforms to that so prescribed.

(ii) Such insurance company is subject to regulation by its domiciliary State of proxies, consents, or authorizations in respect to securities issued by such company and such regulation conforms to that prescribed by the National Association of Insurance Commissioners.

(iii) After July 1, 1966, the purchase and sales of securities issued by such insurance company by beneficial owners, directors, or officers of such company are subject to regulation (including reporting) by its domiciliary State substantially in the manner provided in section 16 of this title [relating to securities transactions by certain directors, officers and principal shareholders of the issuer of such securities].

managers who exercise investment discretion over at least $100 million in publicly traded equity securities)—relate to specific occurrences or are only applicable in certain circumstances, and, therefore, many issuers of commercial paper may have no obligation to file under these requirements. The commentators also noted that application of the section 13 filing requirement would prevent plans from acquiring commercial paper issued by many privately-held companies and subsidiaries of other companies because such companies also are not required to file reports under section 13 of the 1934 Act. Finally, one commentator asserted that application of the 1934 Act filing requirement would effectively preclude a plan from investing in any commercial paper issued by a company that does not meet this requirement because in most commercial paper transactions it is not known whether the ultimate purchaser of the commercial paper is an employee benefit plan or whether the issuer or an affiliate thereof is a party in interest with respect to the plan.

In the Department's view, it is important that a plan fiduciary have access to relevant financial information regarding an issuer of commercial paper in order to make an informed decision on behalf of a plan. In addition, where such information is readily available, other interested persons will be able to monitor plan fiduciaries' investment decisions with respect to commercial paper. Nonetheless, the Department is persuaded by the comments received that commercial paper that is an appropriate investment for an employee benefit plan may be issued by companies that are not required to file reports under the 1934 Act, and that inclusion of the 1934 Act filing requirement as a condition to the exemption might unduly limit the short-term investment opportunities available to a plan. Therefore, the Department has deleted this condition in the final exemption. However, notwithstanding this change, the Department notes that a plan fiduciary has a general fiduciary duty, in determining whether to acquire commercial paper on behalf of a plan, to obtain and consider such information as is necessary to an informed decision on behalf of the plan.

D. *Stated Maturity.* One commentator noted that the condition in the proposed exemption which limited coverage to commercial paper with a stated maturity of 270 days or less appears to be derived from section 3(a)(3) of the Securities Act of 1933 (the 1933 Act), but that section 3(a)(3) contains additional language modifying the 270 day requirement which does not appear in the condition to the exemption.[8] This commentator suggested that the condition be revised to conform to the definition in the 1933 Act. The Department agrees with this comment and has revised the condition accordingly.

E. *Employer Securities.* One commentator suggested that the Department expand the exemption to include commercial paper issued by an employer of participants in a plan, or an affiliate of such an employer, provided it is a "marketable obligation" as defined in section 407(e) of ERISA and otherwise meets the percentage requirements of section 407. Another commentator suggested that the condition to the proposed exemption which required that commercial paper involved in a transaction subject to the exemption not be issued by an employer of participants in the plan (or an affiliate of such an employer) be coordinated with section 408(e) of ERISA which provides an exemption for certain transactions involving employer securities. In the Department's view, commercial paper issued by an employer of participants in a plan, or an affiliate of such an employer, may be a "marketable obligation," and, therefore, a plan's acquisition or sale of such commercial paper would be exempt from the prohibited transaction restrictions of section 406 of ERISA if the transaction meets the requirements of section 408(e).[9] Accordingly, the Department has decided not to revise the exemption in response to the commentator's suggestions because it believes that section 408(e), rather than the exemption being granted here, should govern the circumstances in which commercial paper issued by an employer may be purchased or sold by a plan.

III. *Repurchase Agreements.* Most of the commentators urged the Department to eliminate or substantially modify several of the conditions of the proposed exemption relating to repurchase agreements. These objections to the conditions and the Department's responses to the comments are discussed below.

A. *The requirement of a writing.* Four of the commentators suggested that the Department eliminate or modify the condition of the exemption that would require that a repurchase agreement covered by the exemption be embodied in, or pursuant to, a written agreement. These commentators noted that a repurchase agreement transaction, like other transactions involving short-term investments, is consummated very quickly, and, in addition, a repurchase agreement may be for as short a period as overnight. According to the commentators, the only written evidence of a separate repurchase agreement transaction may be a confirmation of the transaction, and, in the context of the market for repurchase agreements, it would be burdensome to require a written agreement for each transaction.

The condition relating to a written agreement was included in the proposed exemption because the Department had concluded that a written instrument defining the rights of the parties to the agreement was necessary both for the protection of plans (and their participants and beneficiaries) and in order to permit monitoring of a plan's compliance with the terms of the exemption. However, the Department did not intend that a separate agreement necessarily be entered into for each repurchase agreement transaction. Therefore, the Department has modified the language of the condition to more clearly state that a transaction entered into under a "blanket" written agreement would be sufficient to satisfy the condition. In addition, the Department has revised the condition to provide that receipt of a written confirmation of a transaction will be considered sufficient to meet the requirements of the condition for transactions occurring before a date 90 days from the date of this exemption.

B. *Financial statements.* The proposed exemption included a condition that would require the bank, broker-dealer or dealer entering into the repurchase agreement (the seller) to furnish the plan with its most recent statement of financial condition prior to entering into the agreement, and to represent that there has been no material adverse change in its financial condition since the date of such statement.

Several commentators objected to the proposed condition relating to the furnishing of financial statements,

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[8] Section 3(a)(3) of the 1933 Act provides as follows:

Section 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to the following classes of securities:

* * *

(3) Any note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

[9] The exemption granted here does not extend to conduct that is prohibited under section 406(b) of ERISA, while section 408(e) of ERISA, in certain circumstances, does provide relief from violations of sections 406(b)(1) and 406(b)(2). *See* 45 FR 51194 (August 1, 1980) (to be codified as 29 CFR § 2550.408e).

indicating that, because repurchase agreement transactions are entered into with great speed and for very short periods of time, it would be highly burdensome or impossible for a seller to comply with the condition. In addition, some of the commentators stated that the condition is not necesary for the protection of participants because sellers that are permitted to engage in repurchase agreement transactions pursuant to the terms of the exemption are highly regulated and the plan officials who are likely to engage in such transactions on behalf of a plan are sophisticated investors who would monitor the financial condition of the seller involved in a transaction.

The purpose of the condition relating to the furnishing of financial statements is similar to that underlying the condition to the proposed exemption that related to the filing of reports under the 1934 Act by issuers of commercial paper—*i.e.*, to assure that plan officials entering into such transactions have access to information that is necessary to evaluate the transaction, and to assure that other interested parties can assess the propriety of a plan's short-term investment activities. The Department is not prepared, on the basis of the comments received, to conclude that furnishing statements of the financial condition of a seller who engages in repurchase agreement transactions with a plan is unnecessary to accomplish these purposes. However, the Department is persuaded that the condition as proposed would create undue administrative burdens, and that application of the condition to transactions that may have already occurred would be inequitable. Therefore, the condition has been revised to apply only to transactions that are entered into on and after a date 90 days from the date of this exemption, and, in addition, the condition has been modified to reduce the burden of complying with it. In this regard, one commentator suggested that the condition might be revised to provide that the seller, prior to entering into its first repurchase agreement transaction with the plan, undertake to furnish the plan with statements of financial condition as issued, and, in connection with each repurchase agreement transaction, represent that there has been no material adverse change in the seller's financial condition since the date of the statement last furnished to the plan. Generally, the Department has adopted this suggestion. However, the condition also permits a seller to agree in the instrument pursuant to which the repurchase agreement transaction is entered into that, by entering into such transaction, the seller represents that there has been no material adverse change in its financial condition since the date of the last financial statement furnished to the plan that has not been previously disclosed to the fiduciary with whom the written agreement is made. This change is intended to allow the individuals who engage in repurchase agreement transactions that are covered by the exemption to consummate such transactions without offering or eliciting a separate affirmative representation regarding the seller's financial condition prior to each transaction.

C. *Securities other than obligations of the United States.* Four commentators objected to that portion of a condition in the proposed exemption which required that, in order for a repurchase agreement transaction to be covered by the exemption, the plan must receive securities issued or guaranteed by the United States or its agencies (United States obligations). According to these commentators, repurchase agreements frequently involve securities other than United States obligations and, if the Department limits the availability of the exemption to transactions involving such obligations, the condition would unduly restrict the investment opportunities available to employee benefit plans. Further, one of the commentators argued that it would be inappropriate for the exemption to preclude a plan from acquiring securities in a repurchase agreement transaction that it could acquire directly in a separate transaction.

The Department has modified the condition in response to the comments received because it is persuaded that marketable obligations other than United States obligations may, as collateral, provide sufficient protection of affected plans (and of their participants and beneficiaries). Therefore, under the final exemption, repurchase agreements may involve securities other than United States obligations, as well as banker's acceptances, commercial paper and certificates of deposit,[9] provided: (1) the direct acquisition of the securities, banker's acceptances, commercial paper or certificates of deposit would not violate the restrictions imposed by ERISA on a plan's acquisition or holding of employer securities, and (2) any securities that are subject to the Securities Act of 1933 are obligations that are not restricted securities within the meaning of Rule 144 of that act.[10]

D. *Value of securities received and requirement for the delivery of additional securities.* Under the proposed exemption, in order for a repurchase agreement transacation to be exempt, a plan was required to have received securities whose market value was at least 102% of the purchase price paid by the plan. In addition, under another condition to the proposed exemption, if, during the course of a repurchase agreement, the market value of the underlying securities fell below 102 percent of the purchase price, the plan was required to receive from the seller, by the close of business on the following business day, additional securities the market value of which, together with the market value of securities previously delivered or sold to the plan under the repurchase agreement, equaled at least 102 percent of the purchase price paid to the plan.

With respect to the requirement that a plan receive at the beginning of a repurchase agreement securities whose fair market value is equal to at least 102% of the purchase price, several commentators noted that where a repurchase agreement involves the delivery of securities the fair market value of which is in excess of the purchase price, the purchaser might be required to accept a lower effective interest rate on the transaction. In addition, these commentators indated that sellers might be reluctant to engage in repurchase agreement transactions with plans if the plan is required to receive such "excess collateral."

With respect to the requirement that a plan receive additional securities by the close of the next business day when the fair market value of securities received under a repurchase agreement falls below 102% of the purchase price, many commentators indicated that repurchase agreements are often for a one-day or overnight period, and, that under such an overnight agreement, there would be no need to comply with the requirement

[9] The Department has specifically included banker's acceptances, commercial paper, and certificates of deposit in order to make it clear that the exemption is available for repurchase agreements that involve such instruments. However, in specifically including these instruments, the Department does not intend to express an opinion regarding whether these instruments are, or are not, securities.

[10] In determining whether to engage in a repurchase agreement transaction that involves securities or instruments other than United States obligations, a plan fiduciary, in addition to ascertaining whether direct acquisition of such securities, banker's acceptances, commercial paper or certificates of deposit would violate the restrictions relating to employer securities and determining whether the securities or instruments are of appropriate quality for use in a repurchase agreement transaction, would also be required to evaluate the additional risks of the transaction in relation to the expected return.

to deliver additional securities because the agreement would be fully performed by the close of the next business day following the day on which the market value of the securities involved fell below 102% of the purchase price. In addition, these commentators stated that the requirement of daily "marking-to-market"—*i.e.*, daily determination of the sufficiency of the market value of the securities underlying a repurchase agreement—would present substantial administrative difficulties, and, therefore, imposition of such a requirement might place employee benefit plans at a competitive disadvantage in the repurchase agreement market.

The commentators suggested several different ways of modifying the "marking-to-market" requirement. Some suggested that the requirement be applicable only with respect to repurchase agreements whose term exceeds a specified period, such as 15 or 35 days, and that additional collateral only be required upon the expiration of a period longer than one day; others suggested that the requirement that additional collateral be delivered be related to a different event, such as a substantial decline in the fair market value of the securities received by the plan, or a decline in the value of such securities to 95% or less of the purchase price. Still other commentators suggested that this requirement be deleted in its entirety but that the requirement that the securities initially delivered have a fair market value of at least 102% of the purchase price be retained.

The requirement that the securities received by a plan have a fair market value equal to at least 102% of the purchase price and the requirement that additional securities be delivered as necessary to maintain the fair market value of securities in the possession of the plan at at least 102% of the purchase price were included in the proposed exemption because such "excess collateral," in the Department's view, would provide meaningful protection to affected plans and their participants against the possibility that a seller would be unable to meet its obligations under a repurchase agreement and that the proceeds from the sale of the underlying securities would be insufficient to provide the plan with the benefit of its bargain. However, the Department also believes that plan officials should be permitted the maximum discretion in choosing repurchase agreement opportunities that is consistent with the protection of plan participants and beneficiaries. Therefore, the Department has modified the exemption to require that, in order for a repurchase agreement transaction to be covered by the exemption, a plan must receive securities at the outset of the transaction whose fair market value is at least equal to 100 percent of the purchase price. In addition, the final exemption requires that, for future transactions, the written agreement pursuant to which the repurchase agreement transaction is entered into must provide that if, during the course of an agreement, the value of the underlying securities falls below the purchase price, the plan may require the seller to deliver, on the following business day, additional securities whose market value together with the market value of securities initially received by the plan equals at least 100 percent of the purchase price. These revisions are intended to assure that there is initially full security for the plan's investment while allowing plan fiduciaries some latitude where the market value of the securities initially received falls below the purchase price.[11]

E. *Other Matter Relating to Repurchase Agreements.* One commentator suggested that the condition providing that the exemption is not available with respect to a repurchase agreement where the seller or an affiliate of the seller has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice with respect to those assets, should be revised to make it clear that a determination of whether a person is providing "investment advice" will be made in accordance with the Department's regulation[12] dealing with the meaning of that phrase as it is used in the definition of the term "fiduciary" under section 3(21)(A)(ii) of ERISA. The Department has decided to adopt this suggestion, and has revised the condition accordingly. In addition, for the sake of uniformity, the Department has made the same revision to the analogous conditions of those portions of the exemption that deal with banker's acceptances, commercial paper and certificates of deposit.[13]

Another commentator noted that the securities underlying a repurchase agreement may not be held directly by the purchaser, but may be held by a third party as agent for the purchaser, or in escrow. This commentator requested that the Department make it clear that the conditions to the exemption do not require the purchaser to hold such securities directly. In the Department's view, a repurchase agreement transaction that involves the delivery of the underlying securities to an agent for the plan that is acquiring the securities pursuant to the agreement, or delivery of the securities to an independent third party in escrow, would be covered by the exemption, provided the other conditions relating to repurchase agreements are met, because, under such arrangements, the seller has relinquished possession of the securities and, in the case of an agent, the plan has control of the person who receives the securities, and, in the case of an escrow arrangement, an independent third person is obligated to deliver the securities to the plan upon the occurrence of specified events, (such as default by the seller). However, some arrangements may not actually involve a repurchase agreement. For example, an arrangement might be nominally a "repurchase agreement," but, because the securities have not been segregated, the plan would have to take legal action against the seller in order to take possession of them in the event of default, and other creditors of the seller might be able to proceed against them. Such transactions would not be covered by the exemption.

Finally, one commentator suggested that the Department revise the condition of the proposed exemption which required that a plan receive "interest at a rate no less than it would receive in a comparable transaction with an unrelated party" to provide that the condition would be satisfied if the fiduciary acquiring the security, acting in good faith, reasonably believes that the interest rate is no less than that which would be available at the time from unrelated parties. The Department has not adopted this suggestion because it believes that a fiduciary who causes a plan to engage in a repurchase agreement transaction of the kind described in the applications and in the comments received should have no difficulty in establishing his compliance with the condition as it was proposed.

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[11] The revised exemption does not prevent a plan from negotiating a repurchase agreement that provides for more stringent initial "collateralization" and "marking-to-market" terms—or both, and, depending on the financial condition of the seller and the character of the underlying securities, a fiduciary may be obligated to obtain such terms before engaging in the transaction. *See* section 404(a) of ERISA.

[12] 29 CFR 2510.3-21(c).

[13] See the discussion below regarding the inclusion in the final exemption of certain bank certificates of deposit.

IV. *Scope of the exemption.*

A. *Section 406(b).* One commentator suggested that the proposed exemption be expanded to permit a plan to invest in commercial paper or banker's acceptances issued by a plan fiduciary with respect to the assets involved in the transaction as well as to permit a plan to enter into a repurchase agreement with such a fiduciary. According to the commentator, the short-term investments that are permitted by the exemption are analogous to bank deposits described in section 408(b)(4) of ERISA, which provides an exemption that permits a fiduciary bank to invest plan assets in its own deposits in certain circumstances, and the proposed exemption should therefore be expanded to include relief for transactions involving banker's acceptances that is similar to that provided for deposits by section 408(b)(4). The commentator also stated that such relief would be appropriate because a short-term investment that involves a fiduciary with respect to the plan assets involved in the transaction (or an affiliate of such a fiduciary) may be the best investment available to the plan, and excluding such investments would result in a lower overall yield to the plan than would otherwise be available.

In addition, another commentator suggested that those portions of the exemption dealing with banker's acceptances and commercial paper be expanded to include relief from sections 406(b)(1) and 406(b)(2) of ERISA for transactions where a party in interest acquires such an instrument on behalf of a plan pursuant to the direction of another person. The commentator noted that, in most cases involving a "directed account" transaction, the fiduciary with authority to make the investment decision directs the party executing the trade to purchase commercial paper or a banker's acceptance, but does not require that the commercial paper be issued by a particular person or that the banker's acceptance be that of a particular bank. In such circumstances, the commentator stated, the directed fiduciary should not be required to "screen" the persons involved in its purchase of commercial paper on behalf of the plan in order to determine whether the purchase would violate sections 406(b)(1) or 406(b)(2). Accordingly, the commentator suggested that the exemption should extend to those sections as well as section 406(a) with respect to transactions of the kind described, provided that the directed fiduciary was precluded from purchasing its own instruments or from its own portfolio.

The Department has not expanded the scope of the exemption to allow a plan to make short-term investments in a person who is fiduciary with respect to the plan assets involved in the transaction because it does not believe that the kinds of investments permitted by this exemption are sufficiently analogous to the bank deposits described in section 408(b)(4) of ERISA to justify providing relief from the restrictions on fiduciary conduct in section 406(b) without additional independent safeguards.

With respect to directed accounts, a fiduciary who receives general investment instructions from another person, but who has discretion to choose from among several specific investments, may have interests that prevent him from exercising his independent judgment as a fiduciary in connection with an investment in the person from whom he receives his instructions.[14] In addition, since the person effecting the short term investment on behalf of the plan must necessarily be aware of the fiduciary from whom he receives investment instructions, it should not be burdensome for him to identify that fiduciary and the affiliates of that fiduciary. Therefore, the Department has also decided not to revise the exemption to provide relief from section 406(b) for short-term investment transactions that involve a fiduciary who receives investment instructions from another.

One commentator noted that a fiduciary, such as a bank, may receive funds belonging to a plan at a time at which access to markets for short-term investments is limited or non-existent (such as a Friday afternoon or the afternoon of a day preceding a legal holiday), and, according to the commentator, in these circumstances it might substantially benefit the plan to enter into a repurchase agreement with the fiduciary who receives the funds. The Department has not revised the exemption to provide relief for the transactions described by the commentator because it does not believe that the comment provides information sufficient to establish a basis for class relief regarding the circumstances in which it might be necessary for a fiduciary to cause a plan to engage in a repurchase agreement with itself in order to discharge its fiduciary obligations to the plan.

Another commentator noted that an issuer, seller or guarantor of a short-term investment might also manage a portion of the assets of a plan on whose behalf such investment is made (and would thus be a plan fiduciary), even though such issuer, seller or guarantor has no control over the assets involved in the transaction. The commentator expressed concern that such an issuer, seller or guarantor might, in such circumstances, be regarded as dealing with plan assets in its own interest or for its own account in violation of section 406(b)(1) of ERISA and 4975(c)(1)(E) of the Code, or acting on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan in violation of section 406(b)(2) of ERISA. Therefore, the commentator requested that the Department either specifically state that the conduct described would not constitute a violation of section 406(b)(1) and 406(b)(2) of ERISA (and 4975(c)(1)(E) of the Code), or that it expand the scope of the exemption to include relief from those provisions.

In the Department's view, if a fiduciary issues, sells, or guarantees a short term investment that is acquired by a plan, and if such fiduiciary uses none of the authority, control or responsibility that makes him a fiduciary in connection with the acquisition of the short term investment by the plan, he has not engaged in a transaction described in section 406(b)(1) of ERISA (and section 4975(c)(1)(E) of the Code). In addition, where a fiduciary issues, sells or guarantees a short-term obligation that is acquired by a plan, and such fiduciary is a fiduciary solely because he is an investment manager or provides investment advice with respect to plan assets other than the assets involved in the transaction, and does not use any of the authority, control or responsibility that makes him a fiduciary in connection with the plan's acquisition of the obligation, he has not engaged in a transaction that is prohibited under section 406(b)(2) of ERISA.

The same commentator also expressed concern that where a fiduciary with respect to a plan receives a fee for guaranteeing a short term obligation that is issued by another person, and the investment is acquired by the plan, the fiduciary might be considered to have received

[14] For example, a fiduciary in such circumstances may be affiliated with the person from whom he receives instructions, or the person giving the instructions may have discretion regarding the plan's continued use of the fiduciary's services, and these relationships may influence the fiduciary's decisions regarding the investment of plan assets in instruments issued or sold by the directing fiduciary or one of its affiliates. However, see the discussion below regarding certain transactions involving a fiduciary that do not violate sections 406(b)(1) or 406(b)(2) of ERISA.

consideration for his own personal account from a party dealing with the plan in a transaction involving the assets of the plan in violation of section 406(b)(3) of ERISA (and section 4975(c)(1)(F) of the Code) even though the fiduciary used none of his authority, control or responsibility as a fiduciary to cause the plan to acquire the obligation. In the Department's view, the mere receipt by a fiduciary of a fee for guaranteeing a short-term investment that is offered in an open market and is ultimately acquired by a plan does not constitute a violation of section 406(b)(3) of ERISA (or a transaction described in section 4975(c)(1)(F) of the Code) because the fiduciary received the fee for guaranteeing the investment and not in connection with the transaction that involved the assets of the plan (*i.e.* the plan's acquisition of the investment).[15] Therefore, no revisions have been made to the exemption in response to the request.

B. *Retroactivity.* Several commentators, while agreeing with the proposed January 1, 1975, effective date of the exemption, urged the Department to apply various conditions to the exemption only prospectively. As discussed above, the Department has made several revisions to the exemption in response to these comments.

C. *Certificates of Deposit.* One commentator suggested that the Department revise the exemption to permit the acquisition of a certificate of deposit that is issued by a bank which is supervised by the United States or a State if neither the bank nor any affiliate of the bank has discretionay authority or control with respect to the investment of plan assets involved in the transaction or renders investment advice with respect to the assets. In regard to this suggestion, the commentator noted that section 408(b)(4) of ERISA (and section 4975(d)(4) of the Code) provides an exemption from the prohibited transaction provisions of ERISA for the investment of a plan's assets in deposits of a bank or similar financial institution that is a fiduciary of the plan if the plan covers only employees of the bank or financial institution or if the investment is expressly authorized by a provision of the plan or by a fiduciary (other than the bank or similar financial institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to the investment. The commentator also noted that although the Department's regulations under section 408(b)(4)[16] describe what will constitute sufficient authorization of a plan's investment in a bank or other financial institution that makes the investments in its own deposits or in deposits of an affiliate, the regulation provides no guidance with respect to authorization of transactions occurring after November 1, 1977, where the deposit is with a party in interest bank or other financial institution other than the institution making the deposit (or an affiliate of that institution). Therefore, the commentator suggested, it would be appropriate for the Department to include such certificates of deposit in the scope of the exemption in order to make it clear that they are permitted.

The Department has, in general, adopted the commentator's suggestion and has revised the exemption accordingly. However, the Department has not adopted a portion of the commentator's suggested revision to the exemption which merely reiterates the requirements of the Department's regulations under section 408(b)(4).

D. *Other Matters.* One commentator urged the Department to expand the exemption to include investments in, among other things, loans for development of alternative energy sources, and loans that would promote employee ownership of corporations. These matters are outside the scope of the exemption.

General Information

The attention of interested persons is directed to the following:

1. The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary of a plan to which the exemption is applicable from certain other provisions of the Act, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties with respect to the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act.

2. The exemption granted here does not extend to transactions prohibited under section 406(b) of the Act and sections 4975(c)(1) (E) and (F) of the Code.

3. The exemption set forth herein is supplemental to, and not in derogation of, any other provisions of the Act, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

4. The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

5. In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record, including the written comments submitted in response to the notice of April 25, 1980, the Department makes the following determinations:

(i) The class exemption set forth herein is administratively feasible;

(ii) It is in the interests of plans and of their participants and beneficiaries; and

(iii) It is protective of the rights of participants and beneficiaries of plans.

Exemption

Accordingly, the following exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975).

Effective January 1, 1975, the restrictions of sections 406(a)(1)(A), (B) and (D) of the Act, and the taxes imposed by reason of section 4975(c)(1)(A), (B) and (D) of the Code shall not apply to an investment of employee benefit plan assets which involves the purchase or other acquisition, holding, sale, exchange or redemption by or on behalf of an employee benefit plan of the following:

I. *Banker's Acceptances.* A banker's acceptance that is issued by a bank if:

A. The banker's acceptance has a stated maturity date of one year or less from date of issue or has a maturity date of one year or less from the date of purchase on behalf of the plan;

B. Neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

C. The terms of the transaction are at least as favorable to the plan as those of an arm's length transaction with an unrelated party would be; and,

D. With respect to transactions occurring on or after April 23, 1981 the bank issuing the banker's acceptance is

[15] However, receipt of such a fee could constitute a violation of section 406(b)(3) in certain circumstances; for example, a violation of section 406(b)(3) might occur where it is specifically contemplated by the parties at the time the fiduciary receives the fee for guaranteeing the obligation, that the plan will acquire the short-term investment.

[16] 29 CFR 2550.408b–4.

supervised by the United States or a State.

II. *Commercial Paper.* Commercial paper if:

A. It is not issued by an employer any of whose employees are covered by the plan or by an affiliate of such employer;

B. It has a stated maturity date of nine months or less from the date of issue, exclusive of days of grace, or is a renewal of an issue of commercial paper the maturity of which is likewise limited;

C. Neither the issuer of the commercial paper, any guarantor of the commercial paper, nor an affiliate of such issuer or guarantor, has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets;

D. With respect to an acquisition or holding of commercial paper (including an acquisition by exchange) occurring on or after April 23, 1981, at the time it is acquired, the commercial paper is ranked in one of the three highest rating categories by at least one nationally recognized statistical rating service.

III. *Repurchase Agreements.* A repurchase agreement (or securities or other instruments under cover of a repurchase agreement) in which the seller of the underlying securities or other instruments is a bank which is supervised by the United States or a State; a broker-dealer registered under the Securities Exchange Act of 1934; or a dealer who makes primary markets in securities of the United States government or any agency thereof and reports daily to the Federal Reserve Bank of New York its position with respect to government securities and borrowings thereon, if each of the following conditions are satisfied.

A. The repurchase agreement is embodied in, or is entered into pursuant to, a written agreement the terms of which are at least as favorable to the plan as an arm's length transaction with an unrelated party would be. For transactions occurring before April 23, 1981 a written confirmation of a repurchase agreement whose terms were at least as favorable to the plan as an arm's length transaction with an unrelated party would have been will be deemed to satisfy this condition.

B. The plan receives interest at a rate no less than that which it would receive in a comparable transaction with an unrelated party.

C. The repurchase agreement has a duration of one year or less.

D. The plan receives securities, banker's acceptances, commercial paper, or certificates of deposit having a market value equal to not less than 100 percent of the purchase price paid by the plan.

E. Upon expiration of the repurchase agreement and return of the securities or other instruments to the bank, broker-dealer or dealer (seller), the seller transfers to the plan an amount equal to the purchase price plus the appropriate interest.

F. Neither the seller nor an affiliate of the seller has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

G. The securities, banker's acceptances, commercial paper or certificates of deposit received by the plan—

(1) Could be acquired directly by the plan in a transaction not covered by this section III without violating sections 406(a)(1)(E), 406(a)(2) or 407(a) of the Act; and,

(2) If the securities are subject to the provisions of the Securities Act of 1933, they are obligations that are not "restricted securities" within the meaning of Rule 144 under that act.

H. With respect to transactions occurring on or after *April 23, 1981,*

(1) If the market value of the underlying securities or other instruments falls below the purchase price at any time during the term of the agreement, the plan may, under the written agreement required by paragraph A of this section, require the seller to deliver, by the close of business on the following business day, additional securities or other instruments the market value of which, together with the market value of securities previously delivered or sold to the plan under the repurchase agreement, equals at least 100 percent of the purchase price paid by the plan;

(2) If the seller does not deliver additional securities or other instruments as required above, the plan may terminate the agreement, and, if upon termination or expiration of the agreement, the amount owing is not paid to the plan, the plan may sell the securities or other instruments and apply the proceeds against the obligations of the seller under the agreement, and against any expenses associated with the sale; and,

(3) The seller agrees to furnish the plan with the most recent available audited statement of its financial condition as well as its most recent available unaudited statement, agrees to furnish additional audited and unaudited statements of its financial condition as they are issued and either: (A) agrees that each repurchase agreement transaction pursuant to the agreement shall constitute a representation by the seller that there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made; or (B) prior to each repurchase agreement transaction, the seller represents that, as of the time the transaction is negotiated, there has been no material adverse change in its financial condition since the date of the last statement furnished that has not been disclosed to the plan fiduciary with whom such written agreement is made.

(4) In the event of termination and sale as described in (2) above, the seller pays to the plan the amount of any remaining obligations and expenses not covered by the sale of the securities or other instruments, plus interest at a reasonable rate.

If a seller involved in a repurchase agreement covered by this exemption fails to comply with any condition of this exemption in the course of engaging in the repurchase agreement, the plan fiduciary who caused the plan to engage in such repurchase agreement shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1)(A) through (D) of the Act solely by reason of the seller's failure to comply with the conditions of the exemption.

IV. *Certificates of Deposit.* A certificate of deposit that is issued by a bank which is supervised by the United States or a State if neither the bank nor any affiliate of the bank has discretionary authority or control with respect to the investment of the plan assets involved in the transaction or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

For purposes of this exemption the term "affiliate" is defined in 29 CFR 2510.3–21(e).

Signed at Washington, D.C., this 16th day of January.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

[FR Doc. 81–2583 Filed 1–22–81; 8:45 am]

BILLING CODE 4510–29–M

Proposed Class Exemption To Permit Payment of Compensation To Plan Fiduciaries for the Provision of Securities Lending Services

AGENCY: Department of Labor.

ACTION: Notice of proposed class exemption.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed class exemption from the prohibitions of section 406(b)(1) of the Employee Retirement Income Security Act of 1974 (the Act) and from the taxes imposed by section 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1)(E) of the Code. The proposed class exemption, if granted, will exempt certain compensation arrangements for the provision of securities lending services by a plan fiduciary to an employee benefit plan, if the conditions of the proposed exemption are met. If granted, the proposed exemption would affect participants and beneficiaries of employee benefit plans, and fiduciaries who provide securities lending services to such plans.

DATES: Written comments and requests for a public hearing must be received by the Department on or before February 23, 1981. If adopted, it is proposed that this class exemption will be effective upon the date of its publication in the **Federal Register.**

ADDRESSES: All written comments and requests for a hearing (preferably three copies) should be addressed to the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20216, Attention: "Securities Lending Services".

The comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefit Programs, U.S. Department of Labor, Roon N-4677, 200 Constitution Avenue, N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Roger Thomas, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-8602. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Notice is hereby given of the pendency before the Department of a proposed class exemption from the restrictions of section 406(b)(1) of the Act and from the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1)(E) of the Code.

By notice appearing elsewhere in this issue of the **Federal Register,** the Department has granted a class exemption (PTE 81-6) to permit the lending of securities by employee benefit plans to banks and broker-dealers who are parties in interest with respect to such plans, if the conditions specified in the exemption are met. PTE 81-6 provides an exemption from the restrictions of section 406(a)(1) (A) through (D) of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code.

In the preamble to the proposal that became PTE 81-6, the Department described one type of compensation arrangement for the provision of securities lending services that could give rise to a violation of section 406(b)(1).[1] The Department indicated in the preamble that, although the Department was not proposing relief from section 406(b)(1), the exemption provided by section 408(b)(6) might be available for the payment of compensation under such arrangement.

As explained in greater detail in the preamble to PTE 81-6, a number of commentators requested that the proposed exemption be expanded to cover section 406(b)(1) because of the uncertain availability and limited scope of section 408(b)(6). Since the Department had not previously proposed relief from section 406(b)(1), and since the Department was desirous of not delaying the grant of the proposed relief from section 406(a), the Department decided to adopt PTE 81-6 and to propose a class exemption from the prohibitions of section 406(b)(1) of the Act and 4975(c)(1)(E) of the Code to permit, under certain conditions designed to protect the plans involved, compensation for the provision of securities lending services to employee benefit plans.

The conditions of the exemption proposed herein do not limit the form that the compensation may take, although the compensation must be reasonable. In addition, the compensation must be paid in accordance with the terms of a written instrument. The compensation arrangement must be approved by an independent plan fiduciary, who may terminate the arrangement at any time without prior notice or penalty to the plan. The proposed exemption also provides that the fiduciary to be compensated (the "lending fiduciary") must provide the approving fiduciary with any reasonably available information which the lending fiduciary reasonably believes to be necessary to determine whether the authorization should be made or continued, as well as any other information that the approving fiduciary may reasonably require.

[1] Under this type of arrangement a fiduciary receives, as compensation, a portion of the "rental fee" for the loaned securities received by the lender. In these circumstances, the amount of the fee received by the fiduciary would depend both on the aggregate market value of the securities on loan, and on the duration of the loan. The amount of such fee would, therefore, be under the control of the fiduciary. The Department has taken the position that such an arrangement would violate the provisions of section 406(b)(1). See, letter to Arthur Sporn (Advisory Opinion 79-1111A, February 23, 1979).

Notice to Interested Persons

Because all plan participants and beneficiaries whose plans invest in securities could conceivably be considered interested persons, the Department has determined that the only practical form of notice is publication in the **Federal Register.**

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject to an exemption under section 406(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and the Code. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before any exemption may be granted under section 408(a) of the Act and section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan(s) and of their participants and beneficiaries, and protective of the rights of the participants and beneficiaries of the plan(s);

(3) This exemption does not extend to transactions prohibited under section 406(b) (2) and (3) of the Act and section 4975(c)(1)(F) of the Code;

(4) This exemption is supplemental to and not in derogation of any other provisions of the Act or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(5) If granted, the pending class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Written Comments and Hearing Request

All persons are invited to submit written comments or requests for a hearing on the proposed exemtion to the address and within the time period set forth above. All comments will be made a part of the record. Comments and requests for a hearing should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection with the applications for exemption at the address set forth above.

I. Exemption

Effective [date of publication of the final class exemption], the restrictions of section 406(b)(1) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by sections 4975 (a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1)(E) of the Code shall not apply to the payment by an employee benefit plan to a fiduciary (the "lending fiduciary") of compensation for services rendered in connection with loans of plan assets that are securities, provided that:

(a) The loan of securities is not prohibited by section 406(a) of the Act;

(b) The lending fiduciary is authorized to engage in securities lending transactions on behalf of the plan;

(c) The compensation is reasonable and is paid in accordance with the terms of a written instrument;

(d) The arrangement under which the compensation is paid is subject to the prior authorization of a plan fiduciary (the "authorizing fiduciary"), who is independent of the lending fiduciary and of any affiliate thereof, and may be terminated by the authorizing fiduciary at any time without prior notice to the lending fiduciary and without penalty to the plan; and

(e) No such authorization is made or renewed unless the lending fiduciary shall have furnished the authorizing fiduciary with any reasonably available information which the lending fiduciary reasonably believes to be necessary to determine whether such authorization should be made or renewed, and any other reasonably available information regarding the matter that the authorizing fiduciary may reasonably request.

II.

For purposes of this exemption, the term "affiliate" of another person means:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(ii) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and

(iii) Any corporation or partnership of which such other person is an officer, director or partner.

For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed in Washington, D.C. this 16th day of January 1981.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

[FR Doc. 81-2584 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-29-M

[Prohibited Transaction Exemption 81-7]

Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

AGENCY: Department of Labor.

ACTION: Grant of Class Exemption.

SUMMARY: This class exemption permits, under certain conditions, transactions between plans and parties in interest with respect to those plans related to the origination, maintenance and termination of mortgage pool investment trusts (mortgage pools), and the acquisition and holding of certain mortgage-backed pass-through certificates (certificates) of mortgage pools by plans. In the absence of the retroactive and prospective relief provided by this exemption, these transactions might be prohibited by the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code).

EFFECTIVE DATE: January 1, 1975.

FOR FURTHER INFORMATION CONTACT: William J. Flanagan, Esq., Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-7925. (This is not a toll free number.)

SUPPLEMENTARY INFORMATION: On May 6, 1980, notice was published in the **Federal Register** (45 FR 29937) of the pendency before the Department of Labor (the Department) of a proposal for a class exemption from the restrictions of sections 406(a), 406(b) and 407 of the Act, and from the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code. The exemption was proposed on the basis of four individual applications filed by Bank of America National Trust and Savings Association (D-1448), Crocker National Bank (D-1449), Wells Fargo Bank, National Association (D-1357), and PMI Mortgage Corporation (D-1447). The notice set forth a summary of facts and representations contained in these applications, and referred interested persons to the applications for a complete statement of facts and representations. The applications have been available for public inspection at the Department in Washington, D.C.

Public comments and requests for a hearing with regard to the proposed class exemption were received pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). Notice of a public hearing on the proposed class exemption was published on August 1, 1980 (45 FR 51318), and the public hearing was held on September 9, 1980. The record of this hearing remained open until September 23, 1980 and additional comments were received.

Upon consideration of all of the comments submitted and testimony received, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the major comments are discussed below.

Description of the Proposal

The proposed class exemption contained in the notice of pendency provided conditional relief prospectively and retroactively to January 1, 1975 for transactions involving the origination, maintenance and termination of mortgage pools, and the acquisition and holding by plans of certificates issued by mortgage pools. Section I(A) of the proposed exemption would provide relief from the restrictions of section 406(a) and 407 of the Act and section 4975(c)(1) (A) through (D) of the Code for the sale, exchange or transfer of certificates between a plan and a pool sponsor when the pool sponsor or pool trustee is a party in interest with respect to such plan. Section I(A) also would provide such relief for a variety of listed transactions necessary to fulfill the terms of the pooling and servicing agreement governing each pool. This list of transactions was derived from the applicants' descriptions of the operations of their mortgage pools. The

specific conditions pertaining to each listed transaction were also taken from the representations of the applicants.

Section I(B) of the proposal would provide conditional relief from section 406(b) (1) and (2) of the Act and section 4975(c)(1)(E) of the Code for the sale exchange or transfer of certificates between a plan and a pool sponsor when the pool sponsor or pool trustee is a fiduciary with respect to such plan. Such relief would be available provided that: (1) a fiduciary who is independent of the pool sponsor and pool trustee and who has the authority to manage and control the assets of the plan approves the purchase of certificates; (2) the plan pays no more for the certificates than would be paid by an unrelated third party in an arm's-length transaction; (3) the plan pays no investment management, investment advisory, sales commission or similar fee to the pool sponsor with regard to such sale or acquisition; and (4) the total value of certificates purchased by all plans with respect to which the pool sponsor or pool trustee is a fiduciary shall not exceed 10% of the amount of the offering.

Section I(C) of the proposed exemption would provide relief from the restrictions of section 406(b)(1) of the Act and section 4975(c)(1)(E) of the Code for the collection, holding and investment of individual mortgage payments by the pool sponsor prior to the date of disbursement to certificate holders, and the retention of a specified portion of the interest by the pool sponsor as part of its compensation for organizing and servicing the mortgage pool. Relief for the retention of prepayment, late payment and assumption fees by the pool sponsor would be provided by section I(D) of the proposal.

Section II of the proposal contained four general conditions applicable to all of the transactions listed in Section I. Condition 1 provided that the certificates must have been issued in a public offering registered under the Securities Act of 1933 pursuant to a firm commitment underwriting. Condition 2 required the maintenance of a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans up to an amount not less than the greater of one percent of the aggregate principal value of the pooled loans, or the principal value of the largest pooled loan. The condition went on to specify the ways in which such a system must be structured. These specifications were based on the applicants' representations. Condition 3 required that the pool trustee not be an affiliate of the pool sponsor. Condition 4 provided that the sum of all payments made to and retained by the pool sponsor in connection with a mortgage pool, and all funds inuring to the benefit of the pool sponsor as a result of the administration of the mortgage pool, must represent not more than adequate consideration for selling the mortgage loans plus reasonable compensation for services provided by the pool sponsor to the pool.

Section III of the proposal contained definitions of the terms "pool sponsor," "mortgage pool," "mortgage pool pass-through certificate," and "affiliate." These definitions generally reflected the representations of the applicants.

Discussion of the Comments

A. Structure of the Exemption

As noted above, the proposed class exemption would provide detailed relief in response to the applicants' requests. This was especially true in section I of the proposal, which listed the individual transactions exempted along with the specific conditions applicable to each transaction. It was the Department's intention that this specificity provide the basis for a detailed analysis of the ways in which the provisions of the Act affected investments in mortgage pools.

While praising the thoroughness of the Department's proposal, many commentators noted serious problems with this specific, transaction-based approach. Most indicated that the mortgage pool investment industry is still relatively young and is constantly developing new methods of operation. The commentators argued that the Department's proposal would, if finalized in the same form, require rigid adherence to the present modes of operation, thus preventing possibly beneficial innovation.

Several commentators also indicated the difficulties inherent in drafting and administering an exemption in the form proposed. In order to demonstrate the problems in basing a class exemption on a supposedly comprehensive list of transactions, the commentators brought to the Department's attention a number of transactions omitted from the list. The commentators further noted that mortgage pools maintained by sponsors other than the applicants may vary in certain minor ways from the applicants' pools. While these variations may not be sufficient to undermine the basis for granting class relief, the effect of such differences could render a specific, transaction-based exemption inapplicable to transactions posing no greater possibility for abuse than those associated with the pools described in the applications.

The Department has carefully reviewed these comments and has decided to restructure the final class exemption in the more generalized manner suggested by the commentators. Thus, section I of the final exemption provides relief for several types of transactions, but does not list those transactions individually. Section II contains several conditions applicable to the relief provided in section I. These conditions are designed to assure certain levels of protection for investing plans, rather than to require strict conformance to a specifically described program. Section III contains definitions designed to provide exemptive relief for a broader spectrum of entities involved in the mortgage pool investment industry. The provisions of these sections, and the ways in which they reflect modifications made in response to comments received regarding the proposal, are discussed below.

B. Section I(A)

Section I(A) of the final exemption provides relief from sections 406(a) and 407 of the Act and section 4975(c)(1) (A) through (D) of the Code for the direct or indirect sale, exchange or transfer of mortgage pool certificates between the sponsor of the mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of the pool is a party in interest with respect to such plan. Such relief is available provided the plan pays no more than fair market value for such certificates, and the rights and interests evidenced by such certificates are not subordinated to the rights and interests evidenced by other certificates of the same mortgage pool. Section I(A) of the final exemption also provides relief for the continued holding by a plan of such certificates.

This section of the final exemption is essentially similar to paragraph I(A)(1) of the proposal. However, the Department has received several comments regarding this provision. First, certain commentators questioned whether the relief would extend to transactions in the secondary market. In response, the Department notes that it intended the relief provided in this section to apply only to the initial sale of certificates. In order to clarify this, the Department has modified this paragraph to apply only to the sale, exchange or transfer of certificates in the initial issuance of certificates. Also, in this regard, the Department notes that several other commentators have indicated that they anticipate that transactions in the secondary market would be so-called "blind transactions."

As such, these transactions would not be subject to the prohibited transaction provision of the Act. *See* H.R. Rept. 93–1280, 93d Cong., 2d Sess. 307 (1974). To the extent a sale of certificates between a plan and a party in interest in the secondary market is not, for whatever reason, a blind transaction, such transaction is not exempted under the provisions of this class exemption, and would be a prohibited transaction.

Second, at the request of several commentators, the final exemption provides relief for the continued holding by a plan of certificates purchased or otherwise acquired in accordance with the other provisions of section I(A). Such relief had been omitted from the proposal.

Third, section I(A) of the final exemption provides relief when the pool sponsor, trustee or insurer is a party in interest with respect to a plan purchasing certificates. The proposal referred only to the pool sponsor or trustee. One commentator argued that relief might be necessary when an insurer of the pool is a party in interest with respect to an investing plan. Another commentator objected to the reference to the pool trustee since, in the commentator's belief, the trustee is a totally disinterested party with respect to the sale of certificates. The Department has decided to provide relief when either the insurer or the trustee is a party in interest since such relief has been requested. The fact that such relief is available, however, is not dispositive of whether such transactions are in fact prohibited.

C. Section I(B)

Section I(B) of the final exemption provides conditional relief from the restrictions of section 406(b) (1) and (2) of the Act and section 4975(c)(1)(B) of the Code for the direct or indirect sale, exchange or transfer of certificates between the sponsor of a mortagage pool and a plan when the pool sponsor, insurer or trustee is a fiduciary with respect to the plan assets invested in such certificates. This section is based on section I(B) of the proposal, but with several important modifications made in response to comments received.

First, the proposal referred to fiduciaries with investment discretion with respect to an investing plan. Several commentators stated that this formulation was too broad for the perceived prohibited transaction since many plans have more than one fiduciary with investment authority. Thus, for example, a pool sponsor might be a fiduciary with investment discretion with respect to a portion of plan assets other than those invested in pool certificates, and would therefore not need an exemption from sections 406(b) (1) and (2). In light of these comments, the Department has modified the provisions of section I(B) to refer to situations in which the pool sponsor, insurer or trustee is a fiduciary with respect to the plan assets invested in pool certificates.

Second, section I(B)(1) of the final exemption contains five conditions on the purchase of certificates when the pool sponsor, trustee or insurer is a fiduciary with respect to an investing plan. The proposal contained four conditions. Condition (1) of the proposed exemption required that the decision to purchase certificates be made by an independent fiduciary with the authority to manage and control plan assets. Proposed condition (2) required that the plan pay no more for the certificates than would be paid by an unrelated third party in an arm's-length transaction. Both of these conditions have been adopted without change.

The third condition in the proposal required that the plan pay no investment management, investment advisory, sales commission or similar fee to the pool sponsor with regard to the acquisition of certificates. One commentator indicated that the condition could be interpreted to prohibit the pool sponsor from collecting either its investment management fee from the plan or its servicing compensation from the pool. The Department intended that this condition would prohibit the direct or indirect payment by a plan to a plan fiduciary of double fees for the same services. To the extent that a pool sponsor is a fiduciary with respect to a plan, and the services furnished by the pool sponsor to the plan which give rise to the investment management fee are different from those giving rise to the pool servicing compensation, the Department does not believe that this condition would prohibit the collection of both fees. Therefore, in light of these clarifications, this condition has been adopted as proposed.

The fourth condition in the proposal provided that the total value of all certificates purchased by all plans with respect to which the pool sponsor or trustee is a fiduciary shall not exceed 10% of the amount of the offering. A large number of commentators argued that this condition was too restrictive and would rob pool sponsors of the flexibility necessary to market pool certificates. These commentators stated further that such a condition would discriminate against pool sponsors who might be fiduciaries for a large number of plans. Because of these comments, and in light of the new conditions adopted in section I(B)(1) of the final exemption, the Department has decided to delete this condition.

In the final exemption, the Department has adopted new conditions (d) and (e). These conditions parallel the provisions of section 407(e)(2) of the Act, which define, in part, the term "marketable obligation." One of the commentators suggested this approach as a means to accomplish the Department's original aims in this class exemption in a way that would not be disruptive of current practices. Thus, condition (d) provides that the total value of the certificates purchased by a plan must not exceed 25% of the amount of the issue. Condition (e) requires that at least 50% of the issue is accquired by persons independent of the pool sponsor, trustee or insurer. (The term "persons independent of the pool sponsor, trustee or insurer" is difined in section III(F), discussed below.) The Department believes that these conditions guard against the potential abuse of "dumping" certificates on a plan, while at the same time allowing pool sponsors sufficient financial flexibility. In the Department's view, they also reduoce the possiblility that pool certificates will be sold to plans at an unfair price by providing for an independent assessment of that price.

D. Section I(C)

Section I(C) of the final exemption provides conditional relief from the restrictions of sections 406(a) and (b) and 407 of the Act and section 4975(c) of the Code for all transactions in connection with the servicing and operation of mortgage pools. Section I(C) is designed specifically to meet requests that the exemption be more broadly drafted. Aside from the sales of certificates covered by sections I(A) and I(B) of the final class exemption, all of the transactions listed in the proposal, and most of the additional transactions suggested by the commentators, occur as a result of the internal functioning of the mortgage pool investment trust. As described by the applicants and commentators, these functions are primarily ministerial in nature, involving such responsibilities as the collection and processing of payments, the organization of indemnification procedures, and the investigations necessary to assure that warranties have been met. All of these functions are governed by the terms of the pooling and servicing agreement under which the pool is organized. As noted previously, because such pooling and servicing agreements may vary in certain technical ways, it becomes

difficult to list comprehensively all of the transactions which may occur pursuant to such agreement and which may be eligible for exemptive relief.

As a result, the Department has decided to dispense with the technique of listing individual transactions in this case and to provide more general relief. It should be understood that relief contained in section I(C) of the final exemption is intended to extend to all thsoe transactions listed in sections I(A)(2) through (15), I(C), and I(D) of the proposal. However, this relief is not limited to transactions so listed.[1] Further, the only conditions applicable to such relief are those actually listed in the final exemption, and not those indicated only in the proposal.

The relief contained in section I(C) of the final class exemption is provided subject to two conditions. First, the transactions must be carried out in accordance with the terms of a binding pooling and servicing agreement which governs the operation of the pool. Second, the pooling and servicing agreement must be made available to investors before they purchase pool certificates. These conditions are simply corollaries of the representations of the applicants and commentators that the terms of the pooling and servicing agreement afford adequate protection for all certificate-holders and that the terms of the agreement generally are disclosed prior to the time certificates are purchased. These conditions assure that an investment plan will be aware of the terms of the pooling and servicing agreement, and that those terms will in fact govern the operation of the pool.

It should, of course, be noted that these conditions must be read in light of the conditions contained in sections I(A) and I(B) of the final exemption. Since the price of a certificate should reflect, amoung other things, the quality of the protections afforded investors under the pooling and servicing agreement, then the fair market value, arm's-length, and percentage limitations in section I(A) and I(B) will operate along with the conditions in section I(C) to provide an acceptable level of protection for investing plans.

[1] For example, among the transactions not listed in the proposal but covered by this final class exemption are transactions peculiar to variable rate mortgages. As noted in the preamble to the proposal, 45 FR at 29939, n.9, the Department intended to provide relief for pools composed in whole or in part of variable rate mortgages. Nevertheless, some commentators questioned whether the exemption would cover such pools. The Department believes that the provisions of the final exemption are broad enough to deal with the specific issues raised by variable rate mortgage pools, and that no special provisions for these pools are necessary.

E. Section I(D)

Serveral commentators noted that the proposed exemption provided no reflief for situations in which prohibited transactions may arise solely because a plan owns a pool certificate. These commentators stated that, subsequent to purchasing a certificate, a plan may, for example, have dealings with the pool sponsor regarding matters having nothing to do with the mortgage pool. The commentators indicated that, under such circumstances, a large number of inadvertant, technical prohibited transactions could result when no potential for abuse existed. These commentators have therefore requested general exemptive relief for such "external" transactions.

The Department has carefully considered this comment in light of its past practice regarding similar requests. In Class Exemption 80-51 (45 FR 49709, July 25, 1980) for Certain Transactions Involving Bank Collective Investment Funds, the Department provided, among other things, broad relief for certificate transactions between a collective investment fund and a service provider with respect to a plan investing in such a fund. Similar relief was provided in Class Exemption 78-19 (43 FR 59915, December 22, 1978) for Certain Transactions Involving Insurance Company Pooled Separate Accounts. The present request would extend beyond relief for service providers and would apply to a potentially large number of unspecified transactions.

It has been represented and the Department believes that an investment in a mortgage pool is fundamentally different from an investment in a bank collective investment fund or an insurance company pooled separate account. A mortgage pool is a fixed pool of loans; these assets generally are not subject to change once the certificates have been sold, except as mortgages are paid off and the principal and interest passed through to certificate-holders. Although the pooled loans are held in trust for the benefit of certificateholders, included investing plans, the Department does not believe that the mere existence of such an arrangement, or the provision of the services attendent upon an investment in a mortgage pool, would, absent other factors, pose such a potential for abuse as to preclude exemptive relief.

In addition, the Department notes that the structure of the mortgage pool relationship provides additional safeguards against the potential for abuse. The pooling and servicing agreement requires that certain services must be provided with regard to the pool regardless of the identity of individual certificateholders. When a plan comtemplates investing an an issue of pool certicates, this exemption requires that the pooling and servicing agreement be made available to the plan prior to the purchase of certificates. When the pool sponsor is also a fiduciary with repect to an investing plan, this exemption requires that an independent fiduciary decide whether to purchase pool certificates upon consideration of the pooling and servicing agreement and other relevant information. Thus, the relationship established by the purchase of a pool certificates is far more attenuated than the usual, direct relationship established by the purchase of a pool certificate is far more attenuated than the usual, direct relationship between a plan and a service provider.

Therefore, the Department has decided to adopt this comment and has added section I(D) to the exemption. Section I(D) provides relief from the restrictions of section 406(a) and 407 of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1) (A) through (d) of the Code for any transactions to which such restrictions and taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with repect to a plan who provides services to the plan, or who has a relationship to a service provider described in section 3(14) (F), (G), (H) or (I) of the Act, solely by reason of the ownership of a certificate by such plan. The Department notes, however, that this exemption would not be available if such person were a party in interest with respect to the plan because of any other pre-existing or subsequent relationship with the plan. [2]

F. Section II-General Conditions

Section II of the final class exemption contains three conditions applicable to the relief provided in Section I. Each of these conditions is based on one of the conditions contained in the proposal.

[2] It should be noted that this commentator also requested relief from the provisions of section 406(b) of the Act and section 4975(c)(1)(E) and (F) of the Code of transactions between a plan and person deemded to be a fiduciary with respect to that plan solely be reason of a the plan's ownership of a certificate. Neither the applicants nor the commentators have identified any transaction outside of the mortgage pool relationship which would be prohibited under these sections merely because the pool sponsor exercised fiduciary authority conferred solely by reason of the plan's ownership of pool certificates. As a result, section I(D) of the exemption provides no relief from section 406(b) of the Act or section 4975(c)(1)(E) and (F) of the Code.

(1) *Insurance and Indemification.* Condition 1 requires the establishment for each pool of a system for insuring or otherwise protecting the pooled mortgage loans and the property securing such loans, and for indemnifing certificateholders against reductions in pass-through payments due to loan defaults or property damage. The minimum amount for such coverage must be not less than the greater of the one percent of the aggregate principal balance of the covered loans, or the principal balance of the largest covered loan.

This condition is based on paragraph II(A)(2) of the proposal, but has been modified in response to comments in two ways. First, the proposal required that this protection be provided by one of the systems listed in subparagraphs II(A)(2) (a) through (d) of the proposal. A large number of commentators stated that this stipulation of methods rendered this provision overly restrictive. They argued that is would prevent development of safer, more efficient methods to accomplish the same level of protection. Upon consideration of these comments, the Department has eliminated this provision.

Second, the proposal required that when a pool sponsor purchased hazard and mortgage insurance from a private insurer, such insurer could not be an affiliate of the pool sponsor or pool trustee. One of the applicants, PMI Mortgage Corporation, had requested relief for pools using an affiliated insurer, but had not, in the Department's opinion, provided sufficient information on which to base the findings required by section 408(a) of the Act for the proposal of an exemption under those circumstances. However, after the publication of the proposal, PMI and the other commentators argued that it would be inconsistent to prohibit the use of an affiliated insurer while allowing a pool to self-insure, as proposed, through a system of subordinated certificates and a reserve fund. They also noted that an affiliated insurer would be subject to state insurance regulation. In light of these comments, the Department has deleted this prohibition from the final exemption.

(2) *Independent Trustee.* Condition 2 requires generally that the pool trustee not be an affiliate of the pool sponsor. This condition is the same as paragraph II(A)(3) of the proposal with one modification. In its comment, the Federal National Mortgage Association indicated that, as a public entity which might possible establish mortgage pools, it was prohibited by statute from transferring mortgages from its portfolio into the control of an independent trustee. The Department, in recognition of the public policy expressed by such statutory provisions and of the additional safeguards usually present when a public entity is the pool sponsor, has adopted this comment and made the independent trustee requirement inapplicable in the case of a governmental or quasi-governmental entity such as the Federal National Mortgage Association.

(3) *Funds retained by the pool sponsor.* The third condition listed in Section II provides that the sum of all payments made to and retained by the pool sponsor, and all funds inuring to the benefit of the pool sponsor as a result of the administration of a mortgage pool, must represent not more than adequate consideration for selling the mortgage loans plus reasonable compensation for services provided by the pool sponsor to the pool. This condition is identical to paragraph II(A)(4) of the proposal. One commentator criticized this condition as unnecessary, and said that the Department should let the marketplace determine the pool sponsor's remuneration. However, as the Department explained in the preamble to the proposal (45 FR 29937, 29939 n. 10), this condition does nothing more than repeat the requirement for the continued applicability of the exemptive relief accorded the provision of certain services under section 408(b)(2) of the Act and section 4975(d)(2) of the Code when no more than reasonable compensation is paid by the plan for such services.[3] Accordingly, the Department is adopting this condition as proposed.

(4) *Public Offerings.* The proposal contained a general condition requiring that all certificates purchased by plans pursuant to a final exemption be issued in a public offering registered under the Securities Act of 1933 pursuant to a firm commitment underwriting. All of the commentators addressing this provision opposed its adoption. Many noted that public offerings must be fairly large in order to be profitable, and this requirement would eliminate all but the largest entities as potential pool sponsors due to the increased cost. Other commentators contended that public offerings are inflexible investment vehicles and would not allow sponsors and investors alike to take advantage of market trends. Other commentators noted that private placements offer no significant additional risk for investors. These commentators made similar statemnts with regard to the firm commitment underwriting requirement.

The Department notes that the applications upon which the proposal was based focused primarily on publicly offered pools distributed through firm commitment underwritings. Although mention was made of other marketing methods, there was insufficient information in the record upon which to base relief for private placements even if such relief had been requested. In the case of any exemption application, the applicants bear the burden of bringing before the Department the information necessary to make the findings required by section 408(a) of the Act.

In response to the proposal, the commentators have supplied the Department with copious information regarding the advisability of private placements of pool certificates. They have indicated that the mortgage industry has traditionally used private placements, although the applicants have not consistently used this method for offering pool certificates. The commentators have also made a number of helpful suggestions for additional safeguards if the Department believed such extra protection to be necessary in the case of private placements. As explained above, the Department has adopted several of these suggestions.

As a result, the Department has deleted the public offering, firm commitment underwriting provision. The Department believes that the conditions contained in the final exemption provide sufficient protections for plan participants.[4]

G. Section III. Definitions

Section III of the final exemption contains definitions of terms used elsewhere in the exemption. These

[3] For a fuller discussion of this point, see the Preamble to the proposed exemption, 45 FR 29937, 29942 n. 17–18.

[4] As a related matter, one of the applicants had requested that the Department grant relief for the use of an affiliated underwriter to market pool certificates. In the preamble to the proposal, 45 FR 29937, 29941 n.15, the Department refused to propose such relief. The Department did not believe at that time it had sufficient information upon which to base such relief. A number of commentators have furnished the Department with additional information in support of this request for relief. However, due to the changes made in the final exemption which provide relief regardless of the method in which the certificates are marketed, specific relief in this area is no longer necessary. The exemption has been revised, in view of the relief which will now be available for transactions involving fiduciaries, to provide that no underwriting fee or similar compensation can be paid to the pool sponsor or its affiliate regarding the acquisition of pool certificates when such persons are fiduciaries with respect to the assets involved in the transaction. In these circumstances, the Department does not believe the commentators have demonstrated that there is justification for such compensation.

definitions are based on those contained in the proposal, with several changes and additions in response to comments.

(1) *Pool Sponsor.* Section III(A) defines the term "pool sponsor." This definition has been modified in two ways from the proposal. First, the proposal indicated in part that the pool sponsor was the entity which organizes and continues to service the pool. Several commentators noted that the pool sponsor often delegates the servicing of the fund to an affiliate, or to the institutions from which the sponsor purchased the pooled loans. These commentators suggested that the definition be modified to apply to entities which organize or service the pool. However, this formulation would raise all service providers with respect to the pool to the status of pool sponsor. In order to avoid this anomolous result, and at the same time to accommodate the concerns expressed by the commentators, the Department has modified this provision to refer to the entity which organizes, and either continues to service or supervises the provision of services to, a mortgage pool.

Second, the proposal limited the definition of pool sponsor to those entities which made the pooled loans or purchased such loans from the original lender. Several commentators noted that, in the case of so-called "conduit" pool sponsors, loans may not be purchased directly from the lender but from brokers or other third parties. They indicated that the proposal would prevent them from participating in the mortgage pool market. The Department originally proposed this definition to provide an accurate description of the pool sponsor as represented in the applications. In light of the commentators' concerns, the Department has decided to delete this restriction.

(2) *Mortgage Pool.* Section III(B) defines the term mortgage pool. This section contains one minor modification from the proposal. The proposal referred only to deeds of trust. In light of the fact that many states do not permit the use of deeds of trust, the Department has expanded this reference to include mortgages.

The Department has received a number of comments regarding various provisions of this section. First, the proposal would apply only to pools of first mortgages or first deeds of trust. Two commentators requested that this be expanded to include junior lien loans. They indicated that junior lien loans often have a better loan to value ratio than first mortgages, and also provide a higher return over a shorter period of time. They indicated that it was their belief that a pool of junior lien loans would be a higher quality investment and should, therefore, be accorded exemptive relief.

The Department notes that the proposal was based on information regarding pools of first mortgage loans. The applications, comments and hearing testimony all indicated that first mortgage pools have a structural uniformity which makes class relief possible. The Department has not received similar information concerning second mortgage pools. While there is nothing on the record reflecting adversely upon the quality of investment in second mortgages and second mortgage pools, the record is similarly silent regarding the extent to which second mortgage pools differ as a general matter, from first mortgage pools. Different conditions may be necessary for pools of second mortgage loans. In the absence of sufficient information upon which to base class exemptive relief, the Department has decided not to adopt this comment and the final exemption is restricted to pools of first lien loans.

Second, one commentator requested that the definition, which is restricted to pools organized as trusts, be expanded to include limited partnerships. With regard to this suggestion, the Department notes that the structure of the exemption and the presence of certain conditions, such as the independent trustee requirement, are premised on the trust format. The Department at this time does not know to what extent the partnership format would pose additional problems or involve additional prohibited transactions. The Department is also unaware of the extent to which limited partnership mortgage pools require class relief. Therefore, the Department does not accept this comment. This does not, however, preclude the commentator from seeking individual relief.

Similarly, the Department received two comments requesting relief for the commentators' specific programs. Both differed significantly from the other programs described to the Department. One involved the issuance of debt securities to finance mortgage purchases. The other involved a program to provide mortgage and construction financing in a specified geographic area. Rather than radically modify the terms of the proposal to accommodate these commentators, the Department invites them to seek individual relief.

(3) *Certificates.* Section III(C) defines the term "mortgage pool pass-through certificates." The proposal required that such certificates provide monthly pass-through payments. Several commentators noted that some pools provide quarterly or other periodic payments. Upon consideration of these comments, the Department has decided to adopt this comment and has deleted the reference to monthly payments.

(4) *Single-Family, Residential Property.* In response to requests by several commentators, the Department has adopted a new section, III(E), which defines "single-family residential property." This definition states that single-family residential property is non-farm property comprising one to four dwelling units, and also includes condominiums. This provision basically follows the industry definition previously noted in the preamble to the proposal. 45 FR 29937, 29938 n.6.

(5) *Independent Person.* New section III(F) defines the term "person independent of the pool sponsor, trustee or insurer." This term is used in section I(B)(1)(e) of the final exemption, which requires that 50 percent of an issue of certificates must be purchased by such persons in order to achieve relief from the restrictions of section 406(b) of the Act and section 4975(c)(1)(E) of the Code. This provision, based on section 407(e) of the Act, was suggested by a commentator, but the Department believes that a further definition of this term is necessary. Therefore, section III(F) states that a person will be "independent of the pool sponsor, trustee or insurer" only if: (1) such person is not an affiliate of the pool sponsor, trustee or insurer; and (2) neither the pool sponsor, trustee, insurer, nor any affiliate thereof, is a fiduciary who has investment management authority or renders investment advice with respect to any of the assets of such person. The Department has chosen this formulation to assure that a truly independent assessment of the worth of mortgage pool certificates takes place.

H. Other Comments

The Department has received one written comment referring to the possibility of "forward commitment" or "forward placement" of mortgage pool certificates. Testimony elicited at the hearing also referred to this subject. The Department does not have sufficient information at this time to identify this practice completely, to ascertain the frequency of its use in the mortgage pool industry, or to determine what, if any, abuses may be involved with such practices. The Department does not believe that it would be beneficial at this time to reopen the comment period

regarding this subject and thereby delay adoption of a final class exemption.

The Department notes that the class exemption adopted today applies to the sale, exchange, transfer or other acquisition by a plan of certificates representing undivided beneficial ownership interests in a pool of mortgage loans. The structure of this class exemption is predicated upon the provisions of a pooling and servicing agreement referring to a specific pool, and the presence of safeguards designed to protect the owner of a pool certificate. Therefore, to the extent that so-called "forward placements" or "forward commitments" involve transactions which precede the formation of a mortgage pool, such transactions are beyond the scope of this class exemption. To the extent that members of the public believe that relief is appropriate for such transactions, they are invited to file with the Department an application for relief in accordance with the provisions of ERISA Procedure 75–1 (40 FR 18471, April 28, 1975).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption granted under section 408(a) of the Act and section 4975 (c)(2) of the Code does not relieve a fiduciary or other party in interest with respect to a plan to which the exemption is applicable from certain other provisions of the Act and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act which, among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of the plan's participants and beneficiaries and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that a plan must operate for the exclusive benefit of participants and beneficiaries.

(2) This exemption is supplemental to, and not in derogation of, any other provision of the Act and the Code, including statutory exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

(3) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Exemption

In accordance with section 408(a) of the Act and section 4975(c)(2) of the code, and based upon the entire record including the written comments submitted in response to the notice of May 6, 1980, and the testimony given at the public hearing of September 9, 1980, the Department makes the following determinations:

(a) The class exemption set forth herein is administratively feasible;

(b) it is in the interests of plans of their participants and beneficiaries; and

(c) it is protective of the rights of participants and beneficiaries of plans.

Accordingly, the following exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75–1.

I. Transactions

A. Effective January 1, 1975, the restrictions of sections 406(a) and 407 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions involving mortgage pool investment trusts (mortgage pools) and pass-through certificates evidencing interests therein (certificates):

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a party in interest with respect to such plan, provided that the plan pays no more than fair market value for such certificates, and provided further that the rights and interests evidenced by such certificates are not subordinated to the rights and interests evidenced by other certificates of the same mortgage pool;

(2) The continued holding of certificates acquired pursuant to subparagraph (1), above, by an employee benefit plan.

B. Effective January 1, 1975, the restrictions of section 406(b) (1) and (2) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975 (c)(1)(E) of the Code shall not apply to the following transactions involving mortgage pools and certificates evidencing interests therein:

(1) The direct or indirect sale, exchange or transfer of certificates in the initial issuance of certificates between the sponsor of a mortgage pool and an employee benefit plan when the sponsor, trustee or insurer of such pool is a fiduciary with respect to the plan assets invested in such certificates provided:

(a) such sale, exchange or transfer is expressly approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being invested in such cerrificates;

(b) the plan pays more for the certificates than would be paid in an arm's length transaction with an unrelated party;

(c) no investment management, advisory, or underwriting fee or sales commission or similar compensation is paid to the pool sponsor with regard to such sale, exchange or transfer;

(d) the total value of certificates purchased by a plan does not exceed 25% of the amount of the issue; and

(e) at least 50% of the aggregate amount of the issue is acquired by persons independent of the pool sponsor, trustee or insurer;

C. Effective January 1, 1975, the restrictions of section 406(a) and 407 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c) of the Code shall not apply to transactions in connection with the servicing and operation of the mortgage pool provided that: (1) such transactions are carried out in accordance with the terms of a binding pooling and servicing agreement; and (2) such pooling and servicing agreement is made available to investors before they purchase certificates issued by the pool.

D. Effective January 1, 1975, the restrictions of section 406(a) and 407 of the Act and the taxes imposed by section 4975 (a) and (b) of the Code by reason of section 4975(c)(1) (A) through (D) of the Code shall not apply to any transactions to which such restrictions or taxes would otherwise apply merely because a person is deemed to be a party in interest (including a fiduciary) with respect to a plan by virtue of providing services to the plan (or who has a relationship to such service provider described in section 3(14) (F), (G), (H) or (I) of the Act), solely because of the ownership of a certificate evidencing an interest in a mortgage pool by such plan.

II. General Conditions

A. The relief provided under section I, above, is available only if the following conditions are met:

(1) The sponsor and trustee for each mortgage pool must maintain a system for insuring or otherwise protecting the

pooled mortgage loans and the property securing such loans, and for indemnifying certificateholders against reductions in pass-through payments due to defaults in loan payments or property damage. This system must provide such protection and indemnification up to an amount not less than the greater of one percent of the aggregate principal balance of all covered pooled mortgages, or the principal balance of the largest covered mortgage;

(2) Except in the case of a governmental or quasi-governmental entity such as the Federal National Mortgage Association, the trustee for each mortgage pool must not be an affiliate of the sponsor of such pool, provided, however, that the trustee shall not be considered to be an affiliate of the pool sponsor solely because the trustee has succeeded to the rights and responsibilities of the pool sponsor pursuant to the terms of the pooling and servicing agreement providing for such succession upon the occurrence of one or more events of default by the pool sponsor; and

(3) The sum of all payments made to and retained by the pool sponsor in connection with a mortgage pool, and all funds inuring to the benefit of the pool sponsor as a result of the administration of the mortgage pool, must represent not more than adequate consideration for selling the mortgage loans plus reasonable compensation for services provided by the pool sponsor to the pool.

III. Definitions

A. For the purposes of this exemption the terms "sponsor" or "pool sponsor" mean:

(1) the entity which organizes, and either continues to service or supervises the provision of services to, a mortgage pool comprised of mortgage loans either made or purchased by such entity; and

(2) any successor thereto.

B. For the purposes of this exemption, the term "mortgage pool" means an investment pool the corpus of which

(1) is held in trust; and

(2) consists solely of

(a) interest bearing obligations secured by first mortgages or deeds of trust on single-family, residential property;

(b) property which had secured such obligations and which has been acquired by foreclosure; and

(c) undistributed cash.

C. For the purposes of this exemption, the terms "mortgage pool pass-through certificate," or "certificate" means a certificate representing a beneficial undivided fractional interest in a mortgage pool and entitling the holder of such certificate to pass-through payment of principal and interest from the pooled mortgage loans, less any fees retained by the pool sponsor.

D. For the purposes of this exemption, the term "affiliate" of another person means:

(i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person;

(ii) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and

(iii) Any corporation or partnership of which such other person is an officer, director or partner.

For purposes of this paragraph, the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

E. For the purposes of this exemption, the term "single-family, residential property" means non-farm property comprising one to four dwelling units, and also includes condominiums.

F. For the purposes of this exemption, a person will be "independent of the pool sponsor, trustee, or insurer" only if:

(1) such person is not an affiliate (as defined in paragraph III(D) of this exemption) of the pool sponsor, trustee, or insurer; and

(2) neither the pool sponsor, trustee, insurer, nor any affiliate thereof, is a fiduciary who has investment management authority or renders investment advice with respect to any of the assets of such person.

Signed at Washington, D.C. this 16th day of January, 1981.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

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[Prohibited Transaction Exemption 81-6]

Class Exemption To Permit Certain Loans of Securities by Employee Benefit Plans

AGENCY: Department of Labor.

ACTION: Grant of class exemption.

SUMMARY: This exemption will allow the lending of securities by employee benefit plans to banks and broker-dealers who are parties in interest with respect to such plans, if the conditions specified in the exemption are met. The exemption affects participants and beneficiaries of employee benefit plans, persons who manage the assets of such plans, and parties in interest who might engage in securities lending transactions with such plans. In the absence of this exemption, securities lending transactions between a plan and a party in interest would be prohibited by the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code).

EFFECTIVE DATE: January 23, 1981. For purposes solely of Prohibited Transaction Exemption 79-23 (the Grumman Corp. Pension Trust, 44 FR 31750, June 1, 1979), the final disposition of this class exemption will be deemed to occur on February 23, 1981.

FOR FURTHER INFORMATION CONTACT: Roger Thomas, Esq., Office of the Solicitor, U.S. Department of Labor, (202) 523-8602. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On April 11, 1980, notice was published in the **Federal Register** (45 FR 24946) of the pendency before the Department of Labor (the Department) of a proposed class exemption from the restrictions of section 406(a)(1)(A) through (D) of the Act and the taxes imposed by section 4975(a) and (b) of the Code by reason of section 4975(c)(1)(A) through (D) of the Code.[1] Four applications were filed requesting individual exemptions concerning the lending of securities by employee benefit plans. These applications were filed by Grumman Corporation Pension Trust (D-762), Morgan Guaranty Trust Company (D-1102), Salomon Brothers (D-1108) and Fischer, Francis, Trees and Watts, Inc. (D-1130). In addition, the American Bankers Association filed an application (D-1323) requesting a class exemption covering the lending of securities by employee benefit plans to parties in interest with respect to such plans. The above applications were filed pursuant to section 408(a) of the Act and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975).

As stated in ERISA Procedure 75-1, an application for an individual exemption is not ordinarily considered separately if a class exemption which might encompass the transaction described in the individual application is under consideration by the Department. Accordingly, the Department notified each individual applicant of the fact that its application would not be considered separately from the proposed class exemption, and that its comments with

[1] Hereafter, references to provisions of the Act shall include references to parallel provisions of the Code.

respect to the proposed class exemption were sought by the Department.[2]

Section 102 of Reorganization Plan 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978, transferred the authority of the Secretary of the Treasury for granting exemptions of the type granted herein to the Secretary of Labor. Therefore, although the four applications for individual exemptions were filed with both the Department and the Internal Revenue Service, the notice of pendency was issued and the exemption is being granted solely by the Department.

Upon consideration of all the public comments submitted, the Department has determined to grant the proposed class exemption, subject to certain modifications. These modifications and the major comments are discussed below.

Discussion of Comments

A. Paragraph 1

The proposed exemption included a condition that for a securities lending transaction between a plan and a party in interest to be exempted, neither the borrower nor an affiliate of the borrower could be a fiduciary with respect to the plan assets being loaned. One commentator suggested that the Department clarify that this requirement is meant to refer only to fiduciaries with investment authority or who render investment advice for a fee. Another commentator similarly request the Department's clarification as to which parties would be permitted to utilize this exemption.

In order to remove any uncertainty, this condition of the exemption has been changed to provide that neither the borrower not any affiliate of the borrower (1) has any discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or (2) renders investment advice (within the meaning of 29 CFR § 2510.3–21(c)) with respect to those assets.

B. Paragraph 2

1. *Simultaneous Delivery*

The Department received many comments regarding a condition of the proposed exemption which would have required the simultaneous delivery of securities to the borrower and receipt of corresponding collateral by the plan. Some of the commentators asserted that complex administrative and operational processes involved in transferring securities and collateral make it difficult to determine, in a precise manner, when delivery of the securities and collateral in question would occur.

Another commentator noted that the actual time of receipt of the securities and collateral, after their transfer is initiated, might also depend upon the nature of the securities and collateral involved, and upon the efficiency of the parties' transfer agents. A few of the commentators indicated that transfers of securities and collateral are generally made through different channels, which would also cause uncertainty as to the exact time of delivery. Most of the commentators suggested that the Department modify the exemption so that it is conditioned upon delivery of collateral to the lender by the close of the lender's business on the day the borrowed securities are delivered to the borrower. On the basis of the comments, the Department has adopted this suggestion.

A few of the commentators also noted that certain transfers are always made through "book entry" systems of securities depositories. In these instances, "physical" delivery of the securities or collateral is impossible. In other cases, for the purpose of convenience, transfers are also made through book entries. Although, in these cases, physical delivery of securities or collateral might also be possible, the Department has decided, on the basis of the comments, that it is not necessary to require physical delivery of certificates. As a result, the final exemption provides that transfers of collateral made through such book entries will satisfy the delivery requirements of this exemption.

2. *Types of Collateral*

Another requirement of the proposed exemption stated that the plan as lender must receive from the borrower collateral consisting of cash or securities issued or guaranteed by the United States Government or its agencies, or any combination thereof. A number of commentators urged that the exemption be expanded to include bank letters of credit as permissible collateral. The commentators noted that bank letters of credit are customarily used in securities lending transactions, and that their omission from the exemption would put plans at a competitive disadvantage with respect to other lenders of securities. The Department, having considered these comments, has determined to expand the exemption so as not to preclude the use of bank letters of credit as collateral, provided that the letter of credit is irrevocable and is issued by a person other than the borrower or an affiliate of the borrower. Paragraph 2 of the exemption has been modified accordingly. This modification, of course, does not relieve a plan fiduciary from its responsibilities under section 404(a) of the Act that its decision to secure a loan with a bank letter of credit as well as its decision regarding the terms of the letter of credit are, among other things, "prudent" decisions.

3. *Amount of Collateralization*

Under the proposal, in order for a securities lending transaction to be exempt, the lending plan would have been required to receive collateral whose market value, at the time of the transaction, is equal to at least 102 percent of the then market value of the securities loaned. In addition, if, during the term of the securities loan, the market value of the collateral were less than 102 percent of the market value of the borrowed securities, the plan would have been required to receive from the borrower by the close of business on the following business day additional collateral the market value of which, together with the market value of other loan collateral previously delivered to the plan, equals at least 102 percent of the market value of the securities borrowed.

Five commentators stated that they supported the Department's requirement of 102 percent collateralization. However, most of these commentators suggested that the 102 percent minimum should apply to initial collateralization only, and recommended that additional collateral should be required to be posted by the borrower only when the market value of the collateral already given falls below 100 percent of the market value of the borrowed securities. In conjunction with this recommendation, it was further suggested that when the borrower did post additional collateral the amount of collateralization should be restored to the 102 percent level. The commentators pointed out that initial collateralization of the 102 percent, combined with a two percent margin, minimizes administrative burdens and transaction costs because a borrower would otherwise be required to make frequent deliveries of collateral to maintain 100 percent collateralization where insignificant variations in the market value of the borrowed securities had occurred.

Four commentators suggested that this 102 percent minimum is an artificial and unjustified standard that would limit the ability of plans to lend securities. Most of these commentators indicated that the amount of collateral should be determined by the "market place" (*i.e.*, the amount other prudent investment

[2] The Department granted a temporary individual exemption to permit the lending of securities to broker-dealers and banks by Grumman Corporation Pension Trust (44 FR 31750, June 1, 1979). Under its terms, that individual exemption will terminate upon the final disposition of this class exemption.

advisers would require for the same or similar securities).

The Department is not persuaded to permit transactions with collateralization of less than 100 percent. However, it does find persuasive the arguments of the commentators that a two percent margin (or some other margin) may be in the interests of all the parties to a securities lending transaction. The Department has decided, therefore, to revise this condition to require that a securities loan maintain a minimum collateralization or 100 percent throughout the term of the loan. This revision should provide adequate protection to plans while offering the parties the flexibility to negotiate whatever margin is appropriate under the circumstances.

C. Former Paragraph 3—Regulation T Purposes

The proposed exemption included a condition that would require that securities borrowed are used solely for purposes described in section 6(h) of Regulation T of the Federal Reserve Board (12 CFR §220.6(h)). This condition was based upon the submissions of the applicants, some of which described the reasons why broker-dealers would customarily borrow securities from others (including plans with respect to which they are parties in interest). Under section 6(h) of Regulation T, borrowing of securities is permitted for "* * * the purpose of making delivery of securities in the case of short sales, failure to receive securities [the broker-dealer] is required to deliver, or other similar cases * * *"

A few commentators indicated that they objected to limiting the purposes for which securities could be borrowed to those encompassed by Regulation T. One commentator suggested that plans which lend securities are not affected by how those securities are used by borrowers, and that the plan is protected by the borrower's financial resources (as evidenced by the required financial disclosures) and the requirement that the loan be fully collateralized. Another commentator indicated that the language in paragraph 3 could result in liability to an intermediary broker-dealer or bank who borrows securities from a plan and subsequently lends the securities to a third party for Regulation T purposes, if the third party, in fact, uses them for another purpose.

The Department has considered these comments and has decided that a specific condition in the exemption regarding the purposes for which securities are borrowed is not necessary for the protection of plans in light of the other safeguards contained in the exemption. Accordingly, the condition in paragraph 3 of the proposal has been omitted from the exemption as adopted.

D. Paragraph 3 (as renumbered)—Financial Statements

The proposed exemption included a condition that would require the bank or broker-dealer who intends to borrow securities to furnish the plan, prior to the loan, its most recent statement of financial condition and a representation that there has been no material adverse change in its financial condition since the date of such statement. Many commentators objected to this condition, and indicated that since the need for securities changes on a daily basis, the timing of securities lending transactions is critical, and compliance with this condition would be onerous or impossible for each separate loan. In addition, some commentators stated that it was a common practice for the borrower to supply its most recent financial statement together with a basic written loan agreement,[3] which would cover a series of loan transactions, and then to furnish additional financial statements on a quarterly basis or, alternatively, when available or as requested by the lender. Further, the commentators indicated that, for individual security loans under such a basic agreement, it is customary for the borrower to confirm the terms of the loan and assure the lender that there has been no material adverse change in its financial condition since its most recent financial statement.

One of the commentators suggested that the requirement to furnish the lender with the borrower's most recent statement of its financial condition is generally unnecessary and would impose a burden on borrowers in securities loan transactions without a corresponding benefit or protection to plan participants and beneficiaries. This commentator further stated that a fiduciary representing lenders of securities would normally deal only with borrowers whom it believes to be solvent, and argued that since all securities loans must be fully collateralized in cash or government securities, the requirement of furnishing financial statements is unnecessary and redundant. The Department, however, believes that the borrower's financial condition would be of importance to the plan fiduciary in evaluating possible securities lending transactions. It is in the interest of the lending plan, for example, to know whether a borrower is in weak financial condition since the borrower's inability to produce additional collateral, if required, could result in adverse consequences for the plan.

On the basis of the comments received, the Department is not prepared to conclude that the furnishing of financial statements is unnecessary. Nevertheless, the Department does believe that the condition, as proposed, might create undue burdens for the borrower. With regard to the requirement of furnishing the most recent financial statements, several commentators suggested that the condition be modified to require the borrower to furnish its most recent audited financial statement. The Department accepts this comment. However, since audited financial statements may be prepared on a relatively infrequent basis, the Department has modified the exemption so that, prior to the making of the loan by the plan, the borrower shall have provided the lending plan fiduciary with (1) its most recent available audited financial statement, (2) its most recent available unaudited financial statement, if more recent than the audited statement, and (3) a representation that, as of the time the loan is negotiated, there has been no material adverse change in the borrower's financial condition since the date of the financial statement last furnished to the plan. These changes are intended to allow persons covered by the exemption to engage in such transactions without providing separate financial statements prior to each transaction.

E. Paragraph 4 Arm's length requirement

Under the proposed exemption, in order for a securities lending transaction to be exempt, the loan is required to be made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as would be an arm's length transaction between the borrower and an unrelated party. A few commentators recommended that, in order to facilitate securities lending transactions, the Department consider permitting the use of a master or basic written loan agreement which could cover a series of loan transactions between a particular borrower and an employee benefit plan. One commentator stated that the use of such an agreement would eliminate the need for the parties to execute an agreement for each individual loan transaction with the same borrower, which would

[3] The utilization of a basic written loan agreement is discussed in more detail, *infra*, in connection with the conditions set forth in paragraph 5 of the proposal.

be burdensome because of the rapidity with which loan transactions are consummated. Several commentators also indicated that the use of a master agreement is a customary practice.

The Department accepts this comment and has modified the exemption accordingly. In addition, the Department has revised the condition to permit, in lieu of a written agreement for each transaction, written confirmation of each transaction covered by a "master" written agreement.

Two commentators also suggested that the Department eliminate the condition that the terms of the securities loan agreement be "at least as favorable to the plan as an arm's length transaction between the borrower and an unrelated party would be."

One of the commentators asserted that it would be difficult for the plan to document the terms of arm's length transactions between a borrower and unrelated third parties. In addition, the commentator stated that each loan is "unique" and that no reported loan transactions are available for comparison by the plan fiduciary. Another commentator suggested that this condition would be difficult for the borrower to monitor since it would require that all agreements entered into with employee benefit plans be compared with all other agreements negotiated at arms's length.

The Department believes that an arm's length standard is necessary for the protection of plan participants. However, in light of these comments, the Department has modified this condition of the exemption to require that the terms of the written loan agreement are at least as favorable to the plan as an arm's length transaction with an unrelated party would be. The Department believes that a fiduciary who causes a plan to engage in a securities lending transaction, as contemplated in this exemption, should be able to comply with the terms of the condition as adopted.

F. Paragraph 5—Reasonable Fee

Many commentators objected to that portion of the condition contained in paragraph 6 of the proposed exemption that requires, in order for a securities lending transaction to be covered by the exemption, that the plan must receive "a reasonable fee that is related to the value of the borrowed securities and the duration of the loan * * *" Several of the commentators stated that it was their belief that this condition implies either that the borrower will make a specifically defined payment to the plan which is dependent on the value of the borrowed securities and the duration of the loan, or, in the case of cash collateral, that a specfied rate of return will be provided or guaranteed by the borrower. The commentators indicated that if the plan receives cash collateral from the borrower, it would not, in that case, receive a "reasonable fee" from the borrower. Instead, the amount of compensation the plan would realize from its securities loan would depend upon the plan's ability to invest the collateral during the term of the loan.[4]

Some commentators suggested that because of the use of cash collateral, the exemption should be modified so that the concept of a "reasonable fee" includes the opportunity for the plan to receive a return generated by the investment of the cash collateral, regardless of whether any return is, in fact, achieved.

In view of the recognized practice of providing compensation to lenders through the lenders' investment of cash collateral, the Department has modified the exemption to provide that an arrangement in which a plan derives its compensation through the investment of cash collateral is a compensation method contemplated by the exemption. In instances where the plan has the opportunity to use cash collateral for investments, the Department has further modified the exemption to permit the payment of a loan rebate fee by the plan, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party.

The Department has made these changes because it recognizes that the opportunity to invest cash collateral may be of value to a lending plan, and to that extent could be considered part or all of the consideration for the lending of securities. However, the Department notes that, where the lending plan agrees to pay to the borrower a periodic rebate fee in the form of a fixed percentage of the value of the collateral, the value of that obligation must be offset against the less certain value of the possible return that the plan may obtain through investment of the collateral in order to ascertain the value of the consideration derived by the plan in the arrangement. Plan fiduciaries, therefore, should be mindful of the above in deciding whether to engage in a securities lending transaction that involves the payment of a fixed loan rebate or similar fee.

G. Paragraph 6—Report of Market Value

The first portion of paragraph 7 of the proposed exemption contained a condition that would require the borrower in a securities lending transaction to furnish to the lending plan by the close of each business day, during the term of the loan, a report of the market value of all collateral and the market value of all borrowed securities at the close of trading on the previous business day. Regarding this condition, the Department stated in the preamble to the proposed exemption that while it believed that daily reporting would be an important protection for plan participants, it appeared to the Department that requiring daily reports from the borrower might not be necessary in all securities lending arrangements.

The Department specifically invited comments on this aspect of the proposal. Most of the commentators stated that the requirement of a daily determination by the borrower of the sufficiency of the market value of the borrowed securities and of the underlying collateral ("marking-to-market") would be an unjustified delegation to the borrower of the plan fiduciary's responsibility, and would place the borrower in a conflict of interest position. Moreover, several commentators indicated that a prudent plan fiduciary would verify the accuracy of the borrower's determinations and that, therefore, requiring the borrower to mark-to-market would result in a duplication of effort.

Some commentators also indicated that it is customary practice in securities lending transactions for the lender or some third party to perform the marking-to-market. In addition, several commentators indicated that if the borrower were required to provide market valuations to the lender, the additional paperwork and time involved would place employee benefit plans at a competitive disadvantage. Finally, several commentators stated that it was their belief that the requirement of daily marking-to-market was unnecessary for the plans' protection and unduly burdensome for the borrower.

On the basis of the comments, the Department has decided to delete the condition requiring daily reports. The Department's decision to eliminate this requirement, however, does not relieve the plan fiduciary of its general fiduciary responsibility to monitor the market value of the loaned securities and the collateral to ensure that the plan is

[4] However, in consideration for the lending plan's right to invest the cash collateral and to retain the proceeds of such investment, the lender customarily agrees to remit a fee (generally called a "loan rebate fee") which is established by negotiation between the parties prior to the securities loan, and generally is expressed as an annualized percentage of the cash collateral (which is fixed for the term of the loan). The loan rebate fee is payable in full and is not dependent upon the income which the lender realizes by investing the collateral.

adequately protected during the term of the loan.

H. Paragraph 7—Return of Securities Upon Termination

Under the proposed exemption, the securities loan may be terminated by the plan at any time, whereupon the borrower is required to deliver to the plan certificates for securities that are identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) within the customary delivery period for such securities, or five business days, whichever is lesser. The Department received three comments concerning this condition. One of the commentators suggested, in view of the fact that deliveries of securities are frequently made through depositories by book entries, with no physical delivery involved, that the Department should modify this condition to permit "delivery" of certificates through the use of book entries. In light of this comment, the Department has revised this condition to permit "delivery" of borrowed securities through the use of book entries. This change is consistent with the modifications, discussed above, relating to delivery of securities at the beginning of the loan transaction.

Another commentator suggested that the condition requiring delivery of certificates identical to the borrowed securities or "the equivalent thereof" is ambiguous, and should be modified to require only the return of certificates for securities which are "identical" to the borrowed securities. The purpose of the condition in the proposal concerning "equivalent" securities is to encompass situations in which the issuer of the borrowed securities has experienced a recapitalization, merger or other reorganization during the term of the loan. In these situations, it is possible that certificates "identical" to those borrowed either no longer exist or do not fully represent, at the time of termination of the loan, the rights of the holders of the borrowed securities. For example, in the instance of a stock split in which two new shares of stock are issued in place of one share of original stock, delivery by the borrower of the original number of shares lent by the plan would not satisfy this condition of the exemption. Consequently, the Department has decided not to accept this comment.

One commentator recommended that the lending plan be required to notify the borrower in writing of its desire to terminate a particular loan. The commentator stated that the purpose of this recommendation is to insure that an accurate record is available to complement the written loan agreement. It is the Department's belief that this suggestion would not necessarily be in the interests of the plan involved, because such a requirement might, in some instances, cause an unnecessary delay in notifying the borrower of the plan's desire to terminate the loan. Therefore, the Department has determined not to revise the exemption in this regard.

One commentator also suggested that the Department shorten the amount of time within which the borrower must return the securities to three business days, because one of the events that would trigger a termination of the lending arrangement by the plan would be a sale by the plan of the borrowed securities. Since the customary delivery period for corporate stocks and bonds is five business days, the commentator stated that a shortened time for delivery would enable the plan to be assured that it has the securities necessary to complete a contemplated sale transaction.

Nevertheless, the Department understands that it is customary in securities lending transactions for a lender to require delivery of borrowed securities within five business days. The Department is not persuaded that is is necessary to require, under all circumstances, a shortened period of time for delivery of securities as a condition of the exemption, although the terms of the exemption do not prevent the parties to a securities lending transaction from negotiating a shorter delivery period. Therefore, the Department has determined not to adopt this suggestion.

I. Paragraph 8—Failure to Return Securities Upon Termination

The conditions in this paragraph, as proposed, provided that in the event the loan is terminated, and the borrower fails to return the borrowed securities or the equivalent thereof within the customary delivery period for such securities or five business days, whichever is lesser, (1) the plan may, under the terms of the loan agreement, purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase, and (2) the borrower must pay to the plan the amount of any remaining obligations and expenses not covered by the collateral, plus interest at a reasonable rate.

The Department received one comment on this paragraph. The commentator suggested that in the event of a termination of the loan and the failure of the borrower to return the borrowed securities, the borrower be expressly given the option, as a condition of the exemption, of replacing any non-cash collateral held by the plan with cash collateral equal to the then current market value of the securities borrowed. Although the Department has no objection to allowing the replacement of non-cash collateral with cash, it believes such an exchange should be permissible (and has revised the exemption accordingly) only if (1) the cash received by the plan is equal to or greater than the market value of the collateral at the time of the exchange, and (2) the exchange is approved by the plan fiduciary.

The Department also has made a minor change to this condition to require the borrower to deliver securities in less than either the customary delivery period or five business days, if such shorter period is negotiated by the parties to the securities lending transaction.

J. Fee Arrangement

The furnishing of services to a plan for a fee by a party in interest, including a trustee or other fiduciary, is prohibited by sections 406(a)(1)(C) of the Act. Section 408(b)(2) of the Act and the regulations promulgated thereunder provide exemptions from the restrictions of sections 406(a) for the provision of services to a plan by a party in interest if certain conditions are met.[5] The Department explained in the preamble to the proposed exemption that certain arrangements for the provision of securities lending services may also involve violations of section 406(b)(1) of the Act, which prohibits a fiduciary of a plan from dealing with the assets of the plan in its own interest or for its own account.[6] The exemption provided by section 408(b)(2) does not, however, provide relief from the prohibitions of sections 406(b)(1).[7] Nevertheless, section 408(b)(6) of the Act exempts from the restrictions of sections 406(a) and 406(b)(1) the provision of ancillary services by a bank or similar financial institution to a plan for which it is a fiduciary, if certain conditions are met.[8]

The Department stated in the preamble to the proposed exemption that it is its position, based on

[5] 29 CFR 2550.408b–2.

[6] *See*, ERISA Advisory Opinion 79–111A, dated February 23, 1979.

[7] *See*, regulation cited in note 5, supra.

[8] See 29 CFR 2550.408b–6.

information contained in the applications, that the provision of securities lending services to a plan by a bank or similar financial institution that exercises discretionary authority or control respecting management of the plan's assets which include securities, is an ancillary service within the meaning of section 408(b)(6) of the Act.

Therefore, the Department concluded, a trustee or other fiduciary may provide securities lending services to a plan for an additional fee if: (1) the transaction meets the requirements of section 408(b)(2) and does not constitute a violation of sections 406(b), or (2) the fiduciary is a bank or similar financial institution, the transaction meets the requirements of section 408(b)(6) and the transaction does not constitute a violation of section 406(b)(3).

The Department noted that it had made no determination as to whether any particular fee arrangement, or class thereof, would satisfy the conditions of section 408(b)(6). The Department also stated that whether a fee arrangement satisfies the conditions of either of the statutory exemptions discussed above would depend on the facts and circumstances surrounding that arrangement.

Since none of the applicants requested relief from any specific prohibited transaction provision of the Act or Code for the provision of securities lending services to a plan by a trustee or other fiduciary for a fee, and because the Department was not persuaded, on the basis of the applications, that any relief, beyond that provided by the statutory exemptions discussed above, was necessary or appropriate, no such relief was included in the proposed class exemption.

The Department received many comments concerning the discussion in the preamble regarding the provision of securities lending services by a fiduciary for an additional fee. One commentator asserted that since the Department has not issued "specific guidelines" for section 408(b)(6) purposes, reliance on the statutory exemption provided in that section exposes banks or similar financial institutions to "second-guessing" as to what the guidelines will be and provides no assurance as to the availability of the exemption. Two commentators suggested that the exemption should expressly provide for the payment of reasonable compensation to trustees and other fiduciaries for the provision of securities lending services to plans. The commentators stated that it was their belief that trustees and other fiduciaries might be reluctant to undertake the additional costs necessary to establish and maintain a securities lending program without the Department's express assurance that such an arrangement would be exempt from the prohibitions of sections 406(b)(1).

Several commentators also noted that to the extent section 408(b)(6) does provide relief from sections 406(b)(1) for the provision of securities lending services by banks or similar financial institutions, this interpretation would provide such institutions with a competitive advantage over other institutional fiduciaries.

In view of the uncertainty concerning the availability of the exemption provided by section 408(b)(6), the Department has decided it may be appropriate to provide administrative relief from section 406(b)(1) for the payment of compensation for the provision of securities lending services.

However, the Department did not propose relief from section 406(b)(1) at the time the class exemption was proposed, and, pursuant to the requirements of section 408(a) of the Act, the Department is required to offer interested persons an opportunity to present their views and an opportunity for a hearing before granting an exemption from section 406(b). Therefore, in order not to delay the publication of an exemption from section 406(a) to permit securities lending transactions, the Department has decided to grant the exemption described herein, and to simultaneously publish elsewhere in this issue of the **Federal Register** notice of a class exemption from section 406(b)(1) for the payment of compensation in connection with the provision of securities lending services.

K. Effective Date

The individual class exemption regarding securities lending granted to the Grumman Corp. Pension Trust (Grumman) (Prohibited Transactions Exemption 79-23, 44 FR 31750, June 1, 1979) provides, by its terms, that it would terminate upon the "final disposition" of this class exemption. In order that Grumman is given sufficient notice to make any necessary changes in its securities lending program, the "final disposition" of this class exemption, for purposes of Prohibited Transaction Exemption 79-23, will be deemed to occur 30 days after the effective date of this class exemption.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and the Code. These provisions include any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things, require a fiduciary to discharge his duties respecting the plan solely in the interest of participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) This exemption does not extend to transactions prohibited under section 406(b) of the Act and section 4975(c)(1)(E) and (F) of the Code;

(3) This exemption is supplemental to and not in derogration of any other provisions of the Act or the Code, including statutory or adminstrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The class exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption.

Exemption

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code, and based upon the entire record including the written comments submitted in response to the notice of proposed class exemption published on April 11, 1980, and to the notice of a reopening of the comment period published June 24, 1980, the Department makes the following determinations:

(a) The class exemption set forth herein is administratively feasible;

(b) it is in the interest of plans and of their participants and beneficiaries; and

(c) it is protective of the rights of participants and beneficiaries of plans.

Accordinly, the following exemption is hereby granted under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in ERISA Procedure 75-1. Neither the borrower nor an affiliate of the borrower has discretionary authority or control with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3-21(c)) with respect to those assets:

2. The plan receives from the borrower (either by physical delivery or by book entry in a securities depository) by the close of the lending fiduciary's business on the day in which the securities lent are delivered to the borrower, collateral consisting of cash, securities issued or guaranteed by the United States Government or its agencies, or irrevocable bank letters of credit issued by a person other than the borrower or an affiliate thereof, or any combination thereof, having, as of the close of business on the preceding business day, a maket value equal to not less than 100 percent of the then market value of the securities lent;

3. Prior to the making of any such loan, the borrower shall have furnished the lending fiduciary with (1) the most recent available audited statement of the borrower's financial condition, (2) the most recent available unaudited statement of its financial condition (if more recent than such audited statement), and (3) a representation that, at the time the loan is negotiated, there has been no material adverse change in its financial condition since the date of the most recent financial statement furnished to the plan that has not been disclosed to the lending fiduciary. Such representation may be made by the borrower's agreeing that each such loan shall constitute a representation by the borrower that there has been no such material adverse change;

4. The loan is made pursuant to a written loan agreement, the terms of which are at least as favorable to the plan as an arm's-length transaction with an unrelated party would be. Such agreement may be in the form of a master agreement covering a series of securities lending transactions;

5. (a) The plan (1) receives a reasonable fee that is related to the value of the borrowed securities and the duration of the loan, or (2) has the opportunity to derive compensation through the investment of cash collateral. Where the plan has that opportunity, the plan may pay a loan rebate or similar fee to the borrower, if such fee is not greater than the plan would pay in a comparable transaction with an unrelated party;

(b) The plan receives the equivalent of all distributions made to holders of the borrowed securities during the term of the loan, including, but not limited to, cash dividends, interest payments, shares of stock as a result of stock splits and rights to purchase additional securities;

6. If the market value of the collateral at the close of trading on a business day is less than 100 percent of the market value of the borrowed securities at the close of trading on that day, the borrower shall deliver, by the close of business on the following business day, an additional amount of collateral (as described in paragraph 2) the market value of which, together with the market value of all previously delivered collateral, equals at least 100 percent of the market value of all the borrowed securities as of such preceding day.

Notwithstanding the foregoing, part of the collateral may be returned to the borrower if the market value of the collateral exceeds 100 percent of the market value of the borrowed securities, as long as the market value of the remaining collateral equals at least 100 percent of the market value of the borrowed securities;

7. The loan may be terminated by the plan at any time, whereupon the borrower shall deliver certificates for securities identical to the borrowed securities (or the equivalent thereof in the event of reorganization, recapitalization or merger of the issuer of the borrowed securities) to the plan within (1) the customary delivery period for such securities, (2) five business days, or (3) the time negotiated for such delivery by the plan and the borrower, whichever is lesser; and

8. In the event the loan is terminated, and the borrower fails to return the borrowed securities or the equivalent thereof within the time described in paragraph 7, above, (i) the plan may, under the terms of the loan agreement, purchase securities identical to the borrowed securities (or their equivalent as described above) and may apply the collateral to the payment of the purchase price, any other obligations of the borrower under the agreement, and any expenses associated with the sale and/or purchase, and (ii) the borrower is obligated, under the terms of the loan agreement, to pay, and does pay to the plan the amount of any remaining obligations and expenses not covered by the collateral plus interest at a reasonable rate.

Notwithstanding the foregoing, the borrower may, in the event the borrower fails to return borrowed securities as described above, replace non-cash collateral with an amount of cash not less than the then current market value of the collateral, provided such replacement is approved by the lending fiduciary.

If the borrower fails to comply with any condition of this exemption in the course of engaging in a securities lending transaction, the plan fiduciary who caused the plan to engage in such transaction shall not be deemed to have caused the plan to engage in a transaction prohibited by section 406(a)(1) (A) through (D) of the Act solely by reason of the borrower's failure to comply with the conditions of the exemption.

For purposes of this class exemption the term "affiliate" of another person shall include: (i) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such other person; (ii) Any officer, director, or partner, employee or relative (as defined in section 3(15) of the Act) of such other person; and (iii) Any corporation or partnership of which such other person is an officer, director or partner. For purposes of this definition the term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed in Washington, D.C. this 16th day of January, 1981.

Ian D. Lanoff,

Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.

[FR Doc. 81-2606 Filed 1-21-81; 11:39 am]

BILLING CODE 4510-29-M

Office of Federal Contract Compliance Programs

Compliance Responsibility for Equal Employment Opportunity; Correction

AGENCY: Office of Federal Contract Compliance Programs, Department of Labor.

ACTION: Final Notice, correction.

SUMMARY: On October 3, 1980, the Department of Labor published a Notice and attached Appendix B–80 to 41 CFR Part 60–4 (45 FR 65979) which set employment goals for minority workers in the construction industry. This notice makes corrections to Appendix B–80 published on October 3, 1980.

EFFECTIVE DATE: January 23, 1981.

FOR FURTHER INFORMATION CONTACT: James Cisco, Acting Director, Division of Program Policy, Office of Federal Contract Compliance Programs, Room C–3324, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210, Telephone (202) 523–9426.

Correction of Publication: The following corrections to Appendix B–80, 45 FR 65984, are made as follows:

1. In Economic area 012, New York, N.Y. SMSA 5460, the goal is 5.8.

2. In Economic Area 012, New York, N.Y., SMSA 5600, delete "NY New York City" following "Westchester."

3. In Economic Area 012, New York, N.Y., SMSA 5600, the goal is 22.6.

4. In Economic Area 154, Missoula, MT., SMSA 154, insert"; MT Lake" after "MT Silver Bow."

5. In Economic Area 005, Non-SMSA Counties, "IR" is corrected to "RI".

6. In Economic Area 034, Non-SMSA Counties, "Collecton" is corrected to "Collection".

7. In Economic Area 106, "MO Boone" is the line following "1740 Columbia, MO" rather than preceding it.

8. In Economic Area 111, Non-SMSA Counties, on the sixth line, "Spring" is corrected to "Springs".

9. In Economic Area 124, on the sixth line, "5TX" is corrected to "TX".

10. In Economic Area 126, on the sixth line, "4TX" is corrected to "TX".

Ray Marshall,

Secretary of Labor

Donald Elisburg,

Assistant Secretary, Employment Standards Administration.

Weldon J. Rougeau,

Director, Office of Federal Contract Compliance Programs.

Signed at Washington, D.C.,

[FR Doc. 81-2188 Filed 1-16-81; 2:18 pm]

BILLING CODE 4510-27-M

Office of the Secretary

Labor-Management Research Advisory Committee; Establishment

In accordance with the provisions of the Federal Advisory Committee Act and Office of Management and Budget Circular A-63 of March 1974, and after consultation with GSA, the Secretary of Labor has determined that the establishment of the Labor-Management Research Advisory Committee is in the public interest in connection with the responsibilities vested in the Department by the Act creating the Department of Labor, 29 U.S.C. 551 et seq., and subsequent enactments.

The Committee will advise the Secretary of Labor by (1) developing a richer dialogue among researchers, policymakers, and practitioners active in the area of labor-management relations and making recommendations for strengthening research efforts; and (2) helping update and advising on implementation of the research agenda of the Department and making recommendations on research reports.

The Committee will consist of 19 members: six academic researchers, six management representatives, six labor representatives, and the Assistant Secretary for Labor-Management Relations or his designee.

The Committee will function solely as an advisory body and in compliance with the provisions of the Federal Advisory Committee Act. Its charter will be filed under the Act on February 9, 1981.

Interested persons are invited to submit comments regarding the establishment of the Labor-Management Research Advisory Committee to Mrs. Ruth Morgenstern, Departmental Committee Management Officer, Department of Labor, Room S2517, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Signed at Washington, D.C., this 16th day of January 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-2400 Filed 1-19-81; 4:54 pm]

BILLING CODE 4510-29-M

[TA-W-7498, 7499, 7499A]

Americana Glass Company, Inc., et al.; Negative Determination on Reconsideration

On October 17, 1980, the Department issues an Affirmative Determination Regarding Application for Reconsideration for workers and former workers producing souvenir decals at Americana Glass Company and for workers producing decorative earthenware products at Queens China Company. Americana Art China Company is the selling arm of these two affiliates.

The petitioners claimed that increased imports of decals are causing declines in jobs in the Company's artistry department, and at Queens China, loss of jobs was due to increased Company imports of pottery to fill orders of merchandise normally filled with products made at Queens China.

The Department's review showed that workers at the Sebring, Ohio facilities of Americana Glass Company, Queens China Company and Americana Art China Company did not meet the "contribute importantly" criterion of the Trade Act of 1974 with respect to souvenir decals and decorated earthenware products. A customer survey revealed that customers who decreased purchases from Americana Art China and increased import purchases represented a very small portion of the Company's sales decline during the periods covered by the survey. The Department also conducted a survey with those customers purchasing decorated pottery directly from Queens China. The survey showed that these customers did not purchase imported earthenware pottery.

On reconsideration, the Department found that although Americana Art China and its affiliated facilities imported some merchandise over a period of years, most of the merchandise was imported because these facilities were unable to produce those items for various reasons. In the periods from 1978 through 1980, these imports represented less than one percent of the Companies' total purchases.

With respect to decals, the Department found that Americana Art China Company did import some decals, but only because those decals were not available locally. Further, Company-imported products did not replace those items produced by the Company.

Conclusion

After reconsideration, I reaffirm the original Notice of Determination Regarding Eligibility to Apply for Worker Adjustment Assistance to workers and former workers of Americana Glass Company, Inc., Queens China Company, Inc., and Americana Art China Company, Inc., Sebring, Ohio.

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

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1993 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-8861]

Anchor Fasteners, Inc.; Negative Determination Regarding Application for Reconsideration

By letter of November 16, 1980, (copy attached), one of the petitioners for the workers requested administrative reconsideration of the Department of Labor's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance for workers and former workers of Anchor Fasteners, Inc., Bedford Heights, Ohio. The determination was published in the **Federal Register** on October 31, 1980, (45 FR 72364).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) if it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts previously considered; or

(3) if, in the opinion of the Certifying Officer, a misrepresentation of facts or of the law justifies reconsideration of the decision.

One of the petitioners claims in his application for reconsideration that the reduction in domestic automobile manufacturing because of imported cars

is a basis for certification of firms in the industrial fastener industry.

The Department's review showed that the petition for workers at Anchor Fasteners, Inc., Bedford Heights, Ohio did not meet the "contributed importantly" test of the Trade Act. U.S. imports of industrial fasteners, which include nuts, bolts and large screws, decreased both absolutely and relative to domestic production in 1979 compared to 1978 and decreased absolutely in the first six months of 1980 compared to the same period in 1979. The Department's customer survey showed that customers who represented the preponderance of Anchor Fasteners' sales in 1979 and in the first five months of 1980 did not increase their reliance on imported industrial fasteners.

The Department grants that automobiles, whatever their origin—domestic or foreign, incorporate industrial fasteners; however, imports of the final product are not like or directly competitive with the component parts within the meaning of the Trade Act. The courts have sustained this position in at least one instance. Thus, imports of industrial fasteners must be considered in determining import injury to workers producing industrial fasteners at Anchor Fasteners, Inc., Bedford Heights, Ohio.

Conclusion

After review of the application and the investigative file, I conclude that there has been no error or misinterpretation of the law which would justify reconsideration of the Department of Labor's prior decision. The application is, therefore, denied.

Signed at Washington, D.C., this 12th day of January 1981.

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1694 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-9310-9311]

Chrysler Corporation; Amplex-Harper Plant, Detroit, Michigan; Affirmative Determination Regarding Application for Reconsideration

On December 22, 1980, the petitioner requested administrative reconsideration of the termination date specified in the Department of Labor's Certification Regarding Eligibility to Apply for Worker Adjustment Assistance for workers and former workers of Chrysler Corporation's Amplex-Harper plant in Detroit, Michigan and the Amplex Division Office also in Detroit, Michigan. This determination was published in the **Federal Register** on December 2, 1980, (45 FR 79952).

The petitioner claims that layoffs have occurred, because of increased imports, beyond the termination date, November 29, 1980, specified in the Department's Certification for workers at the Amplex Division Office in Detroit, Michigan and that other layoffs will occur at the Amplex-Harper plant in Detroit, Michigan on January 12, 1981.

Conclusion

After review of the application, I conclude that the petitioner's claim is of sufficient weight to justify reconsideration of the Department of Labor's prior decision. The application is, therefore, granted.

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

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1695 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-7924, 8529C, 8511-28, 8530-31, 8533-34]

Ford Motor Co., Dearborn, Michigan; Revised Determination Regarding Eligibility to Apply for Worker Adjustment Assistance

On December 1, 1980, the Department reopened the instant investigations on behalf of workers and former workers at certain support facilities of the Ford Motor Company, Dearborn, Michigan. The Department's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance in the instant cases was published in the **Federal Register** on December 12, 1980 (45 FR 81898).

The Department's original denials of certification of the workers at the instant support facilities was based on the finding that they did not produce an article within the meaning of Section 223(3) of the Trade Act of 1974 and they were not substantially integrated into the production of import-impacted Ford vehicles.

The Department reconsidered the denials following oral and written representations by the International Union of the United Auto Workers (UAW).

The UAW contended that Ford Parts Distribution Center (PDC) workers should have been certified because they worked for Ford, Ford vehicles were import-impacted, and PDC's warranty work made their activity "part and parcel" of the sale of the import-impacted vehicles. The UAW also argued that, since predelivery services are a prerequisite to the sale of Ford vehicles, the Ford Predelivery Service Corporation (PSC) workers should not be denied adjustment assistance just because independent dealers could perform these services themselves (The dealers had the option of preparing new Fords for retail sale or hiring PSC to do so.)

The Department's position, with respect to service workers generally, is that they may be certified eligible to apply for adjustment assistance only if an important cause of their separations was a reduction in demand for their services which (1) directly and substantially related to the articles adversely impacted by imports, and (2) originated at a facility of the same firm (or another firm related by ownership or control) at which workers independently meet the group eligibility requirements (Section 222 of the Trade Act of 1974). In this particular case, the Department's position is that the Ford Parts Distribution Center workers do not meet the above criteria but that some of the Ford Predelivery Service Workers do.

Ford Parts Distribution Center Workers

The Department recognizes two bases on which program coverage might be extended to workers at Ford Parts Distribution Centers (PDC's). One—an indirect link to import competition—would be if the parts activities were directly and substantially dependent on the production or sale of new import-impacted Ford vehicles.

The other—a direct link to import competition—would be if the parts activities were adversely affected by increased imports of parts like or directly competitive with those produced by Ford and handled by these workers.

(1) In its investigation, the Department found that virtually all of the activity of the Parts Distribution Centers was associated with providing parts to Ford vehicles which had already been sold. Direct import competition is felt at the point of sale and reflected back up the earlier stages in the manufacturing chain. While there may be an adverse, subsequent impact on follow-on parts activity—because of the import-related decline in new car sales—the reduced demand for such activity is less direct. The Centers are not a direct link in the production-sales chain but rather operate at a later stage subsequent to the sale of the new vehicles. The activities carried out by workers at the Parts Distribution Centers take place after title to the new vehicle has passed from Ford to the dealership or to the individual consumer. The impact of automobile import competition on replacement part operations might occur after a lag of several years. There is no evidence in the Trade Act of 1974 or in the legislative history that it was Congress' intent to extend

program coverage to these kinds of indirect and delayed import effects.

With respect to the warranty workers, who might under certain circumstances be eligible for assistance, the record shows that some of the parts handled by the PDCs are for warranty work, but the amount of activity by the PDCs associated with warranty does not constitute a substantial share of overall PDC activity. Moreover, the workers at the Centers are not separately identifiable along the lines of warranty versus non-warranty parts. The fact that the Centers engaged in some warranty work and that warranties may play a role in the promotion and sale of new cars would not provide an adequate basis for coverage.

(2) The parts handled by the Ford Parts Distribution Centers were predominantly produced by independent parts companies and not by Ford-owned plants which produce parts. Ford-owned facilities generally only produce parts as original equipment for Ford-assembled vehicles. The predominant share of Ford's own parts production is used for this purpose. Ford parts production for the replacement market or for warranty activity is not substantial. Under the circumstances, increased imports of directly competitive parts—if indeed there are any—would not provide an adequate basis for covering the workers at Ford's Parts Distribution Centers since most of the parts handled by the Ford depot workers are not parts produced by the Ford Motor Company.

In view of the above, it is concluded that increased imports of passenger cars and light trucks did not contribute importantly to the separation of workers at the Ford PDCs.

Predelivery Service Corporation

Workers at Ford Motor Company's Predelivery Service Corporation (PSC) perform the service of preparing new vehicles for sale following their shipment by sea or rail to a distribution point. Those services involve primarily cleaning new vehicles, checking them out for mechanical defects, and otherwise readying them for sale. PSC Centers enter into contracts with dealerships to perform these services.

On the one hand, the predominant number of dealerships with which PSC contracts are independent businesses. They are not Ford-owned. Title to domestically produced vehicles serviced by PSC has already passed from Ford to the independent dealership. Further, some of the vehicles which PSC workers prepare for delivery to the dealerships are Fords manufactured abroad, which makes them imports within the meaning of the Trade Act of 1974. Dealerships often do the new car prepping themselves and, regardless of whether the dealerships are Ford-owned or independent, they have the option of contracting with PSC to perform this service.

On the other hand, PSC workers are Ford employees, they service only Ford-produced vehicles, and predelivery services are an integral part of the sale of Ford vehicles. The Department found that most of the 1979 and 1980 Fords were adversely affected by increased import competition. It is likely that most of the domestic vehicles prepped for sale by PSC in the period under investigation were import-impacted vehicles. The reduction in demand for their services originated at Ford production facilities whose workers were certified eligible to apply for adjustment assistance because, to the extent there is less Ford auto production because of increased import competition, there is less demand for the car prepping services performed by PSC. Therefore, Ford predelivery services can properly be regarded as adversely affected by the loss of Ford sales due to increased import competition.

Of Ford's PSC facilities, those located at Houston, Texas (TA–W–8529B), Portsmouth, Virginia (TA–W–8529D), and Tampa, Florida (TA–W–8529A) exclusively serviced imported Ford vehicles in 1979. Increased company imports would have been correlated with sales increases, not decreases. PSC Headquarters in Detroit (TA–W–8529) oversees an operation most of which involves activity related to imported vehicles. At none of these facilities is there sufficient basis to certify the workers for adjustment assistance. At the Portland, Oregon (TA–W–8529C) and La Mirada, California (TA–W–7924) facilities, however, most of the vehicles serviced were domestically produced.

The greater weight of evidence supports certification of the PSC centers where a major share of the prepping activity involved domestically-produced vehicles. Therefore, it is concluded that increased imports of passenger cars and light trucks contributed importantly to the separation of workers at the La Mirada, California and Portland, Oregon facilities of PSC.

Coverage

Based on additional evidence, a review of the entire record, and in accordance with the provisions of the Act, I make the following revised determination:

After reconsideration, I reaffirm the original denial of eligibility to apply for adjustment assistance for all workers of Ford Motor Company's Parts Distribution Centers at the indicated locations below:

TAW	*Facility and location*
8511	Ford Parts & Service Division, Parts Redistribution Center, Wayne County, Detroit, Michigan
8512	Atlanta Parts Distribution Center, East Point, Georgia
8513	Boston Parts Distribution Center, Natik, Massachusetts
8514	Charlotte Parts Distribution Center, Charlotte, North Carolina
8515	Chicago Parts Distribution Center, Melrose Park, Illinois
8516	Cincinnati Parts Distribution Center, Cincinnati, Ohio
8517	Cleveland Parts Distribution Center, Cleveland, Ohio
8518	Dallas Parts Distribution Center, Carrollton, Texas
8519	Delaware Valley Parts Distribution Center, Pennsauken, New Jersey
8520	Denver Parts Distribution Center, Denver, Colorado
8521	Detroit Parts Distribution Center, Detroit, Michigan
8522	Houston Parts Distribution Center, Houston, Texas
8523	Jacksonville Parts Distribution Center, Jacksonville, Florida
8524	Kansas City Parts Distribution Center, Lenexa, Kansas
8525	Los Angeles Parts Distribution Center, Los Angeles, California
8526	Memphis Parts Distribution Center, Memphis, Tennessee
8527	National Parts Distribution Center, Livonia, Michigan
8528	New York Parts Distribution Center, Teterboro, New Jersey
8530	San Francisco Parts Distribution Center, Richmond, California
8531	Seattle Parts Distribution Center, Seattle, Washington
8533	Twin Cities Parts Distribution Center, Minneapolis, Minnesota
8534	Virginia Parts Distribution Center, Richmond, Virginia.

Further, I revise the original denial of eligibility for Ford Predelivery Service Corporation workers. All workers of Ford Motor Company's Predelivery Service Corporation's facilities at La Mirada, California (TA–W–7924) and Portland, Oregon (TA–W–8529C) who became totally or partially separated from employment on or after May 15, 1979, are eligible to apply for adjustment assistance under Title II, Chapter 2 of the Trade Act of 1974.

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

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1606 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-9026; 9246-48; 9250-51; 9253; 10,733; 10,735; 10,743-44; 10,748; 10,757; 10,761; 10,763; 10,766; 10,771-72; 10,775; 10,778; 10,781; 10,797; 10,799; 10,801-14; 10,818-44; 10,846-48]

General Motors Corp.; Amended Certification of Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974, the Department of Labor issued Certifications of Eligibility to Apply for Adjustment Assistance on October 10, 1980, applicable to all workers of certain designated support facilities of General Motors Corporation, Detroit, Michigan. the Certifications were published in the **Federal Register** on October 21, 1980, (45 FR 69600). The Department also issued Notices of Amended Certification of Eligibility to Apply for Worker Adjustment Assistance on November 14, 1980, (45 FR 75368) and on December 5, 1980, (45 FR 80602).

On the basis of additional information, the Office of Trade Adjustment Assistance, on its own motion, reviewed the certifications. The additional information revealed that significant layoffs occurred immediately before the impact date of July 1, 1980 set for the GM Central Offices located in Los Angeles, California, TA-W-10,748; Denver, Colorado, TA-W->10,743; Chicago, Illinois, TA-W-10,735; Flint, Michigan, TA-W-10,757; St. Louis, Missouri, TA-W-10,766; Union, New Jersey, TA-W-10,771; Moorestown, New Jersey, TA-W-10,772; Tarrytown, New York, TA-W-10,775; Cincinnati, Ohio, TA-W-10,778; and Milwaukee, Wisconsin, TA-W-10,799. Layoffs also occurred immediately before the impact dates of June 1, 1980 and October 1, 1979 set for workers at the GM Proving Grounds in Milford, Michigan and for workers at the Chevrolet Zone Sales Office in Denver, Colorado, TA-W-10,761 and TA-W-10,814, respectively. Two layoffs occurred several weeks before the impact date of June 1, 1980 set for workers at the GM Central Office in New York, New York TA-W-9250. These layoffs were not covered by the original impact dates set in the certifications immediately cited above.

The intent of the certifications is to cover all workers at the instant General Motors support facilities who were affected by the decline in production of import impacted GM vehicles. The Certifications, therefore, are amended to include new impact dates: June 1, 1980 for workers at GM Central Office in Los Angeles, California, TA-W-10,735; Denver, Colorado, TA-W-10,743; Chicago, Illinois, TA-W-10,748; Flint, Michigan, TA-W-10,757; St. Louis, Missouri, TA-W-10,766; Union, New Jersey, TA-W-10,771; Moorestown, New Jersey, TA-W-10,772; Tarrytown, New York, TA-W-10,775; Cincinnati, Ohio, TA-W-10,778; and Milwaukee, Wisconsin, TA-W-10,799; May 1, 1980 for workers at the GM Proving Grounds in Milford, Michigan, TA-W-10,761; September 1, 1979 for workers at the Chevrolet Zone Sales Office in Denver, Colorado, TA-W-10,814; and February 1, 1980 for workers at the GM Central Office in New York, New York, TA-W-9250.

The certifications applicable to TA-W-9250, TA-W-10,735, TA-W-10,743, TA-W-10,748, TA-W-10,757, TA-W-10,761, TA-W-10,766, TA-W-10,771, TA-W-10,772, TA-W-10,775, TA-W-10,778, TA-W-10,799 and TA-W-10,814 are hereby amended as indicated in the appendix and issued as follows:

All workers of the support facilities of General Motors Corporation listed in the appendix who became totally or partially separated from employment on or after the impact date listed in the Appendix and before November 1, 1980 are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

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

Appendix

Facility and TA-W-	Location	Impact date
GM Central Office:		
9250	New York, N.Y	Feb. 1, 1980.
10,735	Los Angeles, Calif.	June 1, 1980.
10,743	Denver, Colo	June 1, 1980.
10,748 GM	Chicago, Ill	June 1, 1980.
10,757	Flint, Mich	June 1, 1980.
GM Proving Grounds:		
10,761	Milford, Mich	May 1, 1980.
GM Central Office:		
10,766	St. Louis, Mo	June 1, 1980.
10,771	Union, N.J	June 1, 1980.
10,772	Moorestown, N.J	June 1, 1980.
10,775	Tarrytown, N.Y	June 1, 1980.
10,778	Cincinnati, Ohio	June 1, 1980.
10,799	Milwaukee, Wis	June 1, 1980.
Chevrolet Zone Sales Office:		
10,814	Denver, Colo	Sept. 1, 1980.

[FR Doc. 81-1697 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-7904]

Interstate United Corp.; Negative Determination Regarding Application for Reconsideration

By letter of November 5, 1980, after being granted a filing extension, the union for the workers requested administrative reconsideration of the Department of Labor's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance in the case of workers and former workers of that company. The determination was published in the **Federal Register** on July 28, 1980, (45 FR 52969).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) if it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) if it appears that the determination complained of was based on a mistake in the determination of facts previously considered; or

(3) if, in the opinion of the Certifying Officer, a misinterpretation of facts or of the law justifies reconsideration of the decision.

The union claims that although the cafeteria workers in the Chrysler plant where they provide food service do not produce an article, and were therefore denied eligibility to apply for adjustment assistance, some of the plant employees such as security guards and office workers who also do not produce an article, are receiving assistance. It also pointed out that the cafeteria employees work on equipment owned by the Chrysler Corporation and are governed by the same hours, holidays and work regulations as Chrysler employees. The union further claims that Chrysler dictates the menu selection and pricing and may even provide a subsidy.

The Department's review revealed that the Interstate United Corporation is engaged in providing food service and, as such, does not produce an article within the meaning of Section 222(3) of the Trade Act.

The Department does not agree with the union's claim that cafeteria workers of the Interstate United Corporation are under the control of Chrysler by virtue of the fact that (1) Chrysler controls menu selection and pricing and may even pay a subsidy to the subject firm, and (2) that the cafeteria workers are governed by the same hours of work, holidays, work regulations and use the same facilities (e.g. Credit Union) available to the employees who are on the Chrysler payroll. Since workers at Interstate United do not produce an article, they may be certified only if the Chrysler Corporation is the "workers' firm" within the meaning of Section 222 of the Act. Chrysler may be determined to be the "workers' firm" if Chrysler and Interstate United are related by ownership or by a substantial degree of proprietary control, or if the workers are *de facto* employees of Chrysler. Chrysler is not the "workers' firm" under either test. There is no element of ownership or control between the firms. The workers also are not *de facto* employees of Chrysler since all payroll transactions, personnel actions and employee benefits are under control of

Interstate United. The mere fact the Chrysler may exercise some degree of control over the menu or might make available some of the facilities open to Chrysler employees is not sufficient in itself to support a determination that Chrysler is the "workers' firm". Obviously, Chrysler is the "workers' firm" for its own security guards and office workers. The Department sees no basis for certification of workers at Interstate United on the claim that Chrysler's security guards and office workers, who also do not produce an aritcle, are receiving trade adjustment assistance.

Conclusion

After review of the application and the investigative file, I conclude that there has been no error or misinterpretation of the law which would justify reconsideration of the Department of Labor's prior decision. The application is, therefore, denied.

Signed at Washington, D.C., this 12th day of January 1981.

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1698 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

Rockport Log & Shake

[TA-W-8120]

Negative Determination on Reconsideration

On October 2, 1980, the Department made an Affirmative Determination Regarding Application for Reconsideration for workers and former workers producing cedar shingles and shakes at Rockport Log and Shake Company, Copalis Crossing, Washington.

The petitioners principally claim that imports of Canadian shakes at substantially lower prices make it impossible for the subject firm to compete in the market without great loses to the firm. Claimants contend that this is the primary cause for the decreased demand for their products.

The Department's review of the investigative file revealed that workers at Rockport Log and Shake did not meet the "contributed importantly" test of the Trade Act of 1974. The Department's customer survey indicated that none of the major customers (which were cedar brokers) reduced purchases of cedar shakes and shingles from Rockport in 1979 compared to 1978 while increasing purchases of imported shakes and shingles over the same period.

In its reconsideration investigation, the Department conducted a secondary survey of Rockport Log and Shake's customers (i.e., customers of Rockport's customers). The secondary survey revealed that these customers, while decreasing purchases of domestically produced shingles and shakes in 1979 compared to 1978, also reduced their import purchases during the same period. Although these customers increased their import purchases in the January-September 1980 period compared to the same period in 1979, while decreasing their domestic purchases, these switches to imports occurred after Rockport Log and Shake had already ceased production in November, 1979.

Conclusion

After reconsideration, I reaffirm the original Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance to workers and former workers of Rockport Log and Shake Company, Copalis Crossing, Washington.

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

James F. Taylor,

Director, Office of Management Administration and Planning.

[FR Doc. 81-1699 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

[TA-W-7833]

Sealed Power Corp., St. Johns Division; Negative Determination Regarding Application for Reconsideration

By an application dated December 4, 1980, the petitioner requested administrative reconsideration of the Department of Labor's Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance in the case of former workers producing piston rings for automobiles at Sealed Power Corporation, St. Johns Division, Muskegon, Michigan. The determination was published in the **Federal Register** on November 13, 1980 (45 FR 78298).

Pursuant to 29 CFR 90.18(c), reconsideration may be granted under the following circumstances:

(1) If it appears on the basis of facts not previously considered that the determination complained of was erroneous;

(2) If it appears that the determination complained of was based on a mistake in the determination of facts previously considered; or

(3) If, in the opinion of the Certifying Officer, a misrepresentation of facts or of the law justifies reconsideration of the decision.

The petitioner generally contends that, since piston rings are an integral part of the whole automobile, it would be logical to also entitle workers producing automobile piston rings to trade adjustment assistance as has already been done for workers in the American automakers' parts and assembly plants.

The Department's review of the investigative file revealed that U.S. imports of piston rings, like or directly competitive with those produced by Sealed Power's St. John Division, were negligible during the period under investigation. The Department's survey of Sealed Power's customers showed that most responding customers did not purchase imported piston rings during the period under investigation. A customer who did import piston rings showed that those imports were an insignificant proportion of that customer's total purchases of piston rings.

Imports of piston rings for automobiles must be considered by themselves in determining import injury to workers who manufactured this product at the St. Johns Division of Sealed Power Corporation, Muskegon, Michigan. Imported automobiles cannot be considered "like or directly competitive" with piston rings for automobiles even though they may have had a secondary impact on supplies of component parts to domestic automakers. The courts have concluded that imported finished articles are not like or directly competitive with domestic component parts thereof. *United Shoe Workers of America, AFL-CIO v. Bedell, 506 F 2d. 174 (1974).* In that case, the court held that imported finished women's shoes were not like or directly competitive with shoe counters, a component of footwear.

With respect to the issue of the Department's coverage of Chrysler's and other automakers' parts producing workers, it should be noted that in those instances the parts workers' firm—as that term is used in Section 222 of the Trade Act of 1974—produced automobiles and that the Department has found that there have been increased imports of directly competitive automobiles which contributed importantly to the workers' separations. In the case of workers for independent parts producing firms the Department is only able to consider the workers as employees of the parts producing firm. It is not able to consider them as employees of a firm which produces automobiles. Thus, it cannot take into account auto imports (or the piston rings contained in imported

automobiles) in determining whether or not workers of independent parts producing firms are eligible for trade adjustment assistance.

Conclusion

After review of the application and the investigative file, I conclude that there has been no error or misinterpretation of fact or misinterpretation of the law which would justify reconsideration of the Department of Labor's prior decision. The application is, therefore, denied.

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

C. Michael Aho,

Director, Office of Foreign Economic Research.

[FR Doc. 81-1700 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance

In accordance with Section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor herein presents summaries of determinations regarding eligibility to apply for worker adjustment assistance issued during the period January 5–9, 1981.

In order for an affirmative determination to be made and a certification of eligibility to apply for adjustment assistance to be issued, each of the group eligibility requirements of Section 222 of the Act must be met.

(1) that a significant number of proportion of the workers in the workers' firm, or an appropriate subdivision thereof, have become totally or partially separated,

(2) that sales or production, or both, of the firm or subdivision have decreased absolutely, and

(3) that increases of imports of articles like or directly competitive with articles produced by the firm or appropriate subdivision have contributed importantly to the separations, or threat thereof, and to the absolute decline in sales or production.

NEGATIVE DETERMINATIONS

In each of the following cases it has been concluded that at least one of the above criteria has not been met.

TA-W-10,919; Ventcon, Inc., Allen Park, MI

Investigation revealed that criterion (3) has not been met. Aggregate U.S. Imports of air conditioning and heating ducts are negligible.

TA-W-8706; United Screw and Bolt, Cleveland, OH

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-8263; The B.F. Goodrich Co., Marion, OH

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-8096; Forest Hills Sportswear Co., Lawrenceburg, TN

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-10,649; Goodyear Tire and Rubber Co., Danville, VA

Investigation revealed that criterion (3) has not been met.

TA-W-8370; Capac Manufacturing Co., Capac, MI

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-9650; Sheller-Globe Corp., Niles, MI

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-8720; Escan Corp., Escanaba, MI

Investigation revealed that criterion (3) has not been met. A survey of customers indicated that increased imports did not contribute importantly to worker separations at the firm.

TA-W-11,668; Legislative Services Bureau, Lansing, MI

Investigation revealed that criterion (3) has not been met. Aggregate U.S. Imports of documents are negligible.

AFFIRMATIVE DETERMINATIONS

TA-W-8126; GK Technologies, Inc., Powal, VT

With respect to workers producing insulated wire, investigation revealed that criterion (3) has not been met. A survey of customers revealed that increased imports did not contribute importantly to separations of workers producing insulated wire at the firm.

A certification was issued applicable to all workers producing cordsets at the subject firm who were separated on or after April 1, 1980.

I hereby certify that the aforementioned determinations were issued during the period January 5–9, 1981. Copies of these determinations are available for inspection in Room S-5314, U.S. Department of Labor, 200 Constitution Avene, NW, Washington, D.C. 20210 during normal working hours or will be mailed to persons who write to the above address.

Dated: January 12, 1980.

Marvin M. Fooks

Director, Office of Trade Adjustment Assistance.

[FR Doc. 81-1701 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-28-M

Occupational Safety and Health Administration

Advisory Committee on Construction Safety and Health; Meeting

Notice is hereby given that the Advisory Committee on Construction Safety and Health, established under Section 107(e)(1) of the Contract Work Hours and Safety Standards Act (40 U.S.C. 333) and Section 7(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656), will meet on March 10–11, 1981 in Room N5437, Frances Perkins Department of Labor Building, Washington, D.C. The meeting is open to the public and will begin at 9:00 a.m.

The agenda for the meeting will include discussion of proposed OSHA program directives that are relevant to the construction industry and a general discussion of construction safety and health matters.

Written data, views or arguments may be submitted, preferably with 20 copies, to the Division of Consumer Affairs. Any such submissions received prior to the meeting will be provided to the members of the Committee and will be included in the record of the meeting.

Anyone wishing to make an oral presentation should notify the Division of Consumer Affairs before the meeting. The request should state the amount of time desired, the capacity in which the person will appear, and a brief outline of the content of the presentation.

Oral presentations will be scheduled at the discretion of the chairman depending on the extent to which time permits. Communications may be mailed to Ken Hunt, Committee Management Officer, Office of Information and Consumer Affairs, OSHA, U.S. Department of Labor, Third Street and Constitution Avenue, NW., Room N3635, Washington, D.C. 20210, Phone: (202) 523-8024.

Materials provided to members of the Committee are available for inspection and copying at the above address.

Signed at Washington, D.C. this 16th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-2636 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-26-M

National Advisory Committee on Occupational Safety and Health; Full Committee Meeting and Subgroup Meeting

Notice is hereby given that the National Advisory Committee on Occupational Safety and Health (NACOSH) will meet on February 25–27, 1981 at the Frances Perkins Department of Labor Building, Room N4437, Third Street and Constitution Avenue, N.W., Washington, D.C. The meetings will begin at 9:00 a.m. the public is invited to attend.

The National Advisory Committee was established under Section 7(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 656) to advise the Secretary of Labor and the Secretary of Health, Education and Welfare on matters relating to the administration of the Act.

Wednesday, February 25, 1981 will be devoted to Subgroup meetings. The Subgroups will discuss:

1. Reproductive Hazards.
2. Safety and Health Effects of New Energy Technologies.
3. Information Systems for NIOSH/OSHA Priority Setting.

The agenda for February 26 and 27 will include reports on OSHA and NIOSH activities, a discussion of repeat violations, and discussions of other safety and health matters relating to OSHA and NIOSH.

Written data or views concerning these agenda items may be submitted to the Division of Consumer Affairs. Such documents which are received before the scheduled meeting dates, preferably with 20 copies, will be presented to the Committee and included in the official record of the proceedings.

Anyone who wishes to make an oral presentation should notify the Division of Consumer Affairs before the meeting date. The request should include the amount of time desired, the capacity in which the person will appear and a brief outline of the content of the presentation. Oral presentations will be scheduled at the discretion of the chairman of the Committee to the extent which time permits.

For additional information contact:

Clarence Page, Division of Consumer Affairs, Occupational Safety and Health Administration, 3rd Street and Constitution Avenue, N.W., Rm. N3635, Washington, D.C. 20210, Telephone 202/523–8024.

Official records of the meetings will be available for public inspection at the Division of Consumer Affairs.

Signed at Washington, D.C., this 16th day of January 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-2635 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-26-M

NUCLEAR REGULATORY COMMISSION

Criteria for Guidance of States and NRC in Discontinuance of NRC Regulatory Authority and Assumption Thereof by States Through Agreement

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Statement of Policy.

SUMMARY: The Nuclear Regulatory Commission has revised its statement of policy regarding criteria for guidance of States and NRC in discontinuance of NRC regulatory authority and assumption of regulatory authority by States through agreement. This action is necessary to make editorial changes to update the policy statement, to allow States to enter into agreements for low-level waste only, and to incorporate the provisions and requirements of the Uranium Mill Tailings Radiation Control Act of 1978. Adoption of this policy will allow interested States to enter into agreements with the NRC and regulate low-level waste sites only. Additionally, those States that meet the criteria for the regulation of uranium mills and tailings may exercise regulatory authority over these sources as provided by the Uranium Mill Tailings Radiation Control Act of 1978, as amended.

The revised statement of policy reflects the following principal changes:

1. Modification of Criterion 27 to allow a State to seek an agreement for the regulation of low-level waste as a separate category.

2. Inclusion of additional criteria for States wishing to continue regulating uranium and thorium processors and mill tailings after November 8, 1981.

3. Editorial and clarifying changes to make the statement current.

DATES: This policy statement is effective January 23, 1981.

FOR FURTHER INFORMATION CONTACT: John F. Kendig, Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, telephone: 301–492–7767.

SUPPLEMENTARY INFORMATION:

1. These criteria were developed to implement a program, authorized by Pub. L. 86–373 which was enacted in the form of a new section to the Atomic Energy Act (Section 274) and approved by the President on September 23, 1959 and amended by Pub. L. 95–604 approved November 8, 1978. These criteria are intended to indicate factors which the Commission intends to consider in approving new or amended agreements. They are not intended to limit Commission discretion in viewing individual agreements or amendments. In accordance with these statutory provisions, when an agreement between a State and the NRC is effected, the Commission will discontinue its regulatory authority within that State over one or more of the following materials: byproduct material as defined in Section 11e(1) of the Act (radioisotopes), byproduct material as defined in Section 11e(2) of the Act (mill tailings or wastes), source material (uranium and thorium), special nuclear material (uranium 233, uranium 235 and plutonium) in quantities not sufficient to form a critical mass and permanent disposal of low-level waste containing one or more of the materials stated above but not including mill tailings.

2. An agreement may be effected between a State and NRC: (1) upon certification by the Governor that the State has a program for the control of radiation hazards adequate to protect the public health and safety with respect to the materials within the State covered by the proposed agreement and the State desires to assume regulatory responsibility for such materials; and (2) after a finding by the Commission that the State program is in accordance with the requirements of subsection o of section 274 and in all other respects compatible with the Commission's program for the regulation of such materials, and is adequate to protect the public health and safety with respect to the materials covered by the proposed agreement. It is also necessary that the State have enabling legislation authorizing its Governor to enter into such an agreement.

3. The original criteria were published on March 24, 1961 (26 FR 2537) after discussions with various State officials and other State representatives, to provide guidance and assistance to the States and the AEC (now NRC) in developing a regulatory program which would be compatible with that of the NRC. The criteria were circulated among States, Federal agencies, labor and industry, and other interested groups for comment.

4. The criteria require that the State authority consider the total accumulated occupational radiation exposure of individuals. To facilitate such an appoach, it is the view of the NRC that an overall radiation protection program is desirable. The maximum scope of

each State's radiation protection program is not, however, a necessary or appropriate subject for coverage in the criteria. Consequently, the criteria are silent on the question of whether a State should have a total regulatory program covering all sources of radiation, including those not subject to control by the NRC under the Atomic Energy Act, such as x-rays, radium, accelerators, etc.

5. These revised criteria provide for entering into an agreement for a separate category of materials, namely, low-level waste material in permanent disposal facilities. They also provide new criteria for States wishing to continue regulating uranium and thorium processing and the wastes resulting therefrom under the provisions of the Uranium Mill Tailings Radiation Control Act of 1978 (Pub. L. 95-604) after November 8, 1981. The revised criteria also contain a number of editorial changes such as changing AEC to NRC where appropriate to conform to present practice and law.

6. Inquiries about details of the criteria or other aspects of the NRC Federal-State Relations Program should be addressed to the Office of State Programs, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555.

Criteria [1]

Objectives

1. *Protection.* A State regulatory program shall be designed to protect the health and safety of the people against radiation hazards.

Radiation Protection Standards [2]

2. *Standards.* The State regulatory program shall adopt a set of standards for protection against radiation, which shall apply to byproduct, source and special nuclear materials in quantities not sufficient to form a critical mass.

3. *Uniformity in Radiation Standards.* It is important to strive for uniformity in technical definitions and terminology, particularly as related to such things as units of measurement and radiation dose. There shall be uniformity on maximum permissible doses and levels of radiation and concentrations of radioactivity, as fixed by Part 20 of the NRC regulations based on officially approved radiation protection guides.

4. *Total Occupational Radiation Exposure.* The regulatory authority shall consider the total occupational radiation exposure of individuals, including that from sources which are not regulated by it.

5. *Surveys, Monitoring.* Appropriate surveys and personnel monitoring under the close supervision of technically competent people are essential in achieving radiological protection and shall be made in determining compliance with safety regulations.

6. *Labels, Signs, Symbols.* It is desirable to achieve uniformity in labels, signs and symbols, and the posting thereof. However, it is essential that there be uniformity in labels, signs, and symbols affixed to radioactive products which are transferred from person to person.

7. *Instruction.* Persons working in or frequenting restricted areas [3] shall be instructed with respect to the health risks associated with exposure to radioactive materials and in precautions to minimize exposure. Workers shall have the right to request regulatory authority inspections as per 10 CFR 19, section 19.16 and to be represented during inspections as specified in section 19.14 of 10 CFR 19.

8. *Storage.* Licensed radioactive material in storage shall be secured against unauthorized removal.

9. *Waste Disposal.* The standards for the disposal of radioactive materials into the air, water, and sewers, and burial in the soil shall be in accordance with Part 20. Holders of radioactive material desiring to release or dispose of quantities in excess of the prescribed limits shall be required to obtain special permission from the appropriate regulatory authority.

10. *Regulations Governing Shipment of Radioactive Materials.* The State shall to the extent of its jurisdiction promulgate regulations applicable to the shipment of radioactive materials, such regulations to be compatible with those established by the U.S. Department of Transportation and other agencies of the United States whose jurisdiction over interstate shipment of such materials necessarily continues. State regulations regarding transportation of radioactive materials must be compatible with 10 CFR Part 71.

11. *Records and Reports.* The State regulatory program shall require that holders and users of radioactive materials (a) maintain records covering personnel radiation exposures, radiation surveys, and disposals of materials; (b) keep records of the receipt and transfer of the materials; (c) report significant incidents involving the materials, as prescribed by the regulatory authority; (d) make available upon request of a former employee a report of the employee's exposure to radiation; (e) at request of an employee advise the employee of his or her annual radiation exposure; and (f) inform each employee in writing when the employee has received radiation exposure in excess of the prescribed limits.

12. *Additional Requirements and Exemptions.* Consistent with the overall criteria here enumerated and to accommodate special cases or circumstances, the State regulatory authority shall be authorized in individual cases to impose additional requirements to protect health and safety, or to grant necessary exemptions which will not jeopardize health and safety.

Prior Evaluation of Uses of Radioactive Materials

13. *Prior Evaluation of Hazards and Uses, Exceptions.* In the present state of knowledge, it is necessary in regulating the possession and use of byproduct, source and special nuclear materials that the State regulatory authority require the submission of information on, and evaluation of, the potential hazards and the capability of the user or possessor prior to his receipt of the materials. This criterion is subject to certain exceptions and to continuing reappraisal as knowledge and experience in the atomic energy field increase. Frequently there are, and increasingly in the future there may be, categories of materials and uses as to which there is sufficient knowledge to permit possession and use without prior evaluation of the hazards and the capability of the possessor and user. These categories fall into two groups—those materials and uses which may be completely exempt from regulatory controls, and those materials and uses in which sanctions for misuse are maintained without pre-evaluation of the individual possession or use. In authorizing research and development or other activities involving multiple uses of radioactive materials, where an institution has people with extensive training and experience, the State regulatory authority may wish to provide a means for authorizing broad use of materials without evaluating each specific use.

14. *Evaluation Criteria.* In evaluating a proposal to use radioactive materials, the regulatory authority shall determine the adequacy of the applicant's facilities

[1] The criteria were first adopted in February 1961 (26 FR 2537, March 24, 1961, and amended in November 1965 (30 FR 15044, December 4, 1965). Minor editorial changes were made in June 1968 to reflect the authority of the U.S. Department of Transportation and Organization change in NCRP.

[2] Suggested State regulations and State legislation will give content to all criteria enunciated.

[3] "Restricted area" means any area access to which is controlled by the licensee for the purpose of radiation protection of individuals from exposure to radiation and radioactive materials. "Restricted area" shall not include any area used as residential quarters, although a separate room or rooms in a residential building may be set apart as a restricted area.

and safety equipment, his training and experience in the use of the materials for the purpose requested, and his proposed administrative controls. States should develop guidance documents for use by license applicants. this guidance should be consistent with NRC licensing and regulatory guides for various categories of licensed activities.

15. *Human Use.* The use of radioactive materials and radiation on or in humans shall not be permitted except by properly qualified persons (normally licensed physicians) possessing prescribed minimum, experience in the use of radioisotopes or radiation.

Inspection

16. *Purpose, Frequency.* The possession and use of radioactive materials shall be subject to inspection by the regulatory authority and shall be subject to the performance of tests, as required by the regulatory authority. Inspection and testing is conducted to determine, and to assist in obtaining, compliance with regulatory requirements.

Freqency of inspection shall be related directly to the amount and kind of material and type of operation licensed, and it shall be adequate to insure compliance.

17. *Inspections Compulsory.* Licensees shall be under obligation by law to provide access to inspectors.

18. *Notification of Results of Inspection.* Licensees are entitled to be advised of the results of inspections and to notice as to whether or not they are in compliance.

Enforcement

19. *Enforcement.* Possession and use of radioactive materials should be amenable to enforcement through legal sanctions, and the regulatory authority shall be equipped or assisted by law with the necessary powers for prompt enforcement. This may include, as appropriate, administrative remedies looking toward issuance of orders requiring affirmative action or suspension or revocation of the right to possess and use materials, and the impounding of materials, the obtaining of injunctive relief, and the imposing of civil or criminal penalties.

Personnel

20. *Qualifications of Regulatory and Inspection Personnel.* The regulatory agency shall be staffed with sufficient trained personnel. Prior evaluation of applications for licenses or authorizations and inspection of licensees must be conducted by persons possessing the training and experience relevant to the type and level of radioactivity in the proposed use to be evaluated and inspected. This requires competency to evaluate various potential radiological hazards associated with the many uses of radioactive material and includes concentrations of radioactive materials in air and water, conditions of shielding, the making of radiation measurements, knowledge of radiation instruments—their selection, use and calibration—laboratory design, contamination control, other general principles and practices of radiation protection, and use of management controls in assuring adherence to safety procedures. In order to evaluate some complex cases, the State regulatory staff may need to be supplemented by consultants or other State agencies with expertise in geology, hydrology, water quality, radiobiology and engineering disciplines.

To perform the functions involved in evaluation and inspection, it is desirable that there be personnel educated and trained in the physical and/or life sciences, including biology, chemistry, physics and engineering, and that the personnel have had training and experience in radiation protection. For example, the person who will be responsible for the actual performance of evaluation and inspection of all of the various uses of byproduct, source and special nuclear material which might come to the regulatory body should have substantial training and extensive experience in the field of radiation protection. It is desirable that such a person have a bachelor's degree or equivalent in the physical or life sciences, and specific training-radiation protection.

It is recognized that there will also be persons in the program performing a more limited function in evaluation and inspection. These persons will perform the day-to-day work of the regulatory program and deal with both routine situations as well as some which will be out of the ordinary. These persons should have a bachelor's degree or equivalent in the physical or life sciences, training in health physics, and approximately two years of actual work experience in the field of radiation protection.

The foregoing are considered desirable qualifications for the staff who will be responsible for the actual performance of evaluation and inspection. In addition, there will probably be trainees associated with the regulatory program who will have an academic background in the physical or life sciences as well as varying amounts of specific training in radiation protection but little or no actual work experience in this field. The background and specific training of these persons will indicate to some extent their potential role in the regulatory program. These trainees, of course, could be used initially to evaluate and inspect those applications of radioactive materials which are considered routine or more standardized from the radiation safety standpoint, for example, inspection of industrial gauges, small research programs, and diagnostic medical programs. As they gain experience and competence in the field, trainees could be used progressively to deal with the more complex or difficult types of radioactive material applications. It is desirable that such trainees have a bachelor's degree or equivalent in the physical or life sciences and specific training in radiation protection. In determining the requirement for academic training of individuals in all of the foregoing categories proper consideration should be given to equivalent competency which has been gained by appropriate technical and radiation protection experience.

It is recognized that radioactive materials and their uses are so varied that the evaluation and inspection functions will require skills and experience in the different disciplines which will not always reside in one person. The regulatory authority should have the composite of such skills either in its employ or at its command, not only for routine functions, but also for emergency cases.

Special Nuclear Material, Source Material and Tritium

21. *Conditions Applicable to Special Nuclear Material, Source Material and Tritium.* Nothing in the State's regulatory program shall interfere with the duties imposed on the holder of the materials by the NRC, for example, the duty to report to the NRC, on NRC prescribed forms (1) transfers of special nuclear material, source material and tritium, and (2) periodic inventory data.

22. *Special Nuclear Material Defined.* Special nuclear material, in quantities not sufficient to form a critical mass, for present purposes means uranium enriched in the isotope U-235 in quantities not exceeding 350 grams of contained U-235; uranium 233 in quantities not exceeding 200 grams; plutonium in quantities not exceeding 200 grams; or any combination of them in accordance with the following formula: For each kind of special nuclear material, determine the ratio between the quantity of that special nuclear material and the quantity specified above for the same kind of special nuclear material. The sum of

such ratios for all of the kinds of special nuclear material in combination should not exceed "1" (i.e., unity). For example, the following quantities in combination would not exceed the limitation and are within the formula, as follows:

$$\frac{175 \text{ (grams contained U-235)}}{350} + \frac{50 \text{ (grams U-233)}}{200} + \frac{50 \text{ (grams Pu)}}{200} = 1$$

(This definition is subject to change by future Commission rule or regulation.)

Administration

23. State practices for assuring the fair and impartial administration of regulatory law, including provision for public participation where appropriate, should be incorporated in procedures for:

a. Formulation of rules of general applicability;

b. Approving or denying applications for licenses or authorization to possess and use radioactive materials, and

c. Taking disciplinary actions against licensees.

Arrangements For Discontinuing NRC Jurisdiction

24. *State Agency Designation.* The State should indicate which agency or agencies will have authority for carrying on the program and should provide the NRC with a summary of that legal authority. There should be assurances against duplicate regulation and licensing by State and local authorities, and it may be desirable that there be a single or central regulatory authority.

25. *Existing NRC Licenses and Pending Applications.* In effecting the discontinuance of jurisdiction, appropriate arrangements will be made by NRC and the State to ensure that there will be no interference with or interruption of licensed activities or the processing of license applications, by reason of the transfer. For example, one approach might be that the State, in assuming jurisdiction, could recognize and continue in effect, for an appropriate period of time under State law, existing NRC licenses, including licenses for which timely applications for renewal have been filed, except where good cause warrants the earlier reexamination or termination of the license.

26. *Relations With Federal Government and Other States.* There should be an interchange of Federal and State information and assistance in connection with the issuance of regulations and licenses or authorizations, inspection of licensees, reporting of incidents and violations, and training and education problems.

27. *Coverage, Amendments, Reciprocity.* An agreement providing for discontinuance of NRC regulatory authority and the assumption of regulatory authority by the State may relate to any one or more of the following categories of materials within the State, as contemplated by Public Law 86–373 and Public Law 95–604:

a. Byproduct materials as defined in section 11e(1) of the Act,

b. Byproduct materials as defined in section 11e(2) of the Act,

c. Source materials,

d. Special nuclear materials in quantities not sufficient to form a critical mass,

e. Low-level wastes in permanent disposal facilities, as defined by statute or Commission rules or regulations containing one or more of the materials stated in a, c, and d above but not including byproduct material as defined in Section 11e(2) of the Act;

but must relate to the whole of such category or categories and not to a part of any category.[4] If less than the five categories are included in any discontinuance of jurisdiction, discontinuance of NRC regulatory authority and the assumption of regulatory authority by the State of the others may be accomplished subsequently by an amendment or by a later agreement.

The agreement may incorporate by reference provisions of other documents, including these criteria, and the agreement shall be deemed to incorporate without specific reference the provisions of Pub. L. 86–373 and Pub. L. 95–604 and the related provisions of the Atomic Energy Act.

Arrangements should be made for the reciprocal recognition of State licenses and Federal licenses in connection with out-of-the-jurisdiction operations by a State or Federal licensee.

28. *NRC and Department of Energy Contractors.* The State should provide exemptions for NRC and DOE contractors which are substantially equivalent to the following exemptions:

a. Prime contractors performing work for the DOE at U.S. Government-owned or controlled sites;

b. Prime contractors performing research in, or development, manufacture, storage, testing, or transportation of, atomic weapons or components thereof;

c. Prime contractors using or operating nuclear reactors or other nuclear devices in a U.S. Government-owned vehicle or vessel; and

d. Any other prime contractor or subcontractor of DOE or NRC when the State and the NRC jointly determine (i) that, under the terms of the contract or subcontract, there is adequate assurance that the work thereunder can be accomplished without undue risk to the public health and safety and (ii) that the exemption of such contractor or subcontractor is authorized by law.

Additional Criteria for States Regulating Uranium or Thorium Processors and Wastes Resulting Therefrom After November 8, 1981

Statutes

29. State statutes or duly promulgated regulations should be enacted, if not already in place, to make clear State authority to carry out the requirements or Public Law 95–604, Uranium Mill Tailings Radiation Control Act (UMTRCA) as follows:

a. Authority to regulate the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

b. That an adequate surety (under terms established by regulation) will be provided by the licensee to assure the completion of all requirements established by the (cite appropriate State agency) for the decontamination, decommissioning, and reclamation of sites, structures, and equipment used in conjunction with the generation or disposal of such byproduct material.

c. If in the States' licensing and regulation of byproduct material or of any activity which produces byproduct material, the State collects funds from the licensee or its surety for long-term surveillance and maintenance of such material, the total amount of the funds collected by the State shall be transferred to the U.S. if custody of the byproduct material and its disposal site is transferred to the Federal Government upon termination of the State license. (See 10 CFR 150.32.) If no default has occurred and the reclamation or other bonded activity has been performed, funds for the purpose

[4] A State which does not wihh to continue regulation of uranium and thorium processors and byproduct material, as defined in Section 11e.(2) of the Atomic Energy Act as amended, after November 8, 1981 pursuant to Pub. L. 95–604 may obtain authority over all source material licenses within the State except for uranium or thorium processors.

are not to be transferred to the Federal Government. The funds collected by the State shall be sufficient to ensure compliance with the regulations the Commission establishes pursuant to Section 161X of the Atomic Energy Act.

d. In the issuances of licenses, an opportunity for written comments, public hearing (with transcript) and cross examination is required.

e. In the issuances of licenses, a written determination of the action to be taken based upon evidence presented during the public comment period and which is subject to judicial review is required.

f. A ban on major construction prior to completion of the aforementioned stipulations.

g. An opportunity shall be provided for public participation through written comments, public hearings, and judicial review of rules.

30. In the enactment of any supporting legislation, the State should take into account the reservations of authority to the U.S. in UMTRCA as stated in 10 CFR 150.15a and summarized by the following:

a. The establishment of minimum standards governing reclamation, long-term surveillance or maintenance, and ownership of the byproduct material.

b. The determination that prior to the termination of a license, the licensee has complied with decontamination, decommissioning and reclamation standards, and ownership requirements for sites at which byproduct material is present.

c. The requirement that prior to termination of any license for byproduct material, as defined in Section 11e.(2), of the Atomic Energy Act or for any activity that results in the production of such material, title to such byproduct material and the disposal site be transferred to the Federal Government or State at the option of the State, provided such option is exercised prior to termination of the license.

d. The authority to require such monitoring, maintenance, and emergency measures after the license is terminated as necessary to protect the public health and safety for those materials and property for which the State has assumed custody pursuant to Pub. L. 95–604.

e. The authority to permit use of the surface or subsurface estate, or both of the land transferred to the United States or State pursuant under provision of the Uranium Mill Radiation Tailings Control Act.

f. The authority to exempt land ownership transfer requirements of Section 83(b)(1)(A).

31. It is preferable that State statutes contain the provisions of Section 6 of the Model Act. But the following may be accomplished by adoption of either procedures by regulation or technical criteria. In any case, authority for their implementation should be adequately supported by statute, regulation or case law as determined by the State Attorney General.

In the licensing and regulation of ores processed primarily for their source material content and for the disposal of byproduct material, procedures shall be established which provide a written analysis of the impact on the environment of the licensing activity. This analysis shall be available to the public before commencement of hearings and shall include:[5]

a. An assessment of the radiological and nonradiological public health impacts;

b. An assessment of any impact on any body of water or groundwater;

c. Consideration of alternatives to the licensed activities; and

d. Consideration of long-term impacts of licensed activities (see Item 36b.(1).

Regulations

32. State regulations should be reviewed for regulatory requirements, and where necessary incorporate regulatory language which is equivalent to the extent practicable or more stringent than regulations and standards adopted and enforced by the Commission, as required by Section 274o (see 10 CFR 40 and 10 CFR 150.31(b)).

Organizational Relationships Within the States

33. Organizational relationships should be established which will provide for an effective regulatory program for uranium mills and mill tailings.

a. Charts should be developed which show the management organization and lines of authority. This chart should define the specific lines of supervision from program management within the radiation control group and any other department within the State responsible for contributing to the regulation of uranium processing and disposal of tailings. When other State agencies or regional offices are utilized, the lines of communication and administrative control between the agencies and/or regions and the Program Director should be clearly drawn.

b. Those States that will utilize personnel from other State Departments or Federal agencies in preparing the environmental assessment should designate a lead agency for supervising and coordinating preparation of this environmental assessment. It is normally expected that the radiation control agency in Agreement States will be the lead agency. The basic premise is that the lead agency is required to prepare the environmental assessment. Utilization of an applicant's environmental report in lieu of a lead agency assessment of the proposed project is not adequate or appropriate. However, the lead agency may prepare an environmental assessment based upon an applicant's environmental report. Other credible information may be utilized by the State as long as such information is verified and documented by the State.

c. When a lead agency is designated, that agency should coordinate preparation of the statement. The other agencies involved should provide assistance with respect to their areas of jurisdiction and expertise. Factors relevant in obtaining assistance from other agencies include the applicable statutory authority, the time sequence in which the agencies become involved, the magnitude of their involvement, and relative expertise with respect to the project's environmental effects.

In order to bring an environmental assessment to a satisfactory conclusion, it is highly recommended that an initial scoping document be developed which clearly delineates the area and scope of work to be performed by each agency within a given time constraint.

d. For those areas in the environmental assessment where the State cannot identify a State agency having sufficient expertise to adequately avaluate the proposal or prepare an assessment, the State should have provisions for obtaining outside consulting services. In those instances where non-governmenatal consultants are utilized, procedures should be established to avoid conflict of interest consistent with State law and administrative procedures.

Medical consultants recognized for their expertise in emergency medical matters, such as the Oak Ridge and Hanford National Laboratories, relating to the intake or uranium and its diagnosis thereof associated with uranium mining and milling should be identified and available to the State for advice and direct assistance.

During the budget preparation, the State should allow for funding costs incurred by the use of consultants. In addition, consultants should be available for any emergencies which

[5] It is strongly recommended that a 30-day period be provided for public review.

may occur and for which their expertise would be needed immediately.

Personnel

34. Personnel needed in the processing of the license application can be identified or grouped according to the following skills: Technical; Administrative; and Support.

a. Administrative personnel are those persons who will provide internal guides, policy memoranda, reviews and managerial services necessary to assure completion of the licensing action. Support personnel are those persons who provide secretarial, clerical support, legal, and laboratory services. Technical personnel are those individuals who have the training and experience in radiation protection necessary to evaluate the enginering and radiological safety aspects of a uranium concentrator. Current indications are that 2 to 2.75 total professional person years' effort is needed to process a new conventional mill license, in situ license, or major renewal, to meet the requirements of UMTRCA. This number includes the effort for the environmental assessment and the in-plant safety review. It also includes the use of consultants. Heap leach applications may take less time and is expected to take 1.0 to 1.5 professional staff years' effort, depending on the circumstances encountered. Current indications are that the person years effort for support and legal services should be one secretary for approximately 2 conventional mills and ½ staff years for legal services for each noncontested mill case. The impact on environmental monitoring laboratory support services is difficult to estimate but should be added into the personnel requirements.

In addition, consideration should be given to various miscellaneous post-licensing ongoing activities including the issuance of minor amendments, inspections, and environmental surveillance. It is estimated that these activities may require about 0.5 to 1 person years effort per licensed facility per year, the latter being the case for a major facility. These figures do not include manpower for Title I activitives of UMTRCA.

b. In evaluating license applications the State shall have access to necessary specialities, e.g., radiological safety, hydrology, geology and dam construction and operation.

In addition to the personnel qualifications listed in the "Guide for Evaluation of State Radiation Control Programs," Revision 3, February 1, 1980, the regulatory staff involved in the regulatory process (Radiation) should have additional training in Uranium Mill Health Physics and Environmental Assessments.

c. Personnel in agencies other than the lead agency are included in these total person year numbers. If other agencies are counted in these numbers then it shall be demonstrated that these personnel will be available on a routine and continuing basis to a degree claimed as necessary to successfully comply with the requirements of UMTRCA and these criteria. The arrangements for making such resources available shall be documented, such as an interagency memorandum of understanding and confirmed by budgetary cost centers.

Functions To Be Covered

35. The States should develop procedures for licensing, inspection, and preparation of environmental assessments.

a. *Licensing*

(1) Licensing evaluations or assessments should include in-plant radiological safety aspects in occupational or restricted areas and environmental impacts to populations in unrestricted areas from the plant.

(2) It is expected that the State will review, evaluate and provide documentation of these evaluations. Items which should be evaluated are:

(a) Proposed activities;
(b) Scope of proposed action;
(c) Specific activities to be conducted;
(d) Administrative procedures;
(e) Facility organization and radiological safety responsibilities, authorities, and personnel qualifications;
(f) Licensee audits and inspections;
(g) Radiation safety training programs for workers;
(h) Radiation safety program, control and monitoring;
(i) Restricted area markings and access control;
(j) At existing mills, review of monitoring data, exposure records, licensee audit and inspection records, and other records applicable to existing mills;
(k) Environmental monitoring;
(l) Emergency procedures, radiological;
(m) Product transportation; and
(n) Site and physical decommissioning procedures, other than tailings.
(o) Employee exposure data and bioassay programs.

b. *Environmental Assessment*

(1) The environmental evaluation should consist of a detailed and documented evaluation of the following items:

(a) Topography;
(b) Geology;
(c) Hydrology and water quality;
(d) Meteorology;
(e) Background radiation;
(f) Tailings retention system;
(g) Interim stabilization, reclamation, and Site Decommissioning Program;
(h) Radiological Dose Assessment;
(1) Source terms
(2) Exposure pathway
(3) Dose commitment to individuals
(4) Dose commitment to populations
(5) Evaluation of radiological impacts to the public to include a determination of compliance with State and Federal regulations and comparisons with background values
(6) Occupational dose
(7) Radiological impact to biota other than man
(8) Radiological monitoring programs, pre-occupational and operational
(i) Impacts to surface and groundwater, both quality and quantity;
(j) Environmental effects of accidents; and
(k) Evaluation of tailings management alternatives in terms of regulations.

(2) The States are encouraged to examine the need to expand the scope of the assessment into other areas such as:

(a) Ecology;
(b) Environmental effects of site preparation and facility construction on environment and biota;
(c) Environmental effects of use and discharge of chemicals and fuels; and
(d) Economic and social effects.

c. *Inspections*

(1) As a minimum, items which should be inspected or included during the inspection of a uranium mill should adhere to the items evaluated in the in-plant safety review. The principal items recommended for inspection are:

(a) Administration;
(b) Mill circuit, including any additions, deletions, or circuit changes;
(c) Accidents/Incidents;
(d) Part 19 or equivalent requirements of the State;
(e) Action taken on previous findings;
(f) A mill tour to determine compliance with regulations, and license conditions;
(g) Tailings waste management in accordance with regulations and license conditions (see NRC Reg. Guide 3.11.1);
(h) Records;
(i) Respiratory protection in accordance with license conditions or 10 CFR Part 20.
(j) Effluent and environmental monitoring;
(k) Training programs;
(l) Transportation and shipping;
(m) Internal review and audit by management;

(n) Exit interview; and

(o) Final written report documenting the results of the inspection and findings on each item.

(2) In addition, the inspector should perform the following:

(a) Independent surveys and sampling.

(3) Additional guidance is contained in appropriate NRC regulatory and inspection guides. A *complete* inspection should be performed at least once per year.

d. *Operational Data Review*

(1) In addition to the reporting requirements required by the regulations or license conditions, the licensee will submit in writing to the regulatory agency within 60 days after January 1 and July 1 of each year, reports specifying the quantity of each of the principal radionuclides released to unrestricted areas in liquid and in gaseous effluents during the previous six months of operation. This data shall be reported in a manner that will permit the regulatory agency to confirm the potential annual radiation doses to the public.

(2) All data from the radiological and non-radiological environmental monitoring program will also be submitted for the same time periods and frequency. The data will be reported in a manner that will allow the regulatory agency to conform the dose to receptors.

Instrumentation

36. The State should have available both field and laboratory instrumentation sufficient to ensure the licensee's control of materials and to validate the licensee's measurements.

a. The State will submit its list of instrumentation to the NRC for review. Arrangements should be made for calibrating such equipment.

b. Laboratory-type instrumentation should be available in a State agency or through a commercial service which has the capability for quantitative and qualitative analysis of radionuclides associated with natural uranium and its decay chain, primarily; U-238, Ra-226, Th-320, Pb-210, and Rn-222, in a variety of sample media such as will be encountered from an environmental sampling program.

Analysis and data reduction from laboratory analytical facilities should be available to the licensing and inspection authorities in a timely manner. Normally, the data should be available within 30 days of submittal. State acceptability of quality assurance (QA) programs should also be established for the analytical laboratories.

c. Arrangements should also be completed so that a large number of samples in a variety of sample media resulting from a major accident can be analyzed in a time frame that will allow timely decisions to be made regarding public health and safety.

d. Arrangements should be made to participate in the Environmental Protection Agency quality assurance program for laboratory performance.

Dated at Washington, D.C. this 16th day of January, 1981.

For the Nuclear Regulatory Commission.

John C. Hoyle,

Assistant Secretary of the Commission.

[FR Doc. 81-2428 Filed 1-22-81; 8:45 am]

BILLING CODE 7590-01-M

Advisory Committee on Reactor Safeguards; Proposed Meetings

In order to provide advance information regarding proposed meetings of the ACRS Subcommittees and Working Groups, and of the full Committee, the following preliminary schedule reflects the current situation, taking into account additional meetings which have been scheduled and meetings which have been postponed or cancelled since the last list of proposed meetings published Dec. 22, 1980 (45 FR 84182). Those meetings which are definitely scheduled have had, or will have, an individual notice published in the **Federal Register** approximately 15 days (or more) prior to the meeting. Those Subcommittee and Working Group meetings for which it is anticipated that there will be a portion or all of the meeting open to the public are indicated by an asterisk (*). It is expected that the sessions of the full Committee meeting designated by an asterisk (*) will be open in whole or in part to the public. ACRS full Committee meetings begin at 8:30 a.m. and Subcommittee and Working Group meetings usually begin at 8:30 a.m. The time when items listed on the agenda will be discussed during full Committee meetings and when Subcommittee and Working Group meetings will start will be published prior to each meeting. Information as to whether a meeting has been firmly scheduled, cancelled, or rescheduled, or whether changes have been made in the agenda for the February 1981 ACRS full Committee meeting can be obtained by a prepaid telephone call to the Office of the Executive Director of the Committee (telephone 202/634-3267, ATTN: Mary E. Vanderholt) between 8:15 a.m. and 5:00 p.m., Easter Time.

ACRS Subcommittee Meetings

**Fort St. Vrain*, January 27, 1981, at site, near Longmont, CO. The Subcommittee will review operating experience, degree of success in eliminating the core power fluctuations, core performance (fuel and structural), plans for testing and operation at levels above 70% of rated power and plans for future operations, modifications, refueling, and shift manning requirments. Notice of this meeting was published Jan. 12.

**Safety Philosphy, Technology and Criteria*, January 28, 1981, Los Angeles, CA. The Subcommittee will discuss requirements for new (beyond Near-Term Construction Permit) reactor plants. Notice of this meeting was published Jan. 14.

**Extreme External Phenomena*, January 29-30, 1981, Los Angeles, CA. The Subcommittee will discuss the status of the Seismic Safety Margins Program. Notice of this meeting was published Jan. 14.

**San Onofre 2 and 3*, January 31, 1981, Los Angeles, CA. The Subcommittee will meet to review the seismology and geology related items for San Onofre Units 2 and 3 for an Operating License. Notice of this meeting was published Jan. 15.

**Regulatory Activities*, February 3, 1981, Washington, DC. The Subcommittee will discuss proposed Regulatory Guides and Regulations. Notice of this meeting was published Jan. 19.

**Plant Features Important to Safety*, February 3, 1981, Washington, DC. The Subcommittee will discuss the NRC definitions of the terms "safety grade", "safety related" and "important to safety" as developed for testimony related to the Three Mile Island Unit 1 restart, as well as review the generic implications of the use of these definitions in the licensing process. Notice of this meeting was published Jan. 19.

**NRC Safety Research Program*, February 4, 1981, Washington, DC. The Subcommittee will discuss NRC's long-range safety research plan and ACRS comments on the Office of Nuclear Regulatory Research response to ACRS recommendations in NUREG-0699. Notice of this meeting was published Jan. 21.

**Safety Philosophy, Technology and Criteria*, February 4, 1981, Washington, DC. The Subcommittee will discuss the proposed Near-Term Construction Permit. Notice of this meeting was published Jan. 21.

**Reactor Radiological Effects*, February 5, 1981, (1:00 p.m.), Washington, DC. The Subcommittee is to review and comment on the NRC Staff's paper to the NRC Commissioners on the current status of thinking and

research related to iodine releases and accident source terms. Notice of this meeting was published Jan. 22.

**Advanced Reactors,* February 12–13, 1981, Chicago, IL. The Subcommittee will discuss matters relating to the development of LMFBR safety design criteria.

**San Onofre Units 2 and 3,* February 19, 1981, Los Angeles, CA. The Subcommittee will discuss nonseismic, plant-related items for the Operating License review.

**Summer Plant Operating Licensing Review,* February 26–27, 1981, near site—Columbia, SC. The Subcommittee will continue review of the Operating License application. Notice of this meeting was published Dec. 22.

**Three Mile Island, Unit 2,* March 5–6, 1981 (tentative), Washington, DC. The Subcommittee will review the status of decontamination at TMI–2 and the mode for interaction between the ACRS and the Three Mile Island Advisory Panel. Notice of the meeting was published Dec. 22.

**Three Mile Island, Unit 1,* March 5–6, 1981 (tentative), Washington, DC. The Subcommittee will review the modifications made to TMI–1 in preparation for a restart following the TMI–2 certification process. Notice of this meeting was published Dec. 22.

**Transportation of Radioactive Materials,* March 10, 1981 (tentative), Washington, DC. The Subcommittee will begin a review of the transportation certification process of the NRC Transportation Certification Branch. Notice of this meeting was published Dec. 22.

**Regulatory Activities,* March 10, 1981 (tentative), Washington, DC. The Subcommittee will discuss proposed Regulatory Guides.

**NRC Safety Research Program,* March 11, 1981, Washington, DC. The Subcommittee will discuss NRC's Draft Long-Range Research Plan (NUREG–0740) and ACRS comments on the Office of Nuclear Regulatory Research response to ACRS Recommendations listed in NUREG–0699.

**Generic Items,* March 11, 1981, Washington, DC. The Subcommittee will compare items in order to ensure that ACRS generic items are receiving adequate attention by the NRC Staff; examine methods to combine the ACRS list with the NRC's program for dealing with generic items; and consider means for dealing with future generic items given such a merger. Notice of this meeting was published Dec. 22.

**Site Evaluation,* March 19–20, 1981 (tentative), Washington, DC. The Subcommittee will discuss the latest developments in emergency planning and siting rulemaking.

ACRS Full Committee Meetings

February 5–7, 1981

A. **Near Term Construction Permits*—requirements for NTCPs.

B. **NRC Safety Research Program*—ACRS Annual Report to the U.S. Congress and NRC Long-Range Program Plans.

C. **San Onofre Nuclear Generating Station Units 2 and 3*—Operating License review (seismic design).

D. **Report of ACRS Subcommittees on Safety Related Matters*—discuss matters being reviewd by ACRS Subcommittees including radioactive waste management and disposal, impact of control system failures on nuclear power plant safety, impact of plant operating experience on resolution of anticipated transients without scram, and proposed NRC Regulatory Guides.

E. **Review of Fission Product Source Term*—review of source term used in the evaluation of reactor safety and design/siting of nuclear facilities.

March 12–14, 1981: Agenda to be announced.

April 9–11, 1981: Agenda to be announced.

Dated: January 19, 1981.

John C. Hoyle,

Advisory Committee Management Office.

[FR Doc. 81-2439 Filed 1-22-81; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF STATE

Office of the Secretary

[Public Notice No. 737]

El Paso, Tex.; Application for Bridge Permit

Notice is hereby given that the Department of State has received an application for a permit authorizing the replacement and expansion of the Zaragosa Bridge between El Paso, Texas and Ciudad Juarez, Chihuahua, Mexico. The application has been filed by the City of El Paso, Texas, which proposes to construct, operate and maintain two three-lne bridges for vehicular and pedestrian traffic at the site of the existing bridge in the Ysleta area of El Paso. The existing bridge is owned and operated by the U.S. Section of the International Boundary and Water Commission.

The Department's jurisdiction with respect to this application is based upon Executive Order 11423, dated August 16, 1968, and the International Bridge Act of 1972 (Pub. L. 92–343, 86 Stat. 731, approved September 26, 1972).

As required by E. O. 11423, the Department of State is circulating this application to concerned agencies for comment. In addition, the Office of Environment and Health of the Department of State is reviewing an assessment of the environmental effects of the proposal, which has been submitted as part of the application, in order to determine if an environmental impact statement will be required.

Interested persons may submit their views regarding this application in writing by February 23, 1981 to Mr. John R. Crook, Assistant Legal Adviser for Economic and Business Affairs, Room 6420, Department of State, 2201 C. Street, NW, Washington, D.C. 20520.

The application and related documents made part of the record to be considered by the Department of State in connection with this application are available for inspection and copying in the Office of the Assistant Legal Adviser for Economic and Busniess Affairs during normal business hours.

Any questions relating to this notice may be addressed to Mr. Crook at the above address, (202–632–0242) or to Mr. David P. Stewart (202–632–1572).

Dated: January 19, 1981.

John R. Crook,

Assistant Legal Adviser for Economic and Business Affairs.

[FR Doc. 81-2440 Filed 1-22-81; 8:45 am]

BILLING CODE 4710-01-M

DEPARTMENT OF THE TREASURY

[Dept. Circular Public Debt Series—No. 1-81]

Treasury Notes of January 31, 1983, Series M–1983

January 15, 1981.

1. Invitation for Tenders

1.1. The Secretary of the Treasury, under the authority of the Second Liberty Bond Act, as amended, invites tenders for approximately $4,500,000,000 of United States securities, designated Treasury Notes of January 31, 1983, Series M–1983 (CUSIP No. 912827 LM 2). The securities will be sold at auction, with bidding on the basis of yield. Payment will be required at the price equivalent of the bid yield of each accepted tender. The interest rate on the securities and the price equivalent of each accepted bid will be determined in the manner described below. Additional amounts of these securities may be issued to Government accounts and Federal Reserve Banks for their own account in exchange for maturing

Treasury securities. Additional amounts of the new securities may also be issued at the average price to Federal Reserve Banks, as agents for foreign and international monetary authorities, to the extent that the aggregate amount of tenders for such accounts exceeds the aggregate amount of maturing securities held by them.

2. Description of Securities

2.1. The securities will be dated February 2, 1981, and will bear interest from that date, payable on a semiannual basis on July 31, 1981, and each subsequent 6 months on January 31 and July 31 until the principal becomes payable. They will mature January 31, 1983, and will not be subject to call for redemption prior to maturity.

2.2. The income derived from the securities is subject to all taxes imposed under the Internal Revenue Code of 1954. The securities are subject to estate, inheritance, gift, or other excise taxes, whether Federal or State, but are exempt from all taxation now or hereafter imposed on the principal or interest thereof by any State, any possession of the United States, or any local taxing authority.

2.3. The securities will be acceptable to secure deposits of public monies. They will not be acceptable in payment of taxes.

2.4. Bearer securities with interest coupons attached, and securities registered as to principal and interest, will be issued in denominations of $5,000, $10,000, $100,000, and $1,000,000. Book-entry securities will be available to eligible bidders in multiples of those amounts. Interchanges of securities of different denominations and of coupon, registered, and book-entry securities, and the transfer of registered securities will be permitted.

2.5. The Department of the Treasury's general regulations governing United States securities apply to the securities offered in this circular. These general regulations include those currently in effect, as well as those that may be issued at a later date.

3. Sale Procedures

3.1. Tenders will be received at Federal Reserve Banks and Branches and at the Bureau of the Public Debt, Washington, D.C. 20226, up to 1:30 p.m., Eastern Standard time, Wednesday, January 21, 1981. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, January 20, 1981.

3.2. Each tender must state the face amount of securities bid for. The minimum bid is $5,000 and larger bids must be in multiples of that amount. Competitive tenders must also show the yield desired, expressed in terms of an annual yield with two decimals, e.g., 7.11%. Common fractions may not be used. Noncompetitive tenders must show the term "noncompetitive" on the tender form in lieu of a specified yield. No bidder may submit more than one noncompetitive tender and the amount may not exceed $1,000,000.

3.3. All bidders must certify that they have not made and will not make any agreements for the sale or purchase of any securities of this issue prior to the deadline established in Section 3.1. for receipt of tenders. Those authorized to submit tenders for the account of customers will be required to certify that such tenders are submitted under the same conditions, agreements, and certifications as tenders submitted directly by bidders for their own account.

3.4. Commercial banks, which for this purpose are defined as banks accepting demand deposits, and primary dealers, which for this purpose are defined as dealers who make primary markets in Government securities and report daily to the Federal Reserve Bank of New York their positions in and borrowings on such securities, may submit tenders for account of customers if the names of the customers and the amount for each customer are furnished. Others are only permitted to submit tenders for their own account.

3.5. Tenders will be received without deposit for their own account from commercial banks and other banking institutions; primary dealers, as defined above; Federally-insured savings and loan associations; States, and their political subdivisions or instrumentalities; public pension and retirement and other public funds; international organizations in which the United States holds membership; foreign central banks and foreign states; Federal Reserve Banks; and Government accounts. Tenders from others must be accompanied by full payment for the amount of securities applied for (in the form of cash, maturing Treasury securities, or readily-collectible checks), or by a payment guarantee of 5 percent of the face amount applied for, from a commercial bank or a primary dealer.

3.6. Immediately after the closing hour, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subject to the reservations expressed in Section 4, noncompetitive tenders will be accepted in full, and then competitive tenders will be accepted, starting with those at the lowest yields, through successively higher yields to the extent required to attain the amount offered. Tenders at the highest accepted yield will be prorated if necessary. After the determination is made as to which tenders are accepted, a coupon rate will be established, on the basis of a ⅛ of one percent increment, which results in an equivalent average accepted price close to 100.000 and a lowest accepted price above the original issue discount limit of 99.750. That rate of interest will be paid on all of the securities. Based on such interest rate, the price on each competitive tender allotted will be determined and each successful competitive bidder will be required to pay the price equivalent to the yield bid. Those submitting noncompetitive tenders will pay the price equivalent to the weighted average yield of accepted competitive tenders. Price calculations will be carried to three decimal places on the basis of price per hundred, e.g., 99.923, and the determinations of the Secretary of the Treasury shall be final. If the amount of noncompetitive tenders received would absorb all or most of the offering, competitive tenders will be accepted in an amount sufficient to provide a fair determination of the yield. Tenders received from Government accounts and Federal Reserve Banks will be accepted at the price equivalent to the weighted average yield of accepted competitive tenders.

3.7. Competitive bidders will be advised of the acceptance or rejection of their tenders. Those submitting noncompetitive tenders will only be notified if the tender is not accepted in full, or when the price is over par.

4. Reservations

4.1. The Secretary of the Treasury expressly reserves the right to accept or reject any or all tenders in whole or in part, to allot more or less than the amount of securities specified in Section 1, and to make different percentage allotments to various classes of applicants when the Secretary considers it in the public interest. The Secretary's action under this Section is final.

5. Payment and Delivery

5.1. Settlement for allotted securities must be made at the Federal Reserve Bank or Branch or at the Bureau of the Public Debt, wherever the tender was submitted. Settlement on securities allotted to institutional investors and to others whose tenders are accompanied by a payment guarantee as provided in Section 3.5. must be made or completed on or before Monday, February 2, 1981. Payment in full must accompany tenders submitted by all other investors. Payment must be in cash; in other funds immediately available to the Treasury; in Treasury bills, notes, or bonds (with

all coupons detached) maturing on or before the settlement date but which are not overdue as defined in the general regulations governing United States securities; or by check drawn to the order of the institution to which the tender was submitted, which must be received from institutional investors no later than Friday, January 30, 1981. When payment has been submitted with the tender and the purchase price of allotted securities is over par, settlement for the premium must be completed timely, as specified in the preceding sentence. When payment has been submitted with the tender and the purchase price is under par, the discount will be remitted to the bidder. Payment will not be considered complete where registered securities are requested if the appropriate identifying number as required on tax returns and other documents submitted to the Internal Revenue Service (an individual's social security number or an employer identification number) is not furnished. When payment is made in securities, a cash adjustment will be made to or required of the bidder for any difference between the face amount of securities presented and the amount payable on the securities allotted.

5.2. In every case where full payment has not been completed on time, an amount of up to 5 percent of the face amount of securities allotted, shall, at the discretion of the Secretary of the Treasury, be forfeited to the United States.

5.3. Registered securities tendered in payment for allotted securities are not required to be assigned if the new securities are to be registered in the same names and forms as appear in the registrations or assignments of the securities surrendered. When the new securities are to be registered in names and forms different from those in the inscriptions or assignments of the securities presented, the assignment should be to "The Secretary of the Treasury for (securities offered by this circular) in the name of (name and taxpayer identifying number)." If new securities in coupon form are desired, the assignment should be to "The Secretary of the Treasury for coupon (securities offered by this circular) to be delivered to (name and address)." Specific instructions for the issuance and delivery of the new securities, signed by the owner or authorized representative, must accompany the securities presented. Securities tendered in payment should be surrendered to the Federal Reserve Bank or Branch or to the Bureau of the Public Debt, Washington, D.C. 20226. The securities must be delivered at the expense and risk of the holder.

5.4. If bearer securities are not ready for delivery on the settlement date, purchasers may elect to receive interim certificates. These certificates shall be issued in bearer form and shall be exchangeable for definitive securities of this issue, when such securities are available, at any Federal Reserve Bank or Branch or at the Bureau of the Public Debt, Washington, D.C. 20226. The interim certificates must be returned at the risk and expense of the holder.

5.5. Delivery of securities in registered form will be made after the requested form of registration has been validated, the registered interest account has been established, and the securities have been inscribed.

6. General Provisions

6.1. As fiscal agents of the United States, Federal Reserve Banks are authorized and requested to receive tenders, to make allotments as directed by the Secretary of the Treasury, to issue such notices as may be necessary, to receive payment for and make delivery of securities on full-paid allotments, and to issue interim certificates pending delivery of the definitive securities.

6.2. The Secretary of the Treasury may at any time issue supplemental or amendatory rules and regulations governing the offering. Public announcement of such changes will be promptly provided.

Supplementary Statement

The announcement set forth above does not meet the Department's criteria for significant regulations and, accordingly, may be published without compliance with the Departmental procedures applicable to such regulations.

Paul H. Taylor,

Fiscal Assistant Secretary.

[FR Doc. 81-2372 Filed 1-19-81; 2:29 pm]

BILLING CODE 4810-40-M

VETERANS ADMINISTRATION

Education Benefits; Change of Program; Unsatisfactory Progress or Conduct

AGENCY: Veterans Administration.

ACTION: Request for public comments.

SUMMARY: The Veterans Administration is publishing for public comment new and revised statements of procedures which have been adopted by the agency for implementation when a veteran or eligible person makes a second or subsequent change in his or her program of education and when the veteran or eligible person makes unsatisfactory progress or conduct. These statements will better acquaint veterans, eligible persons, educational institutions and the public at large with the way in which decisions will be made in this area.

DATE: Comments must be received on or before February 19, 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 the normal business hours until March 2, 1981.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer, Assistant Director for Policy and Program Administration, Education Service, Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue, NW., Washington, DC 20420 (202-389-2092).

SUPPLEMENTARY INFORMATION: This publication contains DVB Circulars 22-80-37 and 22-80-38. These circulars deal with procedures for use in determining whether a veteran or eligible person may receive educational assistance following a second or subsequent change in program of education or after unsatisfactory progress.

These circulars have been distributed through normal channels. The Veterans Administration is implementing the procedures contained in the circulars. All comments received will be reviewed and use in changing the circulars, where necessary.

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, DC 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 March 2, 1981. Any person visiting the Veterans Administration Central Office in Washington, DC 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 address and the above room number.

Approved: January 13, 1981.

By direction of the Administrator.

Rufus H. Wilson,

Deputy Administrator.

Department of Veterans Benefits, Veterans Administration, Washington, D.C. 20420, DVB Circular 22–80–37, October 23, 1980.

Second and Subsequent Change of Program

1. Background

a. Title 38, United States Code; section 1791, authorizes the Administrator to approve changes of program for veterans/servicepersons under chapters 32 and 34, and for eligible persons under chapter 35. Before approval of a second or subsequent change of program, the Administrator must find that the proposed program is suitable to the aptitudes, interests and abilities of the veteran or other eligible person.

b. In the past, Veterans Administration regulations have prescribed that a VA counseling psychologist evaluate the suitability of a second or subsequent change of program. A revision of VA regulations has eliminated the requirement that these evaluations be made through VA counseling for trainees under chapters 32 and 34, and for eligible persons under chapter 35.

c. Even though the revision of VA regulations eliminates the requirement for VA counseling in most circumstances, VA counseling will continue to be provided to eligible veterans and servicepersons under chapters 32 and 34, and to eligible persons under chapter 35, upon their request.

d. The first change of program for an eligible son or daughter under chapter 35 will now be processed in the same manner as the first change of program for a veteran student. Unless a chapter 35 trainee is requesting a change to or from a program of special restorative or specialized vocational training, the request for a first change of program does not require the review of a VA counseling psychologist.

2. Purpose

a. This circular contains instructions and procedures to be used by Adjudication Division personnel when making determinations concerning requests for a second or subsequent change of program from veterans, servicepersons, or other eligible persons.

(1) The procedures described in later paragraphs are intended to ensure the statutory requirements of 38 U.S.C. 1791 are fulfilled. The reviews and determinations will be made by an adjudicator (GS–9 or higher grade employee). Technical assistance will be provided by the VR&C (Vocational Rehabilitation & Counseling) staff as necessary.

(2) These procedures will permit the adjudicator to make a determination based on evidence which, in many cases, will already be of record with the VA. In other cases, additional information that may be needed for an adjudicative determination is readily available to the claimant and can be promptly submitted. The procedures have the potential for significantly reducing the overall time required to complete action on requests for second and subsequent changes of program.

b. Pending modification of existing published procedures, the provisions of this circular will be followed.

3. Change of Program

a. A change of program is a change in a student's educational, professional or vocational objective which requires a like change in the courses which must be pursued in order to attain the new objective.

b. If one program is generally recognized as a prerequisite to, or required for entry into another program, there is no change of program upon entering the more advanced or higher level program.

c. A student may elect to change his or her objective without incurring a change of program if substantially all credits and experience previously acquired are transferable to the new program. The most common example of such an adjustment is a change from one degree objective to another, when no material loss of credit occurs because the courses the student has completed are mainly the general education courses that would be required for either degree (38 C.F.R. 21.4234).

4. Adjudicative Actions Following Receipt of a Request for a Second Change of Program

a. When the request is for a second change of program, and the claimant has not *requested* VA counseling, the claims or DEA folder will be carefully reviewed to determine whether evidence is already of record with the VA that will support a finding the proposed new program is probably suitable. Supportive evidence includes, but is not limited to, one or more of the following:

(1) A report from previous VA counseling which indicates the veteran or eligible person has an aptitude for training similar to that provided by the program being requested.

(2) The new program follows a pattern which complements other training previously pursued by the veteran or eligible person. For example, a veteran's second program (first change) was on-the-job training to become a police officer. He/she has successfully completed the program and now requests approval to pursue an associate's degree program in Police Science.

(3) The veteran's or eligible person's request is for approval of an apprenticeship or an established on-the-job training program already approved for VA benefits and he/she has been accepted into the training program.

(4) The veteran or eligible person is requesting to reenter his/her original program, in which he/she was making satisfactory progress prior to entering another program.

(5) The veteran's or eligible person's request is accompanied by a written recommendation from his/her institutional academic adviser, based on grade evaluations and counseling sessions with the student, that successful completion of the new program is probable (i.e., the program is suitable).

b. In cases such as those described in subparagraph a (1) through (5) above, the request for second change of program may be approved without obtaining additional evidence from the claimant if progress in the previous program was satisfactory at the time of interruption. Whenever the request is for resumption of benefits following termination for unsatisfactory progress or conduct, the cause for the earlier unsatisfactory progress or conduct must be found to have been removed. This may necessitate further development in accordance with the procedures contained in DVB Circular 22–80–38, Unsatisfactory Progress or Conduct.

c. If VA counseling has been requested by a trainee under chapter 32, 34 or 35, VA Form 22–1944, Eligibility Entitlement and Counseling Information, will be completed and forwarded to the VR&C Division in accordance with M22–2, part II, paragraph 5.07. Further development will not be undertaken by the adjudicator in these cases, since the VR&C Division will provide a recommendation concerning a suitable program after counseling the claimant.

d. When VA counseling has not been requested, and the evidence of record with the VA is not adequate to determine the suitability of a program, or when evidence suggests the proposed program may not be suitable, the claimant will be asked to furnish additional evidence. A dictated letter will be sent after all evidence of record has been thoroughly reviewed so that the claimant is not asked to furnish information that will be redundant.

Exhibit B to this circular provides typical questions that may be included in the letter to the claimant.

(1) Although claimants will not be required to obtain non-VA counseling nor to submit the results of such counseling, this type of information is very useful in resolving the question of program suitability, and claimants should be encouraged to submit such evidence if it is available. If evidence of non-VA counseling is not submitted, the adjudicative determination will be based on other types of information that are submitted by the claimant.

(2) A development letter should *always* solicit the claimant's reasons for believing why the requested program is suitable to his/her aptitudes, interests, and abilities.

(3) A development letter (see exhibit A for sample) will offer another opportunity and invitation for the claimant to request VA counseling. This will be accomplished, in part, by enclosing VA Form 22–1902, Counseling Record-Personal Information, with the letter.

(4) Due to the time required to conduct a thorough review of the claimant's folder and to compose an appropriate letter, adjudicators are authorized to record an EPC (end product code) 220 when the development letter is dispatched.

(5) A diary suspense period of 30 days will be established for the claimant's response. Control will be maintained under EPC 220. If the claimant has not replied to the request after 30 days, the claim will be administratively disallowed and the end product may be recorded.

e. When the claimant replies to the request, all evidence of record will again be reviewed.

(1) If the claimant submits his/her own statement demonstrating that he/she has substantive reasons for believing the program is suitable, the adjudicator may approve the request.

(2) If evidence of a technical nature (e.g., aptitude test results, achievement test scores, counseling writeups, etc.) is received the adjudicator will, if appropriate, request an interpretation of the technical evidence from a VA counseling psychologist.

(a) The evidence and the claims of DEA folder will be referred to the VR&C Division under cover of VA Form 3230. It will be annotated with a request for VR&C's interpretation of the technical evidence.

(b) Counseling psychologists will review these cases within 2 workdays of receipt in the VR&C Division. The counseling psychologist's interpretation(s) of the technical evidence wil be prepared on VA Form 119, Report of Contact, and promptly transmitted to the Adjudication Division. Time spent by the VR&C staff to provide these interpretations will be reported as "Other Measured Hours."

(3) If VA Form 22–1902 is returned by a trainee under chapter 32, 34 or 35 as a request to receive VA counseling, referral to VR&C will be made in accordance with the procedure outlined in M22–2, part II, paragraph 5.07.

(a) If the claimant completes VA counseling, the VR&C Division will forward a recommendation regarding the suitability of the program to the Adjudication Division using VA Form 22–1902k or 22–1902L.

(b) If the claimant does not subsequently report for VA counseling, the claim will be returned to the Adjudication Division with the counseling psychologist's recommendation regarding the suitability of the program based on available information. The adjudicator will then proceed with an adjudicative determination and take appropriate action to approve or disallow the request. The EPC 220 will be recorded upon final disposition of the request.

5. Requests for a Change of Program After the Second Change

a. A change of program after the second change (i.e., a request for a fourth or subsequent program) may be approved for a veteran or other eligible person *only* if a subsequent change is necessitated by circumstances beyond the control of the claimant.

b. If such circumstances necessitate a change of program after the second change, approval of the request *will be contingent* upon finding the requested program is suitable to the claimant's interests, aptitudes, and abilities.

c. After receipt of a request for a fourth (or later) program of eduction or training, evidence to satisfy both issues, necessity and suitability, will be requested concurrently from the claimant, if adequate evidence is not already of record.

d. Acceptable reasons for the necessity of an additional change of program include, but are not limited to, the following situations:

(1) The claimant has incurred a disability which prevents employment in an occupation for which the claimant trained previously.

(2) Health reasons have forced the claimant to move to a new location where training in the program previously pursued is not available within normal commuting distance.

(3) Unexpected financial difficulties prevent completion of the prior program because of the cost to complete the program.

(4) An additional program is necessary to complement the prior program in order to qualify the claimant for employment in the occupational field of the claimant's approved final objective.

(5) The claimant is unable to complete his/her prior program because it was discontinued by the school, and the same program is not offered by another school within normal commuting distance.

e. The necessity for an additional change of program involves consideration of the situations described above as they relate to the claimant's third program (second change), or the last program that was pursued by the claimant if an additional change has already been approved.

f. If a claimant does not submitacceptable evidence of extenuating circumstances that would necessitate the additional change of program, the request will be denied without consideration of the suitability of the requested program.

g. If acceptable reasons establish that an additional change of program is necessitated by circumstances beyond the control of the claimant, final approval or disapproval of the request will be dependent upon the adjudicator's determination of program suitability.

6. Award and Related Procedures

a. If the adjudicator finds the proposed program is suitable, or has received a favorable recommendation from the counseling psychologist, the claimant will be informed of the approval of his/her program.

(1) Notification to the claimant will be by VA Form 22–1993a or by dictated letter. VA Form 22–1999, Enrollment Certification, will also be sent, if not already of record.

(2) It is imperative the notice to the claimant approving a second change or subsequent change of program makes clear that upon his or her acceptance and negotiation of a benefit payment, no further change of program can be approved, even if a new program is shown to be suitable to his/her aptitudes, interests, and abilities, unless an additional change is necessitated by circumstances beyond his/her control (38 U.S.C. 1791(c)).

b. If all evidence necessary for an award of benefits is of record when a favorable determination regarding suitability is made, an award will be authorized concurrently with issuance of the notice of approval to the claimant.

7. Disallowances

a. A request for a second (or subsequent) change or program will be disallowed when evidence establishes that the requested program is not suitable, when evidence reasonably suggests the requested program is intended for avocational, recreational or personal enrichment purposes, or when the evidence submitted by the claimant is *clearly insufficient* to determine suitability. Possible reasons for finding a program not suitable are:

(1) the claimant has previously completed a program objective, the requested program is unrelated to any previous training, and the claimant does not present a plan for using the proposed training to qualify for, or to obtain, new employment.

(2) A claimant's request is to pursue a program which will result in an academic degree of a lower level than previously completed, and the claimant does not demonstrate that the additional training would supplement and/or enhance the prior degree nor does the claimant show the new degree would provide an alternative occupational opportunity.

(3) The claimant's prior programs were of the same general nature as the program requested, and the prior programs were pursued only briefly before the claimant interrupted training. For example, a veteran initially pursued a program in Air Conditioning and Refrigeration for 3 months, then terminated. He/she used his/her first change of program to pursue a course in small engine repair, withdrawing from that program after 4 months. The request for a second change of program is to pursue a program in automotive mechanics. If the veteran has not consulted a vocational guidance counselor, and has not submitted a counselor's recommendation that such a program is suitable, it may reasonably be concluded that training in a mechanical field is not suitable to the claimant's interests and aptitudes.

(4) A written report from the claimant's school academic adviser to the effect that the successful pursuit for the new program is questionable based on demonstrated academic ability.

b. A dictated letter of disallowance (see exhibit C for sample) to the claimant will furnish the reasons for disallowance and will summarize the evidence upon which the determination was based. A VA Form 1–4107, Notice of Procedural and Appellate Rights, will be enclosed, as will VA Form 22–1995 (22–5495 or 22–5495w) for the claimant's use in applying for a different program or for requesting VA counseling assistance in selecting a suitable educational or vocational program.

8. Miscellaneous

a. Many VA application forms, letters and other publications must be revised to reflect the new procedures contained in this circular. It will be necessary for regional offices to modify existing form letters, if possible, or to use dictated letters for development and disallowance purposes until appropriate form letters can be published.

b. Paragraphs currently used in computer-generated letters do not satisfy the requirements for properly notifying a claimant of the consequences of electing a second change of program. The adjudicator is responsible for assuring that the claimant receives adequate notification.

c. If a claimant elects to appeal the denial of a request for change of program and requests a personal hearing, the VA hearing panel may include, when appropriate, a counseling psychologist from the VR&C staff.

9. *Rescissions*

a. DVB Circular 22–76.8.

b. This circular is rescinded October 1, 1981.

Dorothy L. Starbuck,
Chief Benefits Director.

Exhibit A

Sample Letter—Development of Evidence for Changes of Program

Dear : We have received your request for a change of your approved training objective.

A second change or program is generally the final opportunity for a student to change his or her training objective and still be eligible for VA educational assistance. Accordingly, we are required to determine whether the program you are requesting, , is suitable to your interests, aptitudes and abilities before we can take further action on your request.

Please use the enclosed VA Form 21–4138 to furnish the following information:

Also, if you received counseling from a school's academic or vocational counselor before deciding on this program, please submit a copy of the counseling report which recommends the types of training programs you should consider.

If you have not consulted your school's counselor, but you would like assistance in deciding upon a training program, please complete and return the enclosed VA Form 22–1902 and we will schedule an appointment with a professional VA counseling psychologist. Please do not return VA Form 22–1902 if you do not wish to receive VA counseling.

It is important that you reply to this letter as soon as possible, since we will not be able to take further action on your request until we receive your response.

Sincerely yours,

———— ————,
Adjudication Officer.

Exhibit B

Typical Information to Supplement a Request for a Second or Subsequent Change of Program

1. Adjudicators will select appropriate questions, such as those shown below, for inclusion in the development letter to the claimant.

2. General Information:

a. Home telephone number.

b. Business telephone number.

c. Please describe your present employment. Give your job title, principal duties and responsibilities.

d. What do you like most about your present employment? Like least?

e. Do you have a disability that limits the type of work you can perform?

3. Previous Use of VA Benefits:

a. What did you like most about (Title of Program), the first program for which you received VA benefits? Liked least?

b. Did you complete that program? If no, please explain.

c. What did you like most about (Title of Program), the second program for which you received VA benefits? Liked least?

d. Did you complete that program? If no, please explain.

4. Program of Education or Training Being Requested:

a. Briefly state your reasons for selecting this program, and explain why the training will be suitable to your aptitudes, interests and abilities.

b. Please specifically identify the educational, professional or vocational objective you expect to achieve after completion of this training program.

c. Briefly explain the admission standards for your program. If you have already been accepted, please furnish a copy of your admission or acceptance notification.

Exhibit C

Sample Letter—Disallowance (program suitability not established)

Dear : We have carefully reviewed your request for approval to receive VA benefits for training in a program. As we informed you in our letter dated , your request cannot be approved unless the program is shown to be suitable to your interests, aptitudes, and abilities.

The following evidence was available for our determination of the suitability of your requested program:

a. Your original application for VA benefits showing the training you received before and during military service.

b. Records of your previous training with VA assistance.

c. The supporting evidence you submitted on (date) , which included:

We regret to inform you that we are unable to approve your request for a change of program. The evidence we have received does not show your proposed new program is suited to your interests, aptitudes and abilities.

We would like to remind you again that vocational-educational counseling is

available from the VA to help you make the best use of your VA benefits. An application form is enclosed for your use to apply for a different program of education or training, or to apply for VA counseling.

If you disagree with our decision, please review the enclosed Notice of Procedural and Appellant Rights.

Sincerely yours,

———— ————,

Adjudication Officer.

Enclosure(s)

Department of Veterans Benefits,
Veterans Administration,
Washington, D.C. 20420, DVB
Circular 22–80–38, October 23, 1980.

Unsatisfactory Progress or Conduct

1. Background

a. Title 38, United States Code, sections 1674 and 1724, require that educational assistance benefits to veterans and other eligible persons be discontinued when the student ceases to make satisfactory progress toward completion of his or her training objective. Pertinent sections of title 38, Code of Federal Regulations, include:

(1) 21.4135(g) and 21.5130—Discontinuance dates for benefits.

(2) 21.4203(d) and 21.5200—Reports by schools.

(3) 21.4253(d), 21.4254(b) and 21.5250—Approval of programs.

(4) 21.4277, 21.4278 and 21.5270—Discontinuance because of unsatisfactory progress or conduct and reentrance requirements.

b. Both accredited and nonaccredited schools are required by law (38 U.S.C. 1775 and 1776) to have and to enforce standards of progress and conduct for their programs to be approved for VA benefits. These standards should be stated plainly in the schools catalog or bulletin. A school's policy and regulations for standards of progress and conduct must define:

(1) The school's grading system.

(2) The minimum satisfactory grade level.

(3) Conditions for interruption of training due to unsatisfactory grades or progress.

(4) A description of any probationary period.

(5) Conditions for a student's reentrance/readmission following dismissal/suspension for unsatisfactory progress.

(6) Conditions for dismissal due to unsatisfactory conduct.

c. After educational assistance benefit payments have been terminated due to unsatisfactory progress or conduct, benefits cannot be resumed unless the Veterans Administration finds the cause of the unsatisfactory progress or conduct has been removed and the program of education or training to be pursued by the veteran or eligible person is suitable to the aptitudes, interests and abilities of the student.

d. In the past, VA regulations have prescribed that recommendations regarding the removal of the cause for unsatisfactory progress or conduct and the suitability of a program would be made by a VA counseling psychologist. Those regulations have been revised to eliminate the requirement that such recommendations be developed through VA counseling.

e. Upon receipt of this circular, requests for reentry into training following unsatisfactory progress or conduct will not be referred routinely to the VR&C (Vocational Rehabilitation and Counseling) Division unless VA counseling has been requested by a trainee under chapter 32, 34 or 35. Most determinations of eligibility to reenter training will be made by the Adjudication Division without recommendations from the VR&C staff.

f. In 1976, Public Law 94–502 added a provision to 38 U.S.C. that progress would be considered unsatisfactory when a veteran or other eligible person was not progressing at a rate that would permit graduation within the approved length of a program based on the training time certified to the VA. Sections 1674 and 1724 have been amended by PL 96–466, to delete this provision in favor of reliance on schools' standards of progress.

g. Sections 1775 and 1776, 38 U.S.C., as amended by PL 94–502, require schools to maintain, publish and enforce standards of progress in order to have their programs approved for VA benefits. Oversight of schools' enforcement of their standards of progress by the SAA, VA and accrediting agencies will ensure against future abuses of VA educational assistance programs by persons who do not intend to pursue a program seriously.

2. Purpose

a. This circular provides instructions for school certifying officials and VA personnel for the termination of benefit payments due to unsatisfactory progress or conduct and for the processing of requests to reenter training under chapter 32, 34, or 35 with VA benefits after training has been interrupted due to unsatisfactory progress or conduct.

(1) If a veteran or serviceperson under chapter 32 or 34, or eligible person under chapter 35, has requested VA counseling in his/her application for resumption of benefits, the application will be referred to the VR&C Division in accordance with the procedures described in DVB Manual M22–2, part II, paragraph 5.07. A VA counseling psychologist will recommend appropriate action based on the findings and the results of VA counseling.

(2) When VA counseling has not been requested, adjudicative determinations will rely primarily upon the recommendations of the schools' academic or vocational guidance counselors, if such recommendations are available, when determining if benefit payments should be resumed after unsatisfactory progress or conduct.

b. The major portion of this circular and the examples used are devoted to institutional training. This is because past experience with the problems of unsatisfactory progress or conduct has shown they occur most often in institutional programs. In fact, unsatisfactory progress is usually defined as substandard academic performance. In spite of the focus on institutional programs, no less importance is intended for the problems of unsatisfactory progress or conduct when they occur in other types of training programs.

3. Responsibilities of Schools

a. All schools are required to maintain an academic record for each student which includes, for a veteran or other eligible person, the credit allowed toward the student's current program due to previous training and experience. The record must also show the results of each enrollment period, to include the unit courses or subjects undertaken and the final result (e.g., grade, passed, failed, withdrawn, incomplete, test results, etc.). The record must be cumulative and document the progress being made toward completion of the program.

(1) For those institutions operating on a term basis, the results for each term must be shown.

(2) For those institutions that use a narrative grading system and/or unspecified academic terms, as opposed to the traditional grading system and specified terms, the academic record must contain sufficient information to permit the recipient of a transcript to make an informed evaluation of the student's educational experience.

(3) For those schools not operating on a term basis, the record must show the student's proficiency at the various stages in the training program.

b. School officials are responsible for enforcing their established standards of progress. This will require that the school specify intervals between initial enrollment and graduation (i.e., completion) when each student's progress will be evaluated. Each such

evaluation must compare the student's progress with clearly defined progress standards such as:

(1) For programs offered on a term basis, a minimum grade average (e.g., GPA (grade point average)) or credit level that bears a reasonable relationship to final attainment of graduation requirements. It is frequently appropriate that separate evaluation be made for overall GPA and the GPA attained in courses from the student's major field of study.

(2) For programs not offered on a term basis, a minimum proficiency level expected of a student if he/she is to successfully complete the program within the number of hours of training that has been approved by the SAA (State approving agency). Measurement of a student's proficiency should be based on instructors' appraisals, graded course work, periodic testing, or other techniques that will permit an evaluation of students' progress toward satisfactory completion of the program.

c. When a student has failed to maintain prescribed standards of progress, the VA must be informed promptly so that benefit payments can be discontinued in accordance with the law. The termination date assigned by the school will be the last day of the term or other evaluation period in which the student's progress became unsatisfactory.

(1) Institutions should use VA Form 22–1999b, Notice of Change in Student Status, to report the student's termination.

(2) Flight schools, correspondence schools and training establishments may submit notice of termination on the periodic certification forms (VA forms in the 22–6553 series) used in these training programs. A letter or other written communication, providing the student's name, VA file number and the date and reason for termination should be used if a VA form is not available.

(3) The reporting official will assist the student and the VA by furnishing the reason(s) progress or conduct is considered unsatisfactory, and by describing the apparent cause(s), if known.

d. Schools that provide a period of academic probation may not continue to certify a veteran or eligible person (who remains in a probationary status) for an indefinite period of time. It is expected that institutions will report a termination due to unsatisfactory progress if a student remains on academic probation beyond 2 terms, quarters or semesters without an improvement in his/her academic standing. Clearly, if a school continues to certify the enrollment of a veteran or eligible person whose academic progress remains below graduation requirements, then the school's progress standards do not satisfy the approval criteria of 38 CFR 21.4253 and 21.4254.

e. A school's standards of progress must include specific conditions a veteran or eligible person is required to satisfy to permit recertification for VA benefits after being terminated (for benefit purposes) because of unsatisfactory progress or conduct.

(1) When a school recertifies a student's enrollment to the VA after a termination due to unsatisfactory progress or conduct, it is presumed the school has established there is a reasonable likelihood that the student will be able to maintain satisfactory progress and conduct in the future.

(2) The school's certifying official is encouraged to submit a statement with the first recertification of enrollment that describes the conditions for the student's continued certification to the VA. These conditions should prescribe the minimum performance standards to be achieved by the student during the next enrollment/evaluation period.

f. Veterans and eligible persons should be advised of the counseling services available to them at the school in order to resolve academic or other problems and to establish a meaningful plan for successful completion of their education or training. Schools and training establishments that are unable to provide counseling services are asked to remind veterans and eligible persons of the counseling services available through the VA.

4. Responsibilities of SAA's

a. The SAA must assure that a school enforces standards of progress specific enough to determine a point in time when VA benefits for veterans and other eligible persons should be discontinued due to unsatisfactory progress. The grades/results of all unit courses and subjects are to be considered when determining if progress standards are being met.

b. The SAA is responsible for suspending or withdrawing the approval of programs at any school that has not adopted or is not enforcing progress standards that reflect the academic performance or proficiency necessary for a veteran or other eligible person to satisfy graduation requirements.

5. Responsibilities of the VA Education Liaison Representative

a. The ELR (Educational Liaison Representative) is responsible for reviewing the policies and regulations for standards of progress of each approved school to ensure that they are completely and plainly stated, and that they are enforced.

b. The ELR must make prompt referral to the SAA of any evidence that a school is not enforcing its standards of progress for veterans and eligible persons.

6. VA Actions Following Notification of Unsatisfactory Progress or Conduct

a. Upon receipt of a notice of termination due to unsatisfactory progress or conduct, the Adjudication Division will act promptly to stop further payment of educational assistance benefits if the student's award extends beyond the termination date for benefits as reported by the school. It is essential that ending reason code 62, Unsatisfactory Progress, be used in the stop-payment transaction. The "folder pull" indicatory in the Target System must also be set (see DVB Circular 22–80–14).

b. A computer-generated termination letter will be allowed to issue so that the student is informed of his/her remaining entitlement and the amount of overpayment, if any.

c. Until FL 22–337 can be revised, a dictated letter will also be sent to inform the student of the consequences of unsatisfactory progress or conduct in training and the procedures that must be followed if the student wishes to have benefits resumed. A sample letter is shown as exhibit A to this circular.

7. Requests for Reentry Into Training

a. A specific request for resumption of VA benefits following an interruption due to unsatisfactory progress or conduct must be submitted by the claimant to initiate action by the VA to determine whether further payments of VA educational assistance allowance should be authorized. Requests may be submitted on VA Form 22–1995, 22–5495 or 22–5495w, as appropriate.

b. An adjudicator (GS–9 or higher grade employee) will determine whether:

(1) The cause of the unsatisfactory progress has been removed;

(2) There is a reasonable likelihood the unsatisfactory progress will not recur; and

(3) The program of education or training now being requested by the veteran or other eligible person is suitable to his or her aptitudes, interests and abilities.

c. Following termination of VA benefits because of unsatisfactory progress, the majority of requests for reentry into training have been for resumption of benefits for the same program at the same school the student has been attending. These requests are

more easily resolved, provided there have not been prior reports of unsatisfactory progress, than are requests to pursue training at another school.

(1) If the same school will again certify enrollment to the VA, and indicates on the enrollment certification that the problems relating to the unsatisfactory progress or conduct have been discussed with the student, the adjudicator will accept the school's recertification of the student's enrollment as prima facie evidence that the cause of the unsatisfactory progress has been removed. The school will monitor the student's progress and ensure that if there is a recurrence of unsatisfactory progress, it will again be promptly reported to the VA.

(2) In these cases, the suitability of the program will be conceded (in the absence of contradictory evidence) based on the student's expressed desire to continue in the same program, and the school's decision that the student's enrollment may again be certified to the VA for benefit payments.

d. When, after VA benefits have been terminated for unsatisfactory progress, a veteran or eligible person requests approval to change his/her program and/or place of training, a determination of eligibility for resumption of benefits will be based on other types of evidence, as described in the following subparagraphs.

e. The development of evidence to evaluate the issue of unsatisfactory progress must be undertaken carefully in order to prevent further frustration for the student who has been making a serious effort to maintain satisfactory progress.

f. A request for evidence from a claimant must be designed to elicit the actual cause of unsatisfactory progress and the measures taken by the student to correct the problem. However, the request must not infer or suggest the cause(s) so as to lead the claimant into furnishing a particular response. The development letter must not contain statements that offer assurance benefits will be resumed, or statements that imply it is unlikely that the claimant's request for approval of a new program or place of training will be approved. Due to the time required to compose an appropriate development letter, adjudicators are authorized to record an end product code 220 at the time the letter is dispatched.

g. Whenever a claimant requests approval to change programs and/or place of training, one of the essential items to be furnished will be a personal statement in which the student gives an explanation of the reasons progress in training has not been satisfactory. The student should also give his/her reasons for believing there is an increased likelihood progress will be satisfactory after a change of program or place of training.

h. If the new program will be pursued at an institution, through a correspondence school, or at a flight school, the student will be asked to submit:

(1) A copy of his/her transcript of grades or other equivalent evaluation that reflects the results of his/her performance through the time progress or conduct was reported as unsatisfactory.

(2) A copy of the official notification of acceptance or admission into the program being requested.

(3) A copy of the results of academic or vocational counseling or testing, if available.

(4) A copy of the school's evaluation of the student's prior training and experience made by the admissions officer, registrar or other school official. If an enrollment certification has been received, the evaluation may be indicated by the credit allowed for prior training by the school.

(5) For degree programs, a school's statement giving the special conditions, if any, which must be met for the student's full matriculation into the program.

(6) For nondegree programs, a statement from the school giving the special conditions, if any, associated with the student's enrollment.

i. If training is to be provided by an on-the-job or apprenticeship training establishment, the claimant will be asked to obtain a statement from the owner of the establishment or the personnel office, attesting to the fact the claimant has been hired, or is being considered for placement into a training program.

8. Evaluation of Evidence and Related Actions

a. The types of evidence furnished by a claimant will be evaluated together with the following evidence that may be of record in the claims or DEA (Departments' Educational Assistance) folder.

(1) Is this the first indication that the student's progress in training is unsatisfactory, or has the claimant previously been interrupted because of unsatisfactory progress or conduct in the same or a similar program? If the latter, is the cause for unsatisfactory progress or conduct substantially the same as the previous cause(s)?

(2) Has the student completed a significant portion of the same or a similar program (i.s., approximately half or more), or will the new program represent the claimant's initial attempt at that type of program?

(3) Has the student recently received VA tutorial assistance?

(4) Does the claimant's record show previous pursuit of deficency courses?

(5) Does the claimant possess a high school diploma or equivalent?

(6) Is there a record of previous Va counseling, or counseling information previously submitted by the claimant, that deals with the problem of unsatisfactory progress?

(7) Has the student recently received nonpunitive grades and submitted evidence of mitigating circumstances that could also be reasons for making unsatisfactory progress?

b. Finding that the cause for unsatisfactory progress has been removed will require a judgmental decision by Adjudication personnel. Typical causes and acceptable remedies are:

(1) The claimant's progress was unsatisfactory in a full-time academic program.

(a) The student cited the cause for unsatisfactory progress as insufficient time to complete assigments and prepare for several examinations at the same time.

1. The student proposes to reduce his/her rate of pursuit to attain satisfactory progress through enrollment in fewer courses.

2. The student plans to devote more time to his/her educational program by reducing the number of hours worked each week or by obtaining employment that allows (more) study time on the job.

3. VA tutorial assistance was claimed shortly before academic suspension or dismissal and evidence supports a conclusion that further tutoring will raise performance to an acceptable level.

(b) Evidence shows the student was unprepared academically for his/her program and he/she plans to pursue a different program that is less demanding (academically) than the previous program.

(2) The student's progress became unsatisfactory due to family, financial or health problems that, according to the claimant's own statement, have subsequently been resolved.

(3) The student has received poor grades in certain advanced or upper-division classes because necessary prerequisite courses were not completed. The student now plans to pursue the prerequisite courses, or will attend other refresher, remedial or deficiency training.

c. If the adjudicator determines that the cause for the unsatisfactory progress has probably been removed, the requested program still must be found suitable to the aptitudes, interests and abilities of the claimant before benefit payments can be resumed. Procedures for determining the suitability of a program are found in DVB Circular 22–80–37, Second or Subsequent Change of Program.

d. If the student or school submits evidence such as aptitude test results, percentile rankings, technical counseling reports, etc., the adjudicator may request the assistance of a VA counseling psychologist for an evaluation of the evidence.

(1) The evidence and the claims or DEA folder will be referred to the VR&C Division under cover of VA Form 3230. It will be annotated with a request that VR&C's interpretation of the evidence address the liklihood that the cause for unsatisfactory progress has been removed and the probable suitability of the proposed program.

(2) Counseling psychologists will review these cases within 2 workdays of receipt in VR&C. When reviews have been completed, the claims or DEA folder with the counseling psychologist's interpretation noted on VA Form 119, Report of Contact, will be returned promptly to the Adjudication Division. Time expended for these reviews will be reported as "Other Measured Hours."

e. If a claimant requests and receives VA counseling, the VR&C Division will prepare a recommendation concerning resumption of benefits on VA Form 22–1902 or 22–1902L for the Adjudication Division.

(1) If the recommendation from VR&C is in favor of resumption of benefits, conditions for continuation of benefits may be indicated by the VA counseling psychologist. If the school has reported conditions that are more restrictive than those recommended by the VR&C Division the conditions furnished by the school will apply. Notification of approval will be transmitted to the claimaint by use of VA Form 22–1993a, Certificate of Eligibility, or by dictated letter.

(2) If a claimant does not report for requested VA counseling, the claim will be returned to the Adjudication Division. If there is technical evidence in the record which has a bearing on the determination to be made, the counseling psychologist will provide an interpretation of this evidence for consideration by the adjudicator. The adjudicator will then proceed with an adjudicative determination to approve or disallow the request for resumption of benefit payments.

f. Approval of payment for an interval between terms is appropriate only if the student has been permitted to reenroll in the next available term, and payment is otherwise in order for the interval.

9. Disallowances

a. A determination that the cause for unsatisfactory progress has *not* been removed will require that the claimant's request be disallowed. These determinations require the same degree of careful deliberation as a favorable determination. Justifiable reasons for disallowance are:

(1) Evidence of multiple occurrences of unsatisfactory progress in the same or a similar program.

(2) A significant portion of a program has been completed, but according to a report from the claimant's school, there is no possibility the student can raise his or her academic standing to a level that would permit graduation within reasonable period of additional training.

(3) A student has been unable to attain satisfactory progress in his/her program despite intensive tutoring.

(4) A claimant's record of prior training conclusively shows inadequate prior education for the program being attempted.

(5) Evidence submitted by the claimaint is clearly insufficient for an informed determination.

b. A dictated letter of disallowance to the claimant will furnish the reasons for disallowance and will summarize the evidence upon which the determination was based. VA Form 1–4107, Notice of Procedural and Appellate Rights, will be enclosed, as will VA Form 22–1995 (22–5495) or 22–5495w) for the claimant's use in applying for a different program, for requesting VA counseling assistance, or for later reapplication for the same program after the cause for unsatisfactory progress or conduct has been removed.

10. Miscellaneous

a. The new procedures described by this circular will be incorporated into VA manuals, pamphlets, application forms, and form letters as soon as possible and practical.

b. If a claimant elects to appeal the denial of a request for resumption of benefit payments and requests a personal hearing, the VA hearing panel may include, when appropriate, a counseling psychologist from the VR&C staff.

c. Education liaison representatives will ensure that a copy of this circular is sent to each SAA.

11. Rescissions

a. Appendix O, Revised, and change 10 to DVB Circular 20–76–84; Appendix G and change 11 to DVB Circular 20–77–97; DVB Circular 20–78–1 and change 1 thereto.

b. This circular is rescinded October 1, 1981.

Dorothy L. Starbuck,
Chief Benefits Director.

Exhibit A

Termination Letter—Unsatisfactory Progress

Dear : We have terminated your award of educational assistance benefits effective *(date)*, because we have received evidence that you are not making satisfactory progress toward the completion of your objective. We are sending a separate letter to inform you of your remaining entitlement to benefits and the amount of an overpayment of benefits, if any.

Since you have not made satisfactory progress in training, we will not be able to authorize VA benefits for any future training unless we receive evidence that the cause for your unsatisfactory progress has been corrected, and evidence that the training program you select is suitable to your aptitudes, interests and abilities.

In order to apply for additional benefits, for the same program or for a different program, you should submit the enclosed application form. Please submit the following evidence with your application:

a. Your own statement describing the

reason(s) you were not able to maintain satisfactory progress in training, and how you plan to overcome the problem(s). You should explain why you believe your program is suitable for you.

b. A transcript of grades or an equivalent evaluation of the performance you have previously demonstrated in training.

c. A copy of your official notice of acceptance into your proposed training program. This should include the school's evaluation of your prior training and experience and list the special conditions, if any, you must meet to continue your enrollment at the school.

d. If you have consulted your school's academic or vocational guidance counselor, please submit a copy of the counselor's written recommendation concerning the appropriate course of action to avoid recurrence of unsatisfactory progress or conduct.

If you would like the assistance of a professionally trained VA counselor in selecting a suitable program, you can make your request on the application form. This counseling is provided free of charge.

Please do not hesitate to contact one of our benefit counselors for futher information and assistance. The VA telephone number can be found in your local telephone directory under "U.S. Government, Veterans Administration."

Sincerely yours,

_____,

Adjudication Officer.

Enclosure.

Note: A VA Form 1–4107, Notice of Procedural and Appellate Rights, will be enclosed.

[FR Doc. 81–2384 Filed 1–22–81; 8:45 am]

BILLING CODE 8320–01–M

Sunshine Act Meetings

Federal Register
Vol. 46, No. 15
Friday, January 23, 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

COMMODITY FUTURES TRADING COMMISSION.

TIME AND DATE: Tuesday, January 27, 1981, 10:00 a.m.

PLACE: 2033 K Street, N.W., Washington, D.C., 5th floor hearing room.

STATUS: Open.

MATTERS TO BE CONSIDERED:

The regulation of advertising in the commodity futures industry.

Proposed rule prohibiting futures commission merchants from agreeing to limit any person's loss or guaranteeing any person against loss.

CONTACT PERSON FOR MORE INFORMATION: Jane Stuckey, 254-6314.

[S-117-81 Filed 1-21-81; 3:46 pm]

BILLING CODE 6351-01-M

2

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of Changes in Subject Matter of Agency Meeting.

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2)), notice is hereby given that at its closed meeting held at 2:30 p.m. on Monday, January 19, 1981, the Corporation's Board of Directors determined, on motion of Chairman Irvine H. Sprague, seconded by Director William M. Isaac (Appointive), concurred in by Director John G. Heimann (Comptroller of the Currency), that Corporation business required the withdrawal from the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matters:

Request of Investors Bank & Trust Company, Boston, Massachusetts, for modification of conditions imposed in granting Federal deposit insurance.

Application of Home Savings Bank of Upstate New York, Albany, New York, for consent to establish a branch on Columbia Turnpike, 200 yards southwest of Sherwood Avenue, Town of East Greenbush, New York.

The Community Savings Bank, Rochester, New York, for consent to establish a branch at the southeast corner of Muller Boulevard and Jefferson Road, Town of Henrietta, New York.

The Board further determined, by the same majority vote, that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matters:

Recommendations regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Case No. 44,629-L—Banco Economias, San German, Puerto Rico.

Memorandums and Resolution re: Centennial Bank, Philadelphia, Pennsylvania.

The Board further determined, by the same majority vote, that no earlier notice of the changes in the subject matter on the meeting was practicable; that the public interest did not require consideration of the matters added to the agenda in a meeting open to public observation; and that the matters added to the agenda could be considered in a closed meeting by authority of subsections (c)(4), (c)(6), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(4), (c)(6), (c)(9)(B), and (c)(10)).

Dated: January 19, 1981.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[S-115-81 Filed 1-21-81; 11:50 am]

BILLING CODE 6714-01-M

3

FEDERAL ENERGY REGULATORY COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: [26 FR 6126, January 21, 1981].

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: January 22, 1981, 10 a.m.

CHANGE IN THE MEETING: The following item has been added:

Item No., Docket No., and Company

CAG-16, ST80-59, Southern Natural Gas Company.

Lois D. Cashell,

Acting Secretary.

[FR Doc. S-114-81 Filed 1-21-81; 11:31 am]

BILLING CODE 6450-01-M

4

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM.

TIME AND DATE: 10 a.m., Wednesday, January 28, 1981.

PLACE: Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Summary Agenda

Because of its routine nature, no substantive discussion of the following item is anticipated. This matter will be voted on without discussion unless a member of the Board requests that the item be moved to the discussion agenda.

1. Proposed amendments to Regulation F to conform with SEC rules regarding safe harbor from liability for projections, corporate governance, dividend-reinvestment plans, tender offers, and going-private transactions. (Proposed earlier for public comment; Docket No. R-0327)

Discussion Agenda

2. Proposals concerning eligibility to hold NOW accounts.

3. Proposed revisions to the Board's "Rules Regarding Delegation of Authority" in the areas of Reserve Bank operations and personnel.

4. Any item carried foward 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 19, 1981.

James McAfee,

Assistant Secretary of the Board.

[S-112-81 Filed 1-21-81; 9:19 am]

BILLING CODE 6210-01-M

5

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: Notice forwarded to Federal Register on January 19, 1981.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 10:00 a.m., Wednesday, January 28, 1981.

CHANGES IN THE MEETING: One of the items announced for inclusion at this meeting was consideration of any agenda items carried forward from a previous meeting; the following such open item(s) was added:

1. Further consideration of the proposal to revise Regulation C (Home Mortgage Disclosure) to implement amendments to the Home Mortgage Disclosure Act.

This matter was originally announced for an open meeting on Wednesday, January 21, 1981.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 462–3204.

Dated: January 21, 1981.

James McAfee,

Assistant Secretary of the Board.

[FR Doc. S–118–81 Filed 1–21–81; 3:46 pm]

BILLING CODE 6210–01–M

6

U.S. METRIC BOARD, PUBLIC AWARENESS AND EDUCATION COMMITTEE.

TIME AND DATE: 1:30 p.m., Wednesday, February 4, 1981.

PLACE: U.S. Metric Board, 4th Floor, 1600 Wilson Boulevard, Arlington, Virginia 22209.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

Approval of minutes.
Approval of Agenda.
Report on Personnel.
Review of previous month's activity.
Review of previous Public Forum.
Report on next Public Forum.
Review of Metric Magazine program.
Philosophy of USMB Public Awareness and Education program.
Status of educational materials.
Public Forum presentations for FY 1981.
Metric Week Plan/Theme/PSAs.
Political or Editorial contest.
Report of Public Awareness and Education operating plan.
Meeting sites for FY 1982.
Review of *What About Metric.*
Discussion of T. V. PSA concepts.
Agenda for next meeting.

[S–113–81 Filed 1–21–81; 10:33 am]

BILLING CODE 6820–94–M

7

NATIONAL COUNCIL ON THE HANDICAPPED.

TIME AND DATE:

9:00 a.m.—5:00 p.m., Wednesday, February 18, 1981.
9:00 a.m.—5:00 p.m., Thursday, February 19, 1981.
9:00 a.m.—5:00 p.m., Friday, February 20, 1981.

PLACE: Capitol Holiday Inn, (202) 479–4000, 550 C Street, S.W., Washington, D.C. 200024.

STATUS: Open meeting.

MATTERS TO BE CONSIDERED:

1. Reports to Council by the Rehabilitation Service Administration (RSA) and the National Institute of Handicapped Research (NIHR).
2. Council discussion of its operating procedures and review of its draft Annual Report to the Secretary, Congress and the President.

CONTACT PERSON FOR MORE INFORMATION: Carol Berman, National Council on the Handicapped, (202) 245–3498.

Carol Berman,

Executive Secretary.

[S–119–81 Filed 1–21–81; 3:47 pm]

BILLING CODE 4000–01–M

8

NEIGHBORHOOD REINVESTMENT CORPORATION: [No. 17].

Personnel Committee Meeting

TIME AND DATE: 3:00 PM, January 27, 1981.

PLACE: Conference Room E, Sixth Floor, Federal Home Loan Bank Board, 1700 G Street, N.W., Washington, D.C.

STATUS: Open Meeting.

CONTACT PERSON FOR MORE INFORMATION: Timothy McCarthy, Associate Director, Communications, (202) 377–6815.

AGENDA: I. Approval of Neighborhood Reinvestment Corporation Group Pension Plan and Group Annuity Contract.

Donnie L. Bryant,

Secretary.

January 21, 1981.

[FR S–116–81 Filed 1–21–81; 3:32 pm]

BILLING CODE: None.

9

NUCLEAR REGULATORY COMMISSION.

DATE: Thursday, January 22 & Friday, January 23, 1981.

PLACE: Commissioners' Conference Room, 1717 H St. N.W., Washington, D.C.

STATUS: Open/Closed.

MATTERS TO BE CONSIDERED:

Thursday, January 22

10 a.m.—1. Briefing on Information Flow Concerning the TMI Accident (approximately 2 hours) (closed—exemptions 7, 10).

2 p.m.—1. Affirmation Session (approximately 30 minutes—public meeting).

a. Affirmation Items.

1. EPA's Env. Rad. Protection Stds for Nuc Pwr Operations.

2. Fire Protection Rule for Future Plants.

3. Petition Filed by Citizens Advisory Board Requesting Amendment to 10 CFR 2.

4. Draft Bailly Show Cause Order (tentative).

5. Final rule in Part 60 (tentative).

b. Discussion and Vote of above Affirmation Items, if Required.

2. Discussion of Management-Organization and Internal Personnel Matters (approx. 1½ hours—closed—exemptions 2, 6).

Friday, January 23

2 p.m.—1. Briefing on NFS-Erwin (tentative—approximately 1½ hours—closed—exemption 1).

ADDITIONAL INFORMATION: By a vote of 4–0 on January 15, the Commission determined pursuant to 5 U.S.C. 552b(e)(1) and § 9.107(a) of the Commission's Rules that Commission business required that the Discussion of TMI–1 Restart Order, held that day, be held on less than one week's notice to the public and that it be closed to the public under Exemption 10.

AUTOMATIC TELEPHONE ANSWERING SERVICE FOR SCHEDULE UPDATE: (202) 634–1498.

Those planning to attend a meeting should reverify the status on the date of the meeting.

CONTACT PERSON FOR MORE INFORMATION. Walter Magee (202) 634–1410.

Walter Magee,

Office of the Secretary.

January 15, 1981.

[S–120–8 Filed 1–21–81; 4:32 pm]

BILLING CODE 7590–01–M

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NUCLEAR REGULATORY COMMISSION.

DATE: Monday, January 26 and Tuesday, January 17, 1981.

PLACE: Commissioners' Conference Room, 1717 H Street, N.W., Washington, D.C.

STATUS: Open.

MATTERS TO BE CONSIDERED:

Monday, January 26, 2 p.m.

Briefing on Adequacy of Sequoyah Ignition Systems (approximately 1½ hours—public meeting—postponed from 1/21/81).

Tuesday, January 27, 2 p.m.

Discussion and Vote on Final Rule to 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic

Repositories—Licensing Procedures" (if necessary—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.

Dated: January 19, 1981.

Walter Magee,

Office of the Secretary.

[S–121–81 Filed 1–21–81; 4:32 pm]

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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

CIVIL AERONAUTICS BOARD

84991 12-24-80 / Air carriers; terminations, suspensions, and reductions of service; maintenance of schedule listings

ENERGY DEPARTMENT

Economic Regulatory Administration—

84967 12-24-80 / Calculation for the cost of using alternate fuels under the Powerplant and Industrial Fuel Use Act of 1978

ENVIRONMENTAL PROTECTION AGENCY

85004 12-24-80 / Approval of Michigan sulfur dioxide stock; Implementation plan for Consumer Power Company's J. H. Campbell Plant

85005 12-24-80 / Approval and promulgation of implementation plans; State of Missouri

INTERIOR DEPARTMENT

Land Management Bureau—

84788 12-23-80 / California; partial revocation of reclamation withdrawals

Rules Going Into Effect Saturday, January 24, 1981

INTERIOR DEPARTMENT

Land Management Bureau—

85023 12-24-80 / California; Revocation of air navigation site withdrawal

Rules Going Into Effect Sunday, January 25, 1981

AGRICULTURE DEPARTMENT

Food Safety and Quality Service—

7 1-2-81 / Increase in fees and charges

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 Aids section of the issue of January 7, 1981

Advance Orders are now Being Accepted for Delivery in About 6 Weeks

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A Cumulative checklist of CFR issuances for 1980 appears in the back of the first issue of the Federal Register each month in the Reader Aids section. In addition, a checklist of current CFR volumes, comprising a complete CFR set, appears each month in the LSA (List of CFR Sections Affected).

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7562 Part II—HHS/FDA:
Medical Devices; Classification of Gastroenterology-Urology Devices; Proposed Rules—will consist of approximately 120 pages

7644 Part III—DOI/FWS:
U.S. Fish and Wildlife Service Migration Policy

7666 Part IV—EPA:
Incinerator Standards for Owners and Operators of Hazardous Waste Management Facilities; Interim Final Rule and Proposed Rule

7692 Part V—DOL/OSHA:
Hazardous Materials; Request for Comments

7702 Part VI—DOL/WGH/ESA:
Minimum Wages for Federal and Federally-Assisted Construction; General Wage Determination Decisions, Modifications and Supersedeas Decisions

7748 Part VII—DOA/FNS:
Food Stamp Program; Photo Identification

7756 Part VIII—DOL:
Office of the Assistant Secretary for Labor-Management Relations—Hospital Employee Protection Program

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7764 Part IX—DOL/ETA:
Basic and Support Service of the Employment Service; Final Rule

7776 Part X—DOE/ERA:
Mandatory Petroleum Price Regulations; Retroactive Amendments to "V" Factor of Refiner Cost Allocation Formulae

7786 Part XI—DOL/ETA:
Unemployment Compensation for Civilian Employees

7796 Part XII—DOL/ETA:
Unemployment Compensation for Ex-Service Members

7806 Part XIII—Office of the Special Assistant to the President for Consumer Affairs:
Export of Banned or Significantly Restricted Substances; Background Report on Executive Order 12264

7822 Part XIV—DOL/ETA:
Comprehensive Employment and Training Act Regulations; Amendments

7836 Part XV—EPA:
Federal Radiation Protection Guidance for Occupational Exposures

7846 Part XVI—DOA/FNS:
Special Supplemental Food Program for Women, Infants and Children; Eligibility Criteria

7856 Part XVII—DOI/OSMRE:
List of Laboratories Qualified To Perform Work Under the Small Operator Assistance Program

7878 Part XVIII—DOA/FNS:
Special Supplemental Food Program for Women, Infants, and Children; Food Delivery Systems

7894 Part XIX—DOI/OSMRE:
Prime Farmlands: Interim and Permanent Regulatory Programs

7902 Part XX—DOI/OSMRE:
Permanent and Interim Regulatory Program Modifications

7906 Part XXI—DOI/OSMRE:
Amendment of State Program Process

7912 Part XXII—The President:
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Part II

Department of Health and Human Services

Food and Drug Administration

Medical Devices; Classification of Gastroenterology-Urology Devices; Proposed Rules

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 876

[Docket No. 76N-1945]

Classification of Gastroenterology-Urology Devices; Development of General Provisions

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing general rules applicable to the classification of all gastroenterology-urology devices. The Medical Device Amendments of 1976 require the agency to classify all medical devices intended for human use into three categories: class I, general controls; class II, performance standards; and class III, premarket approval. In the preamble to this proposal, FDA describes the development of the proposed regulations classifying individual gastroenterology-urology devices, which are being published elsewhere in this issue of the **Federal Register.** The preamble also describes the activities of the Gastroenterology-Urology Device Section of the General Medical Devices Panel (formerly the Gastroenterological and Urological Device Classification Panel), an FDA advisory committee that makes recommendations to FDA concerning the classification of gastroenterology-urology devices.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Device Classification System

The Medical Device Amendments of 1976 (the amendments) (Pub. L. 94-295) establish a comprehensive system for the regulation of medical devices intended for human use. One provision of the amendments, section 513 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360c) establishes three categories (classes) of devices, depending on the regulatory controls needed to provide reasonable assurance of their safety and effectiveness. The three categories are as follows: class I, general controls; class II, performance standards; and class III, premarket approval.

Most devices are not classified under section 513 of the act until after FDA has (1) received a recommendation from a device panel (an FDA advisory committee); (2) published the panel's recommendation for comment, along with a proposed regulation classifying the device; and (3) published a final regulation classifying the device. These steps must precede the classification of any device that was in commercial distribution before May 28, 1976 (the date of enactment of the amendments) and that was not previously regarded by FDA as a new drug under section 505 of the act (21 U.S.C. 355). A device that is first offered for commercial distribution after May 28, 1976, and that is substantially equivalent to a device classified under this scheme, is classified in the same class as the device to which it is substantially equivalent.

A device that FDA previously regarded as a new drug, or a newly offered device that is not substantially equivalent to a device that was in commercial distribution before the amendments, is classified by statute into class III. These two types of devices are classified into class III without any FDA rulemaking proceedings. The agency determines whether new devices are substantially equivalent to previously offered devices by means of the premarket notification procedure in section 510(k) of the act (21 U.S.C. 360(k)) and Part 807 of the regulations (21 CFR Part 807).

Related Regulations

In the **Federal Register** of July 28, 1978 (43 FR 32988), the agency issued final regulations describing the procedures for classifying devices intended for human use. These regulations, which were proposed in the **Federal Register** of September 13, 1977 (42 FR 46028), supplement the agency's regulations in Part 14 (21 CFR Part 14) governing the use of advisory committees. The agency also issued interim device classification procedures in a notice published in the **Federal Register** of May 19, 1975 (40 FR 21848).

Activities of Panel

Anticipating enactment of the amendments, FDA established several advisory committees to make preliminary recommendations on device classification. The Gastroenterology-Urology Device Classification Panel (the Panel) was originally chartered on April 16, 1973, as the Panel on Review of Gastroenterological and Urological Devices. FDA placed a report of the Panel's tentative classification recommendations on file with the Dockets Management Branch (HFA-305), Food and Drug Administration, and announced the availability of the report to the public by notice published in the **Federal Register** of April 20, 1976 (41 FR 16603). On August 9, 1976, the Panel and other preamendments device classification panels were rechartered to reflect their new responsibilities under the amendments. The agency directed each panel to reconsider its preamendments classification recommendations in light of the new requirements. In 1976 and 1977, the Panel reviewed all devices that FDA had referred to it to make certain that its recommendations were in accord with the amendments.

Throughout the Panel's deliberations, interested persons were given an opportunity to present their views, data, and other information concerning the classification of gastroenterology-urology devices. The Panel also invited experts to testify and sought information on many devices from the published literature.

In October 1977, the Panel submitted to FDA a preliminary report of its recommendations. The report included a roster of current and former Panel members and consultants and listed all meeting dates. The agency placed a copy of the report in the Dockets Management Branch (HFA-305), Food and Drug Administration, and announced its availability to the public by notice published in the **Federal Register** of November 29, 1977 (42 FR 60792). At subsequent meetings the Panel changed its previous recommendations concerning the classification of several devices. An addendum to the Panel report showing these changes has been placed in the Dockets Management Branch, Food and Drug Administration. Also available in the Dockets Management Branch are summary minutes from all Panel meetings, verbatim transcripts of meetings held after May 28, 1976 (the date of enactment of the amendments), and all references cited in individual gastroenterology-urology device proposed classification regulations.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA

published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). The Gastroenterological and Urological Device Classification Panel was terminated, and its functions are now conducted by the Gastroenterology-Urology Device Section of the General Medical Devices Panel.

Relationship Between the Device Names in the Device Registration and Listing Codes and the Device Names in Classification Regulations

Some manufacturers have become accustomed to identifying a device by its registration and listing name and three letter code used for purposes of device listing under section 510 of the act (21 U.S.C. 360). However, FDA is still making changes in the names and identifications of generic types of devices in the classification regulations for all devices for which final regulations have not been published. Because FDA has not used the present device registration and listing names in the proposed and final classification regulations, FDA has prepared an index of names of generic types of medical devices used in classification regulations to aid a manufacturer in matching its device with the proper classification regulation. The index shows the device registration and listing product code for each device reviewed by a classification panel and the corresponding name of the generic type of device and classification panel in which the device classification will be published in the **Federal Register**. The agency announced the availability of this index in the **Federal Register** of March 6, 1979 (44 FR 12269). If necessary, this index will be updated and the availability of the revised index will be reannounced in the **Federal Register**. FDA believes that, because this index is available, it is unnecessary to include or cross reference the present device registration and listing name and product code in the classification regulations. In the future, following publication of most of the device classification regulations, the agency will revise and reissue the device registration and listing product code so the device names to be used for registration and listing correspond to the device names in the final device classification regulations.

List of Gastroenterology-Urology Devices

In 1972 FDA surveyed device manufacturers to identify the devices for which classification regulations would be needed. Following this survey, FDA developed a list of gastroenterology-urology devices. The Panel supplemented the list by using its members' knowledge of gastroenterology-urology devices in use. Devices that were solely for experimental or investigational use or that were not generally available were not included. Additional gastroenterology-urology devices, which are not included in this list and which were commercially available before May 28, 1976, will be added to the list as necessary.

FDA is proposing to establish a new Part 876 in title 21 of the Code of Federal Regulations. Part 876 will consist of sections identifying each gastroenterology-urology device with a brief narrative description and stating the classification of that device. A list of gastroenterology-urology devices appears elsewhere in this preamble.

Individual Gastroenterology-Urology Device Classification Regulations

Elsewhere in this issue of the **Federal Register**, the agency is issuing 57 individual proposed regulations to classify each gastroenterology-urology device. The agency is proposing to classify 4 of these devices into class I (general controls), 40 devices into class II (performance standards), and 10 into class III (premarket approval). In addition, in one document the agency is proposing to classify a device into class II, while proposing to classify some accessories of the device into class I. In two other documents, FDA is proposing to classify devices into class II for some uses and into class III for other uses.

The agency also is publishing the recommendations of the Panel regarding these devices, as required by section 513 (c)(2) and (d)(1) of the act (21 U.S.C. 360c (c)(2) and (d)(1)).

Published Panel Recommendations

Each published Panel recommendation concerning a gastroenterology-urology device includes the information described below.

1. *Identification.* Both the Panel recommendation and the proposed FDA classification regulation include a brief narrative identification of the device. The identification statement is necessarily broad because it applies to a category or type of device rather than to a specific device. As explained in proposed § 876.1 (21 CFR 876.1), any manufacturer of a newly offered device who files a premarket notification submission under section 510(k) of the act (21 U.S.C. 360(k)) and Part 807 (21 CFR Part 807) of the regulations cannot show merely that the device is accurately described by the section title and identification provisions of a classification regulation. Although a new device may be described accurately by the title and identification in a classification regulation, it is nevertheless in class III under section 513(f) of the act if it is not substantially equivalent to a preamendments device (or to a postamendments device that has already been reclassified from class III into class I or class II). It is not practical for FDA to publish an identification of each type of device that is so detailed as to anticipate every product feature that may be relevant in determining whether a new device is substantially equivalent to previous devices classified by the regulation. The agency believes that this problem was recognized in, and addressed by, the premarket notification procedures in section 510(k) of the act. Accordingly, any manufacturer who submits a premarket notification submission should state why the manufacturer believes the device is substantially equivalent to other devices in commercial distribution, as required by § 807.87 (21 CFR 807.87), and whether the device is described in a classification regulation.

Several regulations classify products that have both medical and nonmedical uses. FDA will regulate a multipurpose product as a medical device if it is intended for a medical purpose i.e., for "use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease," or "to affect the structure or any function of the body." Section 201(h). FDA will determine the intended use of a product based upon the expressions of the persons legally responsible for its labeling and by the circumstances surrounding its distribution. The most important factors the agency will consider in determining the intended use of a particular product are the labeling, advertising, and other representations accompanying the product. Products that have medical uses only are clearly intended for medical purposes and, therefore, will be regulated as medical devices whether or not medical claims are made for them.

2. *Recommended classification.* Each Panel's recommendation describes whether the device is recommended for classification into class I (general controls), class II (performance standards), or class III (premarket approval).

For each device recommended for classification into class I, the Panel considered whether the device should be exempt from any requirements under certain sections of the act: section 510

(21 U.S.C. 360, registration), section 519 (21 U.S.C. 360i, records and reports), and section 520(f) (21 U.S.C. 360j(f), good manufacturing practice requirements). The Panel recommended that several devices be exempted from section 510, section 519, and section 520(f) of the act in the manufacture of these devices. The agency's policy concerning these exemption recommendations is discussed below in the section of this proposal concerning "Exemptions for Class I Devices."

A Panel recommendation that a device be classified into class II includes the Panel's recommended priority ("high," "medium," or "low") for establishing a performance standard for the device. Similarly, each Panel recommendation that a device be classified into class III includes the Panel's recommended priority ("high," "medium," or "low") for application of premarket approval requirements to that device. As explained below in the section of this notice concerning "Priorities for Class II and III Devices," the agency is not, however, proposing the establishment of FDA priorities at this time.

3. *Summary of reasons for recommendation.* The summary of reasons for the Panel's recommendation explains why the Panel believes that a particular device meets the statutory criteria for classification into class I, II, or III.

Except in those instances in which FDA's classification proposal differs from the Panel's recommendation, FDA is adopting the Panel's summary of reasons as the agency's statement of the reasons for issuing the regulations, as required by section 517(f) of the act (21 U.S.C. 360g(f)).

The summary of reasons for a recommendation identifies any device that is an implant or a life-supporting or life-sustaining device. The summary of reasons for any implant or life-supporting or life-sustaining device that is not recommended for classification into class III also explains why the Panel determined that classification of the device into class III is not necessary to provide reasonable assurance of its safety and effectiveness. The agency provides a similar explanation in the "Proposed Classification" section of the preamble to any proposal to classify an implant or a life-supporting or life-sustaining device into a class other than class III.

4. *Summary of data on which the recommendation is based.* In many cases, the Panel based its recommendations on the Panel members' personal knowledge of, and clinical experience with, the devices under review. The Panel particularly relied upon clinical experience and judgment when the Panel considered a device that had been used extensively and was accepted widely before the amendments were enacted. The legislative history of the amendments provides that the term "data" has a special meaning in section 513(c)(2)(A) of the act, which requires that a Panel recommendation summarize the data upon which a recommendation is based. As used in that section, "data" refers not only to the results of scientific experiments, but also to less formal evidence, other scientific information, or judgments of experts (House Committee on Interstate and Foreign Commerce, Medical Device Amendments of 1976, H.R. Rept. No. 94-853, 94th Congress, 2d Session 40 (1976)). FDA has determined that clinical experience and judgment constitute valid scientific evidence for classifying certain devices.

In many cases, FDA sought more data and information concerning the classification of a device than were cited by the Panel. References to these data and information are found in the "Proposed Classification" section of the preambles to individual gastroenterology-urology device regulations. The agency is adopting as its statement of the basis for issuing the regulation under section 517(f) of the act the Panel's summary of the data on which a recommendation to classify a device is based, together with any additional data and information cited in the preamble to the proposed classification regulation.

5. *Risks to health.* In identifying the risks to health presented by gastroenterology-urology devices, the Panel recognized that few devices are completely free of risk. The Panel listed the risks it considered most significant, especially those that are unique to the individual device. In some cases, FDA has identified risks to health presented by a device in addition to those presented by the Panel. These additional risks are set out in the section of the preamble concerning the "Proposed Classification" of a particular device. The term "electrical injury" in this section includes electrical shock as well as other adverse effects of electricity, such as burns and the consequences of electrically induced muscular contractions.

Because of the classification recommendations and FDA regulations may not identify all risks to health presented by gastroenterology-urology devices, future regulations establishing performance standards under section 514 of the act (21 U.S.C. 360d) or requiring premarket approval under section 515(b) of the act (21 U.S.C. 360e(b)) may identify additional risks to health to be addressed by FDA requirements.

Proposed Classification

Each proposed regulation to classify a gastroenterology-urology device states whether FDA agrees with the Panel's recommendation, describes the agency's proposed classification of the device, and proposes a new section in Part 876 in which the device classification will be codified.

FDA cautions that the final classification of a device may differ from the proposal. Factors that may cause such a change include comments, the agency's reconsideration of existing data and information, and the agency's consideration of new data and information.

Priorities for Class II and III Devices

For a device that the Panel recommends be classified into class II or class III, section 513(c)(2)(A) of the act requires that the Panel recommendation include, to the extent practicable, a recommendation for the assignment of a priority for application to the device of performance standards or premarket approval requirements. In developing its advice concerning priorities ("high," "medium," or "low") of device recommended for classification into class II or class III, the Panel compared the devices with other gastroenterology-urology devices, based on information available to the Panel members concerning the relative importance of use of the device and the relative risks presented by the device. The Panel recommended assignment of a "high priority" only to those class II or class III devices that the Panel believed should receive the agency's immediate attention.

FDA is not proposing at this time to establish priorities for development of performance standards for all class II devices. Section 513(d)(3) of the act authorizes, but does not require, establishment of these priorities. In the **Federal Register** of February 1, 1980 (45 FR 7489 and 45 FR 7493), FDA published notices identifying which class II devices the agency found to warrant a high priority for the development of performance standards. At a later date, the agency will establish priorities for the development of standards for the remaining class II devices. All priorities established by the agency are based on the classification panels' recommendations, available resources, and other relevant factors. The agency's priorities will be reflected in the

agency's annual budget request and other publicly available documents and may be published in the **Federal Register.**

Exemptions for Class I Devices

Section 513 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c) provides that FDA may exempt a device recommended for classification into class I from a requirement under the following sections of the act: section 510 (21 U.S.C. 360), registration; section 519 (21 U.S.C. 360i), records and reports; and section 520(f) (21 U.S.C. 360j(f)), good manufacturing practices.

Under section 510 of the act, a person "engaged in the manufacture, preparation, propagation, compounding or processing of * * * a device or devices" must register with FDA (section 510(b) through (i)), file a list of devices (section 510(j)), and notify FDA at least 90 days before beginning commerical distribution of a device (section 510(k)). (See Part 807 (21 CFR Part 807).) Section 510(g)(4) authorizes the agency to exempt a device from section 510 if it finds that compliance with that section is not necessary for the protection of the public health. In § 807.65 (21 CFR 807.65), FDA has exempted certain classes of persons from section 510 of the act. Several devices classification panels have recommended that manufacturers of certain class I devices also be exempted from all or some of the requirements of section 510. The agency has determined that protection of the public health requires that manufacturers of medical devices, other than those already exempt under § 807.65, register and list their products with FDA to ensure that the agency can identify these manufacturers and their products and conduct necessary inspections.

The agency has determined, however, that it is not necessary for the protection of the public health that FDA receive premarket notification submissions for certain devices. Thus, the agency has proposed to exempt manufacturers of certain devices from Subpart E of Part 807 of the regulations, which implements section 510(k) of the act. The agency does not, at this time, anticipate that premarket approval will be required for these devices. The agency believes that the semiannual updating of device listing under section 510(j)(2) of the act will provide FDA with adequate notice of new products within these generic types of devices.

Section 519 of the act authorizes FDA to issue regulations requiring device manufacturers, importers, and distributors to establish and maintain such records, make such reports, and provide such information as the agency may reasonably require to assure that devices are not adulterated or misbranded and to otherwise assure their safety and effectiveness. The records and reports requirements in several of FDA's present device regulations are authorized, wholly or in part, by section 519. The most extensive of these requirements are found in the device good manufacturing practice (GMP) regulation under Part 820 (21 CFR Part 820), published in the **Federal Register** of July 21, 1978 (43 FR 31508). In the future, FDA will publish other regulations in accordance with section 519 of the act, including regulations requiring reports to FDA of experience with medical devices. Until these regulations are issued, FDA believes that it cannot properly issue exemptions from them. In the future, whenever the agency proposes device regulations that include records and reports requirements, interested persons may submit comments requesting that certain classes of manufacturers or other persons be exempted from the requirements, and FDA will issue exemptions that are appropriate.

The only type of exemption from records and reports requirements that FDA is proposing now, in device classification regulations, is an exemption of certain manufacturers from most requirements of the device GMP regulation. As explained below, the exemption will not extend to two device GMP records requirements.

The device GMP regulation was published in final form in the **Federal Register** of July 21, 1978. At the time of the Panel's recommendations, the GMP regulation had not yet been promulgated, and the agency had not yet developed criteria for exempting manufacturers of a class I device from GMP requirements. The agency has now decided that, if any one of the following criteria is met, FDA will consider exempting from the GMP regulation manufacturers of a class I device that is not labeled or otherwise represented as sterile. The agency will not, however, exempt manufacturers of a device from general requirements concerning records or complaint files. The criteria are:

1. FDA has determined, based on adequate information about current practices in the manufacture of the device and about user experience with the device, that application of the GMP regulation is unlikely to improve the safety and effectiveness of the device.

2. FDA has determined that all possible defects relating to the safety and effectiveness of the device are readily detectable before use, either through visual examination by the user or routine testing before use, e.g., testing a clinical laboratory reagent with positive and negative controls.

3. FDA has determined that any defect in the device that is not readily detectable will not result in a device failure that could have an adverse effect on the patient or other user.

FDA has determined that no device that is labeled or otherwise represented as sterile will be exempted from the device GMP regulation. A sterile device must be subject to the entire GMP regulation to ensure that manufacturers adequately reduce the bioburden (number of microorganisms) on the device and its components during the manufacturing process. This reduction is accomplished through adherence to a comprehensive quality assurance program as is required by the GMP regulation, with adequate environmental controls, trained personnel, appropriate maintenance and calibration of sterilization equipment, recordkeeping concerning lot sterility, strict packaging and labeling controls, and other quality assurance measures.

The agency also has determined that no exemption from the device GMP regulation will extend to § 820.180, with respect to general requirements concerning records, or § 820.198, with respect to complaint files. The agency believes that granting exemptions from these sections would not be in the public interest, and that compliance with these sections is not unduly burdensome for device manufacturers. To ensure that device manufacturers have adequate systems for complaint investigation and followup, all manufacturers are required to comply with the complaint file requirements. All device manufacturers also are required to comply with the general requirements concerning records to ensure that FDA has access to complaint files, can investigate device-related injury reports and complaints about product defects, may determine whether the manufacturer's corrective actions are adequate, and may determine whether the exemption from other sections of the GMP regulation is still appropriate.

In general, FDA has not initiated proposals to exempt manufacturers of devices from requirements under section 510 or 520(f) of the act, but has acted on the basis of exemption recommendations of the device classification panels. However, FDA has proposed occasionally to exempt manufacturers of certain devices classified into class I or class II from the requirements of certain sections of the GMP regulation, according to the above exemption criteria. Manufacturers and other interested persons may submit

comments on the appropriateness of the proposed exemptions of manufacturers of devices, whether the exemptions are proposed in response to recommendations of the panels or on the agency's initiative. Comments requesting additional exemptions should be supported by information showing that the exemption of manufacturers of a device from the premarket notification requirement or the GMP regulation is consistent with the criteria discussed above.

Guidelines for Preparing Petitions Requesting Exemption or Variance From the Device GMP Regulation for Devices Classified Into Class I or Class II

FDA has prepared guidelines on the procedures that should be followed by persons who wish to submit petitions for exemption or variance from the device GMP regulation. These petitions may be submitted in accordance with provisions of section 520(f)(2) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360j(f)(2)). The agency announced the availability of the guidelines in a notice published in the Federal Register of January 18, 1980 (45 FR 3671).

List of Gastroenterology-Urology Devices

The following is a list of gastroenterology-urology devices that FDA is proposing to classify, the section in the Code of Federal Regulations under which the regulation classifying the device will be codified, the docket number of the proposed classification regulation, and the proposed classification of each device.

Section and device	Docket No.	Class
Subpart B—Dignostic Devices		
876.1075 Gastroenterology-urology biopsy instrument.	78N-1946	II
876.1400 Stomach pH electrode	78N-1952	II
876.1500 Endoscope and accessories	78N-1953	II
876.1620 Urodynamics measurement system.	78N-1950	II
876.1725 Gastrointestinal motility monitoring system.	78N-1955	II
876.1800 Urine flow or volume measuring system.	78N-1964	II
Subpart C—Monitoring Devices		
876.2040 Enuresis alarm	78N-1958	II
Subpart D—Prosthetic Devices		
876.3350 Penile inflatable implant	78N-1968	III
876.3630 Penile rigidity implant	78N-1979	III
876.3750 Testicular prosthesis	78N-1961	III
Subpart E—Surgical Devices		
876.4020 Fiberoptic light ureteral catheter.	78N-1947	II
876.4200 Circumcision instrument	78N-1990	II
876.4270 Colostomy rod	78N-1971	II
876.4300 Endoscopic electrosurgical unit and accessories.	78N-1993	II
876.4370 Gastroenterology-urology evacuator.	78N-1994	II
876.4400 Hemorrhoidal ligator	78N-1995	II
876.4480 Electrohydraulic lithotriptor	78N-1998	III
876.4500 Mechanical lithotriptor	78N-2001	II
876.4530 Gastroenterology-urology fiberoptic retractor.	78N-1999	I
876.4560 Rebdam	78N-2067	II
876.4590 Interlocking urethral sound	78N-2068	II
876.4620 Ureteral stent	78N-1984	II
876.4650 Water jet renal stone dislodger system.	78N-1988	II
876.4680 Ureteral stone dislodger	78N-2002	II
876.4730 Manual gastroenterology-urology surgical instrument and accessories.	78N-1996	I
876.4770 Urethrotome	78N-2004	II
876.4890 Urological table and accessories.	78N-2070	II
Subpart F—Therapeutic Devices		
876.5010 Biliary catheter and accessories.	78N-2005	II
876.5030 Continent ileostomy catheter	78N-1972	II
876.5090 Suprapubic urological catheter and accessories.	78N-1969	II
876.5130 Urological catheter and accessories.	78N-2006	II
876.5160 Urological clamp for males	78N-2009	II
876.5210 Enema kit	78N-2060	I
876.5220 Colonic irrigation system	78N-2011	II, III
876.5250 Urine collector and accessories.	78N-2010	II
876.5270 Implanted electrical urinary continence device.	78N-1978	III
876.5280 Implanted mechanical/hydraulic urinary continence device.	78N-1969	III
876.5320 Nonimplanted electrical continence device.	78N-2069	III
876.5365 Esophageal dilator	78N-2058	II
876.5450 Rectal dilator	78N-1992	II
876.5470 Ureteral dilator	78N-2057	II
876.5520 Urethral dilator	78N-2059	II
876.5540 Blood access device and accessories.	78N-2044	II, III
876.5600 Sorbent regenerated dialysate delivery system for hemodialysis.	78N-2019	II
876.5630 Peritoneal dialysis system and accessories.	78N-2051	II
876.5665 Water purification system for hemodialysis.	78N-2047	II
876.5820 Hemodialysis system and accessories.	78N-2014	II, I
876.5830 Hemodialyzer with disposable insert (Kill type).	78N-2038	II
876.5860 High permeability hemodialysis system.	78N-2039	III
876.5870 Sorbent hemoperfusion system.	78N-2061	III
876.5880 Isolated kidney perfusion and transport system and accessories.	78N-2063	II
876.5895 Ostomy irrigator	78N-1975	II
876.5900 Ostomy pouch and accessories.	78N-1974	II
876.5920 Protective garment for incontinence.	78N-2062	II
876.5955 Peritoneo-venous shunt	78N-1990	III
876.5970 Hernia Support	78N-1967	II
876.5980 Gastrointestinal tube and accessories.	78N-2072	II

Devices Not in Commercial Distribution

The Panel made classification recommendations concerning several devices that may not be in commercial distribution. If a device was not in commercial distribution before enactment of the amendments and is not substantially equivalent to a device that was in commercial distribution before the amendments, the device is classified into class III by section 513(f) of the act (21 U.S.C. 360c(f)). Because FDA is unaware that the devices listed below are now in commercial distribution, the agency is not issuing a separate proposed regulation for the devices and is requesting the submission of information regarding the commercial distribution of any of these devices:

1. The Panel recommended that the ostomy magnet, a device used with a cap to maintain continence following a colostomy, be classified into class II (performance standards) because the Panel believed that the biocompatibility of the materials should be controlled.

2. The Panel recommended that the radio pill, a device used to transmit data such as movement, temperature, pressure, and acid base balance from within the body, be classified into class II (performance standards) because the Panel believed that the biocompatibility of the materials on the exterior of the device should be adequately controlled.

3. The Panel recommended that the ultrasonic stone crusher, a device used to facilitate removal of stones lodged in various ducts, be classified into class III (premarket approval) because the Panel believed that unsafe energy levels may be generated by the device, resulting in tissue damage, and that there is not sufficient information available to establish a performance standard that will assure the safety and effectiveness of this device.

4. The Panel recommended that the uretero vesicle valve, a device used to treat uretero vesicle valve disorders or used when the ureter is implanted in the colon, be classified into class III (premarket approval) because the Panel believed that the device is an implant and there is not sufficient information available to establish a performance standard that will assure its safety and effectiveness.

5. The Panel recommended that the urethral sphincter prosthesis, a device used to provide urinary continence by means of a manually operated spigot valve, be classified into class III (premarket approval) because the Panel believed that the device is an implant and that there is not sufficient information available to establish a performance standard that will assure its safety and effectiveness.

6. The Panel recommended that the urethral replacer, a device used to restore proper function to the urethra by means of a prosthetic replacement, be classified into class III (premarket approval) because the Panel believed that the device is an implant and that there is not sufficient information available to establish a performance standard that will assure its safety and effectiveness.

7. The Panel recommended that the cystometric air device, a device used to measure volume and pressure when the urinary bladder is filled with air through a catheter, be classified into class III (premarket approval) because the Panel

believed that the use of an insoluble gas (i.e., air) may lead to air embolism. Therefore, these devices present a potential unreasonable risk of illness or injury to the patient.

8. The Panel recommended that the prostatic cooler, a device designed to cool the prostate in order to stop bleeding by means of a balloon catheter which can be filled with coolant after insertion into the bladder, be classified into class III (premarket approval) because the Panel believed that the device presents a potential unreasonable risk of illness or injury to the patient.

9. The Panel recommended that the esophageal and gastric cooler, a device that consists of a balloon attached to tubes through which a liquid coolant is circulated to expand the balloon and bring the coolant into proximity with the walls of the stomach or esophagus to reduce bleeding, be classified into class III (premarket approval) because the Panel believed that the device is used to treat severe and life threatening conditions and presents a potential unreasonable risk of illness or injury to the patient.

10. The Panel recommended that the ureteral prosthesis, a device designed to replace a portion of the ureter by implantation of a tube made of silastic, dacron, teflon, or other suitable material, be classified into class III (premarket approval) because the Panel believed that the device is an implant and that there is not sufficient information available to establish a performance standard that would assure its safety and effectiveness.

Devices Considered by Two or More Panels

Many devices were reviewed by two or more device classification panels. For these devices, FDA will publish each panel's recommendation and a single proposed classification regulation. The following devices were considered by the Gastroenterology-Urology Device Section of the General Medical Devices Panel (formerly the Gastroenterological and Urological Device Classification Panel) and by other panels:

1. The Surgical and Rehabilitation Devices Panel recommended that the AC-powered endoscope and accessories be classified into class II, the incandescent endoscope lamp be classified into class I, and the battery-powered endoscope and accessories be classified into class I. The General Medical Devices Panel recommended that the endoscope and accessories be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the endoscope and accessories into class II, and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

2. The Surgical and Rehabilitation Devices Panel recommended that the testicular prosthesis be classified into class II. The General Medical Devices panel recommended that the testicular prosthesis be classified into class III. The agency has determined that these devices are essentially the same. The agency is proposing a single regulation classifying the testicular prosthesis into class III and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

3. The Surgical and Rehabilitation Devices Panel recommended that the inflatable penile implant be classified into class III. The General Medical Devices Panel recommended that the mechanical/hydraulic impotence device be classified into class III. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the penile inflatable implant into class III and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

4. The Surgical and Rehabilitation Devices Panel recommended that the rigid rod penile implant be classified into class II. The General Medical Devices Panel recommended that the penile rigidity implant be classified into class III. The agency has determined that these devices are essentially the same. FDA is proposing a single regulation classifying the penile rigidity implant into class III and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

5. The Surgical and Rehabilitation Devices Panel recommended that the biliary catheter and accessories be classified into class II. The General Medical Devices panel recommended that the biliary catheter and accessories be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the biliary catheter and accessories into class II and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

6. The Surgical and Rehabilitation Devices Panel recommended that the urethral catheter be classified into class II. The General Medical Devices Panel recommended that the urological catheter and accessories be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the urological catheter and accessories into class II and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

7. The Surgical and Rehabilitation Devices Panel recommended that the rectal catheter and the irrigation and aspiration catheter (gastric, colonic, etc.) be classified into class II. The General Medical Devices Panel recommended that gastrointestinal tubes and accessories be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying gastrointestinal tubes and accessories into class II and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

8. The General Medical Devices Panel and the Surgical and Rehabilitation Devices panel recommended that the ostomy bag be classified into class I. The Gastroenterology-Urology Device Section of the General Medical Devices Panel recommended that the ostomy pouch and accessories be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the ostomy pouch and accessories into class II and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

9. The Obstetrics-Gynecology and Radiologic Devices Panel recommended that the AC-powered vaginal muscle stimulator used for incontinence control be classified into class III. The General Medical Devices Panel recommended that the nonimplantable electrical stimulator for urinary continence control be classified into class III. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the nonimplanted electrical continence device into class III and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

10. The Surgical and Rehabilitation Devices panel recommended that the gastrointestinal motility system be classified into class II. The General Medical Devices Panel recommended

that the gastrointestinal motility monitoring system be classified into class II. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the gastrointestinal motility monitoring system into class II and is publishing the two Panels' recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

11. The Surgical and Rehabilitation Devices Panel recommended that the colonic irrigator be classified into class I. The General Medical Devices Panel recommended that the colon cleansing device be classified into class II for some uses and class III for other uses. The agency has determined that these devices are essentially the same. Therefore, the agency is proposing a single regulation classifying the colonic irrigation system into class II for some uses and class III for other uses, and is publishing the two Panel's recommendations in a proposal appearing elsewhere in this issue of the **Federal Register.**

12. The Gastroenterology-Urology Device Section of the General Medical Devices Panel and other sections or panels listed below made classification recommendations concerning the following devices:

Device	Other panel(s)
Electromagnetic or doppler non-invasive blood flow meter	Circulatory Systems.
GU applicator	General Hospital and Personal Use Section of the General Medical Devices Panel.
Scrotal support	General Hospital and Personal Use Section of the General Medical Devices Panel.
Dialysis patient scales	
Barium enema kit	Obstetrics-Gynecology and Radiologic.
Metal mesh	Surgical and Rehabilitation.
Injection cannula	
Fiberoptic focusing headlight	
Gastro/urology needle	
Abdominal belt	
Pure latex sheet drape	
Disposable urological drape	
GU tourniquet	
Stomach and intestinal suturing apparatus	
Clip for suturing apparatus	
Plastic wound protector	

The agency is not at this time publishing the recommendations of the Gastroenterology-Urology Device Section of the General Medical Devices Panel to classify the devices listed above. The agency has published, or will publish, these recommendations and proposed classification regulations along with the recommendations of other Panels that reviewed the devices. Some of these other Panel's recommendations have already been published in the **Federal Register.** The following table shows the current structure of the advisory committees involved with classification of medical devices and a list of all proposed and final classification regulations published to date:

Panel/Section Name and Publication Date in "Federal Register"

Circulatory Systems Devices Panel
March 9, 1979, 44 FR 13284–13434 (proposals); February 5, 1980, 45 FR 7904–7971 (final regulations)
Clinical Chemistry and Hematology Devices Panel
Clinical Chemistry Device Section
Clinical Toxicology Device Section
Hematology and Pathology Device Section
September 11, 1979, 44 FR 52950–53063 (proposals); September 12, 1980, 45 FR 60576–60651 (final regulations)
General Medical Devices Panel
General Hospital and Personal Use Device Section
Gastroenterology-Urology Device Section
August 24, 1979, 44 FR 49844–49954 (proposals); October 21, 1980, 45 FR 69678–69737 (final regulations)
Immunology and Microbiology Devices Panel
Immunology Device Section
April 22, 1980, 45 FR 27204–27359 (proposals)
Microbiology Device Section
April 22, 1980, 45 FR 27204–27359 (proposals)
Obstetrics-Gynecology and Radiologic Devices Panel
Obstetrics-Gynecology Device Section
Radiology Device Section
April 3, 1979, 44 FR 19894–19971 (proposals); February 26, 1980, 45 FR 12682–12720 (final regulations)
Ophthalmic; Ear, Nose, and Throat; and Dental Devices Panel
Ophthalmic Device Section
Ear, Nose, and Throat Device Section
Dental Device Section
Respiratory and Nervous System Devices Panel
Anesthesiology Device Section
November 2, 1979, 44 FR 63292–63426 (proposals)
Neurological Device Section
November 28, 1978, 43 FR 54640–55732 (proposals); September 4, 1979, 44 FR 51726–51778 (final regulations)
Surgical and Rehabilitation Devices Panel
Physical Medicine Device Section
Orthopedic Device Section
General and Plastic Surgery Device Section
August 28, 1979, 44 FR 50458–50537 (proposals)

Environmental Impact

The agency has determined pursuant to § 25.24(b)(12) (21 CFR 25.24(b)(12)) (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. 513 and 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))), and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes that Chapter I of Title 21 of the Code of Federal Regulations be amended by adding new Part 876, Subpart A, to read as follows:

PART 876—GASTROENTEROLOGY-UROLOGY DEVICES

Subpart A—General Provisions

Sec.
876.1 Scope.

Authority: Secs. 513 and 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c and 371(a)).

Subpart A—General Provisions

§ 876.1 Scope.

(a) This part sets forth the classification of gastroenterology-urology devices intended for human use.

(b) The identification of a device in a regulation in this part is not a precise description of every device that is, or will be, subject to the regulation. A manufacturer who submits a premarket notification submission for a device under Part 807 cannot show merely that the device is accurately described by the section title and identification provision of a regulation in this part, but shall state why the device is substantially equivalent to other devices, as required by § 807.87.

(c) To avoid duplicative listings, a gastroenterology-urology device that has two or more types of uses (e.g., used both as a diagnostic device and as a therapeutic device) is listed in one subpart only.

(d) References in this part to regulatory sections of the Code of Federal Regulations are to Chapter I of Title 21 unless otherwise noted.

Interested persons may, on or before March 24, 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 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.

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. A copy of the regulatory analysis assessment supporting this determination is on file with the Dockets Management Branch, Food and Drug Administration.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-749 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1946]

Medical Devices; Classification of Gastroenterology-Urology Biopsy Instruments

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying gastroenterology-urology biopsy instruments into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of gastroenterology-urology biopsy instruments:

1. Identification: A gastroenterology-urology biopsy instrument is a device used to remove, by cutting or aspiration, a specimen of tissue for microscopic examination. This generic type of device includes the biopsy punch, gastrointestinal mechanical biopsy instrument, suction biopsy instrument, gastro-urology biopsy needle and needle set, and nonelectric biopsy forceps. This recommendation does not apply to biopsy instruments that have specialized uses in other medical specialty areas and that were the subject of recommendations by other device classification panels.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for these devices be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that gastroenterology-urology biopsy instruments be classified into class II because the mechanical properties and tissue removal mechanisms must be controlled by a performance standard to assure that unnecessary cutting or tissue removal does not occur, causing unnecessary risks to the patient. The design, materials, and construction of this device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation and to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of the devices in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that gastroenterology-urology biopsy instruments be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1075, to read as follows:

Subpart B—Diagnostic Devices

§ 876.1075 Gastroenterology-urology biopsy instrument.

(a) *Identification.* A gastroenterology-urology biopsy instrument is a device used to remove, by cutting or aspiration, a specimen of tissue for microscopic examination. This generic type of device includes the biopsy punch, gastrointestinal mechanical biopsy instrument, suction biopsy instrument, gastro-urology biopsy needle and needle set, and nonelectric biopsy forceps. This section does not apply to biopsy instruments that have specialized uses in other medical specialty areas and that are covered by classification regulations in other parts of the device classification regulations.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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 at 4 p.m., Monday through Friday.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-750 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1952]

Medical Devices; Classification of Stomach pH Electrodes

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying stomach pH electrodes into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of stomach pH electrodes:

1. Identification: A stomach pH electrode is a device used to measure intragastric and intraesophageal pH (hydrogen ion concentration). The pH electrode is at the end of a flexible lead which may be inserted into the stomach through the patient's mouth and esophagus. The device may include an integral gastrointestinal tube.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that stomach pH electrodes be classified into class II because the measurement accuracy of the device must be controlled by a performance standard to prevent inaccurate diagnostic information. The design, materials used in, and construction of this device must be controlled by a performance standard to ensure that the size, shape, rigidity, flexibility, surface finish, and tensile strength of the device are appropriate to prevent tissue trauma, hemorrhage, or perforation and to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over this characteristic. The Panel believes that a performance standard would provide a reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, this device.

5. Risks to health: (a) Misdiagnosis and inappropriate therapy: Inadequate design of the device can lead to generation of inaccurate diagnostic data. The user may prescribe a course of treatment based on inaccurate diagnostic data which places the patient at risk unnecessarily. (b) Hemorrhage: Bleeding of the gastrointestinal tract may result from a mucosal injury caused by irritation from the device and consequent forceful vomiting. (c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (d) Trauma or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma or perforation.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that stomach pH electrodes be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by this device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority

delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1400, to read as follows:

§ 876.1400 Stomach pH electrode.

(a) *Identification.* A stomach pH electrode is a device used to measure intragastric and intraesophageal pH (hydrogen ion concentration). The pH electrode is at the end of a flexible lead which may be inserted into the stomach through the patient's mouth and esophagus. The device may include an integral gastrointestinal tube.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-751 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1953]

Medical Devices; Classification of Endoscopes and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying endoscopes and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that these devices be classified into class II, and the recommendation of the General and Plastic Surgery Device Classification Panel that certain endoscopes and accessories be classified into class II and that battery-powered endoscopes and accessories and incandescent endoscope lamps be classified into class I (general controls). The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA propses that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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

FOR FURTHER INFORMATION CONTACT: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of endoscopes and accessories:

1. Identification: An endoscope and accessories is a device used to provide access, illuminate, and allow observation or manipulation of body cavities, hollow organs, and canals. The device consists of various rigid or flexible instruments that are inserted into body spaces and may include an optical system for conveying an image to the user's eye and their accessories may assist in gaining access or increase the versatility and augment the capabilities of the devices. Examples of devices that are within this generic type of device include cleaning accessories for endoscopes, photographic accessories for endoscopes, nonpowered anoscopes, automatic pneumoperitoneum apparatus, binocular attachments for endoscopes, pocket battery boxes, flexible or rigid choledochoscopes, colonoscopes, diagnostic cystoscopes, cystourethroscopes, enteroscopes, esophagogastroduodenoscopes, rigid esophagoscopes, fiberoptic illuminators for endoscopes, incandescent endoscope lamps, mediastinoscopes, simple or spring-loaded pneumoperitoneum needles, biliary pancreatoscopes, proctoscopes, resectoscopes, nephroscopes, sigmoidoscopes, laparoscopes, ureteroscopes, urethroscopes, endomagnetic retrievers, cytology brushes for endoscopes and lubricating jelly for transurethral surgical instruments. This recommendation does not apply to endoscopes that have specialized uses in other medical specialty areas and that were the subject of recommendations by other device classification panels.

2. Recommended classification: Class II (performance standards). The Gastroenterology-Urology Device Classification Panel recommends that establishing a performance standard for these devices be a high priority. The General and Plastic Surgery Device Classification Panel recommends that establishing a performance standard for these devices be a low priority. The General and Plastic Surgery Device Classification Panel recommends that battery-powered endoscopes and accessories be classified into class I (general controls) and that they be exempt from the good manufacturing practice regulation under section 520(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360j(f)) and exempt from premarket notification under section 510(k) of the act (21 U.S.C. 360(k)). The General and Plastic Surgery Device Classification Panel also recommends that incandescent endoscope lamps be classified into class I with no exemptions.

3. Summary of reasons for recommendation: The Panels recommend that endoscopes and their accessories be classified into class II because the electrical, optical, mechanical, biocompatibility, and lighting characteristics of these devices must be controlled by a performance standard to prevent injury to the patient. The Panels believe that general controls alone would not provide sufficient control over these characteristics. The Panels believe that performance standards would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish performance standards. The General and Plastic Surgery Device Classification Panel recommends that battery-powered endoscopes and accessories and incandescent endoscope lamps be classified into class

I because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the devices. The Panel recommends that battery-powered endoscopes and accessories be exempt from premarket notification procedures under section 510(k) of the act and from the good manufacturing practice regulation under section 520(f) of the act because the Panel believes that these are simple devices that present no unreasonable risks to health when used in a normal manner and for the purposes recommended.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of the devices in medical practice.

5. Risks to health: (a) Misdiagnosis and inappropriate therapy: Inadequate design of the devices can lead to generation of inaccurate diagnostic data. The user may prescribe a course of treatment based on inaccurate diagnostic data which places the patient at risk unnecessarily. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (c) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation. (d) Adverse tissue reaction: If the materials used in the construction of these devices are not biocompatible, the patient may have an adverse tissue reaction. (e) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or operator. (f) Burns: An intense concentration of heat may cause thermal burns to tissue. (g) Rupture of body cavity, embolism and hypotensive shock: Those accessories that inject gas into the patient may allow high pressures to build up within the patient, possibly causing a rupture of the body cavity or an air or carbon dioxide embolism, and, if the pressure continues for extensive periods of time, a decrease in cardiac function and subsequent hypotensive shock.

Proposed Classification

FDA agrees with the recommendation of the Gastroenterology-Urology Device Classification Panel and in part with the recommendation of the General and Plastic Surgery Device Classification Panel and is proposing that endoscopes and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard will provide reasonable assurance of the safety and effectiveness of the devices. FDA also believes that there is sufficient information to establish a performance standard for these devices.

On August 20, 21, and 22, 1980 the National Institutes of Health held a consensus conference entitled "Endoscopy: What is its Role in Upper Gastrointestinal Bleeding?" The conference summary (Ref. 1) discusses briefly the use of endoscopy in the diagnosis and treatment of upper gastrointestinal bleeding.

The agency disagrees with the General and Plastic Surgery Device Classification Panel recommendation that battery-powered endoscopes and accessories and incandescent endoscope lamps be classified into class I (general controls). The agency believes that the risk of electrical injury and other hazards exist with the battery-powered devices as well as with AC-powered devices. The agency believes that the risk of electrical injury and thermal burns to tissue in contact with incandescent endoscope lamps requires a performance standard to minimize these hazards. Because the agency has determined that endoscopes and accessories should be classified into class II rather than class I, the agency is not required to publish a regulation adopting or rejecting the General and Plastic Surgery Device Classification Panel's recommendation that certain of these devices be exempt from the premarket notification procedures under section 510(k), and the good manufacturing practice regulation under section 520(f) of the act.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for endoscopes and accessories and has concluded that these devices should be published in the part of the Code of Federal Regulations for gastrointerology and urology devices.

Reference

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. "Endoscopy in Upper GI Bleeding," National Institutes of Health Consensus Development Conference Summary, Vol. 3, No. 5, 1980.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1500, to read as follows:

§ 876.1500 Endoscope and accessories.

(a) *Identification.* An endoscope and accessories is a device used to provide access, illumination, and allow observation or manipulation of body cavities, hollow organs, and canals. The device consists of various rigid or flexible instruments that are inserted into body spaces and may include an optical system for conveying an image to the user's eye and their accessories may assist in gaining access or increase the versatility and augment the capabilities of the devices. Examples of devices that are within this generic type of device include cleaning accessories for endoscopes, photographic accessories for endoscopes, nonpowered anoscopes, automatic pneumoperitoneum apparatus, binocular attachments for endoscopes, pocket battery boxes, flexible or rigid choledochoscopes, colonoscopes, diagnostic cystoscopes, cystourethroscopes, enteroscopes, esophagogastroduodenoscopes, rigid esophagoscopes, fiberoptic illuminators for endoscopes, incandescent endoscope lamps, mediastinoscopes, simple or spring-loaded pneumoperitoneum needles, biliary pancreatoscopes, proctoscopes, resectoscopes, nephroscopes, sigmoidoscopes, laparoscopes, ureteroscopes, urethroscopes endomagnetic retrievers, cytology brushes for endoscopes and lubricating jelly for transurethral surgical instruments. This section does not apply to endoscopes that have specialized uses in other medical

specialty areas and that are covered by classification regulations in other parts of the device classification regulations.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-752 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78-1950]

Medical Devices; Classification of Urodynamics Measurement Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urodynamics measurement systems into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urodynamics measurement systems:

1. Identification: A urodynamics measurement system is a device used to measure volume and pressure in the urinary bladder when it is filled through a catheter with carbon dioxide or water. The device controls the supply of carbon dioxide or water any may also record the electrical activity of the urinary muscles. The device system may include transducers, electronic signal conditioning and display equipment, a catheter withdrawal device to enable a urethral pressure profile to be obtained, and special catheters for urethral profilometry and electrodes for electromyography. This generic type of device includes the cystometric gas (carbon dioxide) device, the cystometric hydraulic device, and the electrical recording cystometer, but excludes any device that uses air to fill the bladder.

2. Recommended classification: Class II (performance standards). The Panel recommends that different priorities be given for establishing performance standards for the various kinds of products within the generic urodynamics measurement system. The Panel recommends that the cystometric gas device be given a high priority, that the cystometric hydraulic device be given a medium priority and that the electrical recording cystometer be given a low priority for the development of performance standards.

3. Summary of reasons for recommendation: The Panel recommends that urodynamics measurement systems be classified into class II because the design, accuracy, and any limitations of the function of the device must be controlled by a performance standard to ensure that insoluble gas (e.g., air) does not enter the system and that the amount and pressure of delivered carbon dioxide or water are controlled to prevent overdistension of the bladder. The electrical porperties of the device must be controlled by a performance standard to prevent electrical injury to the patient or operator. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The measurement accuracy of the device must be controlled by a performance standard to prevent the development of inaccurate diognostic information. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices.

5. Risks to health: (a) Misdiagnosis and inappropriate therapy: Inadequate design of the device may lead to generation of inaccurate diagnostic data. The user may prescribe a course of treatment based on inaccurate diagnostic data which places the patient at risk unnecessarily. (b) Electrical injury: Improper design, construction, or a malfunction of the device can result in electrical injury to the patient or operator. (c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (d) Overdistention of the bladder: The failure of the device to prevent excess gas or water pressure in the bladder may cause an overdistention of the bladder.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urodynamics measurement systems be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. FDA also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in

the Federal Register of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the Federal Register.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1620, to read as follows:

§ 876.1620 Urodynamics measurement system.

(a) *Identification.* A urodynamics measurement system is a device used to measure volume and pressure in the urinary bladder when it is filled through a catheter with carbon dioxide or water. The device controls the supply of carbon dioxide or water and may also record the electrical activity of the urinary muscles. The device system may include transducers, electronic signal conditioning and display equipment, a catheter withdrawal device to enable a urethral pressure profile to be obtained, and special catheters for urethral profilometry and electrodes for electromyography. This generic type of device includes the cystometric gas (carbon dioxide) device, the cystometric hydraulic device, and the electrical recording cystometer, but excludes any device that uses air to fill the bladder.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-753 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1955]

Medical Devices; Classification of Gastrointestinal Motility Monitoring Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying gastrointestinal motility monitoring systems into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the Federal Register.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the Federal Register provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of gastrointestinal motility monitoring systems:

1. Identification: A gastrointestinal motility monitoring system is a device used to measure peristalic activity or pressure in the stomach or esophagus by means of a probe with transducers that is introduced through the mouth into the gastrointestinal tract. The device may include signal conditioning, amplifying, and recording equipment. This generic type of device includes the esophageal motility monitor and tube, the gastrointestinal motility (electrical) system, and certain accessories, such as a pressure transducer, amplifier, and external recorder.

2. Recommended classification: Class II (performance standards). Both Panels recommend that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panels recommend that gastrointestinal motility monitoring systems be classified into class II because the electrical properties of the device must be controlled by a performance standard to prevent electrical injury to the patient or operator. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The measurement accuracy of the device must be controlled by a performance standard to prevent the development of inaccurate diagnostic information. The Panels believe that general controls alone would not provide sufficient control over these characteristics. The Panels believe that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: Both Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Misdiagnosis and inappropriate therapy: Inadequate design of the device may lead to the generation of inaccurate diagnostic data. The user may prescribe a course of treatment based on inaccurate diagnostic data which places the patient at risk unnecessarily. (b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (c) Electrical injury: Improper design or a malfunction of the

device may cause electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the recommendations of both Panels and is proposing that gastrointestinal motility monitoring systems be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is sufficient information to establish a performance standard for this device. FDA has reviewed the recommendations of both the Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel for gastrointestinal motility monitoring systems and has concluded that the classification of this device should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1725, to read as follows:

§ 876.1725 Gastrointestinal motility monitoring system.

(a) *Identification.* A gastrointestinal motility monitoring system is a device used to measure peristaltic activity or pressure in the stomach or esophagus by means of a probe with transducers that is introduced through the mouth into the gastrointestinal tract. The device may include signal conditioning, amplifying, and recording equipment. This generic type of device includes the esophageal motility monitor and tube, the gastrointestinal motility (electrical) system, and certain accessories, such as a pressure transducer, amplifier, and external recorder.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–754 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1964]

Medical Devices; Classification of Urine Flow or Volume Measuring Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urine flow or volume measuring systems into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK)–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urine flow or volume measuring systems:

1. Identification: A urine flow or volume measuring system is a device that measures directly or indirectly the volume or flow of urine from a patient, either during the course of normal urination or while the patient is catheterized. The device may include a drip chamber to reduce the risk of retrograde bacterial contamination of the bladder and a transducer and electrical signal conditioning and display equipment. This generic type of device includes the electrical urinometer, mechanical urinometer, nonelectric urinometer, disposable nonelectric urine flow rate measuring device, and uroflowmeter.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for these devices be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that urine flow or volume measuring systems be classified into class II because the design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The electrical properties of the device must be controlled by a performance standard to prevent electrical injury to the patient or operator. The measurement accuracy of the device must be controlled by a performance standard to prevent the development of inaccurate diagnostic information. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that

there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommenation on the Panel members' personal knowledge of, and clinical experience with, these devices and on the widespread use of these devices in medical practice.

5. Risks to health: (a) Misdiagnosis and inappropriate therapy: Inadequate design and calibration of the device may lead to generation of inaccurate diagnostic data. The user may prescribe a course of treatment based on inaccurate diagnostic data that places the patient at risk unnecessarily. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient. (c) Electrical injury: Improper design and construction or a malfunction of the device may result in electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the Panel recommendations and is proposing that urine flow or volume measuring systems be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Comestic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart B by adding new § 876.1800, to read as follows:

§ 876.1800 Urine flow or volume measuring system.

(a) *Identification.* A urine flow or volume measuring system is a device that measures directly or indirectly the volume or flow of urine from a patient, either during the course of normal urination or while the patient is catheterized. The device may include a drip chamber to reduce the risk of retrograde bacterial contamination of the bladder and a transducer and electrical signal conditioning and display equipment. This generic type of device includes the electrical urinometer, mechanical urinometer, nonelectric urinometer, disposable nonelectric urine flow rate measuring device, and uroflowmeter.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–755 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1958]

Medical Devices; Classification of Enuresis Alarms

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying enuresis alarms into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of enuresis alarms:

1. Identification: An enuresis alarm is a device used in the treatment of bedwetting. Through an electrical trigger mechanism, the device sounds an alarm when a small quantity of urine is detected on a sensing pad. This generic type of device includes the conditioned response enuresis alarm.

2. Recommended classification: Class II (performance standards.) The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that enuresis alarms be classified into class II because the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The electrical properties of the device must be controlled by a performance standard to prevent electrical injury to the patient. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction. (b) Electrical injury: Improper design, construction, or a mulfunction of the device could result in electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that enuresis alarms be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart C by adding new § 876.2040, to read as follows:

Subpart C—Monitoring Devices

§ 876.2040 Enuresis alarm.

(a) *Identification.* An enuresis alarm is a device used in the treatment of bedwetting. Through an electrical trigger mechanism, the device sounds an alarm when a small quantity of urine is detected on a sensing pad. This generic type of device includes conditioned response enuresis alarms.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–756 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1968]

Medical Devices; Classification of Penile Inflatable Implants

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Administration (FDA) is issuing for public comment a proposed regulation classifying penile inflatable implant devices into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel that the devices be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendation regarding the classification of penile inflatable implants:

1. Identification: A penile inflatable implant is a device that consists of two inflatable cylinders implanted in the penis, connected to a reservoir filled with radiopaque fluid implanted in the abdomen, and a subcutaneous manual pump implanted in the scrotum. When the cylinders are inflated, they provide rigidity to the penis. This device is used in the treatment of erectile impotence.

2. Recommended classification: Class II (premarket approval). The Gastroenterology-Urology Device Classification Panel recommends that premarket approval of this device be a high priority. The General and Plastic Surgery Device Classification Panel recommends that establishing premarket approval for this device be a medium priority.

3. Summary of reasons for recommendation: the Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel recommend that this device be classified into class III because it is an implanted device and sufficient information is not available to establish a performance standard that would assure its safety and effectiveness. The Panels also believe that there is not sufficient information available on this device to show that general controls are sufficient to assure its safety and effectiveness. Therefore, the device should be subject to premarket approval to assure that manufacturers develop sufficient information showing that the device is safe and effective.

4. Summary of data on which the recommendation is based: the Panels based their recommendations on the experimental nature of this device and

the lack of adequate medical literature and experience supporting its safety and effectiveness.

5. Risks to health: (a) Additional surgery: A defective pump, kinking or rupture of the tube, or low fluid volume in the reservoir may lead to malfunction of the device and require additional surgery. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient. (c) Adverse tissue reaction and erosion: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction and tissue erosion adjacent to the device.

Proposed Classification

The agency agrees with recommendations of both Panels and is proposing that penile inflatable implants be classified into class III (premarket approval). FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (treatment of sexual dysfunction) that is of substantial importance in preventing impairment of human health. Furthermore, the device is an implant, which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for penile inflatable implants and has concluded that the classification of this device should be published in the part of the Code of Federal regulations for gastroenterology and urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart D by adding new § 876.3350, to read as follows:

Subpart D—Prosthetic Devices

§ 876.3350 Penile inflatable implant.

(a) *Identification.* A penile inflatable implant is a device that consists of two inflatable cylinders implanted in the penis, connected to a reservoir filled with radiopaque fluid implanted in the abdomen, and a subcutaneous manual pump implanted in the scrotum. When the cylinders are inflated, they provide rigidity to the penis. this device is used in the treatment of erectile impotence.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-757 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 876

[Docket No. 78N-1979]

Medical Devices; Classification of Penile Rigidity Implants

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying penile rigidity implants into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III (premarket approval) and the recommendation of the General and Plastic Surgery Device Classification Panel that the device be classified into class II (performance standards). The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the Federal Register provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following

recommendation regarding the classification of penile rigidity implants:

1. Identification: A penile rigidity implant is a device that consists of a single semi-rigid rod or a pair of semi-rigid rods implanted in the penis to provide rigidity. It is used in the treatment of erectile impotence.

2. Recommended classification: The Gastroenterology-Urology Device Classification Panel recommends tht penile rigidity implants be classified into class III (premarket approval) and that premarket approval of this device be a high priority. The General and Plastic Surgery Device Classification panel recommends that penile rigidity implants be classified into class II (performance standards) and that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that the penile rigidity implant be classified into class III (premarket approval) because the device is implanted. The Panel believes that the long term consequences of the implantation of this device are not well understood. The Panel believes that general controls alone would not provide sufficient control over the performance characteristics of the device. The Panel also believes that insufficient information exists to determine that general controls or standards would be adequate to provide reasonable assurance of the safety and effectiveness of the device. The Panel also noted that many problems with the device are associated with the size of the device used, and suggested that a variety of sizes should be available to facilitate appropriate fit.

The General and Plastic Surgery Panel recommends that the penile rigidity implant be classified into class II (performance standards) because the Panel believes that the materials used in the construction of this device must meet a satisfactory level of tissue or blood compatibility, including requirements for adequate surface finish and cleanliness which may affect the degree of compatibility. The design of the device, including strength and rigidity, must be controlled to prevent tissue trauma and structural problems; e.g., fracture of the device. The Panel believes that general controls alone would not provide sufficient control over these characteristics. Although the penile rigidity implant is an implanted device, the General and Plastic Surgery Panel believes that premarket approval is not necessary because sufficient information exists to establish a performance standard that would provide reasonable assurance of the safety and effectiveness of the device.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of and clinical experience with, the device and familiarity with the medical literature. The Gastroenterology-Urology Device Classification Panel cited studies in which Small et al. (Ref. 1) and Merrill et al. (Ref. 2) reported successful implantation of the device in the short term in 14 of 15 patients.

5. Risks to health: (a) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, the patient may have an adverse tissue reaction. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (c) Urinary retention: If the prosthesis compresses the urethra, urine flow will be impeded. (d) Erosion or malfunction: If the implant is improperly sized or mechanically breaks, it may either cause tissue erosion or fail to provide adequate support.

Proposed Classification

FDA agrees with the recommendation of the Gastroenterology-Urology Device Classification Panel and is proposing that penile rigidity implants be classified into class III (premarket approval). FDA has reviewed the recommendations of both Panels and obtained additional data and information on penile rigidity implants. An article on the use of one type of this device during an 18-month period reports that 55 of 61 patients regained capacity for sexual intercourse (Ref. 3). The complications noted in this study include wound infection, penile edema, intractable pain, urinary obstruction, displacement of the silicone rods, and urethral erosion. Loeftler and Iverson noted three complications in 72 patients: infection, extrusion, and improper placement of the prosthesis (Ref. 4). In all four cases the prosthesis was removed. In another study carried out by Apfelberg, Maser, and Lash on 25 patients, an 8 percent complication rate was reported (Ref. 5).

FDA disagrees with the General and Plastic Surgery Device Classification Panel recommendation that penile rigidity implants be classified into class II (performance standards). FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (treatment of sexual dysfunction) that is of substantial importance in preventing impairment of human health. Furthermore, the device is an implant, which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

There is evidence (Refs. 1 through 5) of complications due to some designs of the device and that these complications cannot be addressed adequately by a performance standard.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for penile rigidity implants and has concluded that the classification of this device should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Small, M., et al., "Penile Prosthesis New Implant for Management of Impotence," *Journal of Florida Medical Association*, 62:21–25, 1975.

2. Merrill, D., et al., "Experience with the Small-Carrion Penile Prosthesis," *Journal of Urology*, 115:277–279, 1976.

3. Gottesman, J., "The Small-Carrion Prosthesis for Male Impotence," *Journal of Urology*, 117:289–299, 1977.

4. Loeftler, R. A. and R. E. Iverson, "Surgical Treatment of Impotence in the Male," *Plastic and Reconstructive Surgery*, 58:292–297, 1976.

5. Apfelberg, D., M. Maser, and H. Lash, "Surgical Management of Impotence," *The American Journal of Surgery*, 132:336–337, 1976.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in

the Federal Register of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the Federal Register.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart D by adding new § 876.3630, to read as follows:

§ 876.3630 Penile rigidity implant.

(a) *Identification.* A penile rigidity implant is a device that consists of a single semi-rigid rod or a pair of semi-rigid rods implanted in the penis to provide rigidity. It is used in the treatment of erectile impotence.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-750 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1981]

Medical Devices; Classification of Testicular Prostheses

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying testicular prostheses into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III and the recommendation of the General and Plastic Surgery Device Classification Panel that the device be classified into class II. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectivess of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the Federal Register.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the Federal Register provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of testicular prostheses:

1. Identification: A testicular prosthesis is an implanted device that consists of a solid or gel-filled silicone rubber prosthesis that is implanted surgically to resemble a testicle.

2. Recommended classification: The Gastroenterology-Urology Device Classification Panel recommends that testicular prostheses be classified into Class III (premarket approval) and that premarket approval of this device be a medium priority. The General and Plastic Surgery Device Classification Panel recommends that the device be classified into class II (performance standards) and that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that these devices be classified into class III because they are implanted devices. The Panel believes that the long-term consequences of the implantation of these devices are not well understood. There is insufficient information available to establish a performance standard that would assure their safety and effectiveness. The Panel believes that general controls are insufficient to assure their safety and effectiveness. Therefore, the devices should be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the devices and thus assure their safety and effectiveness.

The General and Plastic Surgery Device Classification Panel recommends that testicular prostheses be classified into class II because the design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The Panels believe that general controls alone would not provide sufficient control over these characteristics. Although the testicular prosthesis is an implanted device, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of this device because there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, the patient may have an adverse tissue reaction. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the recommendation of the Gastroenterology-Urology Device Classification Panel and is proposing

that testicular prosetheses be classified into class III (premarket approval). The agency has reviewed the Panel recommendation and has obtained additional data and information describing the use of the testicular prosthesis. The gel-filled prosthesis has been used with minimal complications (Ref. 1); however, silicone gel is known to migrate in the body even from an intact prosthesis. Also, the long-term effects on the body from the silicone material are unknown (Refs. 2 and 3). The clinical use of materials other than silicone rubber was less successful in a study reported by Prentiss (Ref. 4).

FDA disagrees with the recommendation of the General and Plastic Surgery Device Classification Panel that testicular prostheses be classified into class II (performance standards). The device presents a potential unreasonable risk of illness or injury to the patient. The silicone within the prosthesis may migrate in the body of the patient, as described above, with unknown long-term effects (Refs. 2 and 3). Furthermore, the device is an implant which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (reconstructive surgery) that is of substantial importance in preventing impairment of human health. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons, from 9 a.m. to 4 p.m., Monday through Friday.

1. Lattimer, J. K., et al., "A Natural Feeling Testicular Prosthesis," *Journal of Urology*, 110:81–83, 1973.

2. Hausner, R. J., et al., "Foreign Body Reaction to Silicone Gel in Axillary Lymph Nodes after Augmentation Mammaplasty," *Plastic and Reconstructive Surgery*, 62(2):381–383, 1978.

3. Wickham, M. G., et al., "Silicone Identification in Prosthesis-Associated Fibrous Capsules," *Science*, 199:437–439, 1978.

4. Prentiss, R., "Testicular Prosthesis Materials, Methods, and Results," *Journal of Urology*, 90:206–210, 1963.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart D by adding new § 876.3750, to read as follows:

§ 876.3750 Testicular prosthesis.

(a) *Identification.* A testicular prothesis is an implanted device that consists of a solid or gel-filled silicone rubber prosthesis that is implanted surgically to resemble a testicle.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–759 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1947]

Medical Devices; Classification of Fiberoptic Light Ureteral Catheters

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying fiberoptic light ureteral catheters into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of fiberoptic light ureteral catheters:

1. Identification: A fiberoptic light ureteral catheter is a device that consists of a fiberoptic bundle that emits

light throughout its length and is shaped so that it can be inserted into the ureter to enable the path of the ureter to be seen during lower abdominal or pelvic surgery.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that fiberoptic light ureteral catheters be classified into class II because characteristics of the device, including the shape and rigidity of the catheter and the light intensity, must be controlled by a performance standard to prevent trauma. The Panel believes that the design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation and to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The panel based its recommendations on the Panel members' personal knowledge of, and clinical experience with, this device.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation of the ureter. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that fiberoptic light ureteral catheters be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4020, to read as follows:

Subpart E—Surgical Devices

§ 876.4020 Fiberoptic light ureteral catheter.

(a) *Identification.* A fiberoptic light ureteral catheter is a device that consists of a fiberoptic bundle that emits light throughout its length and is shaped so that it can be inserted into the ureter to enable the path of the ureter to be seen during lower abdominal or pelvic surgery.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-760 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 876

[Docket No. 78N–1990]

Medical Devices; Classification of Circumcision Instruments

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying circumcision instruments into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering the public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of circumcision instruments:

1. Identification: A circumcision instrument is a device made specifically for use in circumcision procedures. This generic type of device includes the plastic bell circumcision device, circumcision shield, and circumcision clamp.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a

performance standard for these devices be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that circumcision instruments be classified into class II because the configuration and accurate sizing of the devices must be controlled by a performance standard to prevent tissue damage. The Panel recommends that the design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma or hemorrhage. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, these devices and on the widespread use of these devices in medical practice.

5. Risks to health: (a) Excessive trauma or hemorrhage: Improper size, shape, rigitity, arrangement, or finish on parts of these devices may cause excessive tissue trauma or hemorrhage. (b) Adverse tissue reaction: If the materials used in the construction of these devices are not biocompatible, the patient may have an adverse tissue reaction. (c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed classification

FDA agrees with the Panel recommendation and is proposing that circumcision instruments be classified into calass II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in subpart E by adding new § 876.4200, to read as follows:

§ 876.4200 Circumcision instrument.

(a) *Identification.* A circumcision instrument is a device made specifically for use in circumcision procedures. This generic type of device includeds the plastic bell circumcision device, circumcision shield, and circumcision clamp.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-701 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 876

[Docket No. 78N-1971]

Medical Devices; Classification of Colostomy Rods

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying colostomy rods into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of colostomy rods:

1. Identification: A colostomy rod is a device used during the loop colostomy procedure. A loop of colon is surgically brought out through the abdominal wall and the stiff colostomy rod is placed through the loop temporarily to keep the colon from slipping back through the surgical opening.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that colostomy rods be classified into class II because the materials used in the device that contact the body must meet a biocompatibility standard to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, perforation, or breakage allowing the intestine to retract into the peritoneal cavity leading to leakage of peritoneal contents and peritonitis. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (b) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction. (c) Peritonitis: If the device breaks, the loop of intestine may retract into the peritoneal cavity and leak intestinal contents, with consequent peritonitis. (d) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that colostomy rods be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard will provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4270, to read as follows:

§ 876.4270 Colostomy rod.

(a) *Identification.* A colostomy rod is a device used during the loop colostomy procedure. A loop of colon is surgically brought out through the abdominal wall and the stiff colostomy rod is placed through the loop temporarily to keep the colon from slipping back through the surgical opening.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–762 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1993]

Medical Devices; Classification of Endoscopic Electrosurgical Units and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying endoscopic electrosurgical units and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. the effects of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, Md 20910, 301–426–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere is this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of endoscopic electrosurgical units and accessories:

1. Identification: An endoscopic electrosurgical unit and accessories is a device used to perform electrosurgical procedures through an endoscope. This generic type of device includes the electrosurgical generator, patient plate, electric biopsy forceps, electrode, flexible snare, electrosurgical alarm system, electrosurgical power supply unit, electrical clamp, self-opening rigid snare, flexible suction coagulator electrode, patient return wristlet, contact jelly, adaptor to the cord for transurethral surgical instruments, the electric cord for transurethral surgical instruments, and the transurethral desiccator.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for these devices be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that endoscopic electrosurgical units and accessories be classified into class II (performance standards) because the design and construction of the devices must be controlled by a performance standard to prevent electrical injury to the patient. The design and construction of the device must be controlled by a performance standard to ensure proper cleaning and sterilization of the device to prevent infection. The materials used in the device that contact the body must meet a biocompatibility standard to prevent an adverse tissue reaction. The design, material, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, and surface finish are appropriate to prevent trauma, hemorrhage, and perforation. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of the devices in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of the device may cause tissue trauma, hemorrhage, or perforation. (b) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator. (c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (d) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that endoscopic electrosurgical units and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4300, to read as follows:

§ 876.4300 Endoscopic electrosurgical unit and accessories.

(a) *Identification.* An endoscopic electrosurgical unit and accessories is a device used to perform electrosurgical procedures through an endoscope. This generic type of device includes the electrosurgical generator, patient plate, electric biopsy forceps, electrode, flexible snare, electrosurgical alarm system, electrosurgical power supply unit, electrical clamp, self-opening rigid snare, flexible suction coagulator electrode, patient return wristlet, contact jelly, adaptor to the cord for transurethral surgical instruments, the electric cord for transurethral surgical instruments, and the transurethral desiccator.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–763 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1994]

Medical Devices; Classification of Gastroenterology-Urology Evacuators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying gastroenterology-urology evacuators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device

Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of gastroenterology-urology evacuators:

1. Identification: A gastroenterology-urology evacuator is a device used to remove debris and fluids during gastroenterological and urological procedures by drainage, aspiration, or irrigation. This generic type of device includes the fluid evacuator system, manually operated bladder evacuator, and the AC-powered vacuum pump.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be of low priority.

3. Summary of reasons for recommendation: The Panel recommends that gastroenterology-urology evacuators be classified into class II because the design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation and to ensure that the suction force is controlled to prevent inadequate aspiration due to lack of suction or damage to tissue by excessive suction. The construction of the evacuator tube must be controlled to maintain patency. The design and construction of the device must be controlled by a performance standard to prevent excessive irrigant pressure in the bladder during irrigant instillation and to enable proper cleaning and sterilization of the device to prevent infection. The electrical properties of the device must be controlled to prevent electrical injury to the patient or operator. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (b) Retrograde bacterial spread: Poor design or performance of the device may cause inadequate aspiration of the body cavity and possible retrograde bacterial spread. (c) Bladder rupture: Excessive pressure exerted during irrigant instillation can result in bladder rupture. (d) Tissue damage: Excessive suction can cause tissue damage. (e) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient. (f) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that gastroenterology-urology evacuators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4370, to read as follows:

§ 876.4370 Gastroenterology-urology evacuator.

(a) *Identification.* A gastroenterology-urology evacuator is a device used to remove debris and fluids during gastroenterological and urological procedures by drainage, aspiration, or irrigation. This generic type of device includes the fluid evacuator system, manually operated bladder evacuator, and the AC-powered vacuum pump.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before march 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-764 Filed 1-23-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1995]

Medical Devices; Classification of Hemorrhoidal Ligators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying hemorrhoidal ligators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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:
Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of hemorrhoidal ligators:

1. Identification: A hemorrhoidal ligator is a device used to cut off the blood flow to hemorrhoidal tissue by means of a ligature or band placed around the hemorrhoid.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that hemorrhoidal ligators be classified into class II because the Panel believes that the materials used in, and mechanical design of, this device must be controlled by a performance standard to prevent excessive tissue strangulation or hemorrhage. The Panel believes that general controls alone would not provide sufficient control over this characteristic. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: Hemorrhage or excessive strangulation of tissue: Breakage or poor design of this device could result in hemorrhage or excessive strangulation of tissue.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that hemorrhoidal ligators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19 and 26, 1978 (43 FR 21666 and 22672). This classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4400, to read as follows:

§ 876.4400 Hemorrhoidal ligator.

(a) *Identification.* A hemorrhoidal ligator is a device used to cut off the blood flow to hemorrhoidal tissue by means of a ligature or band placed around the hemorrhoid.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–765 Filed 1–23–81; 8:45 am]
BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1998]

Medical Devices; Classification of Electrohydraulic Lithotriptors

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying electrohydraulic lithotriptors into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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:
Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of electrohydraulic lithotriptors:

1. Identification: An electrohydraulic lithotriptor is an AC-powered device used to fragment urinary bladder stones. It consists of a high voltage source connected by a cable to a bipolar electrode that is introduced into the urinary bladder through a cystoscope. With the bladder full of water, the electrode is held against the stone and repeated electrical discharges between the two poles of the electrode cause electrohydraulic shock waves which disintegrate the stone.

2. Recommended classification: Class III (premarket approval). The Panel

recommends that premarket approval of this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that this device be classified into class III because it presents a potential unreasonable risk of illness or injury to the patient. The Panel believes that a performance standard would not provide reasonable assurance of the safety and effectiveness of the device and that there is not sufficient information to establish a standard. The device, therefore, should be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the device and thus assure its safety and effectiveness.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the usage of this device as reported in the medical literature. Although the references cited indicate the value of using this device, the Panel members identified significant hazards associated with its use (Refs. 1, 2, and 3). The Panel believes there is not enough information at this time to promulgate a performance standard for this device.

5. Risks to health: (a) Perforation of the bladder: If the stone is against the bladder mucosa, the introduction of shock waves into the stone and the physical contact of the stone with the bladder wall can cause ulceration, infection, sloughing, and eventual perforation of the bladder. (b) Inability to crush stones: Use of inadequate voltage can result in failure to fragment the stones. (c) Formation of additional stones: This device can drive particles from a stone being fragmented into the bladder wall. If the fragments of the stone remain in the bladder wall, they can become nuclei for the formation of additional stones. (d) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that electrohydraulic lithotriptors be classified into class III (premarket approval). FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. Shock waves associated with the use of this device may result in significant tissue damage. In addition, the device is purported or represented to be for a use (treatment of urinary bladder stones) that is of substantial importance in preventing impairment of human health. Premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

References

The following information has been placed in the Dockets Management Branch and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Alfthun, O. and M. Murtoman, "Experience with the Clinical and Experimental Urat-I Lithotriptor," *Scandinavian Journal of Urology and Nephrology*, 6(23–25), 1972.
2. Raney, A. M., "Electrohydraulic Lithotripsy: Experimental Study and Case Reports with the Stone Disintegrator," *The Journal of Urology*, Volume 113, pp. 345–347, March 1975.
3. Raney, A. M., "Electrohydraulic Cystolithotripsy," *Urology*, Volume VII:4, April 1976, pp. 379–381.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4480, to read as follows:

§ 876.4480 Electrohydraulic lithotriptor.

(a) *Identification.* An electrohydraulic lithotriptor is an AC-powered device used to fragment urinary bladder stones. It consists of a high voltage source connected by a cable to a bipolar electrode that is introduced into the urinary bladder through a cystoscope. With the bladder full of water, the electrode is held against the stone and repeated electrical discharges between the two poles of the electrode cause electrohydraulic shock waves which disintegrate the stone.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-766 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2001]

Medical Devices; Classification of Mechanical Lithotriptors

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying mechanical lithotriptors into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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:
Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, Md. 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of mechanical lithotriptors:

1. Identification: A mechanical lithotriptor is a device with steel jaws that is inserted into the urinary bladder through the urethra to grasp and crush bladder stones.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that mechanical lithotriptors be classified into class II because the Panel believes that the mechanical design and performance of the device, especially of the jaws, must be controlled by a performance standard to prevent injury to the patient. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: the Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma or perforation, and the sharp teeth of the jaws may cause hemorrhage. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that mechanical lithotriptors be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4500, to read as follows:

§ 876.4500 Mechanical lithotriptor.

(a) *Identification.* A mechanical lithotriptor is a device with steel jaws that is inserted into the urinary bladder through the urethra to grasp and crush bladder stones.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-767 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1999]

Medical Devices; Classification of Gastroenterology-Urology Fiberoptic Retractors

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying gastroenterology-urology fiberoptic retractors into class I (general controls). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class I. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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:
Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of gastroenterology-urology fiberoptic retractors:

1. Identification: A gastroenterology-urology fiberoptic retractor is a device that consists of a mechanical retractor

with a fiberoptic light system that is used to illuminate deep surgical sites.

2. Recommended classification: Class I (general controls). The Panel recommends that there be no exemptions.

3. Summary of reasons for recommendation: The Panel recommends that gastroenterology-urology fiberoptic retractors be classified into class I (general controls) because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of this device.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: Inadequate illumination. If the fiberoptic bundles in the device become disrupted, discontinuity or loss of light may result.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that gastroenterology-urology fiberoptic retractors be classified into class I (general controls) with no exemptions. The agency believes that general controls alone are sufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA agrees with the Panel that the fiberoptic bundles of this device may become disrupted and cause discontinuity or loss of light. However, the agency believes that general controls are adequate to control this risk to health.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 317(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4530, to read as follows:

876.4530 Gastroenterology-urology fiberoptic retractor.

(a) *Identification.* A gastroenterology-urology fiberoptic retractor is a device that consists of a mechanical retractor with a fiberoptic light system that is used to illuminate deep surgical sites.

(b) *Classification.* Class I (general controls).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–768 Filed 1–22–81; 8:45 am]

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21 CFR Part 876

[Docket No. 78N–2067]

Medical Devices; Classification of Ribdams

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ribdams into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of ribdams:

1. Identification: A ribdam is a device that consists of a broad strip of latex with supporting ribs used to drain surgical wounds where copious urine drainage is expected.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that ribdams be classified into class II because the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. In addition, if the device is excessively bulky, pressure on tissues can delay healing. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clincial experience with, the device and on the widespread use of this device in medical practice.

5. Risks to health: (a) Delayed healing and tissue necrosis (destruction): If the device is too bulky, pressure on tissues is increased which may delay the healing process and cause tissue necrosis. (b) Infection: Defects in the design or construction of

the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to the introduced and cause an infection in the patient. (c) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that ribdams be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drug proposes to amend Part 876 in Subpart E by adding new § 876.4560, to read as follows:

876.4560 Ribdam.

(a) *Identification.* A ribdam is a device that consists of a broad strip of latex with supporting ribs used to drain surgical wounds where copious urine drainage is expected.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-769 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2068]

Medical Devices; Classification of Interlocking Urethral Sounds

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying interlocking urethral sounds into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of interlocking urethral sounds:

1. Identification: An interlocking urethral sound is a device that consists of two metal sounds (elongated instruments for exploring or sounding body cavities) with interlocking ends, such as with male and female threads or a rounded point and mating socket, used in the repair of a ruptured urethra. The device may include a protective cap to fit over the metal threads.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that interlocking urethral sounds be classified into class II because the design of the device must be controlled by a performance standard to prevent further trauma to the urethra. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The Panel believes that general controls alone would not provide sufficient control over this characteristic. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Perforation, bleeding, perineal urethral trauma: Improper design of the device or failure of the safety cap may cause additional trauma to the injured urethra. (b) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that interlocking urethral sounds be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient

information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4590, to read as follows:

§ 876.4590 Interlocking urethral sound.

(a) Identification. An interlocking urethral sound is a device that consists of two metal sounds (elongated instruments for exploring or sounding body cavities) with interlocking ends, such as with male and female threads or a rounded point and mating socket, used in the repair of a ruptured urethra. The device may include a protective cap to fit over the metal threads.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–770 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

21 CFR Part 876

[Docket No. 78N–1984]

Medical Devices; Classification of Ureteral Stents

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ureteral stents into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of ureteral stents:

1. Identification: A ureteral stent is a tube-like implanted device that is inserted into the ureter to provide ureteral rigidity and allow the passage of urine. The device may have finger-like protrusions or hooked ends to keep the tube in place. It is used in the treatment of ureteral injuries and ureteral obstruction.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that ureteral stents be classified into class II because the material used in the device that contacts the body must be controlled by a performance standard to ensure it is biocompatible to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, perforation or migration of the device and to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device, and on a review of the literature. Dorr (Ref. 1) has reported on 20 patients treated with this type of repair between 1963 and 1971. Good results were observed in 11 of the 20 patients who were followed from 3 months to 5 years. Four patients had slight residual ureteral obstruction, and of the remaining five patients, the results were inconclusive. Of the 20 cases reviewed, only 2 had complications directly related to the stenting technique.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, arrangement or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (b) Adverse tissue reaction: If the material used in the device is not biocompatible, it may cause an adverse tissue reaction. (c) Migration of stent: Upward or downward migration of the stent may necessitate additional surgery to restore ureteral function. (d) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that

ureteral stents be classified into Class II (performance standards). FDA has obtained additional data on the use of ureteral stents (Refs. 2 through 4). The agency notes that the implantation of a silicone rubber ureteral stent has been used for many years as an acceptable method in the treatment of ureteral obstruction, usually in patients with advanced carcinoma, where the implants have performed satisfactorily for up to 26 months (Ref. 2). Later studies (Refs. 3 and 4) discuss variations in the design of the device that were made to prevent migration of the stent up or down the ureter. The literature indicates that the silicone rubber stent is satisfactory in relieving ureteral obstruction, has presented few problems, and can be removed easily through a cystoscope when required. Although the device is an implant, the agency believes that in this case premarket approval is unnecessary and that performance standards will provide reasonable assurance of the safety and effectiveness of the device. The agency believes that general controls alone are insufficient to control the risks to health presented by the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Dorr, R. P., R. K. Ratliff, and C. W. Hyndman, "Technique of Ureteral Repair Using an Indwelling Ureteral Stent," *Journal of Urology*, 111:481–482, 1974.
2. Gibbons, R. P., J. T. Macon, and R. J. Correa, Jr., "Experience With Undwelling Silicone Rubber Ureteral Catheters," *Journal of Urology*, 111:594–598, 1974.
3. Gibbons, R. P., R. J. Correa, Jr., K. B. Cummings, and J. T. Mason, "Experience With Indwelling Ureteral Stent Catheters," *Journal of Urology*, 115:22–26, 1976.
4. Finney, R. P., "Experience With New Double J Ureteral Catheter Stent," *Journal of Urology*, 120:678–681, 1978.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876s.4620, to reas as follows:

§ 876.4620 Ureteral stent.

(a) *Identification.* A ureteral stent is a tube-like implanted device that is inserted into the ureter to provide ureteral rigidity and allow the passage of urine. The device may have finger-like protrusions or hooked ends to keep the tube in place. It is used in the treatment of ureteral injuries and ureteral obstruction.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-771 Filed 1-22-81; 8:45 am]
BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1988]

Medical Devices; Classification of Water Jet Renal Stone Dislodger Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for pubic comment a proposed regulation classifying water jet renal stone disloger systems into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of water jet renal stone dislodger systems:

1. Identification: A water jet renal stone dislodger system is a device used to dislodge stones from renal calyces (recesses of the pelvis of the kidney) by means of a pressurized stream of water through a conduit. The device is used in the surgical removal of kidney stones.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that water jet renal stone dislodger systems be classified into class II because the Panel believes that the amount of pressure delivered by the device must be controlled by a performance standard to prevent renal damage due to excessive water pressure and to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over this characteristic. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that

there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Kidney damage: Kidney damage may result if this device injects fluid into renal calyces at too high a pressure level. (b) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that water jet renal stone dislodger systems be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4650, to read as follows:

§ 876.4650 Water jet renal stone dislodger system.

(a) *Identification.* A water jet renal stone dislodger system is a device used to dislodge stones from renal calyces (recesses of the pelvis of the kidney) by means of a pressurized stream of water through a conduit. The device is used in the surgical removal of kidney stones.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-772 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2002]

Medical Devices; Classification of Ureteral Stone Dislodgers

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ureteral stone dislodgers into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of ureteral stone dislodgers:

1. Identification: A ureteral stone dislodger is a device that consists of a bougie or a catheter with an expandable wire basket near the tip, a special flexible tip, or other special construction. It is inserted through a cystoscope and used to entrap and remove stones from the lower ureter. This generic type of device includes the metal basket and the flexible ureteral stone dislodger.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that ureteral stone dislodgers be classified into class II because the Panel believes that the design and materials of the device must be controlled by a performance standard to prevent damage to the ureter. The materials used in the device that contact the body must be controlled by a performance standard to ensure biocompatibility of the materials to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish and tensile strength of the device are appropriate to prevent trauma, hemorrhage, and perforation. The Panel noted that device malfunction may lead to incarceration of the metal basket in the ureter, causing additional surgery. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel

based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. Bleeding, perforation, or avulsion of the ureter may result if an improperly designed device contains sharp exposed wires or is not of the correct flexibility. (b) Additional surgery: A defect in the device or malfunction of the device could cause the metal basket to be incarcerated in the ureter, causing the patient to have to undergo additional surgery, with attendent risks. (c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that ureteral stone dislodgers be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4680, to read as follows:

§ 876.4680 Ureteral stone dislodger.

(a) *Identification.* A ureteral stone dislodger is a device that consists of a bougie or a catheter with an expandable wire basket near the tip, a special flexible tip, or other special construction. It is inserted through a cystoscope and used to entrap and remove stones from the lower ureter. This generic type of device includes the metal basket and the flexible ureteral stone dislodger.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-773 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1996]

Medical Devices; Classification of Manual Gastroenterology-Urology Surgical Instruments and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying manual gastroenterology-urology surgical instruments and accessories into class I (general controls). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class I. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATE: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of manual gastroenterology-urology surgical instruments and accessories:

1. Identification: A manual gastroenterology-urology surgical instrument and accessories is a device designed to be used for gastroenterological and urological surgical procedures. The device may be nonpowered, hand-held, or hand-manipulated. Manual gastroenterology-urology surgical instruments include the biopsy forceps cover, biopsy tray without biopsy instruments, line clamp, nonpowered rectal probe, nonelectrical clamp, colostomy spur-crushers, locking device for intestinal clamp, needle holder, gastro-urology hook, gastro-urology probe and director, nonself-retaining retractor, laparotomy rings, nonelectrical snare, rectal specula, bladder neck spreader, self-retaining retractor, and scoop.

2. Recommended classification: Class I (general controls). The Panel recommends that these devices be exempt from registration, device listing, and premarket notification procedures under section 510 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360), records and reports requirements under section 519 of the act (21 U.S.C. 360i), and the good manufacturing practice regulation under section 520(f) of the act (21 U.S.C. 360j(f).

3. Summary of reasons for recommendation: The Panel recommends that manual gastroenterology-urology surgical

instruments and accessories be classified into class I because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of these devices. The Panel believes that manufacturers of the devices should not be required to comply with registration, device listing, premarket notification procedures, records and reports requirements, and the good manufacturing practice regulation because the quality and any defects of the devices are readily apparent to the user.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices.

5. Risks to health: Trauma, hemorrhage, or perforation: The size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that manual gastroenterology-urology surgical instruments and accessories be classified into class I (general controls). The agency believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the devices. FDA disagrees with the Panel recommendation that manufacturers of manual gastroenterology-urology surgical instruments and accessories be exempt from registration, device listing, and premarket notification under section 510 of the act. Under section 510(g)(4) of the act, the agency may exempt a manufacturer from compliance with section 510 only upon a finding that compliance is not necessary for the protection of the public health. In the case of manual gastroenterology-urology surgical instruments and accessories, the agency cannot make the required finding. To protect the public health, the agency needs to require manufacturers of these devices to register and to list their products with FDA so that the agency is able to identify the firms manufacturing these devices and conduct necessary inspections. Premarket notification by these manufacturers assures that FDA learns of new products, and of significant modifications of existing products, for which premarket approval is required.

The agency disagrees with the Panel recommendation that manufacturers of manual gastroenterology-urology surgical instruments and accessories be exempt from records and reports requirements under section 519 of the act (21 U.S. 360i). The records and reports requirements in several of FDA's present device regulations are authorized, wholly or in part, by section 519. The most extensive of these requirements are found in the device good manufacturing practice (GMP) regulation, published in the **Federal Register** of July 21, 1978 (43 FR 31508). In the future, FDA will publish other regulations under section 519, including regulations requiring reports to FDA of experience with medical devices. Until these regulations are issued, FDA believes that it cannot properly issue exemptions from them. In the future, whenever the agency proposes device regulations that include records and reports requirements, interested persons may submit comments requesting that certain classes of manufacturers or other persons be exempt from the requirements, and FDA will issue exemptions that are appropriate. The only type of exemption from records and reports requirements that FDA is proposing now, in device classification regulations, is an exemption of certain manufacturers from requirements of the device GMP regulation. The exemption will not extend to two device GMP requirements, § 820.180 (21 CFR 820.180) with respect to general requirements concerning records and § 820.198 (21 CFR 820.198), with respect to complaint files.

FDA disagrees with the Panel recommendation that manufacturers of manual gastroenterology-urology surgical instruments and accessories be exempt from the good manufacturing practice (GMP) regulation under section 520(f) of the act. The agency believes that compliance with this regulation is necessary to assure the quality of these devices and thus their safety, effectiveness, and compliance with the adulteration and misbranding provisions of the act. Compliance with the GMP regulation will help prevent production of manual gastroenterology-urology surgical instruments and accessories having defects that could harm users. FDA agrees with the Panel that these devices can cause tissue damage if the parts possess improper configuration, rigidity, or finish; however, the agency believes that these hazards can be adequately controlled by general controls.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21668, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4730, to read as follows:

§ 876.4730 Manual gastroenterology-urology surgical instrument and accessories.

(a) *Identification.* A manual gastroenterology-urology surgical instrument and accessories is a device designed to be used for gastroenterological and urological surgical procedures. The device may be nonpowered, hand-held, or hand-manipulated. Manual gastroenterology-urology surgical instruments include the biopsy forceps cover, biopsy tray without biopsy instruments, line clamp, nonpowered rectal probe, nonelectrical clamp, colostomy spur-crushers, locking device for intestinal clamp, needle holder, gastro-urology hook, gastro-urology probe and director, nonself-retaining retractor, laparotomy rings, nonelectrical snare, rectal specula, bladder neck spreader, self-retaining retractor, and scoop.

(b) *Classification.* Class I (general controls).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–774 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

21 CFR Part 876

[Docket No. 78N-2004]

Medical Devices; Classification of Urethrotomes

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urethrotomes into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, and FDA advisory committee, made the following recommendation regarding the classification of urethrotomes:

1. Identification: A urethrotome is a device that is inserted into the urethra and used to cut urethral strictures and enlarge the urethra. It is a metal instrument equipped with a dorsal-fin cutting blade which can be elevated from its sheath. Some urethrotomes incorporate an optical channel for visual control.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that urethrotomes be classified into class II because the design of the cutting blade, together with its associated complex mechanical linkages and fiberoptic lighting system, must be controlled by a performance standard to prevent avulsion of urethral mucosa, external sphincter injury, light failure and loss of field of vision, injury to the operator, or tissue trauma, hemorrhage or perforation.

The Panel believes that the design and construction of the device must be controlled by performance standards to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristcs. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Trauma, hemorrhage, or perforation. Improper size, shape, rigidity, or arrangement of the device or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation.

(b) External sphincter injury: Defects in the design of the device may result in injury to the external sphincter and urethral avulsion.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urethrotomes be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4770, to read as follows:

§ 876.4770 Urethrotome.

(a) *Identification.* A urethrotome is a device that is inserted into the urethra and used to cut urethral strictures and enlarge the urethra. It is a metal instrument equipped with a dorsal-fin cutting blade which can be elevated from its sheath. Some urethrotomes incorporate an optical channel for visual control.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-775 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 876

[Docket No. 78N-2070]

Medical Devices; Classification of Urological Tables and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urological tables and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urological tables and accessories:

1. Identification: A urological table and accessories is a device that consists of a table, stirrups, and belts used to support a patient in a suitable position for endoscopic procedures of the lower urinary tract. The table can be adjusted into position mechanically or electrically.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a medium priority.

3. Summary of reasons for recommendation: The Panel Recommends that urological tables and accessories be classified into class II because the design of the table and the locking, release, and movement mechanism of the stirrups must be controlled by a performance standard to avoid injury to the patient. Any electrical properties of the device must be controlled by a performance standard to prevent electrical injury to the patient or operator. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of this device in medical practice.

5. Risks to health: (a) Electrical injury: Improper design, construction, or a malfunction of the electrically operated device could result in electrical injury to the patient or the operator.

(b) Pressure injuries: Defects in design, construction, or malfunction of the device may lead to pressure injuries which could result in pressure sores, nerve palsies, venous stasis, impaired healing, tissue necrosis or edema.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urological tables and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.4890, to read as follows:

§ 876.4890 Urological table and accessories.

(a) *Identification.* A urological table and accessories is a device that consists of a table, stirrups, and belts used to support a patient in a suitable position for endoscopic procedures of the lower urinary tract. The table can be adjusted into position mechanically or electrically.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-776 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2005]

Medical Devices; Classification of Biliary Catheters and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying biliary catheters and accessories into class II (performance standards). FDA is also publishing the recommendation of the

Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel that these devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of biliary catheters and accessories:

1. Identification: A biliary catheter and accessories is a tubular flexible device used for temporary or prolonged drainage of the biliary tract, for splinting of the bile duct during healing, or for preventing stricture of the bile duct. This generic type of device may include a bile collecting bag that is attached to the biliary catheter by a connector and fastened to the patient with a strap.

2. Recommended classification Class II (performance standards). Both Panels recommend that establishing a performance standard for these devices be a low priority.

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that biliary catheters and accessories be classified into class II because the design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. A performance standard is also necessary to enable proper cleaning and sterilization of the device to prevent infection. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction.

The General and Plastic Surgery Device Classification Panel recommends that biliary catheters be classified into class II because the material integrity of catheters must meet an acceptable level of performance to reduce the possibility of fragmentation of the catheter, leading to formation of biliary calculi. Materials used in the construction of these devices must comply with a performance standard to ensure they meet a generally accepted satisfactory level of tissue or blood biocompatibility, to prevent an adverse tissue reaction.

The Panels believe that general controls alone would not provide sufficient control over these characteristics. The Panels believe that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard. The Gastroenterology-Urology Panel believes that the device as it is presently marketed is not suitable for long term implantation (over 30 days).

4. Summary of data on which the recommendation is based: The Panels based their recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, and arrangement of the devices or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation.

(b) Bile duct obstruction: The size, shape, or design of the device may result in obstruction of, or injury to, the bile duct.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of devices sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

(d) Biliary calculi (stone) formation: Fragmentation, stiffening, or obstruction caused by the device can result in the formation of biliary calculi.

(e) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the recommendations of both Panels and is proposing that biliary catheters and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for biliary catheters and has concluded that the classification of this device should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart E by adding new § 876.5010, to read as follows:

Subpart F—Therapeutic Devices

§ 876.5010 Biliary catheter and accessories.

(a) *Identification.* A biliary catheter and accessories is a tubular flexible device used for temporary or prolonged drainage of the biliary tract, for splinting of the bile duct during healing, or for preventing structure of the bile duct. This generic type of device may include

a bile collecting bag that is attached to the biliary catheter by a connector and fastened to the patient with a strap.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-777 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1972]

Medical Devices; Classification of Continent Ileostomy Catheters

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying continent ileostomy catheters into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of continent ileostomy catheters:

1. Identification: A continent ileostomy catheter is a flexible tubular device used as a form during surgery for continent ileostomy and it provides drainage after surgery. Additionally, the device may be inserted periodically by the patient for routine care to empty the ileal pouch. This generic type of device includes the rectal catheter for continent ileostomy.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that continent ileostomy catheters be classified into class II (performance standards) because the design and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation.

The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device. The Panel members noted that this device has not been used extensively.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, and arrangement, or finish on parts of this devices may cause tissue trauma, hemorrhage, or perforation.

(b) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, the patient may have an adverse tissue reaction.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that continent ileostomy catheters be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5030 to read as follows:

§ 876.5030 Continent ileostomy catheter.

(a) *Identification.* A continent ileostomy catheter is a flexible tubular device used as a form during surgery for continent ileostomy and it provides drainage after surgery. Additionally, the device may be inserted periodically by the patient for routine care to empty the ileal pouch. This generic type of device includes the rectal catheter for continent ileostomy.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–778 Filed 1–22–81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1989]

Medical Devices; Classification of Subrapubic Urological Catheters and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying suprapubic urological catheters, and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of suprapubic urological catheters and accessories:

1. Identification: A suprapubic urological catherer and accessories is a tubular flexible device that is inserted through the abdominal wall into the urinary bladder with the aid of a trocar and cannula. The device is used to pass fluids to and from the urinary tract. This generic type of device includes the suprapubic catheter and tube, malecot catheter, catheter punch instrument, suprapubic drainage tube, and the suprapubic cannula and trocar.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a peformance standard for these devices be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that the suprapubic urological catheter and accessories be classified into class II because the Panel believes that the design, materials, and construction of the device must be controlled by a performance standard to ensure that the device's shape, size, rigidity, surface finish, and strength are appropriate to prevent trauma, hemorrhage, or perforation. A performance standard is also needed to ensure that the structural integrity of the device is adequate to prevent collapse of the catheter, blocking the drainage of urine, and to enable proper cleaning and sterilization of the device to prevent infection. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. This device can be implanted into the patient for an extended period of time; however, the majority of the applications for this device are for less than 30 days. The Panel recommends that labeling indicate to the user the internal and external diameters of the device.

The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel Members' personal knowledge of, and clinical experience with, the devices, and on the widespread successful use of the devices in the medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation.

(b) Adverse tissue reaction: If the materials used in the devices are not biocompatible, an adverse tissue reaction may result.

(c) Failure of urine drainage: If the device has poor structural integrity, the catheter wall could collapse, causing a blockage that would prevent urine from draining.

(d) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that suprapubic urological catheters and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668), and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5090, to read as follows:

§ 876.5090 Suprapubic urological catheter and accessories.

(a) *Identification.* A suprapubic urological catheter and accessories is a tubular flexible device that is inserted through the abdominal wall into the urinary bladder with the aid of a trocar and cannula. The device is used to pass fluids to and from the urinary tract. This generic type of device includes the suprapubic catheter and tube, malecot catheter, catheter punch instrument, suprapubic drainage tube, and the suprapubic cannula and trocar.

(b) *Classification.* Class II (performance standard).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–779 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

Docket No. 78N–2006

Medical Devices; Classification of Urological Catheters and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urological catheters and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that urological catheters, urological catheter trays and urological catheter stylets be classified into class II and that urological catheter accessories be classified into class I (general controls). FDA is also publishing the recommendation of the General and Plastic Surgery Device Classification Panel that the urological catheter be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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

FOR FURTHER INFORMATION CONTACT: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of urological catheters and accessories:

1. Identification: A urological catheter and accessories is a tubular, flexible device that is inserted through the urethra and used to pass fluids to or from the urinary tract. This generic type of device includes radiopaque urological catheters, ureteral catheters, urethral catheters, coude catheters, balloon retention type catheters, straight catheters, upper urinary tract catheters, double lumen female urethrographic catheters, disposable ureteral catheters, male urethrographic catheters, and urological catheter accessories including urethral catheter stylets, ureteral catheter adapters, ureteral catheter holders, ureteral catheter stylets, ureteral catheterization trays and the gastro-urological irrigation tray (for urological use).

2. Recommended classification: Class II (performance standards). The Gastroenterology-Urology Device Classification Panel recommends that urological catheters, urological catheterization trays, and urological catheter stylets be classified into class II. The Panel recommends that establishing a performance standard for urological catheters be a high priority, and that establishment of a performance standard for urological catheterization trays and urological catheter stylets be a medium priority. The General and Plastic Surgery Device Classification Panel recommends that urological catheters be classified into class II and that establishing a performance standard for this device be a low priority. The Gastroenterology-Urology Device Classification Panel recommends that urological catheter accessories be classified into class I (general controls). The Gastroenterology-Urology Panel recommends that these accessories be exempt from registration, device listing, and premarket notification procedures under section 510 of the act (21 U.S.C. 360), records and reports requirements under section 519 of the act (21 U.S.C. 360i), and the good manufacturing practice regulation under section 520(f) of the act (21 U.S.C. 360j(f)).

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that urological catheters, urological catheterization trays, gastro-urological irrigation trays (for urological use), and urological catheter stylets be classified into class II because the design, materials, and construction of the devices must be controlled by a performance standard to ensure that the shape, size, rigidity, surface finish, and strength of the devices are appropriate in order to prevent trauma, hemorrhage, or perforation. The materials used in devices that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization to prevent infection in the patient. The Gastroenterology-Urology Device Classification Panel recommends that urological catheter accessories be classified into class I (general controls) because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of these devices. The Panel believes that manufacturers of these

device accessories be exempt from registration and device listing requirements, premarket notification procedures, records and reports requirements, and the good manufacturing practice regulation because these are simple devices in common use that present only minimal risks to health, and that the quality of, and any defects of, the device are readily apparent upon user examination. The General and Plastic Surgery Device Classification Panel recommends that urological catheters be classified into class II because the materials used in devices that contact the body must meet a biocompatibility standard to prevent an adverse tissue reaction, and that these devices should not degrade by interaction with body tissue or fluids, nor contain residual (particulate) matter. The Panels believe that general controls alone would not provide sufficient control over these characteristics. The Panels believe that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a standard.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the devices.

5. Risks to health: (a) Infection: Defects in the design or construction of the devices preventing adequate cleaning or sterilization or defects in packaging or processing of devices sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient.

(b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation.

(c) Adverse tissue reaction: If the materials used in the construction of these devices are not biocompatible, the patient may have an adverse tissue reaction.

(d) Obstruction to urine passage: Inadequate size of the lumen or collapse or kinking of the tube because of inappropriate design and construction may lead to obstruction of the passage of urine through the catheter.

(e) Tissue injury: Failure of a balloon-type catheter to deflate as necessary may lead to tissue injury.

Proposed Classification

The agency agrees in part with the recommendation of the Gastroenterology-Urology Device Classification Panel and agrees with the recommendation of the General and Plastic Surgery Device Classification Panel and is proposing that urological catheters and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by these devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. FDA also believes that there is sufficient information to establish a performance standard for these devices.

The agency disagrees with the Gastroenterology-Urology Device Classification Panel's recommendation that urological catheter accessories be classified into class I (general controls). The agency believes that these accessories' design characteristics, including their size, shape, rigidity, arrangement, and finish must be controlled to prevent tissue trauma, hemorrhage, or perforation. Furthermore, the biocompatibility of the materials used in the devices must be controlled to prevent adverse tissue reactions.

Because the agency has determined that urological catheter accessories should be classified into class II rather than class I, the agency is not required to publish a regulation adopting or rejecting the Panel recommendation that these devices be exempt from registration and listing requirements and the premarket notification procedures under section 510, the records and reports requirements under section 519, and the good manufacturing practice regulation under section 520(f) of the act.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for urological catheters and accessories and has concluded that the classification of these devices should be published in the part of the Code of Federal Regulations for gastroenterology-urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5130, to read as follows:

§ 876.5130 Urological catheter and accessories.

(a) *Identification.* A urological catheter and accessories is a tubular, flexible device that is inserted through the urethra and used to pass fluids to or from the urinary tract. This generic type of device includes radiopaque urological catheters, ureteral catheters, urethral catheters, coude catheters, balloon retention type catheters, straight catheters, upper urinary tract catheters, double lumen female urethrographic catheters, disposable ureteral catheters, male urethrographic catheters, and urological catheter accessories including uretheral catheter stylets, ureteral catheter adapters, ureteral catheter holders, ureteral catheter stylets, ureteral catheterization trays and the gastro-urological irrigation tray (for urological use).

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–780 Filed 1–22–81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–2009]

Medical Devices; Classification of Urological Clamps for Males

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urological clamps for males into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifiying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urological clamps for males:

1. Identification: A urological clamp for males is a device used to close the urethra of a male to control urinary incontinence or to hold anesthetic or radiography contrast media in the urethra temporarily. It is an external clamp.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that urological clamps for males be classified into class II because the materials used in the devices that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design, materials, and construction of the devices must be controlled by a performance standard to ensure that the amount of pressure the clamp exerts is not excessive and that the locking mechanism is reliable to avoid damage to the skin from leakage of urine. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Pressure injuries: Defects in design, construction, or malfunction of the device may lead to pressure injuries such as pressure sores, nerve palsies, venous stasis, impaired healing, tissue necrosis, or compression of blood vessels that leads to edema.

(b) Infection or skin reaction: If the locking mechanism of the clamp fails, leakage of urine may lead to infection or skin reaction.

(c) Adverse tissue reaction: If the materials used in the construction of the devices are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urological clamps for males be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by this device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668), and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5160, to read as follows:

§ 876.5160 Urological clamp for males.

(a) *Identification.* A urological clamp for males is a device used to close the urethra of a male to control urinary incontinence or to hold anesthetic or radiography contrast media in the urethra temporarily. It is an external clamp.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–781 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2060]

Medical Devices; Classification of Enema Kits

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying enema kits into class I (general controls). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class I. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final

regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of enema kits:

1. Identification: An enema kit is a device intended to instill water or other fluids into the colon through a nozzle inserted into the rectum to promote evacuation of the contents of the lower colon. The device consists of a container for fluid connected to the nozzle either directly or via tubing.

2. Recommended classification: Class I (general controls). The Panel recommends that this device be exempt from registration, device listing, and premarket notification under section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360).

3. Summary of reasons for recommendation: The Panel recommends that enema kits be classified into class I because the Panel believes that any defects in the device are readily apparent and that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of this device. The Panel believes that manufacturers of the device should not be required to comply with registration, device listing, and premarket notification procedures because enema kits present no unreasonable risks to health when used in the manner recommended and the quality of the device is readily apparent to the user.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: None identified.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that enema kits be classified into class I (general controls). Although the device presents a risk of colon irritation if used excessively or inappropriately, the agency believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device.

FDA disagrees with the Panel's recommendation that manufacturers of enema kits be exempt from all requirements under section 510 of the act. Under section 510(g)(4), the agency may exempt a manufacturer from section 510 only upon a finding that compliance with this section is not necessary for the protection of the public health. In the case of enema kits, the agency cannot make the required finding. To protect the public health, the agency needs to require manufacturers of this device to register and to list their products with FDA, so that the agency is able to identify the firms manufacturing this device and conduct necessary inspections. Premarket notification by these manufacturers assures that FDA learns of new products, and of significant modifications of existing products, for which premarket approval is required.

FDA is proposing that a manufacturer of this device be exempt, in the manufacture of the device, from all requirements in the GMP regulation except § 820.180, with respect to general requirements concerning records, and § 820.198 with respect to complaint files. Based on available information about current practices used in the manufacture of the device and user experience with the device, the agency has determined that application of the GMP regulation, other than §§ 820.180 and 820.198, is unlikely to improve the safety and effectiveness of the device. The agency believes, however, that manufacturers of enema kits must still be required to comply with the complaint file requirements to ensure that these manufacturers have adequate systems for complaint investigations and followup. The agency also believes that manufacturers of enema kits must still be required to comply with the general requirements concerning records to ensure that FDA has access to complaint file, can investigate device-related injury reports and complaints about product defects, may determine whether the manufacturer's corrective actions are adequate, and may determine whether the exemption from other sections of the GMP regulation is still appropriate.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), The Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5210, to read as follows:

§ 876.5210 Enema kit.

(a) *Identification.* An enema kit is a device intended to instill water or other fluids into the colon through a nozzle inserted into the rectum to promote evacuation of the contents of the lower colon. The advice consists of a container for fluid connected to the nozzle either directly or via tubing. This device does not include the colonic irrigation system (§ 876.5220).

(b) *Classification.* Class I (general controls). The device is exempt from the good manufacturing practice regulation in Part 820, with the exception of § 820.180, with respect to general requirements concerning records, and § 820.198, with respect to complaint files.

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-782 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

21 CFR Part 876

[Docket No. 78N-2011]

Medical Devices; Classification of Colonic Irrigation Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying into class II (performance standards) colonic irrigation systems intended for colon cleansing when medically indicated, such as before radiological or endoscopic examinations and classifying into class III (premarket approval) colonic irrigation systems when intended for all other uses, including use routinely for general well being. FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device intended for colon cleansing when medically indicated be classified into class II and that the device be classified into class III when intended for all other uses. FDA is also publishing the recommendation of the General and Plastic Surgery Device Classification Panel that the device be classified into class I (general controls). The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of colonic irrigation systems:

1. Identification: A colonic irrigation system is a device intended to instill water into the colon through a nozzle inserted into the rectum to cleanse (evacuate) the contents of the lower colon. The system is designed to allow evacuation of the contents of the colon during the administration of the colonic irrigation. The device consists of a container for fluid connected to the nozzle via tubing and includes a system which enables the pressure, temperature, or flow of water through the nozzle to be controlled. The device may include a console-type toilet and necessary fittings to allow the device to be connected to water and sewer pipes. The device may use electrical power to heat the water.

2. Recommended classification: The Gastroenterology-Urology Device Classification Panel recommends that the colonic irrigation system intended for colon cleansing when medically indicated, such as before radiological or endoscopic examinations, be classified into class II (performance standards) and that establishing a performance standard for this device be a low priority. The Panel recommends that this device, when intended for other uses, including use routinely for general well being, be classified into class III (premarket approval) and that premarket approval of this device be a low priority. The General and Plastic Surgery Device Classification Panel recommends that this device be classified into class I (general controls), and that there be no exemptions.

3. Summary of reasons for recommendation: On October 26, 1978, the Gastroenterology-Urology Device Classification Panel recommended that colonic irrigation systems be classified into class III because the safety and effectiveness of this device had not been proven for all of its intended uses. Subsequently, the Panel decided to recommend that this device be classified into class II for purposes of colon cleansing when medically indicated, such as before radiological or endoscopic examinations, and into class III when intended for all other uses, including use routinely for general well being. The Panel recommends that colonic irrigation systems used for colon cleansing when medically indicated be classified into class II, because the water pressure and temperature regulating mechanisms used in this device must be controlled by a performance standard to prevent damage to the colon. The electrical properties of this device must be controlled by a performance standard to prevent electrical injury to the patient or operator. The Panel noted that the more elaborate devices do not seem to be any more efficacious than many of the simple systems, such as an enema kit (§ 876.5210). The Panel recommended that this device be labeled to show that it is safe and effective only for colon cleansing when medically indicated and cautioned that excessive or inappropriate use of the device could be irritating to the colon. The Panel believes that general controls alone would not provide sufficient control over the water pressure and temperature regulating mechanisms of the device. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device solely for the use indicated, and that there is sufficient information to establish a performance standard for this use of the device. The Panel recommends that colonic irrigation systems intended for nonmedically indicated uses, including use routinely for general well being, be classified into class III because the Panel believes that it is not possible to establish an adequate performance standard for the device because safe and satisfactory performance has never been demonstrated. Therefore, the device, when intended for these nonmedically indicated uses, must be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the device and, thus, assure its safety and effectiveness. The General and Plastic Surgery Device Classification Panel recommends that colonic irrigation systems be classified into class I (general controls) because general controls are sufficient to provide

reasonable assurance of the safety and effectiveness of the device. The Panel does not believe that this device requires performance standards to control the identified risks to health.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Tissue burns: The temperature regulating mechanism for the water heater used in this device may allow overheating of the water which is delivered to the patient's colon, resulting in tissue burns.

(b) Perforation of the colon: Excessive water pressure delivered by this device could result in perforation of the wall of the colon.

(c) Colon irritation: Excessive or inappropriate use of this device may result in irritation of the colon.

(d) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or operator.

Proposed Classification

FDA agrees with the recommendation of the Gastroenterology-Urology Device Classification Panel and is proposing that colonic irrigation systems intended for colon cleansing when medically indicated, such as before radiological or endoscopic examinations, be classified into class II (performance standards) and that the device be classified into class III (premarket approval) when intended for all other uses, including use routinely for general well being. The agency believes that a performance standard is necessary for this device intended for colon cleansing when medically indicated because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device intended for colon cleansing when medically indicated. The agency also believes that there is sufficient information to establish a performance standard for this use of the device.

However, the agency believes that premarket approval is necessary for this device when intended for other than medically indicated occasional colon cleansing, such as for general well being, because it safety and effectiveness has not been demonstrated for these purposes. The agency believes that insufficient information exists to determine that general controls would provide reasonable assurance of the safety and effectiveness of the device for uses other than the medically indicated uses described above, and that insufficient information exists to establish a performance standard for these other uses of this device.

FDA disagrees with the recommendation of the General and Plastic Surgery Device Classification Panel that the colonic irrigation system be classified into class I (general controls). As described above, the agency believes that either a performance standard or premarket approval is necessary for this device, depending upon its intended uses.

The agency has reviewed the Panel's recommendations for the colonic irrigation system and has concluded that the classification of this device should be published in the part of the Code of Federal Regulations for gastroenterology-urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5220, to read as follows:

§ 876.5220 Colonic irrigation system.

(a) *Identification.* A colonic irrigation system is a device intended to instill water into the colon through a nozzle inserted into the rectum to cleanse (evacuate) the Contents of the lower colon. The system is designed to allow evacuation of the contents of the colon during the administration of the colonic irrigation. The device consists of a container for fluid connected to the nozzle via tubing and includes a system which enables the pressure, temperature, or flow of water through the nozzle to be controlled. The device may include a console-type toilet and necessary fittings to allow the device to be connected to water and sewer pipes. The device may use electrical power to heat the water. This device does not include the enema kit (§ 876.5210).

(b) *Classification.* (1) Class II (performance standards) when the device is intended for colon cleansing when medically indicated, such as before radiological or endoscopic examinations.

(2) Class III (premarket approval) when the device is intended for other uses, including colon cleansing routinely for general well being.

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–783 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2010]

Medical Devices; Classification of Urine Collectors and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urine collectors and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urine collectors and accessories:

1. Identification: A urine collector and accessories is a device used to collect urine. The device and accessories consist of tubing, a suitable receptacle, connectors, mechanical supports, and may include a means to prevent the backflow of urine or ascent of infection. This generic type of device includes the corrugated rubber sheath, pediatric urine collector, urinary drainage collection kit, closed urine drainage system, leg bag, urosheath-type incontinence device, and paste-on device for incontinence.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for these devices be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that urine collectors and accessories be classified into class II because the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, surface finish and strength of the device are appropriate to prevent trauma or hemorrhage and to enable proper cleaning and sterilization of the device to prevent infection in the patient. The Panel believes that general controls alone would not provide reasonable assurance of the safety and effectiveness of the devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of the devices in medical practice.

5. Risks to health: (a) Trauma or hemorrhage: The size, shape, rigidity, arrangement, or finish on parts of the devices may cause tissue trauma or hemorrhage.

(b) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urine collectors and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drug proposes to amend Part 876 in Subpart F by adding new § 876.5250, to read as follows:

§ 876.5250 Urine collector and accessories.

(a) *Identification.* A urine collector and accessories is a device used to collect urine. The device and accessories consist of tubing, a suitable receptacle, connectors, mechanical supports, and may include a means to prevent the backflow of urine or ascent of infection. This generic type of device includes the corrugated rubber sheath, pediatric urine collector, urinary drainage collection kit, closed urine drainage system, leg bag, urosheath-type incontinence device, and paste-on device for incontinence.

(b) *Classification.* Class II performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–784 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1978]

Medical Devices; Classification of Implanted Electrical Urinary Continence Devices

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying implanted electrical urinary continence devices into class III (Premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the devices. These

actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of implanted electrical urinary continence devices:

1. Identification: An implanted electrical urinary continence device is a device intended for treatment of urinary incontinence that consists of a receiver implanted in the abdomen, electrodes for pulsed-stimulation that are implanted either in the bladder wall or in the pelvic floor, and a battery-powered transmitter outside the body.

2. Recommended classification: Class III (Premarket approval). The Panel recommends that premarket approval of these devices be a medium priority.

3. Summary of reasons for recommendation: The Panel recommends that these devices be classified into class III because they are implanted devices and the Panel believes there is insufficient information available to establish a performance standard and to show that general controls are sufficient to ensure their safety and effectiveness. Therefore, the devices should be subject to premarket approval to ensure that manufacturers demonstrate satisfactory performance and thus ensure their safety and effectiveness.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on a review of the historical data concerning implanted electrical urinary continence devices. Halverstadt (Ref. 1) discussed several unsolved problems inherent in the electrical stimulation of the bladder. These problems include breakage of lead wires, the cumbersome nature of the electrodes, risk of perforation by wires of the bladder cavity, difficulty of obtaining uniform contraction of the detrusor muscle, and the spread of the stimulus to neighboring tissues producing abdominal pain. The Panel also based its recommendation on the experimental nature of these devices and on the lack of adequate medical literature and experience supporting their safety and effectiveness.

5. Risks to health: (a) Adverse tissue reaction and erosion: Defects in the design or the construction of the device, or lack of biocompatibility of the materials used in the device, may cause an adverse tissue reaction and tissue erosion adjacent to the device.

(b) Infection: Defects in the design or contruction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

(c) Tissue damage: Defects in the electrode wires may lead to their breakage and consequent tissue damage.

(d) Abdominal and leg pain: The amount of stimulation by the electrodes necessary to obtain adequate bladder stimulation may lead to abdominal and leg pain.

(e) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that implanted electrical urinary continence devices be classified into class III (premarket approval). FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (treatment of urinary incontinence) that is of substantial importance in preventing impairment of human health. Furthermore, the device is an implant, which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

Reference

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Halverstadt, D. B., W. L. Parry, "Electronic Stimulation of the Human Bladder: 9 Years Later," *Journal of Urology*, 13, 341:344, 1975.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5270, to read as follows:

§ 876.5270 Implanted electrical urinary continence device.

(a) *Identification.* An implanted electrical urinary continence device is a device intended for treatment of urinary incontinence that consists of a receiver implanted in the abdomen, electrodes for pulsed-stimulation that are implanted either in the bladder wall or in the pelvic floor, and a battery-powered transmitter outside the body.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-785 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-1969]

Medical Devices; Classification of Implanted Mechanical/Hydraulic Urinary Continence Devices

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying implanted mechanical/hydraulic urinary continence devices into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of implanted mechanical/hydraulic urinary continence devices:

1. Identification: An implanted mechanical/hydraulic urinary continence device is a device used to treat urinary incontinence by the application of continuous or intermittent pressure to occlude the urethra. The device may consist of implanted fixed or adjustable pressure pads or an inflatable cuff around the urethra connected to a container of radiopaque fluid implanted in the abdomen and a manual pump and valve implanted under the skin surface. The fluid is pumped from the container to inflate the cuff or pad to press on the urethra.

2. Recommended classification: Class III (premarket approval). The Panel recommends that premarket approval of these devices be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that these devices be classified into class III because they are implanted devices. The Panel believes that the long term consequences of the implantation of these devices are not well understood. There is insufficient information available to establish a performance standard that would assure their safety and effectiveness. The Panel believes that general controls are insufficient to assure their safety and effectiveness. Therefore, the devices should be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the devices and thus assure their safety and effectiveness.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on a review of the literature for this device and on a presentation given by F. Brantley Scott at a Panel meeting held on September 26, 1976 (Ref. 1). Dr. Scott described safety features incorporated into one type of this device: the implanted inflatable cuff pressure is set below the patient's diastolic blood pressure so that the urethra underneath the cuff continues to have an adequate blood supply. Also, before the bladder pressure becomes inordinately high, the cuff opens automatically allowing release of urine. The most recent published medical article cited by the Panel indicates problems with this device may necessitate further surgery for its correction or removal (Ref. 2).

5. Risks to health: (a) Adverse tissue reaction and erosion: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction and tissue erosion adjacent to the device.

(b) Leakage of urine: Kinking of the tube, insufficient fluid volume in the fluid container, or a defect in the cuff or pressure pad can result in failure to prevent leakage or urine through the urethra.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

(d) Urinary tract infection: If the cuff locks in the closed position preventing emptying of the bladder, urine may back up into the ureter or kidneys and lead to urinary tract infections.

(e) Additional surgery: Defects in the device or malfunction of the device may require the patient to undergo additional surgery, with attendent risks.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that implanted mechanical/hydraulic urinary continence devices be classified into class III (premarket approval).

FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (treatment of incontinence) that is of substantial importance in preventing impairment of human health. Furthermore, the device is an implant, which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons, from 9 a.m. to 4 p.m., Monday through Friday.

1. Transcript of the Meeting of the Gastroenterological and Urological Device Classification Panel, September 26, 1976, pp. 6-17.

2. Furlow, W. L., "The Implantable Artificial Genitourinary Sphincter in the Management of Total Urinary Incontinence," *Mayo Clinic Proceedings*, 51:341–345, 1976.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668), and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5280, to read as follows:

§ 876.5280 Implanted mechanical/hydraulic urinary continence device.

(a) *Identification.* An implanted mechanical/hydraulic urinary continence device is a device used to treat urinary incontinence by the application of continuous or intermittent pressure to occlude the urethra. The device may consist of implanted fixed or adjustable pressure pads or an inflatable cuff around the urethra connected to a container of radiopaque fluid implanted in the abdomen and a manual pump and valve implanted under the skin surface. The fluid is pumped from the container to inflate the cuff or pad to press on the urethra.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–786 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2069]

Medical Devices; Classification of Nonimplanted Electrical Continence Devices

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying nonimplanted electrical continence devices into class III (premarket approval). FDA is also publishing the recommendation of the Obstetrical and Gynecological Device Classification Panel that the device be classified into class III and the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of nonimplanted electrical continence devices:

1. Identification: A nonimplanted electrical continence device is a device that consists of a pair of electrodes on a plug or a pessary that are connected by an electrical cable to a battery-powered pulse source. The plug or pessary is inserted into the rectum or into the vagina and used to stimulate the muscles of the pelvic floor to maintain urinary or fecal continence. When necessary, the plug or pessary may be removed by the user.

2. Recommended classification: The Obstetrical and Gynecological Device Classification Panel recommends that the nonimplanted electrical continence device be classified into class III (premarket approval). The Obstetrical and Gynecological Device Classification Panel recommends that premarket approval of this device be a low priority. The Gastroenterology-Urology Device Classification Panel recommends that the device be classified into class II (performance standards). The Gastroenterology-Urology Device Classification Panel recommends that establishing a performance standard be a low priority.

3. Summary of reasons for recommendation: The Obstetrical and Gynecological Device Classification Panel recommends that the nonimplanted electrical continence device be classified into class III because there is a lack of definitive medical data to support the safety and effectiveness of this device. The Gastroenterology-Urology Device Classification Panel recommends that the nonimplanted electrical continence device be classified into class II because the design characteristics, electrical properties, and materials used in the construction of the device must be controlled by a performance standard to ensure that the stimulation is as painless as possible. The materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. Also, the electrical properties of the device must be controlled by a performance standard to prevent electrical injury to the patient. The Panel believes that general controls alone would not

provide sufficient control over these characteristics. The Panel believes that a performance standard would provide a reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Obstetrical and Gynecological Device Classification Panel based its recommendation on its review of the medical literature which showed that there is a lack of sufficient data to support the safety and effectiveness of the device. The Gastroenterology-Urology Device Classification Panel based its recommendation and the Panel members' personal knowledge of, and clinical experience with, the device and on a review of the medical literature. In one study (Ref. 1), 64 patients were selected for treatment of incontinence using this generic type of device. The selections were based on the results obtained from cystometrogram and urethral pressure profile investigations. The results indicated that 29 of the 64 patients reported satisfactory improvements. The report noted that this kind of electronic treatment would best serve those patients requiring only short-term control of incontinence.

5. Risks to health: (a) Excessive pain: The electrical pulses generated by this device to stimulate the pelvic floor muscles may cause the patient to have excessive pain.

(b) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, the patient may have an adverse tissue reaction.

(c) Electrical injury: Improper design, construction, or a malfunction of the device could result in an electrical injury to the patient.

(d) Urinary retention: If the design of the device makes it difficult or impossible for the patient to remove the device, it may lead to urinary retention.

Proposed Classification

FDA agrees with the recommendations of the Obstetrical and Gynecological Device Classification Panel is proposing that nonimplanted electrical devices be classified into class III (premarket approval). The agency has obtained additional data and information describing the device. Godec, et al., (Ref. 2) include the results of several studies where the reported effectiveness of the device ranged from 23 percent to 92 percent, with the number of patients ranging from 7 through 40. Godec and Cass in a later study (Ref. 3) report some improvement in urinary continence in 17 out of 20 patients. This higher effectiveness rate appears to be related more to careful selection of the patients rather than any identifiable characteristics of the device.

Because of the review of the medical literature that reveals both concern about safety and a possible lack of effectiveness, FDA disagrees with the recommendation of the Gastroenterology-Urology Device Classification Panel that the nonimplanted electrical continence device be classified into class II (performance standards).

FDA believes that the device is purported or represented to be for a use (treatment of urinary or fectal incontinence) that is of substantial importance in preventing impairment of human health. Due to the considerable variation in the reported effectiveness of the device, the agency believes that premarket approval is necessary for the device because general controls or performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device. The agency has reviewed the recommendations of the Panels for the nonimplanted electrical continence device and has concluded that the classification of this device should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Edwards, L. and J. Malvern, "Electronic Control of Incontinence: A Critical Review of the Present Situation," *British Journal of Urology*, 44:467–472, 1972.

2. Godec, C. et al., "Electrical Stimulation for Incontinence," *Urology, 7:388–397, 1976.*

3. Godec, C. and A. Cass, "Acute Electrical Stimulation for Urinary Incontinence," *Urology*, 12:340–342, 1978.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5320, to read as follows:

§ 876.5320 Nonimplanted electrical continence device.

(a) *Identification.* A nonimplanted electrical continence device is a device that consists of a pair of electrodes on a plug or a pessary that are connected by an electrical cable to a battery-powered pulse source. The plug or pessary is inserted into the rectum or into the vagina and used to stimulate the muscles of the pelvic floor to maintain urinary or fecal continence. When necessary, the plug or pessary may be removed by the user.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–787 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2058]

Medical Devices; Classification of Esophageal Dilators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying esophageal dilators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device

Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of esophageal dilators:

1. Identification: An esophageal dilator is a device that consists of a cyclindrical instrument that may be hollow and weighted with mercury or a metal oliveshaped weight that slides on a guide, such as a string or wire and is used to dilate a stricture of the esophagus. This generic type of device includes esophageal or gastrointestinal bougies and the esophageal dilator (metal olive).

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a medium priority.

3. Summary of reasons for recommendation: The Panel recommends that esophageal dilators be classified into class II because the design, materials and construction of the device must be controlled by a performance standard to ensure that the size, shape, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The materials used in the construction of the device must be controlled to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to ensure that the device can be cleaned and sterilized adequately to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of this device in medical practice.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

(b) Trauma, hemorrhage, or perforation of the esophagus: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation of the esophagus.

(c) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that esophageal dilators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees an list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5365, to read as follows:

§ 876.5365 Esophageal dilator.

(a) *Identification.* An esophageal dilator is a device that consists of a cylindrical instrument that may be hollow and weighted with mercury or a metal olive-shaped weight that slides on a guide, such as a string or wire and is used to dilate a stricture of the esophagus. This generic type of device includes esophageal or gastrointestinal bougies and the esophageal dilator (metal olive).

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-788 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1992]

Medical Devices; Classification of Rectal Dilators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying rectal dilators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device

Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of rectal dilators:

1. Identification: A rectal dilator is a device designed to dilate the anal sphincter and canal when the size of the anal opening may interfere with its function or the passage of an examining instrument.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that rectal dilators be classified into class II because the Panel believes that the design, materials and construction of the device must be controlled by a performance standard to ensure that the size, shape, rigidity, flexibility, surface finish, and strength of this device are appropriate to prevent trauma, hemorrhage, or perforations. The materials used in the construction of the device must be controlled by a performance standard to ensure their biocompatibility to prevent any adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to enable the proper cleaning or sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: The size, shape, rigidity, and arrangement, or finish on parts of this devices may cause tissue trauma, hemorrhage, or perforation.

(b) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

(c) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that rectal dilators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard will provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5450, to read as follows:

§ 876.5450 Rectal dilator.

(a) *Identification.* A rectal dilator is a device designed to dilate the anal sphincter and canal when the size of the anal opening may interfere with its function or the passage of an examining instrument.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–789 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2057]

Medical Devices; Classification of Ureteral Dilators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ureteral dilators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These

actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of ureteral dilators:

1. Identification: A ureteral dilator is a device that consists of a specially shaped catheter or bougie and is used to dilate the ureter at the place where a stone has become lodged or to dilate a ureteral stricture.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that ureteral dilators be classified into class II because the design, materials and construction of the device must be controlled by a performance standard to ensure that the size, shape, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. Materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide a reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of this device in medical practice.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage or perforation of the ureter. (c) adverse tissue reaction: If the materials in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that ureteral dilators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666?, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5470, to read as follows:

§ 876.5470 Ureteral dilator.

(a) *Identification:* A ureteral dilator is a device that consists of a specially shaped catheter or bougie and is used to dilate the ureter at the place where a stone has become lodged or to dilate a ureteral stricture.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–790 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2059]

Medical Devices; Classification of Urethral Dilators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying urethral dilators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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:
Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of urethral dilators:

1. Identification: A urethral dilator is a device that consists of a slender hollow or solid instrument made of metal, plastic, or other suitable material in a cylindrical form and in a range of sizes and stiffnesses and may include a mechanism to expand the portion of the device in the urethra and indicate the degree of expansion on a dial. It is used to dilate the urethra. This generic type of device includes the mechanical urethral dilator, urological bougies, metal or plastic urethral sound, urethrometer, filiform, and filiform follower.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that urethral dilators be classified into class II because the design, materials, and construction of the device must be controlled by a performance standard to ensure that the size, shape, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The calibration of the device must be controlled to prevent overdilation of the urethra. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. Materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The Panel believes that general controls alone will not provide sufficient control over these characteristics. The Panel believes that a performance standard will provide a reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of this device in medical practice.

5. Risks to health: (a) Adverse tissue reaction: If the materials in the device are not biocompatible, the patient may have an adverse tissue reaction. (b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (c) Overdilation of the urethra: The use of a mechanical urethral dilator that is not calibrated properly may cause overdilation of the urethra. (d) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow organisms to be introduced and cause an infection in the patient.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that urethral dilators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by this device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5520, to read as follows:

§ 876.5520 Urethral dilator.

(a) *Identification.* A urethral dilator is a device that consists of a slender hollow or solid instrument made of metal, plastic, or other suitable material in a cylindrical form and in a range of sizes and stiffnesses and may include a mechanism to expand the portion of the device in the urethra and indicate the degree of expansion on a dial. It is used to dilate the urethra. This generic type of device includes the mechanical urethral dilator, urological bougies, metal or plastic urethral sound, urethrometer, filiform, and filiform follower.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,
Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–791 Filed 1–22–81; 8:45 am]
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21 CFR PART 876

[Docket No. 78N–2044]

Medical Devices; Classification of Blood Access Devices and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying into class II (performance standards) nonimplanted blood access devices and accessories and classifying into class III (premarket approval) implanted blood access devices and accessories. FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of

one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere is this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of blood access devices and accessories:

1. *Identification:* A blood access device and accessories is a device intended to provide access to a patient's blood for hemodialysis or substantially equivalent uses. When used for hemodialysis, it is part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and provides access to a patient's blood for hemodialysis. The device includes implanted blood access devices and nonimplanted blood access devices and accessories. Accessories common to either type include the shunt adaptor, cannula clamp, shunt connector, shunt stabilizer, vessel dilator, disconnect forceps, shunt guard, crimp plier, tube plier, crimp ring, joint ring, fistula adaptor, and declotting tray (including contents). The implanted and nonimplanted blood access devices and accessories are either connected to a system, such as the hemodialysis system and accessories (§ 876.5820) during dialysis, or are plugged or connected together. This generic type of device includes various shunts and connectors specifically designed to provide access to blood, such as the arteriovenous (A–V) shunt cannula and vessel tip. (a) The implanted blood access device consists of various flexible or rigid tubes, which are surgically implanted in appropriate blood vessels, may come through the skin, and are intended to remain in the body for 30 days or more. (b) The non-implanted blood access device consists of various flexible or rigid tubes, such as catheters, cannulae or hollow needles, which are inserted into appropriate blood vessels or a vascular graft prosthesis (§§ 870.3450 and 870.3460), and are intended to remain in the body for less than 30 days. This generic type of device includes fistula needles, the single needle dialysis set (coaxial flow needle), and the single needle dialysis set (alternating flow, needle only).

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for these devices be a medium priority.

3. Summary of reasons for recommendation: The Panel recommends that blood access devices and accessories be classified into class II because the design, materials, and construction of these devices must be controlled by a performance standard to enable the proper cleaning and sterilization of these devices to prevent infection. Materials used in the device that contact the patient's body and the blood must be controlled by a performance standard to ensure biocompatibility of the materials to prevent an adverse tissue reaction. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The Panel also noted that implanted blood access devices that are attached to the sides of large bore blood vessels are more liable to serious complications. These complications include infection, thrombosis, ischemia of the limb distal to the device and massive hemorrhage. The Panel recommends that implanted blood access devices be attached to the side of large bore blood vessels only when smaller blood vessels are unavailable for use.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices, and on a presentation made by Dr. Khalid Butt at the July 6, 1978 meeting of the Panel (Ref. 1).

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation. (c) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, degrade by interaction with body tissue or fluids, or contain residual (particulate) matter, the patient may have an adverse tissue reaction. (d) Massive hemorrhage: Accidental dislodgment due to weakening of the attachment of the device to the blood vessels (e.g., through infection) or disconnection of the device could lead to massive hemorrhage.

Proposed Classification

FDA agrees in part with the Panel recommendation and is proposing that nonimplanted blood access devices and accessories be classified into class II (performance standards). Although the nonimplanted device is life supporting and life sustaining, the agency believes that premarket approval is not necessary because a performance standard would provide reasonable assurance of the safety and effectiveness of the nonimplanted device. The agency believes that a performance standard is necessary because general controls alone are insufficient to control the risks to health presented by the nonimplanted devices.

FDA has reviewed pertinent clinical literature on implanted and nonimplanted blood access devices and accessories (Refs. 1 through 6). FDA realizes that the nonimplanted blood access device is not intended to be implanted for 30 days or more and although it is part of a life-supporting and life-sustaining system, this system is used to treat renal failure, which is more life threatening than the risks to health from use of the device. Additionally, nonimplanted blood access devices and accessories have been used successfully for two decades to provide repetitive access to a patient's blood circulatory system for hemodialysis. The agency has determined that the risks associated with these nonimplanted devices can be adequately controlled by developing standards for the construction of and materials used in the device and that premarket approval is therefore

unnecessary. The agency believes that there is sufficient information to establish performance standards for these nonimplanted devices.

FDA disagrees in part with the Panel recommendation and is proposing that implanted blood access devices be classified into class III (premarket approval). The device is an implant which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the implanted device because FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the implanted device is part of a life-supporting and life-sustaining system. FDA believes that general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the implanted device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the implanted device.

FDA agrees with the Panel's cautionary statement on the use of blood access devices attached to the sides of large bore blood vessels. Some of the Problems with this use are discussed in Ref. 6.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Transcript of the Gastroenterology and Urology Classification Panel meeting, July 6, 1978, pp. 92–128.

2. Bleyn, J. et al., "Review of Vascular Access for Hemodialysis," *in* "Technical Aspects of Renal Diaylsis," edited by T. H. Frost, Pitman Medical Publishing Company, Ltd., London, 1978, pp. 137–146.

3. Bailey, G. L. and A. P. Morgan, "Circulatory Access for Hemodialysis," *in* "Hemodialysis Principles and Practice," edited by George L. Bailey, Academic Press, New York, 1972, pp. 211–233.

4. Erben, J. et. al., "Long-Term Experience with the Technique of Subclavian and Femoral Vein Cannulation in Hemodialysis," *Artificial Organs*, 3(3), August, 1979.

5. Flynn, C. T. and R. McGowan, "Subclavian Vein Catheter and Clockwork Pump," *Dialysis and Transplantation*, 9(6), June, 1980, pp. 556–557 and p. 616.

6. Morgan, A. and M. Lazarus, "Vascular Access for Hemodialysis," *American Journal of Surgery*, 129:432, April, 1975.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5540, to read as follows:

§ 876.5540 Blood access device and accessories.

(a) *Identification.* A blood access device and accessories is a device intended to provide access to a patient's blood for hemodialysis or substantially equivalent uses. When used for hemodialysis, it is part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and provides access to a patient's blood for hemodialysis. The device includes implanted blood access devices and nonimplanted blood access devices and accessories. Accessories common to either type include the shunt adaptor, cannula clamp, shunt connector, shunt stabilizer, vessel dialator, disconnect forceps, shunt guard, crimp plier, tube plier, crimp ring, joint ring, fistula adaptor, and declotting tray (including contents). The implanted and nonimplanted blood access devices and accessories are either connected to a system, such as the hemodialysis system and accessories (§ 876.5820) during dialysis, or are plugged or connected together. This generic type of device includes various shunts and connector specifically designed to provide access to blood, such as the arteriovenous (A–V) shunt cannula and vessel tip.

(1) The implanted blood access device consists of various flexible or rigid tubes, which are surgically implanted in appropriate blood vessels, may come through the skin, and are intended to remain in the body for 30 days or more.

(2) The nonimplanted blood access device consist of various flexible or rigid tubes, such as catheters, cannulae or hollow needles, which are inserted into appropriate blood vessels or a vascular graft prosthesis (§§ 870.3450 and 870.3460), and are intended to remain in the body for less than 30 days. This generic type of device includes fistula needles, the single needle dialysis set (coaxial flow needle), and the single needle dialysis set (alternating flow, needle only).

(b) *Classification*—(1) *Implanted blood access device and accessories.* Class III (premarket approval).

(2) *Nonimplanted blood access device and accessories.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-792 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2019]

Medical Devices; Classification of Sorbent Regenerated Dialysate Delivery Systems for Hemodialysis

AGENCY: Food and Drug Administration.

ACTION: Proposed Rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying sorbent regenerated dialysate delivery systems for hemodialysis into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public

comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

ADDRESS: Written coments 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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of sorbent regenerated dialysate delivery systems for hemodialysis:

1. Identification: A sorbent regenerated dialysate delivery system for hemodialysis is a device that is part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions, and that consists of a sorbent cartridge and the means to circulate dialysate through this cartridge and the dialysate compartment of the dialyzer. The device is used with the extracorporeal blood system and the dialyzer of the hemodialysis system and accessories (§ 876.5820). The device includes the means to maintain the temperature, conductivity, electrolyte balance, flow rate and pressure of the dialysate, and alarms to indicate abnormal dialysate conditions. The sorbent cartridge may include adsorbent, ion exchange and catalytic materials.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that sorbent regenerated dialysate delivery systems for hemodialysis be classified into class II (performance standards) because the adsorption and ion exchange properties of the cartridge materials must be adequately controlled by a performance standard to prevent electrolyte imbalance. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization to prevent infection. Also, materials used in the device that contact the body must be controlled by a performance standard to ensure biocompatibility of the materials to prevent an adverse tissue reaction. When this device is used with other devices as a system, the combination must be compatible. The Panel believes that an electrical safety standard will ensure that the electrical properties of the device are controlled to prevent electrical injury to the patient or operator. The Panel recommends that the device be labeled with the following caution statement: If the device is used in the dialysis of a patient with very high blood glucose or with a drug intoxication, the sorbent cartridge may become saturated with the glucose or the toxic drug, interfering with further removal of undesirable substances from the blood of the patient. The Panel believes that general controls would not provide sufficient control over these characteristics. Although the sorbent regenerated dialysate delivery system for hemodialysis is part of a life-supporting and life-sustaining device, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of this device because there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator. (c) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, degrade by interaction with body tissue or fluids, or contains residual (particulate) matter, the patient may have an adverse tissue reaction. (d) Pyrogenic reaction (a sudden fever with collapse and chills): Toxic substances may be leached from, or transmitted by, the device. These substances may cause the patient to have a pyrogenic reaction. (e) Electrolyte imbalance: Incorrect composition of the dialysate could result in electrolyte imbalance in the patient's blood and thus lead to cardiac disorders, blood cell damage, or muscle cramps. (f) Inadequate dialysis: Malfunction of the device, inappropriately low membrane permeability, inadequate blood flow, or leakage in the dialysate delivery system may cause inadequate removal of toxic substances from the patient's blood. If the sorbent cartridge becomes saturated with glucose or with a toxic drug, the sorbent cartridge may not remove more of the undesirable substances from the patient's blood. (g) Hemolysis, thromboembolic complications, or other blood damage: The materials used in the construction of the device or excessive dialysate temperature may result in hemolysis, thromboembolic complications, or other damage to the patient's blood. (h) Accumulative toxic effect: Repeated exposure to substances that may be leached from materials that contact the blood or dialysate may lead to an accumulation of these substances in the patient's body, causing a toxic effect.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that sorbent regenerated dialysate delivery systems for hemodialysis be classified into class II (performance standards). The agency has reviewed the Panel recommendation and has obtained additional data and information describing the use of the sorbent regenerated dialysate delivery system for hemodialysis. A recent paper (Ref. 1) describes the use of the device. Since 1973 it has been used by as many as 1,500 patients, some of whom have been dialyzed with the device for as long as 5 years. The paper includes 32 references concerning the use of this device.

FDA realizes that this generic type of device is a part of a device that is both life-sustaining and life-supporting when used in conjunction with hemodialysis; however, the device is used to treat renal failure, which is more life threatening than the risks to health from use of the device. Additionally, the device has been used successfully for over 10 years to regenerate dialysate for hemodialysis. The agency has determined that the risks associated with these devices can be adequately controlled by developing standards for the construction of and materials used in the device and that premarket approval is therefore unnecessary. The agency believes that there is sufficient information to establish performance standards for these devices.

Reference

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Blumenkrantz, M. J., et al., "Applications of the Redy® Sorbent System to Hemodialysis and Peritoneal Dialysis," *Artificial Organs*, 3(3): 230–236, 1979.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the Federal Register of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the Federal Register.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5600, to read as follows:

§ 876.5600 Sorbent regenerated dialysate delivery system for hemodialysis.

(a) *Identification.* A sorbent regenerated dialysate delivery system for hemodialysis is a device that is part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions, and that consists of a sorbent cartridge and the means to circulate dialysate through this cartridge and the dialysate compartment of the dialyzer. The device is used with the extracorporeal blood system and the dialyzer of the hemodialysis system and accessories (§ 876.5820). The device includes the means to maintain the temperature, conductivity, electrolyte balance, flow rate and pressure of the dialysate, and alarms to indicate abnormal dialysate conditions. The sorbent cartridge may include adsorbent, ion exchange and catalytic materials.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-793 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–2051]

Medical Devices; Classification of Peritoneal Dialysis Systems and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying peritoneal dialysis systems and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the Federal Register.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the Federal Register provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of peritoneal dialysis systems and accessories:

1. Identification: (a) A peritoneal dialysis system and accessories is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that consists of a peritoneal access device, an administration set for peritoneal dialysis, a source of dialysate, and, in some cases, a water purification mechanism. After the dialysate is instilled into the peritoneal cavity, it is allowed to dwell there so that undesirable substances from the patient's blood pass through the lining membrane of the peritoneal cavity into this dialysate. These substances are then removed when the dialysate is drained from the patient. The peritoneal dialysis system may regulate and monitor the dialysate temperature, volume, and delivery rate together with the time course of each cycle of filling, dwell time, and draining of the peritoneal cavity or manual controls may be used. This generic device includes the semiautomatic and the automatic peritoneal delivery system. (b) The peritoneal access device is a flexible tube that is implanted through the abdominal wall into the peritoneal cavity and that may have attached cuffs to provide anchoring and a skin seal. The device is either a single use peritoneal catheter, intended to remain in the peritoneal cavity for less than 30 days, or a long term peritoneal catheter. Accessories include stylets and trocars to aid in the insertion of the catheter and an obturator to maintain the patency of the surgical fistula in the abdominal wall between treatments. (c) The disposable administration set for peritoneal dialysis consists of tubing, an optional reservior bag, and appropriate connectors. It may include a peritoneal dialysate filter to trap and remove contaminating particles. (d) The source of dialysate may be sterile prepackaged dialysate (for semiautomatic peritoneal dialysate delivery systems or "cycler systems") or dialysate prepared from dialysate concentrate and sterile purified water (for automatic peritoneal dialysate delivery systems or "reverse osmosis" systems).

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a

performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that peritoneal dialysis systems and accessories be classified into class II because the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization to prevent infection, to ensure that the catheter does not move and cause bowel injury, and to ensure that the skin seals prevent the introduction of microorganisms leading to the peritonitis. The design of the device must be controlled by a performance standard to ensure that the device dispenses and drains the proper volume of sterile peritoneal dialysate at the correct times, achieves adequate dialysis, and does not overfill the peritoneal cavity. The electrical properties of the device must also be controlled to prevent electrical injury to the patient or operator. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish, and strength of the device are appropriate to prevent trauma, hemorrhage, or perforation. The tubing and the integrity of the tubing connector of the administration set must be controlled by a performance standard to prevent inadequate dialysis due to separation of the connector with loss of dialysate, or blockage of the tubing with retention of the dialysate in the peritoneal cavity. The physical integrity of the filter must be controlled by a performance standard to prevent contaminants from entering the patient's body leading to peritonitis, and the materials used in the construction of the administration set must be controlled by a performance standard to ensure that toxic substances are not leached into the dialysate with an adverse effect on the patient. The dialysate proportioning capability of the device must be controlled by a performance standard to prevent electrolyte imbalance. The Panel believes that general controls alone would not provide sufficient control over these characteristics. Although this device is life-sustaining and life-supporting, and the long term peritoneal catheter is implanted, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of the device. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator. (c) Adverse tissue reaction: If the materials used in the construction of these devices are not biocompatible, degrade by interaction with body tissue or fluids, or contain residual (particulate) matter, the patient may have an adverse tissue reaction. (d) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation. (e) Electrolyte imbalance: Incorrect composition of the dialysate could result in electrolyte imbalance in the patient's blood and thus lead to cardiac disorders, blood cell damage, or muscle cramps. (f) Pain and abdominal distention: Malfunction of the control mechanism, or obstruction of the outflow tubing, may cause overfilling with, or retention of, dialysate leading to pain and abdominal distention. Overfilling can cause increased abdominal pressure that may decrease the venous blood returned to the heart, leading to possible shock or death. (g) Peritonitis: The introduction of pathogenic micro-organisms due to improper design of the catheter and skin seal, or due to defects in the filter, may lead to peritonitis. (h) Accumulative toxic effect: Repeated exposure to toxic substances which may be leached from materials which contact the dialysate may lead to an accumulation of these substances in the patient's body and cause a toxic effect. (i) Inadequate peritoneal dialysis: Separation or malfunction of the connectors or tubing of the dialysis catheter may cause leakage of dialysate and inadequate peritoneal dialysis.

Proposed Classification

The agency agrees with the Panel recommendation and is proposing that peritoneal dialysis systems and accessories be classified into class II (performance standards). FDA realizes that this generic type of device is a part of a device that is both life-sustaining and life-supporting when used in conjunction with hemodialysis; however, the device is used to treat renal failure, which is more life threatening than the risks to health from due of the device. Additionally, the device has been used successfully for a long period of time. The agency has determined that the risks associated with these devices can be adequately controlled by developing standards for the construction of, and materials used in, the device and that premarket approval is therefore unnecessary. The agency believes that there is sufficient information to establish performance standards for these devices. The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device.

The agency has reviewed the medical literature and found that the peritoneal dialysis system and accessories, including the long term peritoneal dialysis catheters, have been used in the treatment of acute renal failure. Rae (Ref. 1) cited the safety and efficacy of this treatment and states that the long term peritoneal dialysis is probably the most universally used peritoneal access device for acute renal failure. Oreopoulus (Ref. 2) and Vaamonde (Ref. 3) reviewed the safety and efficacy of this treatment, citing hemorrhage, bowel perforation, peritonitis, fluid and electrolyte abnormalities, and seizure as complications that may occur but that can be controlled by proper training of both patients and attending personnel. Tenchkoff (Ref. 4) cited the safety and efficacy of this treatment suggesting that 20 to 25 percent of patients in need of dialysis should receive peritoneal dialysis as the treatment. Oreopoulus (Ref. 2) reports that the long term peritoneal dialysis catheter has made repetitive peritoneal dialysis possible. The average duration of implantation is 1 year, including reports of the same catheter functioning in use for 7 years.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Rae, Angus, "Peritoneal Dialysis Access," *Dialysis and Transplantation*, 6(2) 18–23 (1977).

2. Oreopoulus, D. G., "Overall Experience with Peritoneal Dialysis," *Dialysis and Transplantation*, 7(8) 783–787 (1978).

3. Vaamonde, C. A. and G. O. Peret, "Peritoneal Dialysis Today," *Kidney*, 10(6) 31–35 (1977).

4. Tenchkoff, H., "Peritoneal Dialysis Today: A New Look," *Nephron*, 12, 420–436 (1974).

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the Federal Register.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5630, to read as follows:

§ 876.5630 Peritoneal dialysis system and accessories.

(a) *Identification.* (1) A peritoneal dialysis system and accessories is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that consists of a peritoneal access device, an administration set for peritoneal dialysis, a source of dialysate, and, in some cases, a water purification mechanism. After the dialysate is instilled into the peritoneal cavity, it is allowed to dwell there so that undesirable substances from the patient's blood pass through the lining membrane of the peritoneal cavity into this dialysate. These substances are then removed when the dialysate is drained from the patient. The peritoneal dialysis system may regulate and monitor the dialysate temperature, volume, and delivery rate together with the time course of each cycle of filling, dwell time, and draining of the peritoneal cavity or manual controls may be used. This generic device includes the semiautomatic and the automatic peritoneal delivery system.

(2) The peritoneal access device is a flexible tube that is implanted through the abdominal wall into the peritoneal cavity and that may have attached cuffs to provide anchoring and a skin seal. The device is either a single use peritoneal catheter, intended to remain in the peritoneal cavity for less than 30 days, or a long term peritoneal catheter. Accessories include stylets and trocars to aid in the insertion of the catheter and an obturator to maintain the patency of the surgical fistula in the abdominal wall between treatments.

(3) The disposable administration set for peritoneal dialysis consists of tubing, an optional reservoir bag, and appropriate connectors. It may include a peritoneal dialysate filter to trap and remove contaiminating particles.

(4) The source of dialysate may be sterile prepackaged dialysate (for semiautomatic peritoneal dialysate delivery systems or "cycler systems") or dialysate prepared from dialysate concentrate and sterile purified water (for automatic peritoneal dialysate delivery systems or "reverse osmosis" systems).

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–794 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–2047]

Medical Devices; Classification of Water Purification Systems for Hemodialysis

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying water purification systems for hemodialysis into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

ADDRESS: Written coments 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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of water purification systems for hemodialysis:

1. Identification: A water purification system for hemodialysis is a device that is intended for use with a hemodialysis system and that is intended to remove organic and inorganic substances and bacteria from water used to dilute dialysate concentrate to form dialysate. This generic type of device may include a water softener, sediment filter, carbon filter, reverse osmosis system, deionizer, and water distillation system.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that water purification systems for hemodialysis be classified into class II because the design, materials, and construction of the device must be controlled by a performance standard to ensure that the device

delivers adequately purified water to prevent toxic reactions in the patient. The design and construction of the device must be controlled by a performance standard to enable proper cleaning and sterilization of the device to prevent infection. The Panel believes that general controls alone would not provide sufficient control over this characteristic. Although the water purification system for hemodialysis is part of both a life-sustaining and a life-supporting device, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of this device because there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice and on presentations made to the Panel meeting on April 11, 1980 (Ref. 1).

5. Risks to health: (a) Toxic reactions: Defects in design or construction of the device or a malfunction of the device may result in failure to purify the water to be mixed with the dialysate concentrate and lead to toxic reactions in a patient. (b) Pyrogenic reaction (a sudden fever with collapse and chills): Toxic substances may be leached from, or transmitted by, the device. These toxic substances may cause the patient to have a pyrogenic reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that water purification systems for hemodialysis be classified into class II (performance standards). These systems were considered in an FDA contract report (Ref. 2). FDA realizes that this generic type of device is a part of a device that is both life-sustaining and life-supporting when used in conjunction with hemodialysis; however, the device is used to treat renal failure, which is more life threatening than the risks to health from use of the device. Additionally, the device has been used successfully for a period of time in hemodialysis. The agency has determined that the risks associated with these devices can be adequately controlled by developing standards for the construction of and materials used in the device and that premarket approval is therefore unnecessary. The agency believes that there is sufficient information to establish performance standards for these devices. The agency believes that a performance standard is necessary because general controls alone are insufficient to control the risks to health presented by the device.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Transcript of the Gastroenterology and Urology Device Classification Panel Meeting, April 11, 1980, pp. 6–41.

2. Contract Report, Investigation of the Risks and Hazards Associated with Hemodialysis Devices, FDA Bureau of Medical Devices Contract No. 223–78–5046, 1980.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5665, to read as follows:

§ 876.5665 Water purification system for hemodialysis.

(a) *Identification.* A water purification system for hemodialysis is a device that is intended for use with a hemodialysis system and that is intended to remove organic and inorganic substances and bacteria from water used to dilute dialysate concentrate to form dialysate. This generic type of device may include a water softener, sediment filter, carbon filter, and water distillation system.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–795 Filed 1–22–81; 8:45 am]

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21 CFR Part 876

[Docket No. 78N–2014]

Medical Devices; Classification of Hemodialysis Systems and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying hemodialysis systems into class II (performance standards). The proposed regulation would also classify certain accessories of these device systems into class II and other accessories into class I (general controls). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the devices be classified into class II and that certain accessories of the devices be classified into class I. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after its date of publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of hemodialysis systems and accessories:

1. Identification: A hemodialysis system and accessories is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that consists of an extracorporeal blood system, a conventional dialyzer, a dialysate delivery system, and accessories. Blood from a patient flows through the tubing of the extracorporeal blood system to the blood compartment of the dialyzer, then returns through further tubing of the extracorporeal blood system to the patient. The dialyzer has two compartments that are separated by a semipermeable membrane. While the blood is in the blood compartment, undesirable substances in the blood pass through the semipermeable membrane into the dialysate in the dialysate compartment. The dialysate delivery system controls and monitors the dialysate circulating through the dialysate compartment of the dialyzer. (a) The extracorporeal blood system consists of tubing, pumps, pressure monitors, air foam or bubble detectors, and alarms to keep blood moving safely from the blood access device and accessories for hemodialysis (§ 876.5540) to the blood compartment of the dialyzer and back to the patient. (b) The conventional dialyzer allows a transfer of water and solutes between the blood and the dialysate through the semipermeable membrane. The semipermeable membrane of the conventional dialyzer has a sufficiently low permeability to water that an ultrafiltration controller is not required to prevent excessive loss of water from the patient's blood. This conventional dialyzer does not include hemodialyzers with disposable inserts (Kiil type) (§ 876.5830) or dialyzers of high permeability (§ 876.5860). (c) The dialysate delivery system consists of mechanisms that monitor and control the temperature, conductivity, flow rate, and pressure of the dialysate and circulates dialysate through the dialysate compartment of the dialyzer. The dialysate delivery system includes alarms to indicate abnormal dialysate conditions. This dialysate delivery system does not include the sorbent regenerated dialysate delivery system for hemodialysis (§ 876.5600), the dialysate delivery system of the peritoneal dialysis system and accessories (§ 876.5630), or the controlled dialysate delivery system of the high permeability hemodialysis system (§ 876.5860). (d) Accessories to the hemodialysis system include the unpowered dialysis chair without a scale, the powered dialysis chair without a scale, the dialyzer holder set, dialysis tie gun and ties, and hemodialysis start/stop tray.

The Panel previously identified this generic type of device or its parts as the dialysis transducer protector, blood tubing set with or without antiregurgitation valve, dialysis blood filter, Y adapter, infusion T blood tubing connector, extraluminal blood pump, blood pump insert, blood level detector, automatic blood tubing clamp, line clamp, air or foam detector, air bubble detector, pillow pressure alarm, single-needle dialysis set (alternating flow, controller, and tubing only), hollow fiber capillary flow dialyzer, parallel flow dialyzer, single coil dialyzer, twin coil dialyzer, central multiple patient dialysate delivery system, recirculating dialysate delivery system, recirculating single-pass dialysate delivery system, single patient dialysate delivery system, negative pressure type dialysis control system, dialysate proportioning subsystem, water manometer, holding tank, blood leak detector, dialysate tubing connector, coil cannister, remote type conductivity meter, dialysate standard conductivity test solution, dialysate level detector, dialysate flowmeter, dialysate tubing, nonremote conductivity meter, dialysis temperature monitor, and single-pass dialysate delivery system.

2. Recommended classification: Class II (performance standards), except for certain accessories (unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties) that the Panel recommends be classified into class I. The Panel recommends that establishing a performance standard for this generic type of device be a high priority. The Panel recommends that establishing a performance standard for powered dialysis chairs be a medium priority. The Panel recommends that unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties be exempt from registration and device listing requirements and premarket notification procedures under section 510 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360) and from records and reports requirements under section 519 of the act (21 U.S.C. 360i). The Panel also recommends that hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties be exempt from the good manufacturing practice regulation under section 520(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360j(f)).

3. Summary of reasons for recommendation: The Panel recommends that hemodialysis systems and accessories be classified into class II because the blood and the dialysate flow characteristics and the membrane permeability of the device must be controlled by a performance standard to ensure the removal of waste and toxic substances from the patient's blood without excessive removal of water or desirable substances. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, surface finish, rigidity, flexibility, and strength of the device are appropriate to prevent trauma, perforation, blood leakage or membrane rupture, leading to massive blood loss and vascular collapse of the patient and to enable proper cleaning and sterilization of the device to prevent infection in the patient. Materials used in the device that contact the blood must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The membrane integrity of the device must be controlled by a performance standard to prevent transfer of contaminants from the dialysate to the patient's blood, leading to infection. The dialysate delivery system must be controlled by standards to ensure that the dialysate is delivered to the dialyzer in the prescribed quantity, with the prescribed conductivity, and at the prescribed temperature, and to assure that alarms are provided to warn of malfunctions. The electrical properties of the device must also be controlled to prevent electrical injury to the patient or operator. The materials used in those parts of the device that contact the disalysate must be controlled to prevent contamination of the dialysate. The design and construction of the air bubble detector must be controlled by a performance standard to prevent the introduction to the patient of a fatal air embolus. The design and construction of the extraluminal blood pump must be controlled by a performance standard to prevent damage to blood cells or inadequate blood flow due to improper design, and to prevent blood loss due to poor fitting connections or laceration of the tubing. The design and construction

of the venous blood line filter must also be controlled by a performance standard to prevent excessive resistance in the filter, leading to excessive ultrafiltration.

In addition, the Panel recommends that the date of manufacture of any conventional dialyzer be shown on its label.

The Panel believes that general controls would not provide sufficient control over these characteristics. Although the hemodialysis system and accessories is both life-sustaining and live-supporting, the Panel believes that premarket approval is not necessary to provide reasonable assurance of safety and effectiveness of this device because there is sufficient information to establish a performance standard.

The Panel recommends that hemodialysis start/stop trays, dialyzer holder sets, unpowered dialysis chairs, and dialysis tie guns and ties be classified into class I because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of these devices.

The Panel recommends that unpowered dialysis chairs be classified into class I because the Panel believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of this device. The Panel believes that the risk of cross contamination due to difficulty in cleaning the chair and the risk of hypovolemic shock due to an inability to reposition the patient can be controlled by general controls. The Panel believes that manufacturers of the device should not be required to comply with registration, device listing, premarket notification, and records and reports regulations, because the Panel believes unpowered dialysis chairs present only minimal risks to health and that the quality of, and any defects of, the device are readily apparent to the user. The Panel believes that manufacturers of these devices should not be required to comply with the good manufacturing practice regulation because the Panel believes that the system accessories present only minimal risks to health and that the quality of the devices is readily apparent to the user.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of these devices in medical practice for more than 18 years. The Panel also cited work by the National Institutes of Health that establishes criteria for determining safety and effectiveness of conventional hemodialyzers (Ref. 1).

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator. (c) Adverse tissue reaction: if the materials used in the construction of the device are not biocompatible, degrade by interaction with body tissue or fluids, or contain residual (particulate) matter, the patient may have an adverse tissue reaction. (d) Pyrogenic reaction (a suddent fever with collapse and chills): Toxic substances may be leached from, or transmitted by, the device. These substances may cause the patient to have a pyrogenic reaction. (e) Electrolyte imbalance: Incorrect composition of the dialysate could result in electrolyte imbalance in the patient's blood and thus lead to cardiac disorders, blood cell damage, or muscle cramps. (f) Hypotension or hypovolemic shock: An abnormally high or uncontrolled ultrafiltration rate may result in hypotension, hypovolemic shock, or both. Inability of the dialysis chair to allow for easy and rapid repositioning of the patient in the event of a hypotensive episode during therapy could delay the treatment of hypovolemic shock. (g) Loss of protein: Inappropriately high membrane permeability may permit loss of protein from the blood. (h) Fatal air embolism: Inability of an air foam or bubble detector to sense small air bubbles and the presence of foam may allow a potentially fatal embolus to enter the patient's bloodstream. (i) Microbial cross-contamination: Inadequate dialysis chair design or improper chair covering materials that prevent adequate cleaning between patients could result in microbial cross-contamination. (j) Inadequate dialysis: Malfunctions of the device, inappropriately low membrane permeability, inadequate blood flow, or leakage in the dialysate delivery system may cause inadequate removal of toxic substances from the patient's blood. (k) Blood loss: Membrane punctures caused by manufacturing defects or structural defects that cause the dialyzer to fall from its holder or cause the severing of blood lines or dialysate tubing, or the inability of sensors to detect blood leakage into the dialysate, may result in loss of the patient's blood (l) Hemolysis, thromboembolic complications, or other blood damage: The materials used in the construction of the device, improper design of the blood pump, or excessive dialysate temperature may result in hemolysis, thromboembolic complications, or other damage to the patient's blood. (m) Accumulative toxic effect: Repeated exposure to substances that may be leached from materials that contact the blood or dialysate may lead to an accumulation of these substances in the patient's body and cause a toxic effect.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that hemodialysis systems be classified into class II (performance standards). FDA is proposing that certain accessories of these device systems be classified into class II and that other accessories (unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties) be classified into class I (general controls).

Hemodialysis systems and accessories have been used successfully in treating patients with end-stage renal disease for two decades. Increasingly, patients are able to live and, in many cases, to lead productive lives in spite of a disease condition that formerly was invariably fatal (Ref. 3). The benefits of the use of this device far outweigh the risks from its use. The basic device, and the material used in the most common semipermeable membrane used in the device, are about the same now as those used in experimental hemodialysis in 1944. Additionally, a study was performed under an FDA contract (Ref. 2) to investigate the risks associated with the use of hemodialysis systems and accessories. FDA realizes that this generic type of device is both life-sustaining and life-supporting when used in conjunction with hemodialysis; however, the device is used to treat renal failure, which is more life threatening than the risks to health from use of the device. Additionally, the device has been used successfully for many years for hemodialysis. The agency has determined that the risks associated with these devices can be adequately controlled by developing standards for the construction of and materials used in the device and that premarket approval is therefore unnecessary. The agency believes that there is sufficient information to establish performance standards for these devices. FDA believes that performance standards are necessary because general controls alone are

insufficient to control the risks to health presented by the device.

FDA disagrees with the Panel's recommendation that manufacturers of unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties be exempt from all requirements under section 510 of the act. Under section 510(g)(4), the agency may exempt a manufacturer from section 510 only upon a finding that compliance with this section is not necessary for the protection of the public health. In the case of unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie gun and ties, the agency cannot make the required finding. To protect the public health, the agency needs to require manufacturers of these device accessories to register and to list their products with FDA, so that the agency is able to identify the firms manufacturing these devices and conduct necessary inspections. Premarket notification by these manufacturers assures that FDA learns of new products, and of significant modifications of existing products, for which premarket approval is required.

FDA disagrees with the Panel's recommendation that manufacturers of the unpowered dialysis chairs, hemodialysis start/stop trays, dialyzer holder sets, and dialysis tie guns and ties, be exempt from records and reports regulations under section 519 of the act (21 U.S.C. 360i). The records and reports requirements in several of FDA's present device regulations are authorized, wholly or in part, by section 519. The most extensive of these requirements are found in the device good manufacturing practice (GMP) regulation published in the **Federal Register** of July 21, 1978 (43 FR 31508). In the future, FDA will publish other regulations under section 519, including regulations requiring reports to FDA of experience with medical devices. Until these regulations are issued, FDA believes that it cannot properly issue exemptions from them. In the future, whenever the agency proposes device regulations that include records and reports requirements, interested persons may submit comments requesting that certain classes of manufacturers or other persons be exempt from the requirements, the FDA will issue exemptions that are appropriate. The only type of exemption from records and reports requirements that FDA is proposing now, in device classification regulations, is an exemption of certain manufacturers from requirements of the device GMP regulation. The exemption will not extend to two device GMP requirements, § 820.180 (21 CFR 820.180), with respect to general requirements concerning records and § 820.198 (21 CFR 820.198), with respect to complaint files. The agency disagrees with the Panel recommendation that manufacturers of hemodialysis start/stop trays, dialyzer holder sets and dialysis tie guns and ties, be exempt from the good manufacturing (GMP) practice regulation (21 CFR Part 820) under section 520(f) of the act. The agency believes that compliance with this regulation is necessary to assure the quality of this device and thus its safety, effectiveness, and compliance with the adulteration and misbranding provisions of the act. Compliance with the GMP regulation will help prevent production of hemodialysis accessories and support equipment having defects that could harm users, such as structural defects in the devices that could, as noted by the Panel, cause blood loss. The agency believes that general controls are sufficient to control these risks to health. The agency agrees with the Panel that unpowered dialysis chairs can cause microbial cross-contamination between patients and make the treatment of hemodynamic shock difficult if the patient cannot easily be put into the proper position. However, the agency believes that general controls are sufficient to control these risks to health.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Evaluation of Hemodialyzers and Dialysis Membranes, DHEW Publication No. (NIH), 77–1294, 1977.

2. Standards Report, Investigation of the Risks and Hazards Associated with Hemodialysis Devices, FDA Bureau of Medical Devices Contract No. 223–78–5046, 1980.

3. Manis T. and E. A. Friedman, "Dialytic Therapy for Irreversible Uremia," *New England Journal of Medicine*, 301(23): 1260–1265, 1979.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5820, to read as follows:

§ 876.5820 Hemodialysis system and accessories.

(a) *Identification.* A hemodialysis system and accessories is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that consists of an extracorporeal blood system, a conventional dialyzer, a dialystate delivery system, and accessories. Blood from a patient flows through the tubing of the extracorporeal blood system to the blood compartment of the dialyzer, then returns through further tubing of the extracorporeal blood system to the patent. The dialyzer has two compartments that are separated by a semipermeable membrane. While the blood is in the blood compartment, undesirable substances in the blood pass through the semipermeable membrane into the dialysate in the dialysate compartment. The dialysate delivery system controls and monitors the dialysate circulating through the dialysate compartment of the dialyzer.

(1) The extracorporeal blood system consists of tubing, pumps, pressure monitors, air foam or bubble detectors, and alarms to keep blood moving safely from the blood access device and accessories for hemodialysis (§ 876.5540) to the blood compartment of the dialyzer and back to the patient.

(2) The conventional dialyzer allows a transfer of water and solutes between the blood and the dialysate through the semipermeable membrane. The semipermeable membrane of the conventional dialyzer has a sufficiently low permeability to water that an ultrafiltration controller is not required to prevent excessive loss of water from the patient's blood. This conventional dialyzer does not include hemodialyzers with the disposable inserts (Kiil type) (§ 876.5830) or dialyzers of high permeability (§ 876.5860)

(3) The dialysate delivery system consists of mechanisms that monitor and control the temperature, conductivity, flow rate, and pressure of the dialysate and circulates dialysate through the dialysate compartment of the dialyzer. The dialysate delivery system includes alarms to indicate

abnormal dialysate conditions. This dialysate delivery system does no include the sorbent regenerated dialysate delivery system for hemodialysis (§ 876.5600), the dialysate delivery system of the peritoneal dialysis system and accessories (§ 876.5630), or the controlled dialysate delivery system of the high permeability hemodialysis system (§ 876.5860).

(4) Accessories to the hemodialysis system include the unpowered dialysis chair without a scale, the powered dialysis chair without a scale, the dialyzer holder set, dialysis tie gun and ties, and hemodialysis start/stop tray.

(b) *Classification.* (1) Class II (performance standards) for a hemodialysis system other than accessories.

(2) Class I (general controls) for accessories of the hemodialysis system, such as the unpowered dialysis chair, hemodialysis start/stop tray, dialyzer holder set, and dialysis tie gun and ties.

Interested persons may, on or before March 24, 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 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 documents. Received comments may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-796 Filed 1-22-81; 8:45 am]

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21 CFR Part 876

[Docket No. 78N-2038]

Medical Devices; Classification of Hemodialyzers With Disposable Inserts (Kiil Type)

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying hemodialyzers with disposable inserts (Kiil type) into class II (performance standards). FDA is also publishing the recomendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATE: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, and FDA advisory committee, made the following recommendation regarding the classification of hemodialyzers with disposable inserts (Kiil type):

1. Identification: A hemodialyzer with disposable inserts (Kiil type) is a device that is used as a part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that includes disposable inserts consisting of layers of seimpermeable membranes sandwiched between support plates. The device is used with the extracorporeal blood system and the dialysate delivery system of the hemodialysis system and accessories (§ 876.5820).

2. Recomended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a medium priority.

3. Summary of reasons for recommendation: The Panel recommends that hemodialyzers with disposable inserts (Kiil type) be classified into class II because the dialysate and blood flow characteristics and the membrane permeability must be controlled by a performance standard to ensure the removal of waste and toxic substances from the patient's blood without excessive removal of water or desirable substances. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, surface finish, and strength be appropriate in order to prevent blood leakage or membrane rupture leading to massive blood loss and vascular collapse of the patient and to enable proper cleaning and sterilization to prevent infection in the patient. Also, materials used in the device that contact the blood must be controlled by a performance standard to ensure biocompatibility of the materials to prevent an adverse tissue reaction. The Panel believes that general controls alone would not provide sufficient control over these characteristics. Although the hemodialyzer with disposable inserts (Kiil type) is part of both a life-sustaining and a life-supporting device, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of this device because there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel member's personal knowledge of, and clinical experienee with, the device and on the widespread use of the device in medical practice (Ref. *1*).

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Adverse tissue reaction: If the materials used in the construction of the devices are not biocompatible, the patient may have an adverse tissue or blood reaction. (c) Inadequate dialysis: Malfunctions of the device, inappropriately low membrane permeability, or inadequate blood flow may cause inadequate removel of toxic substances from the patient's blood. (d) Blood loss: Membrane punctures caused by manufacturing or handling errors or difficulty in assembling the dialyzer may result in blood loss. (e) Pyrogenic reaction (a sudden fever with collapse and chills): Toxic substances may be leached from, or transmitted by, the device. These substances may cause the patient to have pyrogenic reaction. (f) Hemolysis, thromboembolic complications, or other blood damage: The materials used in or the design of the device may lead to hemolysis, thromboembolic complications, or other damage to the patient's blood.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that hemodialyzers with disposal inserts (Kiil type) be classified into class II (performance standards). FDA realizes that this generic type of device is both life-sustaining and life-supporting when used in conjunction with hemodialysis; however, the device is used to treat renal failure, which is more life threating than the risks to health from use of the device. Additionally, the device has been used successfully for many years for hemodialysis. The agency has determined that the risks associated with these devices can be adequately controlled by developing standards for the construction of and materials used in the device and that premarket approval is therefore unnecessary. The agency believes that there is sufficient information to establish performance standards for these devices.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Evaluation of Hemodialyzers and Dialysis Membranes, DHEW (NIH) Publication No. 77-1294.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5830, to read as follows:

§ 876.5830 Hemodialyzer with disposal insert (Kill type).

(a) *Identification.* A hemodialyzer with disposal inserts (Kiil type) is a device that is used as a part of an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that includes disposable inserts consisting of layers of semipermeable membranes sandwiched between support plates. The device is used with the extracorporeal blood system and the dialysate delivery system of the hemodialysis system and accessories (§ 876.5820).

(b) *Classificaion.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

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21 CFR Part 876

[Docket No. 78N-2039]

Medical Devices; Classification of High Permeability Hemodialysis Systems

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying high permeability hemodialysis systems into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the defice to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastorenterology-Urology Device Classification Panel, and FDA advisory committee, made the following recommendation regarding the classification of high permeability hemodialysis systems:

1. Identification: A high permeability hemodialysis system is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that has a semipermeable membrane that is more permeable to water than the semipermeable membrane of the conventional dialyzer. The device system consists of an extracorporeal blood system, a high permeability dialyzer, and a controlled dialysate delivery system that incorporates an ultrafiltration controller to prevent excessive loss of water from the patient's blood. This highly permeable, semipermeable membrane also permits greater loss of higher molecular weight substances from the blood, compared with the conventional dialyzer of the hemodialysis system and accessories (§ 876.5820).

The extracorporeal blood system is the same generic type of extracorporeal blood system that is used in the hemodialysis system and accessories (§ 876.5820). The controlled dialysate delivery system also is similar to the conventional dialysate delivery system of the hemodialysis system and accessories (§ 876.5820), with the addition of an ultrafiltration controller to regulate the rate of the removal of water from the patient's blood.

This generic type of device includes the sealed dialysate delivery system.

2. Recommended classification: Class III (premarket approval). The Panel recommends that premarket approval of this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that this device be classified into class III because of the lack of sufficient scientific and medical data on the device from which to develop a performance standard to assure its safety and effectiveness. There is insufficient information about the membrane transport properties of the high permeability hemodialysis system, particularly in regard to their effect on patient well-being. Therefore, further investigation of the device is necessary to establish its safety and effectiveness. The Panel emphasized the urgent need for establishment of criteria that specifies the safe and effective rates of solute and water removal from the patient by the device. The Panel believes that general controls alone

would not provide sufficient control over these characteristics. The Panel also believes that insufficient information exists to determine that general controls or a performance standard would be adequate to provide reasonable assurance of the safety and effectiveness of this life-supporting device. Therefore, the device should be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the device and thereby assure its safety and effectiveness.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the experimental nature of this device and the lack of adequate medical literature and experience supporting its safety and effectiveness.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Electrical injury: Improper design, construction, or a malfunction of the device could result in electrical injury to the patient or the operator. (c) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, degrade by interaction with body tissue or fluids, or contain residual (particulate) matter, the patient may have an adverse tissue reaction. (d) Pyrogenic reaction (a sudden fever with collapse and chills): Toxic substances may be leached from, or transmitted by, the device. These substances may cause the patient to have a pyrogenic reaction. (e) Electrolyte imbalance: Incorrect composition of the dialysate could result in electrolyte imbalance in the patient's blood and thus lead to cardiac disorders, blood cell damage, or muscle cramps. (f) Hypovolemic shock: An abnormally high or uncontrolled ultrafiltration rate may result in hypotension, hypovolemic shock, or both. (g) Loss of protein: Inappropriately high membrane permeability may permit loss of proteins from the blood. (h) Fatal air embolism: Inability of an air foam or bubble detector to sense small air bubbles and the presence of foam may allow a potentially fatal air embolus to enter the patient's blood stream. (i) Blood loss: Membrane punctures caused by manufacturing defects or structural defects that cause the dialyzer to fall from its holder or cause the serving of blood lines or dialysate tubing, or the inability of sensors to detect blood leakage into the dialysate, may result in loss of the patient's blood. (j) Hemolysis, thromboembolic complications, or other blood damage: The materials used in the construction of the device, improper design of the blood pump, or excessive dialysate temperature may result in hemolysis, thromboembolic complications, or other damage to the pateint's blood. (k) Accumulative toxic effect: Repeated exposure to substances that may be leached from materials that contact the blood or dialysate may lead to an accumulation of these substances in the patient's body and cause a toxic effect. (1) Unpredictable loss of water from the patient's blood: The highly permeable, semipermeable membrane used in the dialyzer causes an unperdictable amount of water loss from the patient's blood which may adversely affect the patient's well being.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that high permeability hemodialysis systems be classified into class III (premarket approval). The agency believes that the device is purported or represented to be for a use (hemodialysis) in supporting or sustaining human life and presents a potential unreasonable risk of illness or injury. The Federal Food, Drug, and Cosmetic Act requires the agency to classify a life-supporting or life-sustaining device into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of the device. In this case the agency has determined that premarket approval is necessary. The agency believes that insufficient information exists to determine that general controls or performance standards will provide reasonable assurance of the safety and effectiveness of the device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1878 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a)) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposed to amend Part 876 in Subpart F by adding new § 876.5860, to read as follows:

§ 876.5860 High permeability hemodialysis system.

(a) *Identification.* A high permeability hemodialysis system is a device that is used as an artificial kidney system for the treatment of patients with renal failure or toxemic conditions and that has a semipermeable membrane that is more permeable to water than the semipermeable membrane of the conventional dialyzer. The device system consists of an extracorporeal blood system, a high permeability dialyzer, and a controlled dialysate delivery system that incorporates an ultrafiltration controller to prevent excessive loss of water from the patient's blood. This highly permeable, semipermeable membrane also permits greater loss of higher molecular weight substances from the blood, compared with the conventional dialyzer of the hemodialysis system and accessories (§ 876.5820). The extracorporeal blood system is the same generic type of extracorporeal blood system that is ued in the hemodialysis system and accessories (§ 876.5820). The controlled dialysate delivery system also is similar to the conventional dialysate delivery system of the hemodialysis system and accessories (§ 876.5820), with the addition of an ultrafiltration controller to regulate the rate of the removal of water from the patient's blood. This generic type of device includes the sealed dialysate delivery system.

(b) *Classification.* Class III (premarket approval).

Interested persons may on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–798 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

21 CFR Part 876

[Docket No. 78N-2061]

Medical Devices; Classification of Sorbent Hemoperfusion Systems

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying surbent hemoperfusion systems into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class III. The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, and FDA advisory committee, made the following recommendation regarding the classification of sorbent hemoperfusion systems:

1. Identification: A sorbent hemoperfusion system is a device that consists of an extracorporeal blood system similar to that identified in the hemodialysis system and accessories (§ 876.5820) and a container filled with adsorbent material that removes a wide range of substances, both toxic and normal, from blood flowing through it. The adsorbent materials are usually activated-carbon or resins which may be coated or immobilized to prevent fine particles entering the patient's blood. The generic type of device may include lines and filters specifically designed to connect the device to the extracorporeal blood system. The device is used in the treatment of poisoning, drug overdose, hepatic coma, or metabolic disturbances.

2. Recommended classification: Class III (premarket approval). The Panel recommends that premarket approval of this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that sorbent hemoperfusion systems be classified into class III because the device is life sustaining and life supporting and because there is a lack of data on the absorption characteristics of this device regarding the possibility that it may, while removing toxic substances, also remove essential substances from the blood or cause loss of platelets and leukocytes (white cells). The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel also believes that it is not possible to establish an adequate performance standard for this device. Therefore, the device should be subject to premarket approval to assure that manufacturers demonstrate satisfactory performance of the device and, thus, assure its safety and effectiveness.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the lack of adequate data to support its safety and efficacy.

5. Risks to health: (a) Substantial platelet loss: The adsorption characteristics of the material may cause large losses of platelets during hemoperfusion. (b) Particulate emboli: Carbon or fine particles leached from the sorbent column of the device may be deposited in the arterioles of the lungs and other organs as particulate emboli. (c) Metabolic disturbance: The removal of many normal metabolites along with undesirable substances may lead to metabolic disturbance. (d) Pyrogenic reaction (a sudden fever with collapse and chills): Toxic substances may be leached from the device. These substances may cause the patient to have a pyrogenic reaction. (e) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (f) Leucopenia: The materials used or design of the device may cause absorption of leukocytes resulting in transient leucopenia (loss of leukocytes).

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that sorbent hemoperfusion systems be classifed into class III (premarket approval). The agency believes that the device is purported or represented to be for a use (removing toxic substances from the blood) in supporting or sustaining human life. The Federal Food, Drug, and Cosmetic Act requires the agency to classify any life-supporting or life-sustaining device into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of the device. In this case the agency has determined that premarket approval is necessary. The agency believes that insufficient information exists to determine that general controls or performance standards would provide reasonable assurance of the safety and effectiveness of the device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in the issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5870, to read as follows:

§ 876.5870 Sorbent hemoperfusion system.

(a) *Identification.* A sorbent hemoperfusion system is a device that consists of an extracorporeal blood system similar to that identified in the hemodialysis system and accessories (§ 876.5820) and a container filled with adsorbent material that removes a wide range of substances, both toxic and normal, from blood flowing through it. The absorbent materials are usually

activated-carbon or resins which may be coated or immobilized to prevent fine particles entering the patient's blood. The generic type of device may include lines and filters specifically designed to connect the device to the extracorporeal blood system. The device is used in the treatment of poisoning, drug overdose, hepatic coma, or metabolic disturbances.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-799 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2063]

Medical Devices; Classification of Isolated Kidney Perfusion and Transport Systems and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying isolated kidney perfusion and transport systems and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Springs, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of isolated kidney perfusion and transport systems and accessories:

1. Identification: An isolated kidney perfusion and transport system and accessories is a device that is used to support a donated or a cadaver kidney and to maintain the organ in a near-normal physiologic state until it is transplanted into a recipient patient. This generic type of device may include tubing, catheters, connectors, an ice storage or freezing container with or without bag or preservatives, pulsatile or nonpulsatile hypothermic isolated organ perfusion apparatus with or without oxygenator, and a disposable perfusion set.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a medium priority.

3. Summary of reasons for recommendation: The Panel recommends that isolated kidney perfusion and transport systems and accessories be classified into class II because the materials used in the device, the integrity of the partitioning between the perfusate and coolant, the temperature regulation procedure, the design characteristics allowing sterilization, and the maintenance of proper identification of the tubing connectors to prevent the coolant tubing being connected to the perfusate connectors of the device, or the reverse, must be controlled by a performance standard. The performance standard would prevent sepsis, kidney damage, adverse tissue reaction, infection and users' mistakes in connecting the tubing for the perfusate and coolant. The Panel believes that general controls alone would not provide sufficient control over these characteristics. Although the device is used to maintain a viable kidney for use in a life-sustaining procedure, the Panel believes that premarket approval is not necessary to provide reasonable assurance of the safety and effectiveness of this device because there is sufficient information available to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the devices.

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Kidney damage: Inappropriate pressure regulation, excessive temperature ranges, insufficient or excessive perfusion, or inadequate oxygenation may lead to kidney damage. (c) Adverse tissue reaction: If the materials used in the construction of the devices are not biocompatible, the patient may have an adverse tissue reaction. (d) Blood incompatibility: Toxic materials from the device may cause damage to the patient's blood or lead to thromboembolic complications after the kidney is transplanted.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that isolated kidney perfusion and transport systems and accessories be classified into class II (performance standards). The agency has reviewed the Panel recommendation and has obtained additional data and information describing the use of the isolated kidney perfusion and transport systems and accessories.

An important summary monograph (Ref. 1) reviews the extensive use of this device over a period of at least 10 years and cites 172 references. FDA realizes that this generic type of device is used in a life-supporting procedure; however, the device is used in the transplantation of a kidney to treat renal failure, which is more life threatening than the risks to health from use of the device. Additionally, isolated kidney perfusion and transport systems have been used successfully for over 10 years to preserve kidneys for transplantation.

Although an isolated kidney perfusion and transport system and accessories is

a device used in a life-supporting procedure, the agency believes that premarket approval is not necessary because a performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency believes that a performance standard is necessary because general controls alone are insufficient to control the risks to health presented by the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

Reference

The following information has been placed in the Dockets Management Branch (address above), and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Collins, G. M. and N. A. Halasz, "Current Aspects of Renal Preservation," *Supplement to Urology*, X(1), July 1977, 22–32.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5880, to read as follows:

§ 876.5880 Isolated kidney perfusion and transport system and accessories.

(a) *Identification.* An isolated kidney perfusion and transport system and accessories is a device that is used to support a donated or a cadaver kidney and to maintain the organ in a near-normal physiologic state until it is transplanted into a recipient patient. This generic type of device may include tubing, catheters, connectors, an ice storage or freezing container with or without bag or preservatives, pulsatile or nonpulsatile hypothermic isolated organ perfusion apparatus with or without oxygenator, and a disposable perfusion set.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-800 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N–1975]

Medical Devices; Classification of Ostomy Irrigators

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ostomy irrigators into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of ostomy irrigators:

1. Identification: An ostomy irrigator is a device that consists of a container for fluid, tubing with a cone-shaped tip or a soft and flexible catheter with a retention shield and that is used to wash out the color through a colostomy, a surgically created opening of the colon on the surface of the body.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a high priority.

3. Summary of reasons for recommendation: The Panel recommends that ostomy irrigators be classified into class II because the design and construction of the device must be controlled by a performance standard to ensure that the shape and size of the cone are appropriate to prevent leaks that may lead to skin irritation. The design, materials, and construction of the device must be controlled by a performance standard to ensure that the shape, size, rigidity, flexibility, surface finish and strength of the device are appropriate to prevent trauma, hemorrhage or perforation. The Panel also recommends that the materials used in the device that contact the body be controlled by a performance standard to ensure their biocompatibility to prevent an allergic or an adverse tissue reaction. The Panel was concerned about the possibility of bowel injury by any catheter which may be used with the device. The Panel recommends that the shape of the cone be controlled to avoid damage to the stoma or to the colon, because a long thin, irrigator cone could be as dangerous as a catheter. The Panel believes that cone-shaped irrigators are less likely to cause injury to the colon than long, thin irrigators. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide a reasonable assurance of the safety and effectiveness of the device and that there is sufficient

information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue trauma, hemorrhage, or perforation. (b) Irritation or allergic reaction: If the device leaks, is of incorrect size, or is not biocompatible, an allergic reaction or skin irritation could occur. (c) Colon injury: If a cone-shaped or other type of irrigation tip is too long and thin, an injury to the colon could occur. (d) Adverse tissue reaction: If the materials used in the device are not biocompatible, the patient may have an adverse tissue reaction.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that ostomy irrigators be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard would provide reasonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5895, to read as follows:

§ 876.5895 Ostomy irrigator.

(a) *Identification.* An ostomy irrigator is a device that consists of a container for fluid, tubing with a cone-shaped tip or a soft and flexible catheter with a retention shield and that is used to wash out the colon through a colostomy, a surgically created opening of the colon on the surface of the body.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–601 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1974]

Medical Devices; Classification of Ostomy Pouches and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying ostomy pouches and accessories into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that these devices be classified into class II and the recommendation of the General Hospital and Personal Use Device Classification Panel and of the General and Plastic Surgery Device Classification Panel that these devices be classified into class I (general controls). The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, the General Hospital and Personal Use Device Classification Panel, and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendations regarding the classification of ostomy pouches and accessories:

1. Identification: An ostomy pouch and accessories is a device that consists of a bag that is attached to the patient's skin by an adhesive material and that is intended for use as a receptacle for collection of fecal material or urine following an ileostomy, colostomy, or ureterostomy (a surgically created opening of the small intestine, large intestine or the ureter on the surface of the body). This generic type of device and its accessories includes the ostomy pouch, ostomy adhesive, the disposable colostomy appliance, ostomy collector, colostomy pouch, urinary ileostomy bag, urine collecting ureterostomy bag, ostomy drainage bag with adhesive, stomal bag, ostomy protector, and the ostomy size selector, but excludes ostomy pouches which incorporate arsenic-containing compounds.

2. Recommended classification: The Gastroenterology-Urology Device Classification Panel recommends that the devices be classified into class II (performance standards) and that establishing a performance standard for these devices be a low priority. The General Hospital and Personal Use Device Classification Panel recommends that the devices be classified into class I

(general controls) and that they be exempt from the good manufacturing practice regulation under section 520(f) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360j(f)) except for those regulations relating to the adhesives used and traceability records. The General and Plastic Surgery Device Classification Panel recommends that the devices be classified into class I and that there be no exemptions.

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that ostomy pouches and accessories be classified into class II because the Panel believes that the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard to ensure that the device fits properly and cannot slip, to prevent leakage or damage to the stoma. The measurement function of the ostomy size selector must be controlled by a performance standard to ensure selection of a correctly sized ostomy appliance, to prevent leakage or stoma damage. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of safety and effectiveness of the device and that there is sufficient information to establish a performance standard. The General Hospital and Personal Use Device Classification Panel and the General and Plastic Surgery Device Classification Panel recommend that ostomy pouches and accessories be classified into class I because the Panels believe that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the devices. The General Hospital and Personal Use Device Classification Panel recommends that the devices be exempt from the good manufacturing practice regulation because the quality of the devices is easily discernible and defects are readily apparent to the user. However, the Panel also recommends that the labeling warn users of possible sensitivity of the skin to the adhesive material on the devices.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of these devices in medical practice.

5. Risks to health: (a) Adverse tissue reaction: If the materials used in the devices are not biocompatible, the patient may have an adverse tissue reaction. (b) Loss of skin: Inadequate fit or leakage allowing liquid feces or urine to contact the skin will cause irritation and loss of skin surface. (c) Damage or obstruction of stoma: An improper size, malposition, or slipping of the device with pressure against a protruding stoma may cause damage to, or obstruction of, the stoma. (d) Toxic systemic effects: Toxic substances in the adhesive material which are absorbed through the skin or lungs may cause toxic systemic effects in the patient. (e) Damage to stoma or skin: An improperly calibrated ostomy size selector may result in selection of an incorrectly sized ostomy appliance, which could lead to damage to the skin or stoma.

Proposed Classification

FDA agrees with the recommendation of the Gastroenterology-Urology Device Classification Panel and is proposing that ostomy pouches and accessories be classified into class II (performance standards). The agency has reviewed the medical literature and has found that allergenicity is related to the chemical composition of the materials used in construction of ostomy pouches and accessories (Ref. 1). Therefore, the agency disagrees with the recommendations of the General Hospital and Personal Use Device Classification Panel and the General and Plastic Surgery Device Classification Panel that ostomy pouches and accessories be classified into class I (general controls). The agency believes that performance standards are necessary to ensure that the adhesives that contact the skin are biocompatible. The adhesives may be in contact with the patient for many years. Because the agency has determined that ostomy pouches and accessories should be classified into class II rather than class I, the agency is not required to publish a regulation adopting or rejecting the recommendation of the General Hospital and Personal Use Device Classification Panel that these devices be exempt from the good manufacturing practice regulation under section 520(f) of the act. The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency aso believes that there is sufficient information to establish a performance standard for these devices.

FDA has reviewed the recommendations for ostomy pouches and accessories of the Gastroenterology-Urology Device Classification Panel, the General Hospital and Personal Use Device Classification Panel, and the General and Plastic Surgery Device Classification Panel, and has concluded that the classification of these devices should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

Reference

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. Hill, G., "Ileostomy Surgery Physiology and Management," Grune and Stratton, New York, pp. 47–50, 1976.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5900, to read as follows:

§ 876.5900 Ostomy pouch and accessories.

(a) *Identification.* An ostomy pouch and accessories is a device that consists of a bag that is attached to the patient's skin by an adhesive material and that is intended for use as a receptacle for collection of fecal material or urine following an ileostomy, colostomy, or ureterostomy (a surgically created opening of the small intestine, large intestine or the ureter on the surface of the body). This generic type of device and its accessories includes the ostomy pouch, ostomy adhesive, the disposable colostomy appliance, ostomy collector,

colostomy pouch, urinary ileostomy bag, urine collecting ureterostomy bag, ostomy drainage bag with adhesive, stomal bag, ostomy proctor, and the ostomy size selector, but excludes ostomy pouches which incorporate arsenic-containing compounds.

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-802 Filed 1-22-81; 8:45 am]

BILLING CODE 4110-03-M

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21 CFR Part 876

[Docket No. 78N-2062]

Medical Devices; Classification of Protective Garments for Incontinence

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying protective garments for incontinence into class I (general controls). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class I (general controls). The effect of classifying a device into class I is to require that the device meet only the general controls applicable to all devices. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of protective garments for incontinence:

1. Identification: A protective garment for incontinence is a device that consists of absorbent padding and a fluid barrier and that is intended to protect an incontinent patient's garments from the patient's urine. This generic type of device does not include diapers for infants.

2. Recommended classification: Class I (general controls). The Panel recommends that there be no exemptions.

3. Summary of reasons for recommendation: The Panel recommends that protective garments for incontinence be classified into class I because general controls are sufficient to provide reasonable assurance of their safety and effectiveness. The Panel does not believe that this device requires a performance standard to control the identified risks to health. The Panel recommends that the risk of skin irritation be controlled by proper warning in the labeling that if a patient is allowed to remain in a garment that is saturated by urine, there is a risk of skin irritation.

4. Summary of data on which the recommendation is based: The Panel based its recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device.

5. Risks to health: Skin irritation: The material used in this device in combination with ammonia formed by the bacterial decomposition of urine may cause skin irritation.

Proposed Classification

FDA agrees with the Panel's recommendation and is proposing that protective garments for incontinence be classified into class I (general controls). The agency believes that the risk of skin irritation can be controlled by proper labeling. The agency believes that protective garments for incontinence should be classified into class I because the agency believes that general controls are sufficient to provide reasonable assurance of the safety and effectiveness of the device.

The agency has determined that compliance with the device good manufacturing practice (GMP) Regulation, except for § 820.180 (general requirements concerning records) and § 820.198 (complaint files), is not required to assure that protective garments for incontinence will be safe and effective and otherwise in compliance with the act. The agency has based its determination on available information about current practices used in the manufacture of the device and user experience with the device. The agency is not exempting manufacturers of protective garments for incontinence from the requirements of §§ 820.180 or 820.198 because it has determined that compliance with these sections is in the public interest and will not be unduly burdensome for device manufacturers.

There are two procedures by which FDA may exempt a manufacturer of a device from complying with any or all of the requirements of the GMP regulation. First, a manufacturer of a device subject to any requirements under the GMP regulation may petition the agency pursuant to section 520(f)(2)(A) of the act (21 U.S.C. 360j(f)(2)(A)) for an exemption of variance from the requirement. An exemption granted in response to such a petition applies only to the manufacturer who submitted the petition. Second, in classifying a medical device into class I under section 513 of the act (21 U.S.C. 360c) the agency may determine that certain of the requirements of the GMP regulation shall not apply to the device. In that instance, the exemption applies to all manufacturers of the generic type of device that is the subject of the classification regulation. The agency may grant an exemption under either procedure only if it determines that compliance with the requirement is not necessary to assure that the device will be safe and effective and otherwise in compliance with the act.

The agency previously granted a manufacturer's petition (79P–0288) for exemption of its protective garments for incontinence from the requirements of the GMP regulation, except § 820.180 (general requirements concerning records) and § 820.198 (complaint files). As explained above, that exemption applied only to the petitioner. In this regulation classifying protective garment for incontinence, FDA is exempting from

certain sections of the GMP regulation all manufacturers of this generic type of device. This action is consistent with the agency's policies and criteria for exemption discussed in the preamble to the proposed general provisions for this Part, published elsewhere in this issue of the **Federal Register**. Additional information regarding the procedures for petitioning for exemptions or variances from the GMP regulations is available, as described in a notice published in the **Federal Register** of January 18, 1980 (45 FR 3671).

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Comestic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5920, to read as follows:

§ 876.5920 Protective garment for incontinence.

(a) *Identification.* A protective garment for incontinence is a device that consists of absorbent padding and a fluid barrier and that is intended to protect an incontinent patient's garments from the patient's urine. This generic type of device does not include diapers for infants.

(b) *Classification.* Class I (general controls). The device is exempt from the good manufacturing practice regulation in Part 820, with the exception of § 820.180, regarding general requirements concerning records, and § 820.198, regarding complaint files.

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–603 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

[Docket No. 78N–1980]

Medical Devices; Classification of Peritoneo-Venous Shunts

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying peritoneo-venous shunts into class III (premarket approval). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the peritoneo-venous shunt of LeVeen design be classified into class II (performance standards) and subject to a requirement that manufacturers develop long term followup data on its use and that peritoneo-venous shunts of other designs be classified into class III (premarket approval). The effect of classifying a device into class III is to require each manufacturer of the device to submit to FDA a premarket approval application at a date to be set in a future regulation. Each premarket approval application would include information concerning safety and effectiveness tests for the device. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of peritoneo-venous shunts:

1. Identification: A peritoneo-venous shunt is an implanted device that consists of a catheter and a pressure activated one-way valve. The catheter is implanted with one end in the peritoneal cavity and the other in a large vein. This device enables ascitic fluid in the peritoneal cavity to flow into the venous system for the treatment of intractable ascites.

2. Recommended classification: Class III (premarket approval), except for the peritoneo-venous shunt of the LeVeen design. The Panel recommends that premarket approval of the device be a high priority. The Panel recommends that the LeVeen design of peritoneo-venous shunt be classified into class II (performance standards). The Panel also recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that the peritoneo-venous shunt of any design other than the LeVeen shunt be classified into class III, because the device is life-supporting, life-sustaining, and an implant. The Panel believes that the long term consequences of the implantation of the peritoneo-venous shunt of other than the LeVeen design are not well understood. There is a lack of safety and effectiveness data to demonstrate the satisfactory performance of the peritoneo-venous shunt of other than the LeVeen design. Therefore, the device, other than the LeVeen design, must be subject to premarket approval to assure its safety and effectiveness. The Panel believes that general controls alone would not provide sufficient control over the performance characteristics of the device. The Panel also believes that insufficient information exists to determine that general controls or standards would provide reasonable assurance of the safety and effectiveness of the peritoneo-venous shunt of other than the LeVeen design.

The Panel also recommends that peritoneo-venous shunts of the LeVeen design be classified into class II because the functioning of the one-way valve must be controlled and the materials used in the construction of this device must meet a generally accepted satisfactory level of tissue or blood compatibility, including attributes of adequate surface finish and cleanliness that may affect the degree of compatibility. Also the design of the device must be controlled to prevent tissue trauma. The Panel believes that general controls alone would not provide sufficient control over these characteristics. Although the peritoneo-venous shunt of the LeVeen design is an implanted device, the Panel believes that premarket approval is not necessary because sufficient information exists to establish a performance standard for this type of the device that would provide reasonable assurance of its safety and effectiveness. The Panel also recommends that manufacturers of the LeVeen peritoneo-venous shunt should be required to develop long term clinical followup data to assure its safety and effectiveness.

The peritoneo-venous shunt is an implanted device that has demonstrated successful application for the treatment of intractable ascites (Refs. 1 through 9). LeVeen reports that approximately 1,100 implantations have been performed with this device (Ref. 1). In one study reported by LeVeen, 70 percent of the patients with ascites (excluding those patients with severe alcoholic hepatitis or upper gastrointestinal bleeding) survived at least 12 to 18 months following surgery (Ref. 1). Twenty-three ascitic patients with renal failure (creatinine level 2.3 milligrams per deciliter or blood urea nitrogen (BUN) level 40 milligrams per deciliter) demonstrated improvement, i.e., decreased BUN level, decreased plasma creatinine, and increased urine flow. Eighteen of 23 patients survived at least 4 weeks post-operatively and one patient without complications involving the liver has survived 4 years in excellent health. However, patients with alcoholic hepatitis and congestive heart failure have continued to exhibit high morbidity and mortality (Ref. 6). In a study of 24 patients with cirrhosis and intractable ascites, 14 patients were still surviving in reported followups from 3 to 21 months (Ref. 3). Case reports include the use of peritoneo-venous shunts in conjunction with hemodialysis (Refs. 8 and 9).

The Gastroenterology-Urology Device Classification Panel heard presentations by Dr. Harry LeVeen and Dr. Malcolm Stanley (Ref. 10). In this presentation, studies that compare surgical intervention with the LeVeen shunt and medical therapy were discussed. Following these presentations the Panel concluded that the LeVeen shunt design should be subject to long term clinical followup, but that the controls of performance standards would ensure the safety and effectiveness of the device.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on a review of the medical literature (Refs. 1 through 9).

5. Risks to health: (a) Infection: Defects in the design or construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (b) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of this device may cause tissue damage. (c) Adverse tissue reaction: If the materials used in the constructon of the device are not biocompatible, the patient may have an adverse tissue reaction. (d) Blood incompatibility or blood disorders: The materials or design of the device may cause damage to blood or lead to thromboembolic complications. Also, the shunting of ascitic fluid into the venous system by this device can result in blood disorders with thrombosis or hemorrhage, particularly in patients with severe liver disorders.

Proposed Classification

FDA agrees with the Panel recommendation that peritoneo-venous shunts of other than the LeVeen design be classified into class III (premarket approval) and disagrees with the Panel recommendation that peritoneo-venous shunts of the LeVeen design be classified into class II (performance standards). FDA is proposing that all peritoneo-venous shunts be classified into class III (premarket approval). FDA believes that the device presents a potential unreasonable risk of illness or injury to the patient if there are not adequate data to assure the safe and effective use of the device. In addition, the device is purported or represented to be for a use (removing excess fluid from the peritoneal cavity) that is of substantial importance in preventing impairment of human health. Furthermore, the device is an implant, which the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360c(d)) requires to be classified into class III unless the agency determines that premarket approval is not necessary to provide reasonable assurance of a device's safety and effectiveness. In this case, the agency has determined that premarket approval is necessary for the device because general controls and performance standards are insufficient to provide reasonable assurance of the safety and effectiveness of the device. FDA also believes that there is insufficient information to establish a standard to provide reasonable assurance of the safety and effectiveness of the device.

FDA is sensitive to the Panel's concerns about the continued availability of the LeVeen shunt and the Panel recommendation regarding the need for long term surveillance of the use of this type of the device. In addition to the LeVeen shunt, FDA has identified the Denver design of the peritoneo-venous shunt (Ref. 11), which is a preamendments device. FDA also requests information on any other kinds of preamendments peritoneo-shunts that are presently being used. FDA believes that the concerns of the Panel can best be met be classifying all designs of this generic type of device into class III and limiting premarket approval of these devices to long term followup studies.

References

The following information has been placed in the Dockets Management Branch (address above) and may be seen by interested persons from 9 a.m. to 4 p.m., Monday through Friday.

1. LeVeen, H. et al., "Peritoneo-Venous Shunt for Ascites," *Surgical Annual*, 10:191–214, 1978.

2. Wapnick, S. et al., "LeVeen Continuous Peritoneal-Jugular Shunt," *Journal of the American Medical Association*, 237:131–133, January 10, 1977.

3. Reinhardt, G. et al., "Peritoneo-Venous Shunting for Ascites," *Surgery, Gynecology and Obstetrics*, 145:419–424, 1977.

4. Pladson, T. et al., "Hepatorenal syndrome," *Archives of Internal Medicine*, 137:1248–1249, 1977.

5. Witte, M. et al., "Peritoneo-Venous (LeVeen) Shunt," *Journal of the American Medical Association*, 239:31–33, January 2, 1978.

6. Wapnick, S. et al., "Renal Failure in Ascites Secondary to Hepatic, Renal, and Pancreatic Disease," *Archives of Surgery*, 13:581–585, 1978.

7. Agishi, T. et al., "Implantable Peritoneo-Caval Shunt Pump for Intractable Ascites," *Transactions of the American Society for Artifical Internal Organs*, 23:652–658, 1977.

8. Wooldridge, T. et al., "LeVeen Shunt: Long-Term Therapy for Idiopathic Ascites of

Chronic Renal Failure," *Proceedings of Dialysis Transplant Forum*, 6:36–41, 1976.

9. Yen, M. et al., "Peritoneo-Venous Shunt for Ascites Associated with Maintenance Dialysis," *Clinical Nephrology*, 8:446–448, 1977.

10. Transcript of the Gastroenterology and Urology Device Classification Panel Meeting, October 26, 1979, pp. 5–63.

11. Lund, R. H. et al, "Peritoneal-Venous Shunting System for Surgical Management of Ascites," *Contemporary Surgery*, 14:31–45, 1979.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5955, to read as follows:

§ 876.5955 Peritoneo-venous shunt.

(a) *Identification.* A peritoneo-venous shunt is an implanted device that consists of a catheter and a pressure activated one-way valve. The catheter is implanted with one end in the peritoneal cavity and the other in a large vein. This device enables ascitic fluid in the peritoneal cavity to flow into the venous system for the treatment of intractable ascites.

(b) *Classification.* Class III (premarket approval).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–804 Filed 1–22–81; 8:45 am]

BILLING CODE 4110–03–M

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21 CFR Part 876

Docket No. 78N–1967]

Medical Devices; Classification of Hernia Supports

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying hernia supports into class II (performance standards). FDA is also publishing the recommendation of the Gastroenterology-Urology Device Classification Panel that the device be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the device. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register.**

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: Fernando Villarroel, Bureau of Medical Devices (HFK–420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301–427–7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel, an FDA advisory committee, made the following recommendation regarding the classification of hernia supports:

1. Identification: A hernia support is a device, usually made of elastic, canvas, leather, or metal, that is intended to be placed over a hernial opening (a weakness in the abdominal wall) to prevent protrusion of the abdominal contents. This generic type of device includes the umbilical truss.

2. Recommended classification: Class II (performance standards). The Panel recommends that establishing a performance standard for this device be a low priority.

3. Summary of reasons for recommendation: The Panel recommends that hernia supports be classified into class II because the materials used in the device that contact the body must be controlled by a performance standard to ensure their biocompatibility to prevent an adverse tissue reaction. The design and construction of the device must be controlled by a performance standard so that the device will not cause pressure sores or aggravate the hernia. The Panel believes that general controls alone would not provide sufficient control over these characteristics. The Panel believes that a performance standard would provide reasonable assurance of the safety and effectiveness of the device and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panel based its recommendation on the Panel members' personal knowledge of, and clinical experience with, the device and on the widespread use of the device in medical practice.

5. Risks to health: (a) Adverse tissue reaction: If the materials used in the construction of the device are not biocompatible, the patient may have an adverse tissue reaction. (b) Exacerbation of the hernia: Inadequate design or construction of the device may cause pressure sores or increase the severity of the hernia.

Proposed Classification

FDA agrees with the Panel recommendation and is proposing that hernia supports be classified into class II (performance standards). The agency believes that a performance standard is necessary for this device because general controls alone are insufficient to control the risks to health presented by the device. A performance standard will provide resonable assurance of the safety and effectiveness of the device. The agency also believes that there is sufficient information to establish a performance standard for this device.

The agency has determined that compliance with the device good manufacturing practice (GMP) regulation, except for § 820.180 (general requirements concerning records) and § 820.198 (complaint files), is not required to assure that hernia supports

will be safe and effective and otherwise in compliance with the act. The agency has based its determination on available information about current practices used in the manufacture of the device and user experience with the device. The agency is not exempting manufacturers of hernia supports from the requirements of §§ 820.180 or 820.198 because it has determined that compliance with these sections is in the public interest and will not be unduly burdensome for device manufacturers.

There are two procedures by which FDA may exempt a manufacturer of a device from complying with any or all of the requirements of the GMP regulation. First, a manufacturer of a device subject to any requirement under the GMP regulation may petition the agency pursuant to section 520(f)(2)(A) of the act (21 U.S.C. 360j(f)(2)(A)) for an exemption or variance from the requirement. An exemption granted in response to such a petition applies only to the manufacturer who submitted the petition. Second, in classifying a medical device into class I under section 513 of the act (21 U.S.C. 360c), the agency may determine that certain of the requirements of the GMP regulation shall not apply to the device. In that instance, the exemption applies to all manufacturers of the generic type of device that is the subject of the classification regulation. The agency may grant an exemption under either procedure only if it determines that compliance with the requirement is not necessary to assure that the device will be safe and effective and otherwise in compliance with the act.

The agency previously granted a manufacturer's petition (79P-0278) for exemption of its hernia support from the requirements of the GMP regulation, except § 820.180 (general requirements concerning records) and §820.198 (complaint files). As explained above, that exemption applied only to the petitioner. In this regulation classifying hernia supports, FDA is exempting from certain sections of the GMP regulation all manufacturers of this generic type of device. This action is consistent with the agency's policies and criteria for exemption discussed in the preamble to the proposed general provisions for this Part, published elsewhere in this issue of the **Federal Register**. Additional information regarding the procedures for petitioning for exemptions or variances from the GMP regulation is available, as described in a notice published in the **Federal Register**, of January 18, 1980 (45 FR 3671).

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register**, of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register**.

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540-546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5970, to read as follows:

§ 876.5970 Hernia support.

(a) *Identification.* A hernia support is a device, usually made of elastic, canvas, leather, or metal, that is intended to be placed over a hernial opening (a weakness in the abdominal wall) to prevent protrusion of the abdominal contents. This generic type of device includes the umbilical truss.

(b) *Classification.* Class II (performance standards). The device is exempt from the good manufacturing practice regulation in Part 820, with the exception of § 820.180, regarding general requirements concerning records, and § 820.198, regarding complaint files.

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81-805 Filed 1-22-81; 8:45 am]

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21 CFR Part 876

[Docket No. 78N-2072]

Medical Devices; Classification of Gastrointestinal Tubes and Accessories

AGENCY: Food and Drug Administration.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is issuing for public comment a proposed regulation classifying gastrointestinal tubes and accessories into class II (performance standards). FDA is also publishing the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel that the devices be classified into class II. The effect of classifying a device into class II is to provide for the future development of one or more performance standards to assure the safety and effectiveness of the device. After considering public comments, FDA will issue a final regulation classifying the devices. These actions are being taken under the Medical Device Amendments of 1976.

DATES: Comments by March 24, 1981. FDA proposes that the final regulation based on this proposal become effective 30 days after the date of its publication in the **Federal Register**.

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: Fernando Villarroel, Bureau of Medical Devices (HFK-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION:

Panel Recommendation

A proposal elsewhere in this issue of the **Federal Register** provides background information concerning the development of the proposed regulation. The Gastroenterology-Urology Device Classification Panel and the General and Plastic Surgery Device Classification Panel, FDA advisory committees, made the following recommendation regarding the classification of gatrointestinal tubes and accessories.

1. Identification: A gastrointestinal tube and accessories is a device that consists of flexible or semirigid tubing used for instilling fluids into, withdrawing fluids from, splinting, or suppressing bleeding of the alimentary

tract. This device may incorporate an integral inflatable balloon for retention or hemostasis. This generic type of device includes the hemostatic bag, irrigation and aspiration catheter (gastric, colonic, etc.), rectal catheter, sterile infant gavage set, gastrointestinal string and tubes to locate internal bleeding, double lumen tube for intestinal decompression or intubation, feeding tube, gastroenterostomy tube, Levine tube, nasogastric tube, single lumen tube with mercury weight balloon for intestinal intubation or decompression, and gastro-urological irrigation tray (for gastrological use).

2. Recommended classification: Class II (performance standards). The Gastroenterology-Urology Device Classification Panel recommends that establishing a performance standard for these devices be a medium priority. The General and Plastic Surgery Device Classification Panel recommends that establishing a performance standard for these devices be a low priority.

3. Summary of reasons for recommendation: The Gastroenterology-Urology Device Classification Panel recommends that gastrointestinal tubes and accessories be classified into class II (performance standards) because the materials used in the construction of the devices must be controlled by a performance standard to ensure their biocompatibility. Also, the design and construction of the devices, including the shape, size, tensile strength, flexibility, surface finish, softness, and strength of the devices must be controlled to prevent tissue damage and blockage, trauma, hemorrhage, or perforation, to enable proper cleaning and sterilization to prevent infection, and the structure and the balloon cuff function must operate properly to permit the tube to be recovered. The General and Plastic Surgery Device Classification Panel recommends that the devices be classified into class II because the devices should be constructed of materials that are nontoxic, nonallergenic, noncarcinogenic, nonpyrogenic, and that do not degrade by interaction with body tissue or body fluid. The General and Plastic Surgery Device Classification Panel also recommends that the devices not contain residual foreign matter. The Panels believe that general controls alone would not provide sufficient control over these characteristics. The Panels believe that a performance standard would provide reasonable assurance of the safety and effectiveness of these devices and that there is sufficient information to establish a performance standard.

4. Summary of data on which the recommendation is based: The Panels based their recommendations on the Panel members' personal knowledge of, and clinical experience with, the devices and on the widespread use of these devices in medical practice.

5. Risks to health: (a) Trauma, hemorrhage, or perforation: Improper size, shape, rigidity, arrangement, or finish on parts of these devices may cause tissue trauma, hemorrhage, or perforation. (b) Adverse tissue reaction: If the materials used in the construction of the devices are not biocompatible, the patient may have an adverse tissue reaction. (c) Wound contamination: If a gastroenterostomy tube breaks, the contents may contaminate the surgical wound. (d) Tissue necrosis (destruction): If the devices exert excessive pressure on the intestine, they may cause tissue necrosis. (e) Ineffective treatment: If the devices are too flexible, they may not be able to pass into the gut, or if the tube is defective and does not allow the intestinal contents to be drained, ineffective treatment could result. (f) Inability to recover tube: If the thin structure of the double lumen tube becomes knotted, or the balloon does not deflate, there may be difficulty in extracting the tube. (g) Infection: Defects in the design and construction of the device preventing adequate cleaning or sterilization, or defects in packaging or processing of a device sold as sterile, may allow pathogenic organisms to be introduced and cause an infection in the patient. (h) Kinking of gut: If intestinal splinting tubes are too supple, the gut may kink. (i) Erosion of gut: If intestinal splinting tubes are too stiff, erosioin of the gut may result.

Proposed Classification

FDA agrees with the recommendations of both Panels and is proposing that gastrointestinal tubes and accessories be classified into class II (performance standards). The agency believes that a performance standard is necessary for these devices because general controls alone are insufficient to control the risks to health presented by the devices. A performance standard would provide reasonable assurance of the safety and effectiveness of the devices. The agency also believes that there is sufficient information to establish a performance standard for these devices.

FDA has reviewed the recommendations of the Gastroenterology-Urology Device Classification Panel and of the General and Plastic Surgery Device Classification Panel for gastrointestinal tubes and accessories, and has concluded that the classification of these devices should be published in the part of the Code of Federal Regulations for gastroenterology and urology devices.

On April 28, 1978, the agency terminated all of the device classification panels and reestablished them with the same functions, but with new names and a new structure. FDA published notices of these changes in the **Federal Register** of May 19, 1978 (43 FR 21666, 21667, and 21668) and May 26, 1978 (43 FR 22672 and 22673). This proposed classification regulation identifies each device panel by the former name. Further information regarding the device advisory committees and list of their new names may be found in the preamble to the general provisions, published elsewhere in this issue of the **Federal Register.**

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 513, 701(a), 52 Stat. 1055, 90 Stat. 540–546 (21 U.S.C. 360c, 371(a))) and under authority delegated to him (21 CFR 5.1), the Commissioner of Food and Drugs proposes to amend Part 876 in Subpart F by adding new § 876.5980, to read as follows:

§ 876.5980 Gastrointestinal tube and accessories.

(a) *Identification.* A gastrointestinal tube and accessories is a device that consists of flexible or semi-rigid tubing used for instilling fluids into, withdrawing fluids from, splinting, or suppressing bleeding of the alimentary tract. This device may incorporate an integral inflatable balloon for retention or hemostasis. This generic type of device includes the hemostatic bag, irrigation and aspiration catheter (gastric, colonic, etc.), rectal catheter, sterile infant gavage set, gastrointestinal string and tubes to locate internal bleeding, double lumen tube for intestinal decompression or intubation, feeding tube, gastroenterostomy tube, Levine tube, nasogastric tube, single lumen tube with mercury weight balloon for intestinal intubation or

decompression, and gastro-urological irrigation (for gastrological use).

(b) *Classification.* Class II (performance standards).

Interested persons may, on or before March 24, 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 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.

Dated: December 19, 1980.

William F. Randolph,

Acting Associate Commissioner for Regulatory Affairs.

[FR Doc. 81–806 Filed 1–22–81; 8:45 am]

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federal register

Friday
January 23, 1981

Part III

Department of the Interior

Fish and Wildlife Service

U.S. Fish and Wildlife Service Mitigation Policy

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

U.S. Fish and Wildlife Service Mitigation Policy; Notice of Final Policy

AGENCY: U.S. Fish and Wildlife Service, Department of the Interior.

ACTION: Notice of Final Policy.

SUMMARY: This Notice establishes final policy guidance for U.S. Fish and Wildlife Service personnel involved in making recommendations to protect or conserve fish and wildlife resources. The policy is needed to: (1) ensure consistent and effective Service recommendations; (2) allow Federal and private developers to anticipate Service recommendations and plan for mitigation needs early; and (3) reduce Service and developer conflicts as well as project delays. The intended effect of the policy is to protect and conserve the most important and valuable fish and wildlife resources while facilitating balanced development of the Nation's natural resources.

EFFECTIVE DATE: January 23, 1981.

ADDRESS: Comments submitted on the proposed policy may be inspected in Room 738, 1375 K Street, N.W., Washington, D.C. 20005, between 9 a.m. and 3 p.m. on business days.

FOR FURTHER INFORMATION CONTACT: John Christian, Policy Group Leader—Environment, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240, (202) 343–7151.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The development and use of the Nation's natural resources continues in an effort to provide people with their basic needs and to improve their lives. Fish and wildlife and the intricate fabric of natural resources upon which they depend provide benefits to people in many ways. Fishing, hunting, and bird watching are basic benefits that come to mind immediately. These activities involve the direct use of these renewable "natural resources." Perhaps a greater benefit, although more difficult for some to understand, is the maintenance of the structure and function of the ecosystem that comprises all living species, including people. The presence of diverse, healthy fish and wildlife populations generally signals a healthy ecosystem which contains those elements necessary for human survival, including unpolluted air an productive land.

That fabric of natural resources called habitat is the supply for fish and wildlife renewal. The life requirements for plant and animal species are varied and complex. Each species requires a different set of environmental conditions for survival and vigorous growth. These conditions form the habitat of the various species. The development and use of natural resources leads to changes in environmental conditions that can redefine habitat and thus change the mix and abundance of plant and animal species.

A given change in habitat might increase or decrease overall habitat productivity or result in gains or losses of species that are valuable to people or ecosystems. In some cases, habitat modifications can also increase the numbers of species considered undesirable, and create a nuisance to people or crowd out more valuable species. Therefore, development actions can cause habitat changes that are considered either beneficial or adverse depending on the intended wildlife management objectives.

When professional biologists determine that a given development action will cause a change that is considered adverse, it is appropriate to consider ways to avoid or minimize and compensate for such adverse change or loss of public resources. This is commonly referred to as mitigation.

Fish and wildlife resources are public in nature. The Service has provided Federal leadership for over 40 years to protect and conserve fish and wildlife and their habitat for the benefit of the people of the United States. Under its legal authorities, the Service conducts fish and wildlife impact investigations and provides mitigation recommendations on development projects of all kinds. These efforts have been conducted through a full partnership with State agencies responsible for fish and wildlife resources, and since 1970, with the National Marine Fisheries Service of the U.S. Department of Commerce. The recommendations of the Service are considered by the Federal development and regulatory agencies for their adoption as permitted by law.

Over the years, the Service has reviewed innumerable project and program plans with the potential to adversely affect fish and wildlife resources. The mitigation recommended in recent years by Service personnel to prevent or ameliorate adverse impacts has been governed primarily by a broad policy statement on mitigation promulgated in 1974 and by specific guidelines issued as needed. Recent events have prompted the Service to make known its mitigation objectives and policies. Specific management needs include:

(1) Recent legialative, executive and regulatory developments concerning the environment which had led to a need to update and expand the advice within the 1974 Service policy statement;

(2) Increasing Service review responsibilities which require issuance of comprehensive guidance on mitigation to maintain the quality and consistency of Service mitigation recommendations;

(3) An explicit summary of Service mitigation planning goals and policies to be disclosed to developers and action agencies to aid their earliest planning efforts; and

(4) Finally, the current national need to accelerate development of energy resources which requires that early planning decisions be made that can minimize conflict between important environmental values and energy development.

For these reasons, it was determined to be necessary to fully outline the overall mitigation policy of the U.S. Fish and Wildlife Service. The final Service policy statement integrates and outlines the major aspects of current Service mitigation efforts. Intended as an overview document, its guidance is based on an analysis of current Service field recommendations and on the guidance contained in recent Service management documents.

This policy conditions only the actions of Service employees involved in providing mitigation recommendations. It does not dictate actions or positions that Federal action agencies or individuals must accept. However, it is hoped that the policy will provide a common basis for mitigation decisionmaking and facilitate earlier consideration of fish and wildlife values in project planning activities.

Finally, it should be stressed that this Service policy outlines mitigation needs for fish and wildlife, their habitat and uses thereof. Others interested in mitigation of project impacts on other aspects of the environment such as human health or heritage conservation may find the Service policy does not fully cover their needs. There was no intent to develop a mitigation policy that covers all possible public impacts except those stated. However, the Service strongly believes that preservation and conservation of natural resources is a necessary prerequisite to human existence.

DISCUSSION

The following items are included to provide a better understanding of the policy's relationship to other guidance and to improve the understanding of its technical basis.

1. Relationship of Service Mitigation Policy to Other Service Planning Activities.

The final policy is designed to stand on its own. However, for a clearer perspective of the relationship of the policy to the goals and objectives of the U.S. Fish and Wildlife Service, it can be read with the Service Management Plan and the Habitat Preservation Program Management Document.

The Service Management Plan describes the overall direction of the Service and the interrelationships of the four major categories, including Habitat Preservation, Wildlife Resources, Fishery Resources, and Federal Aid-Endangered Species.

The Habitat Preservation Program Management Document outlines what the Service will do over a one- to five-year period to ensure the conservation and proper management of fish and wildlife habitat. It provides guidance to Service personnel and other interested parties on the goals, objectives, policies, and strategies of the Habitat Preservation Category of the U.S. Fish and Wildlife Service. It includes a discussion of important resource problems that the Service believes require priority attention.

2. Relationship of the Mitigation Policy to any future Fish and Wildlife Coordination Act (FWCA) Regulations and the National Environmental Policy Act (42 U.S.C. 4321–4347) (NEPA).

The Service migitation policy outlines internal guidance for Service personnel for all investigations and recommendations for mitigation under relevant Service authorities, including the FWCA and NEPA. However, the coverage of the policy is basically different from that of any future FWCA regulations as was explained in the preamble to the proposed policy (September 9, 1980) (45 FR 59486–59494). Any future FWCA regulations will principally recommend procedures for all affected agencies to ensure compliance with that Act before and after they receive fish and wildlife agency recommendations. In contrast, the Service mitigation policy only applies to Service personnel and outlines mitigation planning goals and policies for impact analyses and recommendations.

The relationship of the migitation policy to NEPA requirements is also a complementary one. The regulations implementing NEPA (43 FR 55978–56007) recognize "appropriate" mitigation recommendations as an important element of the rigorous analysis and display of alternatives including the proposed action (40 CFR Part 1502.14). The NEPA regulations later specify that Service impact analyses and mitigation recommendation shall be used as input to preparation of draft environmental impact statements (DEIS) as follows:

"To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.), the National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.), the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), and other environmental review laws and executive orders." (40 CFR 1502.25(a)).

These provisions provide clear direction that NEPA requirements are not duplicative of or substitute for mitigation recommendations developed under the Fish and Wildlife Coordination Act and other Service authorities. In fact, the NEPA regulations require that Service recommendations be fully integrated into the NEPA process as vital information necessary to comply with NEPA.

3. Focus of the Policy on Habitat Value.

The policy covers impacts to fish and wildlife populations, their habitat and the human uses thereof. However, the primary focus in terms of specific guidance is on the mitigation of losses of habitat value. Population estimates are considered by many to be unreliable indicators for evaluating fish and wildlife impacts. Sampling errors, cyclic fluctuations of populations and the lack of time series data all contribute to the problem. Therefore, the Service feels that habitat value, by measuring carrying capacity, is a much better basis for determining mitigation requirements. However, the use of population information is not foreclosed by the policy. In fact, concern for population losses led to formulation of the "General Policy" section to ". . . seek to mitigation all losses of fish, wildlife, their habitat and uses thereof . . ." The Service agrees that migitation of population losses is a necessary aspect of this policy, for example, when habitat value is not affected but migration routes are blocked off as in the case of dam construction on a salmon river.

Mitigation of human use losses of fish and wildlife resources is also a necessary aspect of the policy. However, if mitigation of habitat value occurs, then in the majority of cases, losses of human use are also minimized. But, in some cases, public access to the resource may be cut off by the project and significant recreational or commercial benefits may be lost.

In those cases where mitigation of habitat value is not deemed adequate for losses of fish and wildlife populations or human uses, the Service will seek to mitigate such losses in accordance with the general principles and concepts presented in the policy. However, in the majority of cases, the Service feels that mitigation of impacts on habitat values will assure a continuous supply of fish and wildlife populations and human use opportunities.

The Service has recently revised and updated its *Habitat Evaluation Procedures* (HEP). It can be used, where appropriate, to determine mitigation needs based on habitat value losses. In some cases, the project may not be deemed appropriate for applying the methodology as in the case of activities conducted on the high seas under the Outer Continental Shelf (OCS) leasing program. In such cases, the use of other methods to describe habitat value impacts is clearly acceptable, including the best professional judgment of Service biologists. Other limitations related to the use of HEP are outlined in the Ecological Services Manual (100 ESM 1). The HEP are available upon request from the Chief, Division of Ecological Services, U.S. Fish and Wildlife Service, Department of the Interior, Washington, D.C. 20240.

4. Acre for Acre Loss Replacement Is Not Necessarily Recommended by the Policy.

As explained above, the polciy focuses on habitat value. The habitat value of an acre of habitat can vary considerably depending on the type of vegetation and other physical, biological or chemical features. Service recommendations, therefore, will be based on the habitat value adversely impacted, as opposed to strictly acreage. For example, loss of one acre of a specific type of wetland might result in recommendations for replacement of less than one acre of a different type of wetland of greater habitat value. If the habitat value of the wetland available for replacement was equal to that lost, then recommendations could be on an acre-for-acre basis.

5. Rationale for Mitigation Planning Goals.

In developing this policy, it was agreed that the fundamental principles guiding mitigation are: 1) that avoidance or compensation be recommended for the most valued resources; and 2) that the degree of mitigation requested

correspond to the value and scarcity of the habitat at risk. Four Resource Categories of decreasing importance were identified, with mitigation planning goals of decreasing stringency developed for these categories. Table 1 summarizes all categories and their goals.

Table 1: Resource Categories and Mitigation Planning Goals

Resource category and designation criteria	Mitigation planning goal
1 High value for evaluation species and unique and irreplaceable.	No loss of existing habitat value.
2 High value for evaluation species and scarce or becoming scarce.	No net loss of in-kind habitat value.
3 High to medium value for evaluation species and abundant.	No net loss of habitat value while minimizing loss of in-kind habitat value.
4 Medium to low value for evaluation species.	Minimize loss of habitat value.

POLICY HISTORY

The policy statement integrates and outlines the major aspects of current Service mitigation efforts. Intended as an overview document, its guidance is based on an analysis of over 350 Service field recommendations and on the guidance contained in recent Service management documents. The proposed policy was published in the Federal Register on September 9, 1980 (45 FR 59486–59494). A correction notice which corrected insignificant formatting and typographical errors was published on September 19, 1980 (45 FR 62564). A notice extending the comment period on the proposed policy to November 10, 1980, was published on October 8, 1980 (45 FR 66878). The final publication is based on full and thorough consideration of the public comments as discussed below.

RESPONSE TO COMMENTS

Over 90 sets of comments were received on the proposed policy. All comments were thoroughly analyzed and cataloged and considered. Many commentors expressed agreement with Service publication of the policy, sensing a more consistent and predictable Service approach to mitigation recommendations and a resultant decrease in the degree of conflict with developers. Many felt the policy represented a rational approach to fish and wildlife resource management, and that it would provide for adequate protection and conservation of the Nation's fish and wildlife resources. The underlying concept that the degree of mitigation requested should correspond to the importance and scarcity of the habitat at risk was also supported by many commentors. Numerous commentors also praised its scope, cohesiveness and clarity, and stressed that it should provide valuable guidance for Government personnel providing technical and project planning assistance.

Detailed responses to significant comments follow:

GENERAL COMMENTS ON THE PROPOSED SERVICE MITIGATION POLICY

Comment: Although the Service prepared an Environmental Assessment and, from its findings, concluded that policy issuance did not constitute a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(C) of the National Environmental Policy Act (NEPA), a few commentors disagreed with the Service's conclusion that an Environmental Impact Statement (EIS) was not necessary for the proposed action.

Response: During policy development, the Service took action to determine if preparation of an environmental impact statement under NEPA was required. Although section 1508.18 of the Council on Environmental Quality's (CEQ) Regulations for implementing the procedural provisions of NEPA classified adoption of an official policy as a "Federal action," it remained unclear as to whether this action was "major," or whether it would "significantly" affect the quality of the human environment, since policy implementation would not result in or substantially alter agency programs. As was stated in the preamble, this policy is basically a distillation of approaches and policy currently being practiced by Service field personnel in providing mitigation recommendations.

In order to resolve this uncertainty, an Environmental Assessment was prepared for the proposed and final policy. By doing so, the Service has complied with one of the major purposes of the NEPA regulations, which is to have NEPA applied early in the decisionmaking process.

The NEPA regulations do not, in the opinion of the Service, require that the agency speculate on future, possible events without any relation to actual, existing impacts of an action. Section 1502.2 of the NEPA regulations directs that an EIS is to be analytical, however, the Service action simply does not create any impacts capable of such analysis. Thus, there is no reasonable or scientific way for the Service to analyze any environmental impacts, significant or otherwise, as discussed in §§ 1502.16 and 1508.27.

This problem is particularly vexsome when those impacts depend on future contingencies and can be more appropriately analyzed when those contingencies occur. Even § 1502.4, which discussed EIS's in terms of broad agency actions, does so in the context of specific impacts caused by the action. In the opinion of the Service, it has fully complied with the letter and spirit of NEPA and its regulations.

Comment: One commentor felt that the preamble statement that an EIS would be premature at this time contradicted a finding of no significant impact.

Response: The Service sees no contradiction with a finding of no significant impact and the statement that an EIS is premature. The finding of no significant impact derives from an analysis showing that the policy has no significant impacts amenable to analysis at the present time. However, when in the future the Service does apply the policy in developing mitigation recommendations for a major Federal action which might significantly affect the quality of the human environment, then the environmental impacts associated with implementing those recommendations which are considered justifiable by the development agency can be analyzed by that development agency. The Service has no way of predicting which of its recommendations will be accepted by the developer; therefore, analysis of impacts of accepted mitigation recommendations is the responsibility of the developer.

Comment: One commentor was of the opinion that an EIS "should be prepared for the Service's proposed mitigation recommendations on each project." Moreover, the commentor felt that a significant portion of these EIS's should be devoted to analysis of economic impacts.

Response: Mitigation recommendations and actions cannot be meaningfully analyzed except in the context of the development action initiating them. And, since an EIS would be required for any major Federal action which would significantly affect the quality of the human environment and whose alternatives would include consideration of mitigation, a separate EIS would not be necessary for mitigation actions.

Under the FWCA, the action agency which makes the ultimate decision is to include all "justifiable mitigation means and measures" in project formulation. The burden of analyzing the economic impacts of "justifiable" mitigation measures therefore rests primarily with

the project sponsor, who will likely use the Water Resources Council's Principles and Standards to assist in the analysis.

Comment: The substantive requirements of the Service mitigation policy should be consistent with the requirements of the National Environmental Policy Act's implementing regulations and the Water Resources Council's Principles and Standards.

Response: We agree. The proposed and final policy have been developed consistent with the substantive and procedural requirements or these regulations.

Comment: The Environmental Assessment identifies as one of the advantages of the proposed mitigation policy the establishment of "* * * minimum performance standards for FWS recommendations (which would serve as benchmarks by which the FWS and developers or action agencies * * * could assess individual Service mitigation proposals." However, neither the **Federal Register** notice nor the Environmental Assessment identify or discuss these "benchmarks."

Response: The term "benchmarks" referred to the mitigation goals and planning procedures. Both the proposed policy preamble and its Environmental Assessment discussed these guidelines, explaining their derivation and importance to policy purposes. However, a point of clarification is needed regarding these guidelines. It is the recommendations made by Service personnel that would be measured against these standards, not the mitigation implemented by an action agency. The final policy makes this point explicit.

Comment: Many commentors argued that the proposed policy goes beyond that authorized by law. Specific concern was expressed over the use of words that were mandatory in tone (e.g., "require" and "must") as opposed to advisory. In addition, some commented that the Service has no authority to support or oppose projects as stated in the policy.

Response: The Service agrees that the legal authorities for the mitigation policy do not authorize the Service to exercise veto power over land and water development activities. That understanding was implicit in the proposed policy. Appropriate changes have been made in the policy to more explicitly recognize and signify the advisory nature of the Service responsibility.

However, it should be clearly noted that the Fish and Wildlife Coordination Act places clear mandatory requirements on Federal development agencies falling under that Act's authority to (1) consult with the Service, National Marine Fisheries Service (NMFS) and State agencies responsible for fish and wildlife resources; (2) incorporate such reports and recommendations in one overall project report; (3) provide "full consideration" of the "reports and recommendations;" (4) include in the project plan "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain overall maximum project benefits;" and (5) other requirements related to funding and land acquisition.

The clear intent of Congress was that recommendations developed by the U.S. Fish and Wildlife Service, NMFS, and State agencies responsible for fish and wildlife resources be taken seriously, and we know of no law which prohibits the Service from taking a position for or against a project when making mitigation recommendations.

Comment: The policy will adversely impact developmental interests.

Response: The goal of the policy is to provide for equal consideration of fish and wildlife conservation while facilitating development.

Congress has clearly stated that "wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs" (Pub. L. 85–624, Fish and Wildlife Coordination Act). This advice is further amplified in Senate Report 1981 on the FWCA (84th Congress, 2nd Session (1958)). The Congress recognized that in some instances, the level of dollar benefits to some purposes might have to be diminished "in some slight degree" in order to accomplish the fish and wildlife conservation objectives of the Act.

However, policy issuance should benefit developmental interests. By providing developers with a clear picture of Service mitigation concerns and priorities, the policy will allow developers to anticipate Service mitigation recommendations prior to final decisions on project design and location. By reducing a developer's planning uncertainties, the policy will result in lowered project costs and fewer project delays and conflicts.

Comment: Does the policy present general guidance or minimum required standards? The Service appears to be trying to establish required standards

Response: The final policy sets out mitigation goals and planning guidance to guide the development of Service mitigation recommendations. It does not require absolute strict adherence to a required standard. Changes have been made to reflect this.

Comment: No mention is made of the State role in mitigation planning to assure a compatible approach. The States' authorities and decisionmaking prerogatives with respect to fish and wildlife resources should be denoted and the States' roles in mitigation should be emphasized further.

Response: A compatible approach is desirable. We have included appropriate changes. However, the policy is solely for Service personnel. There is no intent to infringe on the States' prerogatives.

Comment: The policy should require full public disclosure of Service mitigation analyses, determinations, and recommendations.

Response: We agree that full disclosure of Service analyses, determinations and recommendations during the mitigation process would serve the public interest. All public documents associated with Service recommendations for mitigation on specific land and water developments are available for review in Ecological Services field offices. No change in the policy is necessary.

Comment: The Service should specifically address the acid rain problem and its policy. In particular, the policy should address the impact of Federal policies and programs that support power plant conversions to coal.

Response: The Service currently reviews such Federal actions under NEPA, since these policies and programs are likely to require an EIS. Because acid rain has been highlighted as an Important Resource Problem (IRP) by the Service, environmental analyses which do not adequately address acid rain problems will receive particular attention by Service reviewers. Our comments will be technically reinforced by Service research already being conducted in this area. Since the policy already covers this issue, no change is necessary.

Comment: Could the mitigation policy call for a recommendation as extreme as reflooding of the Mississippi River Valley?

Response: The mitigation policy would not lead to so extreme a recommendation because it does not apply to development actions completed prior to enactment of Service authorities or exempted by those authorities. In those situations where the policy does apply, there will be no recommendations for mitigation over and above the level of impacts associated with a project. This policy acts to minimize impacts of projects, not reverse them.

Comment: Which agency enforces this policy and what power does it have?

Response: This is a policy that applies only to Service personnel. It does not predetermine the actions of other Federal agencies, nor the actions of State agencies or developers. Although the policy statement is not judicially enforceable, the Service will administer the policy by monitoring the mitigation recommendations made by its own personnel.

Comment: Too often land acquired for mitigation does not provide the spectrum of resource values previously available because the managing agency's philosophy prevents it from managing the land for a mix of goals.

Response: Lands acquired for mitigation purposes must provide the specific mitigation benefits for which there were intended. Secondary land uses, such as provision of timber, oil and gas exploration, or recreational benefits, should be attempted where these uses are compatible with the mitigation lands' primary purpose. This concept has been added to the policy.

SPECIFIC COMMENTS ON THE MITIGATION POLICY

(These comments are keyed to sections of the proposed policy.)

I. Purpose

Comment: Why is this policy apparently unconcerned with flora?

Response: Mitigating for fish and wildlife loses necessarily means dealing with the plant communities on which all animal life indirectly depends. When habitat is preserved, it is the plant communities that are the vast bulk of the living material of that habitat.

Plants *per se* are addressed by other authorities of the Service which are not within the scope of this policy, such as the Endangered Species Act and associated regulations.

II. Authority

No comments.

III. Scope

Comment: How does the policy affect projects already completed or under construction?

Response: Appropriate changes in the Scope section have been made to clarify policy coverage with regard to completed projects or projects under construction.

Comment: Since Federal permit renewals will result in no new effects on the environment, they should be exempt from the policy.

Response: The permit or license renewal process provides an opportunity to re-evaluate the project. Depending on new scientific information concerning impacts, the adequacy of past developer mitigation efforts, or new authorities, new mitigation recommendations may be necessary.

Not infrequently, permit or license holders use the renewal process as a convenient occasion to seek changes in their permits. Any changes in permit or license holders' activities have to be evaluated to determine whether or not they necessitate new mitigation recommendations.

This policy, therefore, will be used by the Service in permit or license renewal proceedings, keeping in mind that Service recommendations are advisory to action agencies. Appropriate changes were made in the policy to reflect this position.

Comment: Does this policy apply to man-induced wetlands?

Response: Where the Service has the authority and responsibility to recommend mitigation for these habitats, the tenets of the policy shall apply.

Comment: There is a need for a mechanism for evaluating enhancement and a means to differentiate it from mitigation.

Response: Although enhancement is an important concern of the Service, the Service mitigation policy should not serve as the primary vehicle for discussing enhancement. The final policy does differentiate between enhancement and mitigation recommendations by defining enhancement to include measures which would improve fish and wildlife resources beyond that which would exist without the project and which cannot be used to satisfy the appropriate mitigation planning goal. As for evaluating enhancement, it would appear likely that many of the procedures that can be used to evaluate mitigation can be used to evaluate enhancement.

Comment: What is the basis for the policy position that enhancement cannot occur until all losses are compensated? There is no legislative history for this.

Response: Unfortunately, the term "enhancement" suffers from wide differences in semantic usage. The proposed policy used the term to be synonymous with improvements beyond the achievement of full mitigation. This strict interpretation appeared to spark controversy.

The final policy incorporates a different usage of the term. Enhancement is used to describe measures not necessary to accomplish mitigation purposes.

Comment: The policy should credit towards mitigation goals those habitat value increases associated with areas of the habitat which are enhanced by the project. Habitat value should be computed for enhancement activities, and the inclusion of habitat enhancement factors would provide for a more accurate estimate of the project's impact on the environment.

Response: Use of the term "habitat enhancement" to describe development or improvement efforts is confused by this comment. The mitigation policy does not cover enhancement as we have described it. However, where habitat improvement or development caused by a project will result in habitat value increases, it may be considered as mitigation when consistent with the resource category designation criteria and the appropriate mitigation planning goal.

Comment: There should be a clear statement that all opportunities for enhancement of fish and wildlife resources be thoroughly considered and included in project plans to the extent feasible.

Response: We agree. Appropriate changes were made.

IV. Definition of Mitigation

Comment: Some commentors indicated concern over the definition of mitigation as used in the policy. Specific concern was expressed that those aspects of project planning that include avoidance or actions to minimize impacts should be considered good project planning and that mitigation should be confined solely to actions to compensate for resource losses.

Response: The Service agrees that avoidance or actions to minimize impacts should be part of the early design of projects and not just and afterthought. Some consider mitigation to be a separate and distinct process that occurs after project planning has been completed. The legally binding definition of mitigation as used in the regulations to implement the National Environmental Policy Act (NEPA) can have the effect of altering this notion through incorporation of all those actions that can lessen project impacts throughout the planning process.

The policy has been modified to more clearly state that the Service supports and encourages incorporation of features that will reduce adverse impacts on fish and wildlife resources as part of early planning and project design in order to avoid delays or conflicts. But without the emphasis on avoidance and minimization provided by the NEPA regulations' definition, there would be little incentive for development agencies to incorporate such features. The Service, therefore, supports and adopts that definition.

V. Mitigation Policy of the U.S. Fish and Wildlife Service

Comment: A number of documents are referred to in the draft policy. They are essential to the functioning of the policy and should be published as an appendix and otherwise made available for public comment, including public hearings.

Response: The preamble to the proposed policy clearly indicated that the policy was designed to stand on its own. The referenced documents are not essential to the functioning of the policy. For instance, even though Service filed personnel will rely basically on the *Habitat Evaluation Procedures* in conducting project analyses, the policy indicates that other methods can be used where appropriate and available. The concept of habitat value has been recognized throughout the history of fish and wildlife management. It is not new.

Regardless of the fact that the policy stands on its own, the referenced documents have undergone varying degrees of public scrutiny independent of the mitigation policy. For instance, a notice of availability and request for public comment was published in the **Federal Register** for the Service Management Plan and Program Management Document on September 29, 1980 (45 FR 64271–64272). A habitat-based evaluation methodology has been under active development in the Service since 1973. The first document officially called the *Habitat Evaluation Procedures* was published in 1976 with the most recent revision in 1980. During this 7 year period, The Nation's top wildlife biologists have been consulted, both within the government and outside. The procedures have been presented at numerous public conferences and have been the subject of intense scrutiny.

Finally, the referenced documents were made available to reviewers. Over 75 requests were made and immediately filled to allow commentors the full benefit of this information in preparing comments, including the group providing this comment. Minor changes were made in the policy to more clearly indicate that the policy can stand on its own.

A. General Principles

Comment: Pursued to its logical conclusion, the concept of fish and wildlife as public trust resources could lead to serious restrictions on the use and management of private lands.

Response: When the concept of personal property rights is exercised in such a way as to jeopardize the interests of the public in fish and wildlife resources on public or private lands, the government may use its authorities to see that any damage to those interests is prevented or mitigated.

The Service does and will attempt to fulfill its duties within its authorities and in a reasonable manner. It is certainly cognizant of the fact that pursuing any concept to its logical extreme may lead to unreasonableness, and will continue to strive to prevent this from happening in its mitigation activities.

Comment: What does "equal consideration" of wildlife conservation mean within the context of the Fish and Wildlife Coordination Act and this mitigation policy?

Response: "Equal consideration" was not defined in the Act or this policy, and has no particular meaning in the context of this policy. This policy only covers Service recommendations, not action agency requirements.

Comment: The proposed Service policy now absolutely precludes support for non-water dependent projects within or affecting waters of the United States. This should be modified to conform to the requirements of Federal regulatory agencies such as the Army Corps of Engineers (COE) and the Environmental Protection Agency (EPA).

Response: The Service policy clearly does not exercise veto power over development actions. Moreover, the Service will execute its responsibilities fully within the context of existing laws and regulations governing environmental reviews. However, the Service feels that wetlands and shallow water habitats should not be subjected to *needless* development of the public values of these areas. The Service policy statement does not include water dependency as the "sole" criterion for its recommendations. Other factors, including the likelihood of a significant loss, are considered prior to a Service recommendation for support of a project or the "no project" alternative.

The provisions of the policy have been modified to make such recommendations discretionary.

Comment: Congress, not the Service, is the entity that has the authority to require and fund compensation for Federal projects.

Response: We agree. The Policy has been modified.

Comment: Mitigation should not be required for an indefinite period of time.

Response: Mitigation is appropriate for the entire time period that habitat losses persist, which includes the life of the project and as long afterwards as the impacts of the project continue to exist. The policy reflects this position.

Comment: Under "General Principles," the policy should seek and endorse novel or imaginative approaches to mitigation.

Response: The Service fully supports development of novel and imaginative approaches that mitigate losses of fish and wildlife, their habitat, and uses thereof, and has been in the forefront of such development. No change is necessary.

Comment: An Indian tribe strongly supports the Department of the Interior's recognition of the role of Indian tribal governments in mitigation planning.

Response: Our national heritage and, in some cases, the livelihood of Indian tribes, can be directly linked with the conservation and use of fish and wildlife resources. Therefore, the U.S. Fish and Wildlife Service will continue to recognize and support Indian tribal governments' efforts to mitigate impacts on these resources.

B. U.S. Fish and Wildlife Service Mitigation Goals by Resource Category

Comment: The mitigation goals for the resource categories were characterized as: reasonable, too strict, or not strict enough.

Response: As was explained in the preamble to the draft policy, the resource categories and their mitigation goals were abstracted from an analysis of actual field recommendations. The designation criteria for the resource categories (replaceability, scarcity, and value for evaluation species) are the basic decision factors used by Service personnel to assess relative mitigation needs. The mitigation goals represent reasonable mitigation expectations for projects, viewed in the light of our two-faceted goal—(1) to conserve, protect and enhance fish and wildlife and their habitats, and (2) to facilitate balanced development of our Nation's natural resources.

Numerous comments were received commending us on the balanced approach embodied in this policy. Since its tenets derive from field recommendations and comments, the credit belongs entirely to our field staff.

Some commentors criticized the mitigation goals. One group felt that one or several of the mitigation goals were too strict. These commentors objected to what they considered to be unreasonably high goals for fish and wildlife mitigation. In contrast to this first group, another set of commentors felt that the goals were not strict enough, and called attention to our legislative responsibility to seek protection for all fish and wildlife resources.

Our response is that the mitigation goals represent the best professional judgment and cumulative experience of Service field supervisors in developing mitigation proposals that would satisfy

our legislative mandates, operate under time and money constraints, and assist in maximizing overall social well-being. The basic concept, therefore, is unchanged in the final policy, although minor changes were made to improve understanding based on the comments.

Comment: Rather than rely on strict inflexible mitigation goals, the Service should use "tradeoff" evaluation procedures in developing mitigation proposals.

Response: It is the responsibility of the Federal action agency to use tradeoff evaluation procedures consistent with the Water Resources Council's Principles and Standards, where applicable, to select a mitigation alternative that will assist in maximizing overall project benefits. The Fish and Wildlife Coordination Act specifies that "the project plan shall include such justifiable means and measures for wildlife purposes as the *reporting agency* (emphasis added) finds should be adopted to obtain maximum overall project benefits." The role of the Service is to represent those public trust resources under its jurisdiction. The proposed policy outlined a system wherein the highest valued resources would be subject to the most protective mitigation recommendations. Few, if any, commentors have disagreed with this valuation perspective. Therefore, no changes were made.

However, many commenters have questioned the reasonableness of a seemingly uncompromising system that did not appear to allow occasional deviations from these goals.

The system is not rigid. As stated in the Purpose section of the policy, the policy advice will be used as guidance for Service personnel, but variations appropriate to individual circumstances are permitted.

Comment: Numerous commentors raised the issue of the somewhat subjective nature of identifying certain species as "important" for the purposes of the policy. In addition, commentors indicated that such distinctions could lead to mis-classification of habitats in terms of resource categories and that clear criteria were needed. Finally, many commentors felt that the artificial distinction of certain species as "important" was both a violation of the public trust and Service legal authorities.

Response: People perceive some species to be more important than others. In the context of biology and ecology, all species are important, serving a useful purpose within the confines of their biological niche. The mitigation policy must address *both* the needs and desires of human society *and* the ecosystem perspective. This is a difficult task. But human decisions concerning fish and wildlife resources in the face of a development action require judgment about the values of what will be lost and the need to avoid or minimize and compensate for loss of such values.

The specific criteria for such determinations are also exceedingly difficult to frame in a National policy context. The importance of a species to society depends on a complex, changing mix of factors. The importance of a species within an ecosystem is also subject to many dynamic factors. But human decisions about the level and type of mitigation necessary for development actions must be made in the absence of perfect information concerning these factors. In addition, the Service biologist reviewing project impacts has severe constraints on the number of species and ecosystem linkages that can be analyzed given funding, personnel and time limitations. Somehow, choices must be made.

We have deleted the term "important species" from the policy and replaced it with a more precise term, "evaluation species." The criteria for selection of evaluation species still includes those species of high resource value to humans or that represent a broader ecological perspective of an area. Other changes have been made related to the determination of resource categories to allow for additional public input and resource agency coordination into such determinations, where appropriate.

The effect of this change is not intended and shall not be interpreted to broaden the scope or extent of application of this policy. But it does remove the implication that species can be ranked against each other in terms of their overall importance to society, which many considered quite beyond the capability of human beings.

Comment: The wording of the policy should clearly indicate that species selected for analysis should only be those demonstrated to actually utilize an area.

Response: We agree, except for situations where fish and wildlife restoration or improvement plans have been approved by State or Federal resource agencies. In that case the analysis will include species identified in such plans. Appropriate clarification has added to the definition of evaluation species.

Comment: The proper focus of the policy should be the ecosystem rather than particular species.

Response: Aside from the very real technical problems of applying a complex concept such as the ecosystem to mitigation planning, the authorities underlying this policy deal with fish and wildlife and their habitat, rather than ecosystems.

Ecosystems are addressed under this policy in two ways. First, one criterion in the selection of an evaluation species is the biological importance of the species to the functioning of its ecosystem. Secondly, when habitat loss is mitigated, the part of the ecosystem comprising that habitat is itself protected. No changes have been made.

Comment: Recreational use losses may at times have to be directly mitigated. The goal statements should reflect this need.

Response: We agree. Appropriate changes were made.

Comment: In addition to assessing conditions of scarcity from a biogeographical viewpoint, i.e., ecoregions, the policy should also use geopolitical subdivisions, e.g., state boundaries.

Response: As a Federal agency, the Service perceives its major responsibility to be to protect those fish and wildlife and their habitat that are valuable and scarce on a national level, whether or not they transcend state boundaries. However, should State resource agencies with to outline relative scarcity on a more local basis, Service personnel would certainly assist, whenever practicable. This point has been added to the policy.

Comment: The policy should scale the relative need to achieve a particular mitigation goal to the degree a particular habitat will be impacted. For example, if a half-acre of important habitat is affected by a project and it is part of a one-acre plot, this circumstance should lead to a mitigation recommendation different from the situation where the same half-acre is part of a ten thousand acre area. As drafted, the policy does not reflect the differences in these situations.

Response: The Purpose section of the policy states that it will be used as guidance for Service personnel, but variations appropriate to individual circumstances will be permitted. The relative need to achieve a particular mitigation goal depends primarily on the perceived value of the habitat, its scarcity, and the replaceability of the threatened habitat. Other factors, such as scaling considerations, can combine to modify this general Service perspective on what constitutes appropriate mitigation.

Comment: The resource categories and mitigation goals are general, lack definition, and provide no guidance on habitat value. These categories are all

subject to interpretation by the Service field personnel.

Response: It would be counterproductive, if not impossible, for a national policy to be worded as precisely as the commentor suggests and still be implemented in a reasonable manner under numerous and diverse local circumstances. Words used to describe resource categories and mitigation goals do have generally understood meanings. It is essential that field personnel be allowed to exercise professional judgment in applying resource categories and mitigation goals to specific activities. However, numerous clarifying changes were made based on the comments to increase comprehension and understanding.

Comment: It is essential to other agencies' review to know what general types of habitat will be most important in the U.S. Fish and Wildlife Service mitigation policy. At a minimum, some examples of the types of habitat within each category should be given.

Response: The final policy does give guidance on areas that will be generally considered for Resource Category 1 or 2. Providing examples for all resource categories could be misleading since the same type of habitat may fall into several different resource categories, depending on, among other factors, its relative scarcity and quality from one local to another across the nation.

On the other hand, field professionals are generally familiar with the quality and abundance of a given type of habitat that is in their area, so it is preferable not to burden them with potentially inappropriate guidelines of this nature.

Comment: The policy should clearly distinguish between upland habitats and the more valuable wetland habitats.

Response: In some cases, upland habitats may be determined to have resource values equal to or greater than wetland habitats, so a policy that solely favored one habitat type over the other would not be in the best public interest. However, the policy has been changed to indicate that certain habitats within Service-identified Important Resource Problems (IRPs) and special aquatic sites should be given special consideration as Resource Category 1 or 2. The IRPs contain a predominance of wetland coastal areas.

Comment: If you build something in a habitat, it just changes it to another habitat that some other animal or fish lives in—including the human being, although the Service does not seem to appreciate that. For example, if you build a highway, it is bad for dogs, rabbits, opossums and field rats and such that get run over by cars and trucks, but it is good for crows and buzzards that eat dead meat.

Response: The Service has not come across many instances where crows and buzzards could be considered scarce, but when such a circumstance can be documented and verified, the Service will certainly try to protect and enhance valuable highway habitat.

- *Resource Category 1*

Comment: A literal interpretation of the Resource Category 1 mitigation goal would require absolutely no habitat loss—not even a nature trail. Resource Category 1 should be deleted.

Response: Not all environmental changes are adverse to the habitat of a fish and wildlife resource. If a nature trail resulted in an insignificant impact on habitat value that was determined not to be adverse, then the Service would not recommend against it. The policy has been clarified to reflect this point.

Comment: Endangered and threatened species should be included as part of Resource Category 1.

Response: It would be inappropriate to expand the scope of the Mitigation Policy to include threatened and endangered species. The treatment of these species is addressed in an extensive body of complex and detailed legislation and regulation. The Congress has legislated very specific and precise law with regard to threatened and endangered species. Inclusion of these species under this policy would only confuse the issue and compound the difficulties involved in implementation of the Endangered Species Act and its associated regulations. Other reasons are discussed in the scope section of the final policy.

Comment: For all practical purpposes, Resource Categories 1 and 2 adopt a "no growth" policy.

Response: The U.S. Fish and Wildlife Service is not advocating a "no growth" mitigation policy. The means and measures to achieve mitigation for Resource Categories 1 and 2 are designed to provide some flexibility so that limited growth can occur in an environmentally prudent manner. The policy reflects the national consensus that some habitats are of exceptional public value and should be carefully conserved, as evidenced in the Wild and Scenic Rivers Act (Pub. L. 90-542), the Wilderness Act (Pub. L. 88-577), and the National Trails System Act (Pub. L. 94-527).

- *Resource Category 2*

Comment: It is ill-advised to support in-kind replacement involving trading habitat for lesser value habitat which is then improved to support the species affected by the project. It takes too long, and in the meantime, populations supported by the habitat on the project site are lost.

Response: If the period required for improving the replacement habitat to the appropriate condition was exceedingly long, this may be one indication that the habitat at risk was unique or irreplaceable and actually belonged in Resource 1. In that case in-kind replacement through improvement of lesser quality habitat would be an inappropriate mitigation recommendation. Also, additional measures aimed at population restoration could be recommended to restock the area, provided suitable habitat was available to support the stocked species. No changes were made.

Comment: One Commenter was perturbed by an apparently rigid insistence by the policy of in-kind replacement of lost habitat. The commentor pointed out that there could be occasions in which in-kind habitat was not available to a project sponsor.

Response: The policy guideline for Resource Category 2 includes an exception when "* * * in-kind replacement is not physically or biologically attainable". No change was necessary.

Comment: The policy appears to insist upon "acre-for-acre" replacement of in-kind habitat.

Response: The policy does not insist on "acre-for-acre" replacement of in-kind habitat. The mitigation planning goals involving in-kind replacement specifically ask for replacement of in-kind habitat *value*. This point has been further clarified in the definitions section, throughout the policy, and in the policy preamble.

- *Resource Category 3*

Comment: The mitigation goal for Resource Category 3 is not authorized by law and will be difficult to implement due to professional disagreement on satisfactory achievement.

Response: Under the Fish and Wildlife Coordination Act, the Service has the responsibility to recommend compensation for the loss of fish and wildlife resources. The Act does not restrict compensation to in-kind compensation. By recommending out-of-kind compensation under certain circumstances, the Service increases the range of options that developers may use to mitigate project impacts to include development and improvement of marginal resources different from those lost. However, modifications have been made in the policy to indicate that

in-kind replacement is preferred for Resource Category 3.

Comment: The mitigation goal for Resource Category 3 should emphasize that in-kind habitat value replacement is preferable to out-of-kind replacement.

Response: We agree. This point has been brought out in the final policy statement.

Comment: Although out-of-kind replacement is acceptable for Resource Category 3 losses and, under certain circumstances, may be accepted for Resource Category 2 losses, the policy should advise against replacement of rare habitat types for more common habitat types.

Response: We agree with the commentor's point and expect that Service field personnel will recommend mitigation alternatives that incorporate this concept, to the extent practicable. The Service is entirely in favor of preserving and/or promoting habitat diversity. No changes were necessary.

• *Resource Categories 4 and 5*

Comment: Compensation should be included as a means for satisfying the mitigation goal for Resource Category 4.

Response: Appropriate language changes have been made to allow for such recommendations.

Comment: Habitats encompassed by Resource Categories 4 and 5 are the only areas wherein significant increases in fish and wildlife can be realized through habitat improvement. Yet, the mitigation goals for these categories allow continual loss of these areas which possess great potential for improvements in carrying capacity.

Response: The Service appreciates the significance of areas with relatively low existing habitat values with respect to their potential for carrying capacity improvements. In fact, the Service may recommend improvement of these areas' habitat values to mitigate for unavoidable losses in Resource Catorgories 2 and 3. In addition, where these areas are included in a project planning area and are not appropriate for mitigation efforts, the Service will recommend that all opportunities for enhancement of these areas be thoroughly considered and included in project plans, where practicable.

We have amended the policy to include the above guidance.

Comment: Resource Category 5 is confusing and unnecessary. All habitat has some value, no matter how low. It should be redefined or deleted.

Response: We agree. This resource category has been deleted from the final policy.

C. Mitigation Planning Procedures

1. *Mitigation Goals*

Comment: Developers, Federal resource agencies, and the public should participate with the Service and State agencies in making Resource Category determinations and in developing mitigation proposals.

Response: Developers, as well as other members of the public, may provide information that will assist the Service in making Resource Category determinations. This opportunity has been noted in the final policy statement. Moreover, where these parties' inputs will significantly aid in development of mitigation proposals that will adequately satisfy mitigation planning goals, the Service will welcome their input.

Comment: It is hoped that reclassification of habitats in Resource Category 3 to Resource Categories 2 or 1 can be readily employed if and when certain habitats become more scarce.

Response: Resource Category determinations are made on the basis of conditions likely to occur without the project. If those conditions later change, the Resource Category of a given habitat can be redetermined.

However, once a mitigation plan in connection with a given project has been agreed upon, the U.S. Fish and Wildlife Service will not provide new or additional recommendations except under limited circumstances as outlined in the policy under the scope section.

2. *Impact Assessment Methods*

Comment: The policy does not appear to recognize that development activities may also show positive environmental effects. For example, cleared spaces beneath power lines can provide browsing areas for wildlife. Such positive effects should be factored into the mitigation assessment process.

Response: We agree. This point has been included in the final policy statement. The final policy further indicates that the Service and other State and Federal resource agencies shall make the determination of whether a biological change constitutes a beneficial or adverse impact. However, when determining mitigation needs for a planning area, the Service will utilize these policy guidelines to determine whether these positive effects can be applied towards mitigation.

Comment: The draft policy indicates "no net loss" as a goal for certain Resource Categories but it is unclear in defining the time period allowed to restore the land to its original value as in the case of strip mining operations. Maintenance of "no net loss" throughout the life of a long-term operation is not possible.

Response: The policy states that the net biological impact of a specific project proposal is the difference in predicted habitat value between the future with the action and the future without the action. This is based on the procedures established by the Water Resources Council's Principles and Standards. The future with the project determination includes consideration of losses during the life of the project. Under the policy, if the disturbed habitat is of sufficient value for evaluation species to warrant a Resource Category 2 or 3 level determination, the Service will provide recommendations for "no net loss" over the life of the project. The ability of the project sponsor to achieve this goal depends on many factors that cannot be predicted in advance. In many cases, it will be possible to achieve this goal. No change was necessary.

Comment: The with and without analyses should make allowances for human activities and natural species successions which can reasonably be expected to take place in the project area.

Response: We agree. Appropriate changes have been made in this policy.

Comment: Many commentors disagreed with the emphasis placed on the *Habitat Evaluation Procedures* (HEP) within the Service policy statement. Some commentors felt it should be de-emphasized, whereas others felt it deserved further emphasis.

Response: Although references to the more technical aspects of HEP have been deleted, the methodology itself remains one of the Service's more important impact assessment tools. The policy does not recommend exclusive use of HEP, since time or resource contraints may, in some cases, show alternative methods to be more practical. Where HEP habitat value assessments do not fully capture important biological characteristics within a planning area, Service personnel will use supplemental data, methodologies, and/or professional judgment to develop appropriate mitigation proposals.

Comment: What are the "other habitat evaluation systems" alluded to in the policy's section on impact assessment methods? This reference is very vague.

Response: Other systems can include the Habitat Evaluation System (HES) developed by the Department of the Army, and the Instream flow Incremental Methodology (IFIM) of the U.S. Fish and Wildlife Service. Additional systems are referenced by the Water Resources Council in a draft document entitled, "Analysis of

Wetland Evaluation Procedures" and other publications. This information is not appropriate for inclusion into the policy so no change was made.

Comment: If other methodologies are found to be more appropriate for use than the Instream Flow Incremental Methodology (IFIM) for measuring flow impacts, they should be used.

Response: We agree. The final policy does state, however, that consideration should be given to the use of the IFIM.

Comment: Hopefully, this policy will stop the piecemeal destruction of valuable habitat, especially in areas like the Florida Keys where insidious lot-by-lot development continues in low wetland sites with the concurrence of the U.S. Fish and Wildlife Service.

Response: The Service does not concur with piecemeal development where significant resource losses will occur. Cumulative impacts are addressed by this policy. The Service is sensitive to this loss of habitat and will seek mitigation consistent with this policy. No change was necessary.

Comment: Population information should be included as an additional factor in determining mitigation requirements.

Response: We agree. Although population mitigation was an implicit part of the proposed policy, further language clarifying this point has been added to the final policy statement.

Comment: Professional judgment should be used as an alternative method for assessing project impacts.

Response: We agree that this is a valuable method that has been in use for many years. It is difficult to improve on informed and considered scientific judgment by an expert. The Service will continue to rely heavily on this approach. The policy was changed to reflect this emphasis.

3. *Mitigation Recommendations*

Comment: Service recommendations should be timely.

Response: The proposed and final policy specifically require Service personnel to present mitigation recommendations "* * * at the earliest possible stage of project planning to assure maximum consideration." This point has been echoed throughout Service management documents. Service personnel can generally provide timely guidance provided developers make a point of notifying them of proposed projects still in the planning stage and provided Federal action agencies supply sufficient transfer funding with which to conduct environmental investigations. Under Section 2(e) of the Fish and Wildlife Coordination Act, Federal action agencies are authorized to transfer funds to the Service "* * * as may be necessary to conduct all or part of the investigations required to carry out the purposes of * * * (Section 2 of the Act)." The Service uses these transfer funds to conduct project-specific investigations.

Comment: Requiring field biologists to consider cost-effectiveness in providing mitigation recommendations is beyond their capability and may conflict with the lead agencies' role as the determiner of overall public interest. Habitat protection should be a higher priority than cost-effectiveness.

Response: The proposed policy did not require a cost-effectiveness analysis by Service biologists in a formal sense. We fully agree that Service personnel must perceive their responsibility to be analysis and recommendations based on the biological aspects of project proposals. There is no intent to require Service biologists to do a formal economic analysis for which they are not trained nor for which there is clear legislative direction. However, the Service has a responsibility to the public to give consideration to cost while recommending ways to conserve fish and wildlife. The policy has been changed to reflect this need for consideration of other factors.

Comment: The Federal action agency should have the option of non-Service expertise to develop mitigation measures in those instances where the Service cannot meet lead agency program requirements.

Response: Although the Service cannot prevent other agencies from utilizing biological expertise from non-Federal sources to develop mitigation plans, the Fish and Wildlife Coordination Act specifically authorizes the Secretary of the Interior to prepare a report and recommendations on the fish and wildlife aspects of projects, including mitigation. This report and recommendations are to receive "full consideration" by the development agency. If the Federal action agency involves the Service early and provides sufficient transfer funds, then the Service should be able to meet their needs. No change in the policy was necessary.

Comment: Several mitigation proposals should be prepared for each alternative structural or non-structural plan.

Response: The Service is willing to prepare multiple proposals provided funds and time are available.

Comment: Some commentors felt that concurrent and proportionate funding of mitigation may not always lead to optimal mitigation and should not be a rigid requirement. Other commentors strongly supported concurrent and proportionate funding.

Response: The Water Resources Council's Principles and Standards require "* * * *at least* concurrent and proportionate implementation with other major project features, except where such concurrent and proportionate mitigation is physically impossible" (emphasis added).

We agree with the Council, and endorse expenditure of funds at an earlier stage of project planning when this will lead to more effective mitigation. Appropriate changes to the policy on this matter have been made.

Comment: Mitigation costs should include the cost of managing the acquired land for the life of the project, and the value of present and future timber and crops on acquired land. In addition, an environmental benefit/cost analysis should be developed for each project, and Congress should not authorize a project unless the project plan includes the proposed mitigation program and all its costs, including the cost of lost timber productivity and other resources.

Response: Costing of projects is determined by the Water Resource Council's Principles and Standards and is therefore beyond the jurisdiction of this policy. We point out that Service policy does not preclude timber harvest or other resource recovery operations on mitigation lands when the activity is compatible with fish and wildlife management objectives.

Comment: The Service mitigation policy should more clearly note that fee-simple land acquisition should be a measure of last resort.

Response: The policy statement has undergone further modification to more clearly stress the conditions when land acquisition is to be recommended by Service personnel. In the future, the Service will place far greater emphasis on developing mitigation recommendations that avoid, minimize, or rectify impacts in order to reduce the need for compensation lands. Amplification of this point may be seen in the section on mitigation planning procedures.

Comment: If some interest in land must be acquired, areas of marginal productivity should be considered first. Such underdeveloped land would benefit from better management of its productive capacity and respond more vigorously than land already at higher levels of production.

Response: We agree that special consideration should be given to marginal lands, and have changed the policy accordingly.

Comment: Who owns land acquired for mitigation purposes?

Response: Depending on the individual circumstances of the project, land acquired through fee-simple title is usually owned either by the Federal or State government and administered by appropriate Federal or State resource agencies. Where wildlife easements are acquired, the land belongs to the property owner, and the easement right to the Federal or State government.

Comment: The policy should require Service personnel to identify the authority to be used in implementing any mitigation recommendations that are made.

Response: The final policy clearly identifies the legal authorities under which the Service is expected to develop mitigation recommendations. In addition, the policy only applies to Service recommendations and is not an instrument directing legal research in individual circumstances. It would be inappropriate to instruct our personnel to indentify the implementing authority for the development agencies which are fully aware of the authorities available to implement Service recommendations. In the case of projects to be authorized by Congress, authorities to implement mitigation can be, and increasingly have been, spelled out.

Comment: The policy neglects to indicate the necessary process if an agency does not agree with Service mitigation recommendations.

Response: This process has already been established for most Federal agencies. If the project planners and the Service field office cannot agree on a modified or substitute proposal for mitigation, the matter often is referred upwards to the next highest level. Higher management levels are then generally able to resolve the issue quickly, although the Federal action agency has the final say. No change was necessary.

Comment: Mitigation recommendations should ensure that habitats which are preserved are adequate in size and contiguous to ensure species survival and ecosystem functioning.

Response: We agree. This point has not, however, been added to the policy since it is standard operating procedure at the field level.

Comment: Improvement of public use prospects within a project area should not be considered mitigation for habitat value losses. Development of public access is legitimate mitigation only when public uses are lost as a result of project action.

Response: We agree. Construction of public access facilities does not replace habitat lost or degraded and may even reduce wildlife habitat and invite degradation by making an area more accessible to more people. Construction of public use facilities may be in the public interest but should not be disguised as mitigation for loss or degradation of wildlife habitat. This point has been added to the policy.

4. *Follow-up*

Comment: The Service should initiate post-project evaluation studies, as well as encourage, support, and participate in these studies.

Response: We agree and will do so within the constraints of time, personnel and cost. The Service will initiate additional follow-up studies when funds are provided by the Federal action agency. The policy has been changed to reflect this.

Comment: Follow-up studies must be designed so as to separate the effects on fish and wildlife populations of implementing mitigation recommendations from other causes of changes in species numbers. This has not been the case in past studies.

Response: We agree in principle, but point out that this is a very difficult task technically, and that the conclusions in this regard rarely withstand vigorous analysis.

Nonetheless, distinguishing the true causes of population changes should be one of the goals of the follow-up study.

Comment: The policy should indicate what actions would occur if post-project evaluation shows mitigation recommendations are not being achieved as agreed to by the developer.

Response: We agree. The policy now includes provisions instructing Service personnel to recommend corrective action in such situations.

Appendix A

No Comments.

Appendix B

Comment: Why not include more intensive management of remaining habitat as a way of reducing net habitat loss?

Response: We agree, and have modified the policy accordingly in the Means and Measures section, which has since been integrated into the body of the final policy.

The section clearly places priority on increased habitat management as a means of replacing habitat losses, and additionally stresses use of existing public lands to accomplish these ends.

Comment: A mitigation recommendation of "No project" is not logical or valid as a mitigation measure.

Response: The Council on Environmental Quality's definition of mitigation, which has been adopted in this policy, clearly states that mitigation includes ". . . avoiding the impact altogether by not taking a certain action or parts of an action. . . ." Obviously, a mitigation recommendation of "No project" falls under this subset of the definition, since a project's impact can be avoided *altogether* by a decision not to construct a project.

Appendix C

Comment: The definition of the word "practicable" should be amended to denote that the burden of identifying alternative mitigation measures and of conducting a searching inquiry into their practicability rests with the Service as well as the Federal action agency.

Response: The policy indicates that the Service will strive to provide mitigation recommendations that represent the best judgment of the Service on the most effective means and measures to achieve the mitigation goal, including consideration of cost.

Comment: A definition for "developments" (as used in Section V.A., "General Principles") should be provided in Appendix C.

Response: "Development" is a general-purpose term encompassing those activities falling under the scope of Service mitigation authorities cited within this policy. For example, if timber harvesting activities require preparation of an EIS, or involves waters of the U.S. and requires the issuance of a Federal permit or license, the Service would provide mitigation recommendations consistent with the policy.

NATIONAL ENVIRONMENTAL POLICY ACT REQUIREMENTS

The Service has prepared an Environmental Assessment of this final policy. Based on an analysis of the Environmental Assessment, the Director of the U.S. Fish and Wildlife Service has concluded that the final action is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347). Thus the policy does not require an Environmental Impact Statement (EIS).

The Environmental Assessment and Finding of No Significant Impact will be furnished upon request.

REGULATORY ANALYSIS

This policy statement has been issued in conformity with the Department of the Interior's rulemaking requirements, which apply to actions meeting the broad definition of a rule set forth in the Administrative Procedures Act, 5 U.S.C.

551(4) and 43 CFR Part 14.2(e) (1980). This statement is not intended to be judicially enforceable. It will not be codified. It does not create private rights. It only guides internal Service administration and is not to be inflexibly applied by Service personnel. The Department had previously determined that the proposed policy was not a significant rule and did not require a regulatory analysis under Executive Order 12044 and 43 Part 14. No significant changes were made in the final policy that required a new determination.

ACKNOWLEDGEMENTS

The primary author of this final policy is John Christian, Leader, Policy Group—Environment, U.S. Fish and Wildlife Service, (202) 343–7151. Primary support for policy development was provided by policy analysts Nancy Chu, Scott Cameron, and Peter Ciborowski; and Ecological Services Washington Office and field personnel. Manuscript preparation was accomplished by Roberta Hissey, Karen Baker, Carol Prescott, and Jinethel Baynes.

Accordingly, the mitigation policy of the U.S. Fish and Wildlife Service is set forth as follows:

U.S. FISH AND WILDLIFE SERVICE MITIGATION POLICY

I. PURPOSE

This document establishes policy for U.S. Fish and Wildlife Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, their habitats, and uses thereof. It will help to assure consistent and effective recommendations by outlining policy for the levels of mitigation needed and the various methods for accomplishing mitigation. It will allow Federal action agencies and private developers to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife resources with other project features and purposes. This policy provides guidance for Service personnel but variations appropriate to individual circumstances are permitted.

This policy supersedes the December 18, 1974, policy statement entitled "Position Paper of the Fish and Wildlife Service Relative to Losses to Fish and Wildlife Habitat Caused by Federally Planned or Constructed Water Resource Developments" and the Service River Basin Studies Manual Release 2.350 entitled "General Bureau Policy on River Basin Studies."

II. AUTHORITY

This policy is established in accordance with the following major authorities: (See Appendix A for other authorities.)

Fish and Wildlife Act of 1956 (16 U.S.C. 742(a)–754). This Act authorizes the development and distribution of fish and wildlife information to the public, Congress, and the President, and the development of policies and procedures that are necessary and desirable to carry out the laws relating to fish and wildlife including: (1) ". . . take such steps as may be required for the development, advancement, management, conservation, and protection of the fisheries resources;" and (2) ". . . take such steps as may be required for the development, management, advancement, conservation, and protection of wildlife resources through research . . . and other means."

Fish and Wildlife Coordination Act (16 U.S.C. 661–667(e)). This Act authorizes the U.S. Fish and Wildlife Service, National Marine Fisheries Service (NMFS), and State agencies responsible for fish and wildlife resources to investigate all proposed Federal undetakings and non-Federal actions needing a Federal permit or license which would impound, divert, deepen, or otherwise control or modify a stream or other body of water and to make mitigation and enhancement recommendations to the involved Federal agency. "Recommendations . . . shall be as specific as practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages." In addition, the Act requires that wildlife conservation be coordinated with other

features of water resource development programs.

Determinations under this authority for specific projects located in estuarine areas constitute compliance with the provisions of the Estuary Protection Act. (See Appendix A.)

Watershed Protection and Flood Prevention Act (16 U.S.C. 1001–1009). This Act allows the Secretary of the Interior to make surveys, investigations, and ". . . prepare a report with recommendations concerning the conservation and development of wildlife resources . . ." on small watershed projects.

National Environmental Policy Act of 1969 (42 U.S.C. 4321–4347). This Act and its implementing regulations (40 CFR Part 1500–1508) requires that the U.S. Fish and Wildlife Service be notified of all major Federal actions affecting fish and wildlife resources and their views and recommendations solicited. Upon completion of a draft Environmental Impact Statement, the Service is required to review it and make comments and recommendations, as appropriate. In addition, the Act provides that "the Congress authorizes and directs that, to the fullest extent possible . . . all agencies of the Federal Government shall . . . identify and develop methods and procedures . . . which will ensure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations."

III. SCOPE

A. Coverage

This policy applies to all activities of the Service related to the evaluation of impacts of land and water developments and the subsequent recommendations to mitigate those adverse impacts except as specifically excluded below. This includes: (1) investigations and recommendations for all actions requiring a federally issued permit or license that would impact waters of the U.S.; (2) all major Federal actions significantly affecting the quality of the human environment; and (3) other Federal actions for which the Service has legislative authority or executive direction for involvement including, but not limited to: coal, minerals, and outer continental shelf lease sales or Federal approval of State permit programs for the control of discharges of dredged or fill material.

B. Exclusions

This policy does not apply to threatened or endangered species. The requirements for threatened and endangered species are covered in the Endangered Species Act of 1973 and accompanying regulations at 50 CFR Parts 17, 402, and 424. Under Section 7 of the Endangered Species Act, as amended, all Federal agencies shall ensure that activities authorized, funded, or carried out by them are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat. Mitigating adverse impacts of a project would not in itself be viewed as satisfactory agency compliance with Section 7. Furthermore, it is clear to the Service that Congress considered the traditional concept of mitigation to be inappropriate for Federal activities impacting listed species or their critical habitat.

This policy does not apply to Service recommendations for Federal projects completed or other projects permitted or licensed prior to enactment of Service authorities (unless indicated otherwise in a specific statute) or specifically exempted by them and not subject to reauthorization or renewal. It also does not apply where mitigation plans have already been agreed to be the Service, except where new activities or changes in current activities would result in new impacts or where new authorities, new scientific information, or developer failure to implement agreed upon recommendations make it necessary. Service personnel involved in land and water development investigations will make a judgment as to the applicability of the policy for mitigation plans under development and not yet agreed upon as of the date of final publication of this policy.

Finally, this policy does not apply to Service recommendations related to the enhancement of fish and wildlife resources. Recommendations for measures which improve fish and wildlife resources beyond that which would exist without the project and which cannot be used to satisfy the

appropriate mitigation planning goal should be considered as enhancement measures. The Service strongly supports enhancement of fish and wildlife resources. The Service will recommend that all opportunities for fish and wildlife resources enhancement be thoroughly considered and included in project plans, to the extent practicable.

IV. DEFINITION OF MITIGATION

The President's Council on Environmental Quality defined the term "mitigation" in the National Environmental Policy Act regulations to include: "(a) avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments." (40 CFR Part 1508.20(a–e)).

The Service supports and adopts this definition of mitigation and considers the specific elements to represent the desirable sequence of steps in the mitigation planning process. (See Appendix B for definitions of other important terms necessary to understand this policy.)

V. MITIGATION POLICY OF THE U.S. FISH AND WILDLIFE SERVICE

The overall goals and objectives of the Service are outlined in the Service Management Plan and an accompanying Important Resource Problems document which describes specific fish and wildlife problems of importance for planning purposes. Goals and objectives for Service activities related to land and water development are contained in the Habitat Preservation Program Management Document. The mitigation policy was designed to stand on its own; however, these documents will be consulted by Service personnel to provide the proper perspective for the Service mitigation policy. They are available upon request from the Director, U.S. Fish and Wildlife Service, Washington, D.C. 20240.

A. General Policy

The mission of the U.S. Fish and Wildlife Service is to:

PROVIDE THE FEDERAL LEADERSHIP TO CONSERVE, PROTECT AND ENHANCE FISH AND WILDLIFE AND THEIR HABITAT FOR THE CONTINUING BENEFIT OF THE PEOPLE

The goal of Service activities oriented toward land and water development responds to Congressional direction that fish and wildlife resource conservation receive equal consideration and be coordinated with other features of Federal resource development and regulatory programs through effective and harmonious planning, development, maintenance and coordination of fish and wildlife resource conservation and rehabilitation in the United States, its territories and possessions. The goal is to:

CONSERVE, PROTECT AND ENHANCE FISH AND WILDLIFE AND THEIR HABITATS AND FACILITATE BALANCED DEVELOPMENT OF THIS NATION'S NATURAL RESOURCES BY TIMELY AND EFFECTIVE PROVISION OF FISH AND WILDLIFE INFORMATION AND RECOMMENDATIONS

Fish and wildlife and their habitats are public resources with clear commercial, recreational, social, and ecological value to the Nation. They are conserved and managed for the people by State, Federal and Indian tribal Governments. If land or water developments are proposed which may reduce or eliminate the public benefits that are provided by such natural resources, then State and Federal resource agencies and Indian tribal agencies have a responsibility to recommend means and measures to mitigate such losses. Accordingly:

IN THE INTEREST OF SERVING THE PUBLIC, IT IS THE POLICY OF THE U.S. FISH AND WILDLIFE SERVICE TO SEEK TO MITIGATE LOSSES OF FISH, WILDLIFE, THEIR HABITATS, AND USES THEREOF FROM LAND AND WATER DEVELOPMENTS

In administering this policy, the Service will strive to provide information and recommendations that fully support the Nation's need for fish and wildlife resource conservation as well as sound economic and social development through balanced multiple use of the Nation's natural resources. The Service will actively seek to facilitate needed development and avoid conflicts and delays through early involvement in land and water development planning activities in advance of proposals for specific projects or during the early planning and design stage of specific projects.

This should include early identification of resource areas containing high and low habitat values for important species and the development of ecological design information that outlines specific practicable means and measures for avoiding or minimizing impacts. The former can be used by developers to site projects in the least valuable areas. This could possibly lower total project costs to development interests. These actions are part of good planning and are in the best public interest.

The early provision of information to private and public agencies in a form which enables them to avoid or minimize fish and wildlife losses as a part of initial project design is the preferred form of fish and wildlife conservation.

B. U.S. Fish and Wildlife Service Mitigation Planning Goals by Resource Category

The planning goals and guildelines that follow will be used to guide Service recommendations on mitigation of project impacts. Four Resource Categories are used to indicate that the level of mitigation recommended will be consistent with the fish and wildlife resource values involved.

The policy covers impacts to fish and wildlife populations, their habitat and the human uses thereof. However, the primary focus in terms of specific guidance is on recommendations related to habitat value losses. In many cases, compensation of habitat value losses should result in replacement of fish and wildlife populations and human uses. But where it does not, the Service will recommend appropriate additional means and measures.

RESOURCE CATEGORY 1

a. Designation Criteria

Habitat to be impacted is of high value for evaluation species and is unique and irreplaceable on a national basis or in the ecoregion section.

b. Mitigation Goal

No Loss of Existing Habitat Value.

c. Guideline

The Service will recommend that all losses of existing habitat be prevented as these one-of-a-kind areas cannot be replaced. Insignificant changes that do not result in adverse impacts on habitat value may be acceptable provided they will have no significant cumulative impact.

RESOURCE CATEGORY 2

a. Designation Criteria

Habitat to be impacted is of high value for evaluation species and is relatively scarce or becoming scarce on a national basis or in the ecoregion section.

b. Mitigation Goal

No Net Loss of In-Kind Habitat Value.

c. Guideline

The Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service will recommend that those losses be compensated by replacement of the same kind of habitat value so that the total loss of such in-kind habitat value will be eliminated.

Specific ways to achieve this planning goal include: (1) physical modification of replacement habitat to convert it to the same type lost; (2) restoration or rehabilitation of previously altered habitat; (3) increased management of similar replacement habitat so that the in-kind value of the lost habitat is replaced, or (4) a combination of these measures. By replacing habitat value losses with similar habitat values, populations of species associated with that habitat may remain relatively stable in the area over time. This is generally referred to as in-kind replacement.

Exceptions: An exception can be made to this planning goal when: (1) different habitats and species available for replacement are determined to be of greater value than those lost, *or* (2) in-kind replacement is not physically or biologically attainable in the ecoregion section. In either case, replacement involving different habitat kinds may be recommended provided that the total value of the habitat lost is recommended for replacement (see the guideline for Category 3 mitigation below).

RESOURCE CATEGORY 3

a. Designation Criteria

Habitat to be impacted is of high to medium value for evaluation species and is relatively abundant on a national basis.

b. Mitigation Goal

No Net Loss of Habitat Value While Minimizing Loss of In-Kind Habitat Value

c. Guideline

The Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend that those losses be compensated by replacement of habitat value so that the total loss of habitat value will be eliminated.

It is preferable, in most cases, to recommend ways to replace such habitat value losses in-kind. However, if the Service determines that in-kind replacement is not desirable or possible, then other specific ways to achieve this planning goal include: (1) substituting different kinds of habitats, or (2) increasing management of different replacement habitats so that the value of the lost habitat is replaced. By replacing habitat value losses with different habitats or increasing management of different habitats, populations of species will be different, depending on the ecological attributes of the replacemnet habitat. This will result in no net loss of total habitat value, but may result in significant differences in fish and wildlife populations. This is generally referred to as out-of-kind replacement.

RESOURCE CATEGORY 4

a. Designation Criteria

Habitat to be impacted is of medium to low value for evaluation species.

b. Mitigation Goal

Minimize Loss of Habitat Value.

c. Guideline

The Service will recommend ways to avoid or minimize losses. If losses are likely to occur, then the Service will recommend ways to immediately rectify them or reduce or eliminate them over time. If losses remain likely to occur, then the Service may not make a recommendation for compensation, depending on the significance of the potential loss.

However, because these areas posses relatively low habitat values, they will likely exhibit the greatest potential for significant habitat value improvements. Service personnel will fully investigate these areas' potential for improvement, since they could be used to mitigate Resource Category 2 and 3 losses.

C. Mitigation Planning Policies

1. State-Federal Partnership

a. The U.S. Fish and Wildlife Service will fully coordinate activities with those State agencies responsible for fish and wildlife resources, the National Marine Fisheries Service (NMFS) and the Environmental Protection Agency (EPA) related to the investigation of project proposals and development of mitigation recommendations for resources of concern to the State, NMFS or EPA.

b. Service personnel will place special emphasis on working with State agencies responsible for fish and wildlife resources, NMFS and EPA to develop compatible approaches and to avoid duplication of efforts.

2. Resource Category Determinations

a. The Service will make Resource Category determinations as part of the mitigation planning process. Such determinations will be made early in the planning process and transmitted to the Federal action agency or private developer to aid them in their project planning, to the extent practicable.

b. Resource Category determinations will be made through consulation and coordination with State agencies responsible for fish and wildlife resources and other Federal resource agencies, particularly the National Marine Fisheries Service and the Environmental Protection Agency, whenever resources of concern to those groups are involved. Where other elements of the public, including development groups, have information that can assist in making such determinations, the Service will welcome such information.

c. All Resource Category determinations will contain a technical rationale consistent with the designation criteria. The rationale will: (1) outline the reasons why the evaluation species were selected; (2) discuss the value of the habitat to the evaluation species; and (3) discuss and contrast the relative scarcity of the fish and wildlife resource on a national and ecoregion section basis.

Note.—If the State agency responsible for fish and wildlife resources wishes to outline scarcity on a more local basis, U.S. Fish and Wildlife Service personnel should assist in developing such rationale, whenever practicable.)

d. When funding, personnel, and available information make it practicable, specific geographic areas or, alternatively, specific habitat types that comprise a given Resource Category should be designated in advance of development. Priority for predesignation will be placed on those areas that are of high value for evaluation species and are subject to development pressure in the near future. Such predesignations can be used by developers or regulators to determine the least valuable areas for use in project planning and siting considerations.

e. The following examples should be given special consideration as either Resource Category 1 or 2:

(1) Certain habitats within Service-identified Important Resource Problem (IRP) areas. Those IRPs dealing with threatened or endangered species are not covered by this policy. (See Scope)

(2) Special aquatic and terrestrial sites including legally designated or set-aside

areas such as sanctuaries, fish and wildlife management areas, hatcheries, and refuges, and other aquatic sites such as floodplains, wetlands, mudflats, vegetated shallows, coral reefs, riffles and pools, and springs and seeps.

3. Impact Assessment Principles

a. Changes in fish and wildlife productivity or ecosystem structure and function may not result in a biologically adverse impact. The determination as to whether a biological change constitutes an adverse impact for which mitigation should be recommended is the responsibility of the Service and other involved Federal and State resource agencies.

b. The net biological impact of a development proposal (or alternatives) is the difference in predicted biological conditions between the future with the action and the future without the action. If the future without the action cannot be reasonably predicted and documented by the project sponsor, then the Service analysis should be based on biological conditions that would be expected to exist over the planning period due to natural species succession or implementation of approved restoration/improvement plans or conditions which currently exist in the planning area.

c. Service review of project impacts will consider, whenever practicable:

(1) The total long-term biological impact of the project, including any secondary or indirect impacts regardless of location; and (2) any cumulative effects when viewed in the context of existing or anticipated projects.

d. The Habitat Evaluation Procedures will be used by the Service as a basic tool for evaluating project impacts and as a basis for formulating subsequent recommendations for mitigation subject to the exemptions in the Ecological Services Manual (100 ESM 1). When the Habitat Evaluation Procedures do not apply, then other evaluation systems may be used provided such use conforms with policies provided herein.

e. In those cases where instream flows are an important determinant of habitat value, consideration should be given to the use of the Service's Instream Flow Incremental Methodology to develop instream flow mitigation recommendations, where appropriate.

f. Where specific impact evaluation methods or mitigation technologies are not available, Service employees shall continue to apply their best professional judgment to develop mitigation recommendations.

4. Mitigation Recommendations

a. The Service may recommend support of projects or other proposals when the following criteria are met:

(1) They are ecologically sound;

(2) The least environmentally damaging reasonable alternative is selected;

(3) Every reasonable effort is made to avoid or minimize damage or loss of fish and wildlife resources and uses;

(4) All important recommended means and measures have been adopted with guaranteed implementation to satisfactorily compensate for unavoidable damage or loss consistent with the appropriate mitigation goal; and

(5) For wetlands and shallow water habitats, the proposed activity is clearly water dependent and there is a demonstrated public need.

The Service may recommend the "no project" alternative for those projects or other proposals that do not meet all of the above criteria and where there is likely to be a significant fish and wildlife resource loss.

b. Recommendations will be presented by the Service at the earliest possible stage of project planning to assure maximum consideration. The Service will strive to provide mitigation recommendations that represent the best judgment of the Service, including consideration of cost, on the most effective means and measures of satisfactorily achieving the mitigation planning goal. Such recommendations will be developed in cooperation with the Federal action agency or private developer responsible for the project, whenever practicable, and will place heavy reliance on cost estimates provided by that Federal action agency or private developer.

c. The Service will recommend that the Federal action agency include designated funds for all fish and wildlife resource mitigation (including, but not limited to, Service investigation costs, initial development costs and continuing operation, maintenance, replacement, and administrative costs) as part of the initial and any alternative project plans and that mitigation funds (as authorized and appropriated by Congress for Federal projects) be spent concurrently and proportionately with overall project construction and operation funds throughout the life of the project.

Note.—Prevention of losses may necessitate expenditure of funds at an earlier stage of project planning. This is acceptable and preferred.

d. Service mitigation recommendations will be made under an explicit expectation that these means and measures: (1) would be the ultimate responsibility of the appropriate Federal action agency to implement or enforce; and (2) would provide for a duration of effectiveness for the life of the project plus such additional time required for the adverse effects of an abandoned project to cease to occur.

e. Land acquisition in fee title for the purpose of compensation will be recommended by the Service *only* under one or more of the following three conditions:

(1) When a change in ownership is necessary to guarantee the future conservation of the fish and wildlife resource consistent with the mitigation goal for the specific project area; *or*

(2) When other means and measures for mitigation (see Section 5 below) will not compensate habitat losses consistent with the mitigation goal for the specific project area; *or*

(3) When land acquisition in fee title is the most cost-effective means that may partially or completely achieve the mitigation goal for the specific project area.

Service recommendations for fee title land acquisition will seek to identify mitigation lands with marginal economic potential.

f. First priority will be given to recommendation of a mitigation site within the planning area. Second priority will be given to recommendation of a mitigation site in proximity to the planning area within the same ecoregion section. Third priority will be given to recommendation of a mitigation site elsewhere within the same ecoregion section.

g. Service personnel will fully support a variety of uses on mitigation lands where such uses are compatible with dominant fish and wildlife uses and, for Federal wildlife refuges, are consistent with the provisions of the Refuge Recreation Act and the National Wildlife Refuge Administration Act. However, it may be in the best public interest to recommend limiting certain uses that would significantly decrease habitat value for species of high public interest. In such cases, the Service may recommend against such incompatible uses.

h. Measures to increase recreation values will not be recommended by Service personnel to compensate for losses of habitat value. Recreation use losses not restored through habitat value mitigation will be addressed through separate and distinct recommended measures to offset those specific losses.

i. The guidelines contained in this policy do not apply to threatened or endangered species. However, where both habitat and endangered or threatened species impacts are involved,

Service personnel shall fully coordinate Environment efforts with Endangered Species efforts to provide timely, consistent, and unified recommendations for resolution of fish and wildlife impacts, to the extent possible. More specifically, Environment and Endangered Species personnel shall coordinate all related activities dealing with investigations of land and water developments. This includes full use of all provisions that can expedite Service achievement of "one-stop shopping," including coordinated early planning involvement, shared permit review activities, consolidated permit reporting, and consolidated flow of pre-project information to developers, consistent with legislative mandates and deadlines.

j. The Service will place high priority on and continue to develop and implement procedures for reducing delays and conflicts in permit related activities. Such procedures will include, but not be limited to:

(1) Joint processing of permits.

(2) Resource mapping.

(3) Early provision of ecological design information.

(4) Involvement in Special Area Management Planning.

k. The Service will encourage predevelopment compensation actions by Federal action agencies which can be used to offset future unavoidable losses for lands or waters not adequately protected by an existing law, policy, or program.

Banking of habitat value for the express purpose of compensation for unavoidable future losses will be considered to be a mitigation measure and not an enhancement measure. Withdrawals from the mitigation "bank" to offset future unavoidable losses will be based on habitat value replacement, not acreage or cost for land purchase and management.

5. Mitigation Means and Measures

Mitigation recommendations can include, but are not limited to, the types of actions presented below. These means and measures are presented in the general order and priority in which they should be recommended by Service personnel with the exception of the "no project" alternative. (See Section 4(a)).

a. Avoid the impact

(1) Design project to avoid damage or loss of fish and wildlife resources including management practices such as timing of activities or structural features such as multiple outlets, passage or avoidance structures and water pollution control facilities.

(2) Use of nonstructural alternative to proposed project.

(3) No project.

b. Minimize the impact

(1) Include conservation of fish and wildlife as an authorized purpose of Federal projects.

(2) Locate at the least environmentally damaging site.

(3) Reduce the size of the project.

(4) Schedule timing and control of initial construction operations and subsequent operation and maintenance to minimize disruption of biological community structure and function.

(5) Selective tree clearing or other habitat manipulation.

(6) Control water pollution through best management practices.

(7) Time and control flow diversions and releases.

(8) Maintain public access.

(9) Control public access for recreational or commercial purposes.

(10) Control domestic livestock use.

c. Rectify the impact

(1) Regrade disturbed areas to contours which provide optimal fish and wildlife habitat or approximate original contours.

(2) Seed, fertilize and treat areas as necessary to restore fish and wildlife resources.

(3) Plant shrubs and trees and other vegetation to speed recovery.

(4) Control polluted spoil areas.

(5) Restock fish and wildlife resources in repaired areas. Fish stocking or introductions will be consistent with the Service Fish Health Policy (January 3, 1978).

d. Reduce or eliminate the impact over time

(1) Provide periodic monitoring of mitigation features to assure continuous operation.

(2) Assure proper training of project personnel in the operations of the facility to preserve existing or restored fish and wildlife resources at project sites.

(3) Maintain or replace equipment or structures so that future loss of fish and wildlife resources due to equipment or structure failure does not occur.

e. Compensate for impacts

(1) Conduct wildlife management activities to increase habitat values of existing areas, with project lands and nearby public lands receiving priority.

(2) Conduct habitat construction activities to fully restore or rehabilitate previously altered habitat or modify existing habitat suited to evaluation species for purpose of completely offsetting habitat value losses.

(3) Build fishery propagation facilities.

(4) Arrange legislative set-aside or protective designation for public lands.

(5) Provide buffer zones.

(6) Lease habitat.

(7) Acquire wildlife easements.

(8) Acquire water rights.

(9) Acquire land in fee title.

6. Follow-up

The Service encourages, supports, and will initiate, whenever practicable, post-project evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. The Service will initiate additional follow-up studies when funds are provided by the Federal action agency.

In those instances where Service personnel determine that Federal agencies or private developers have not carried out those agreed upon mitigation means and measures, then the Service will request the responsible Federal action agency to initiate corrective action.

APPENDIX A—OTHER AUTHORITIES AND DIRECTION FOR SERVICE MITIGATION RECOMMENDATIONS

LEGISLATIVE

Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.). The 1977 amendments require the Fish and Wildlife Service ". . . upon request of the Governor of a State, and without reimbursement, to provide technical assistance to such State in developing a Statewide (water quality planning) program and in implementing such program after its approval." In addition, this Act requires the Service to comment on proposed State permit programs for the control of discharges of dredged or fill material and to comment on all Federal permits within 90 days of receipt.

Federal Power Act of 1920, as amended (16 U.S.C. 791(a), 803, 811). This Act authorizes the Secretary of the Interior to impose conditions on licenses issued for hydroelectric projects within specific withdrawn public lands. The Secretary is given specific authority to prescribe fishways to be constructed, maintained, and operated at the licensee's expense.

Estuary Protection Act (16 U.S.C. 1221–1226). This Act requires the Secretary of the Interior to review all project plans and reports for land and water resource development affecting estuaries and to make recommendations for conservation, protection, and enhancement.

Coastal Zone Management Act of 1972 (16 U.S.C. 1451–1464). This Act

requires the Secretary of Commerce to obtain the views of Federal agencies affected by the program, including the Department of the Interior, and to ensure that these views have been given adequate consideration before approval of Coastal Zone Management Plans. The Service provides the Department's views about fish and wildlife resources. Pursuant to the Coastal Zone Management Act Amendments of 1980 (Pub. L. 96-464) the Department of Interior provides comments on Federal grants to help States protect and preserve coastal areas because of their ". . . conservational, recreational, ecological or aesthetic values." The 1980 Amendments also authorize the Department of Interior to enter into Special Area Management Planning to ". . . provide for increased specificity in protecting natural resources, reasonable coast dependent economic growth . . . and improved predictability in government decisionmaking."

Water Bank Act (16 U.S.C. 1301-1311). This Act requires that the Secretary of Agriculture ". . . shall consult with the Secretary of Interior and take appropriate measures to insure that the program carried out . . . is in harmony with wetlands programs administered by the Secretary of the Interior."

Wild and Scenic Rivers Act (16 U.S.C. 1271-1287). This Act requires the Secretary of the Interior to comment on such proposals. The Fish and Wildlife Service provides the Department's views with regard to fish and wildlife resources.

Geothermal Steam Act of 1970 (30 U.S.C. 1001-1025). This Act requires that the Fish and Wildlife Service recommend to the Secretary those lands that shall not be leased for geothermal development by reason of their status "as . . . a fish hatchery administered by the Secretary, wildlife refuge, wildlife range, game range, wildlife management area, waterfowl production area, or for lands acquired or reserved for the protection and conservation of fish and wildlife that are threatened with extinction."

Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 et seq.). This Act requires the Department of the Interior to regulate surface mining and reclamation at existing and future mining areas. The Fish and Wildlife Service provides the Department with technical assistance regarding fish and wildlife aspects of Department programs on active and abandoned mine lands, including review of State regulatory submissions and mining plans, and comments on mining and reclamation plans.

Outer Continental Shelf Lands Act Amendments of 1978 (43 U.S.C. 1801). This Act requires the Secretary of the Interior to manage an environmentally sound oil and natural gas development program on the outer continental shelf. The Fish and Wildlife Service provides recommendations for the Department regarding potential ecological impacts before leasing in specific areas and contributes to environmental studies undertaken subsequent to leasing.

Mineral Leasing Act of 1920, as amended (30 U.S.C. 185). This Act authorizes the Secretary of the Interior to grant rights-of-way through Federal lands for pipelines transporting oil, natural gas, synthetic liquids or gaseous fuels, or any other refined liquid fuel. Prior to granting a right-of-way for a project which may have a significant impact on the environment, the Secretary is required by this Act to request and review the applicant's plan for construction, operation, and rehabilitation of the right-of-way. Also, the Secretary is authorized to issue guidelines and impose stipulations for such projects which shall include, but not be limited to, ". . . requirements for restoration, revegetation and curtailment or erosion of surface land; . . . requirements designed to control or prevent damage to the environment (including damage to fish and wildlife habitat); and . . . requirements to protect the interests of individuals living in the general area of the right-of-way or permit who rely on the fish, wildlife and biotic resources of the area for subsistence purposes."

Cooperative Unit Act (16 U.S.C. 753(a)-753(b)). This Act provides for cooperative programs for research and training between the Fish and Wildlife Service, the States, and universities.

Airport and Airway Development Act (49 U.S.C. 1716). This Act requires the Secretary of Transportation to ". . . consult with the Secretary of the Interior with regard to the effect that any project . . . may have on natural resources including, but not limited to, fish and wildlife, natural, scenic, and recreation assets, water and air quality, and other factors affecting the environment . . .".

Department of Transportation Act (49 U.S.C. 1653(f)). This Act makes it national policy that ". . . special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites . . .," and requires that the Secretary of Transportation ". . . cooperate and consult with the Secretary of the Interior in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed." The Department of Transportation projects using protected lands cannot be approved unless there are no feasible and prudent alternatives to avoid such use and, if none, all possible measures to minimize harm have been considered.

EXECUTIVE

President's Water Policy Message (June 6, 1978). This Message directs the Secretary of the Interior to promulgate procedures for determination of measures to prevent or to mitigate losses of fish and wildlife resources.

Water Resources Council's *Final Rules; Principles and Standards for Water and Related Land Resources Planning—Level C* (September 29, 1980). These rules reiterate the importance of participation in the development planning process by interested Federal agencies, including the Department of the Interior. This participation includes review, coordination, or consultation required under various legislative and executive authorities. Under these rules, "Consideration is to be given to mitigation (as defined in 40 CFR 1508.20) of the adverse effects of each alternative plan. Appropriate mitigation is to be included where suitable as determined by the agency decisionmaker. Mitigation measures included are to be planned for at least concurrent and proportionate implementation with other major project features, except where such concurrent and proportionate mitigation is physically impossible. In the latter case, the reasons for deviation from this rule are to be presented in the planning report, and mitigation is to be planned for the earliest possible implementation. Mitigation for fish and wildlife and their habitat is to be planned in coordination with Federal and State fish and wildlife agencies in accordance with the Fish and Wildlife Coordination Act of 1958 (16 U.S.C. 661-664) (sic)."

Executive Order 11990—Protection of Wetlands (May 24, 1977). This Executive Order requires that each Federal agency ". . . take action to minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency's responsibilities for: (1) acquiring, managing and disposing of Federal lands and facilities; and (2) providing federally undertaken, financed or assisted construction and improvements; and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulation and licensing activities." Relevant wetland concerns and values include, but are not

limited to, maintenance of natural systems and long-term productivity of existing flora and fauna, habitat diversity, hydrological utility, fish, wildlife, timber, and food. Under this Order, a developmental project in a wetland may proceed only if no practicable alternatives can be ascertained and if the proposal . . . includes all practicable measures to minimize harm to the wetland that may result from its use."

Executive Order 11988—Floodplain Management (May 24, 1977). This Executive Order requires that Federal agencies take floodplain management into account when formulating or evaluating water or land use plans and that these concerns be reflected in the budgets, procedures, and regulations of the various agencies. This Order allows developmental activities to proceed in floodplain areas only when the relevant agencies have ". . . considered alternatives to avoid adverse effects and incompatible development in the floodplains . . ." or when, in lieu of this, they have ". . . designed or modified their actions in order to minimize potential harm to or within the floodplain . . .".

Executive Order 11987—Exotic Organisms (May 24, 1977). This Executive Order requires that Federal agencies shall restrict, to the extent permitted by law, the introduction of exotic species into the lands or waters which they own, lease, or hold for purposes of administration, and encourage the States, local governments, and private citizens to do the same. This Executive Order also requires Federal agencies to restrict, to the extent permitted by law, the importation of exotic species and to restrict the use of Federal funds and programs for such importation. The Secretary of the Interior, in consultation with the Secretary of Agriculture, is authorized to develop by rule or regulation a system to standardize and simplify the requirements and procedures appropriate for implementing this Order.

NATIONAL/INTERNATIONAL TREATIES

Federal Trust Responsibility to Indian Tribes. This responsibility is reflected in the numerous Federal treaties with the Indian tribes. These treaties have the force of law. Protection of Indian hunting and fishing rights necessitates conservation of fish and wildlife and their habitat.

Convention Between the United States and Japan (September 19, 1974). This Treaty endorses the establishment of sanctuaries and fixes preservation and enhancement of migratory bird habitat as a major goal of the signatories.

Convention Between the United States and the Union of Soviet Socialist Republics Concerning the Conservation of Migratory Birds and Their Environments (November 8, 1978). This Treaty endorses the establishment of sanctuaries, refuges, and protected areas. It mandates reducing or eliminating damage to all migratory birds. Furthermore, it provides for designation of special areas for migratory bird breeding, wintering, feeding, and molting, and commits the signatories to ". . . undertake measures necessary to protect the ecosystems in these areas . . . against pollution, detrimental alteration and other environmental degradation." Implementing legislation, Pub. L. 95–616, was passed in the United States in 1978.

Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (April 15, 1941). This Treaty has several provisions requiring parties to conserve certain wildlife resources and their habitats.

Convention Between the United States and Great Britain (for Canada) for Protection of Migratory Birds (August 1, 1916, as amended January 30, 1979). This Treaty provides for a uniform ". . . system of protection for certain species of birds which migrate between the United States and Canada, in order to assure the preservation of species either harmless or beneficial to man." The Treaty prohibits hunting insectivorous birds, but allows killing of birds under permit when injurious to agriculture. The 1979 amendment allows subsistence hunting of waterfowl outside of the normal hunting season.

APPENDIX B—OTHER DEFINITIONS

"Compensation," when used in the context of Service mitigation recommendations, means full replacement of project-induced losses to fish and wildlife resources, provided such full replacement has been judged by the Service to be consistent with the appropriate mitigation planning goal.

"Ecoregion" refers to a large biogeographical unit characterized by distinctive biotic and abiotic relationships. An ecoregion may be subclassified into domains, divisions, provinces, and sections. A technical explanation and map is provided in the "Ecoregions of the United States" by Robert G. Bailey, published by the U.S. Forest Service, 1976.

"Ecosystem" means all of the biotic elements (i.e., species, populations, and communities) and abiotic elements (i.e., land, air, water, energy) interacting in a given geographic area so that a flow of energy leads to a *clearly* defined trophic structure, biotic diversity, and material cycles. (Eugene P. Odum. 1971. *Fundamentals of Ecology)*

"Evaluation species" means those fish and wildlife resources in the planning area that are selected for impact analysis. They must currently be present or known to occur in the planning area during at least one stage of their life history except where species not present (1) have been identified in fish and wildlife restoration or improvement plans approved by State or Federal resource agencies, or (2) will result from natural species succession over the life of the project. In these cases, the analysis may include such identified species not currently in the planning area.

There are two basic approaches to the selection of evaluation species: (1) selection of species with high public interest, economic value or both; and (2) selection of species to provide a broader ecological perspective of an area. The choice of one approach in lieu of the other may result in a completely different outcome in the analysis of a proposed land or water development. Therefore, the objectives of the study should be clearly defined before species selection is initiated. If the objectives of a study are to base a decision on potential impacts to an entire ecological community, such as a unique wetland, then a more ecologically based approach is desirable. If, however, a land or water use decision is to be based on potential impacts to a public use area, then species selection should favor animals with significant human use values. In actual practice, species should be selected to represent social, economic and broad ecological views because mitigation planning efforts incorporate objectives that have social, economic, and ecological aspects. Species selection always should be approached in a manner that will optimize contributions to the stated objectives of the mitigation planning effort.

Most land and water development decisions are strongly influenced by the perceived impacts of the proposed action on human use. Since economically or socially important species have clearly defined linkages to human use, they should be included as evaluation species in all appropriate land and water studies. As a guideline, the following types of species should be considered:

- Species that are associated with Important Resource Problems as designated by the Director of the Fish and Wildlife Service (except for threatened or endangered species).

• Other species with monetary and non-monetary benefits to people accruing from consumptive and nonconsumptive human uses including, but not limited to, fishing, hunting, bird-watching and educational, aesthetic, scientific or subsistence uses.

An analysis based only on those species with directly identifiable economic or social value may not be broad enough to adequately describe all of the ramifications of a land and water use proposal. If it is desirable to increase the ecological perspective of an assessment, the following types of species should be considered:

• Species known to be sensitive to specific land and water use actions. The species selected with this approach serve as "early warning" or indicator species for the affected fish and wildlife community.

• Species that perform a key role in a community because of their role in nutrient cycling or energy flows. These species also serve as indicators for a large segment of the fish and wildlife community, but may be difficult to identify.

• Species that represent groups of species which utilize a common environmental resource (guilds). A representative species is selected from each guild and predicted environmental impacts for the selected species are extended with some degree of confidence to other guild members.

"Federal action agency" means a department, agency or instrumentality of the United States which plans, constructs, operates or maintains a project, or which plans for or approves a permit, lease, or license for projects or manages Federal lands.

"Fish and wildlife resources" means birds, fishes, mammals, and all other classes of wild animals and all types of aquatic and land vegetation upon which wildlife is dependent.

"Habitat" means the area which provides direct support for a given species, population, or community. It includes all environmental features that comprise an area such as air quality, water quality, vegetation and soil characteristics and water supply (including both surface and groundwater).

"Habitat value" means the suitability of an area to support a given evaluation species.

"Important Resource Problem" means a clearly defined problem with a single important population or a community of similar species in a given geographic area as defined by the Director of the Fish and Wildlife Service.

"In-kind replacement" means providing or managing substitute resources to replace the habitat value of the resources lost, where substitute resources are physically and biologically the same or closely approximate those lost.

"Loss" means a change in fish and wildlife resources due to human activities that is considered adverse and:

(1) reduces the biological value of that habitat for evaluation species;

(2) reduces population numbers of evaluation species;

(3) increases population numbers of "nuisance" species;

(4) reduces the human use of those fish and wildlife resources; or

(5) disrupts ecosystem structure and function.

Changes that improve the value of existing habitat for evaluation species are not to be considered losses, i.e., burning or selective tree harvesting for wildlife management purposes. In addition, reductions in animal populations for the purpose of harvest or fish and wildlife managment will not be considered as losses for the purpose of this policy.

"Minimize" means to reduce to the smallest practicable amount or degree.

"Mitigation banking" means habitat protection or improvement actions taken expressly for the purpose of compensating for unavoidable losses from specific future development actions. It only includes those actions above and beyond those typically taken by Congress for protection of fish and wildlife resources.

"Out-of-kind replacement" means providing or managing substitute resources to replace the habitat value of the resources lost, where such substitute resources are physically or biologically different from those lost.

"Planning area" means a geographic space with an identified boundary that includes:

(1) The area identified in the study's authorizing document;

(2) The locations of resources included in the study's identified problems and opportunities;

(3) The locations of alternative plans, often called "project areas;" and

(4) The locations of resources that would be directly, indirectly, or cumulatively affected by alternative plans, often called the "affected area."

"Practicable" means capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors, such as environment, cost, or technology.

"Project" means any action, planning or approval process relating to an action that will directly or indirectly affect fish and wildlife resources.

"Replacement" means the substitution or offsetting of fish and wildlife resource losses with resources considered to be of equivalent biological value. However, resources used for replacement represent loss or modification of another type of habitat value. Replacement actions still result in a loss of habitat acreage and types which will continually diminish the overall national resource base. It should be clearly understood that replacement actions never restore the lost fish and wildlife resource—that is lost forever.

Dated: January 13, 1981.

Cecil Andrus,

Secretary of the Department of the Interior.

[FR Doc. 81-1895 Filed 1-22-81; 8:45 am]

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federal register

Friday
January 23, 1981

Part IV

Environmental Protection Agency

Incinerator Standards for Owners and Operators of Hazardous Waste Management Facilities; Interim Final Rule and Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122, 264, and 265

[SWH-FRL 1730-5]

Incinerator Standards for Owners and Operators of Hazardous Waste Management Facilities; Consolidated Permit Regulations

AGENCY: Environmental Protection Agency.

ACTION: Interim Final Rule (Parts 264 and 122) and Final rule (Part 265).

SUMMARY: The Environmental Protection Agency is amending its regulations for the management of hazardous waste by (1) promulgating, on an interim final basis, incinerator standards that will be the basis for permit issuance to owners and operators of hazardous waste management facilities (Part 264, Subpart O); (2) finalizing the interim status incinerator standards issued on May 19, 1980 (Part 265, Subpart O); and, (3) amending the permit regulations (Part 122) to correspond to the facility regulations being published today.

Under the Resource Conservation and Recovery Act (RCRA), the Agency is required to establish a Federal hazardous waste management system. Early last year EPA began issuing the first phase of regulations designed to implement that system. In January of this year EPA promulgated major portions of the Phase II technical standards for facilities that treat and store hazardous wastes. Today's publication adds another part to the Phase II technical standards by setting forth requirements for owners or operators of incinerator facilities that treat hazardous waste. These regulations provide the necessary standards by which permits may be granted. The substantive requirements for hazardous waste incinerator permits are included in Part 264, Subpart O. Information required for Part B of a permit application is specified in Part 122.25(b)(5). In many cases trial burns will be necessary to gather data needed for Part B of an incinerator facility's permit application. Criteria for trial burn permits are detailed in Part 122.27(b). Interim Status Standards must be observed by existing facilities until final action on their permit applications. EPA is today finalizing the Interim Status Standards for Incinerators which were promulgated, on an interim final basis, on May 19, 1980. These are in Part 265, Subpart O.

DATES: *Effective Date:* These regulations become effective on July 22, 1981, which is six months after the date of publication in the **Federal Register**, as RCRA Section 3010(b) requires.

Comment Date: These regulations are issued on an interim final basis. EPA will accept public comments on the Part 264 and Part 122 regulations and comments in response to requests in the preamble until March 24, 1981. In regard to the final regulation (Part 265), EPA will accept comments only on technical errors (e.g., typographical errors, inaccurate cross references, etc.).

ADDRESSES: Comments should be sent to Docket Clerk [Docket No. 30041], Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460.

Public Docket: The public docket for these regulations is located in Room 2711, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C., and is available for viewing from 9:00 a.m. to 4:00 p.m. Monday through Friday, excluding holidays. Among other things, the docket contains background documents which explain, in more detail than the preamble to this regulation, the basis for many of the provisions in this regulation.

Copies of Regulations: Single copies of these regulations will be available approximately 30 days after publication from Ed Cox, Solid Waste Information, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, Ohio 45268, telephone (513) 684-5362. Multiple copies will be available from the Superintendent of Documents, Washington, D.C. 20402.

FOR FURTHER INFORMATION CONTACT: For general information contact the RCRA hazardous waste hotline, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (phone 800-424-9346, or in Washington, D.C. 554-1404).

For information on implementation of these regulations, contact the EPA regional offices below:

Region I

Dennis Huebner, Chief, Waste Management Branch, John F. Kennedy Building, Boston, Massachusetts 02203, (617) 223-5775

Region II

Dr. Ernest Regna, Chief, Solid Waste Branch, 26 Federal Plaza, New York, New York 10007, (212) 264-0503

Region III

Robert L. Allen, Chief, Hazardous Materials Branch, 6th and Walnut Streets, Philadelphia, Pennsylvania 19106, (215) 597-0980

Region IV

James Scarbrough, Chief, Residuals Management Branch, 345 Courtland Street, N.E., Atlanta, Georgia 30308, (404) 881-3016

Region V

Karl J. Klepitsch, Jr., Chief, Waste Management Branch, 230 South Dearborn Street, Chicago, Illinois 60604, (312) 886-6148

Region VI

R. Stan Jorgensen, Acting Chief, Solid Waste Branch, 1201 Elm Street, First International Building, Dallas, Texas 75270, (214) 767-8941

Region VII

Robert L. Morby, Chief, Hazardous Materials Branch, 324 East 11th Street, Kansas City, Missouri 64106, (816) 374-3307

Region VIII

Lawrence P. Gazda, Chief, Waste Management Branch, 1860 Lincoln Street, Denver, Colorado 80203, (303) 837-2221

Region IX

Arnold R. Den, Chief, Hazardous Materials Branch, 215 Fremont Street, San Francisco, California 94105, (415) 556-4606

Region X

Kenneth D. Feigner, Chief, Waste Management Branch, 1200 6th Avenue, Seattle, Washington 98101, (206) 442-1260

SUPPLEMENTARY INFORMATION: This preamble outlines the basis and purpose of the standards for incineration of hazardous waste that the Agency is publishing in today's **Federal Register**. It also summarizes and explains changes from the standards originally proposed. More complete explanation of, and support for, these standards can be found in "*Background Document*, 40 CFR Part 264 Subpart O, and 40 CFR Part 265 Subpart O: Incineration," and in the guidance materials which the Agency has developed to assist in the understanding and implementation of these regulations. The latest drafts of these manuals—"Engineering Handbook on Hazardous Waste Incineration," and "Permit Writers' Guidance Document for Hazardous Waste Incineration"—are available in the RCRA docket room, as is the Background Document.

EPA is also proposing today a procedure to allow a variance in acceptable incinerator emissions, based on case-by-case assessments of the risk to human health and the environment from such emissions. This procedure

could be used to set emission limits for hazardous inorganic constituents and combustion by-products, as well as for the organic constituents controlled by today's promulgation. This proposal appears elsewhere in today's **Federal Register** and is discussed in a separate preamble section.

Preamble Outline

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II. *Background*
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V. *Issues Raised by Comments, and Changes in the Regulation*
A. General Concept Underlying the Regulations
B. Significant Comments; Changes to Part 264
C. Significant Comments; Changes to Part 122
D. Significant Comments; Changes to Part 265
VI. *Regulatory Analysis*
A. Economic Analysis
B. Regulatory Alternatives
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I. Authority

These regulations are issued under the authority of Section 1006, 2002(a), 3004, 3005, and 3007 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6905, 6912(a), 6924, 6925, and 6927.

II. Background

On December 18, 1978, EPA issued proposed standards for owners and operators of hazardous waste management facilities, including standards for incinerators (43 FR 58946). The Agency received more than 250 comments on the proposed incinerator regulations and held five public hearings on the December 18 proposal. On May 19, 1980, EPA promulgated the first of two major phases of the final regulations for hazardous waste management facilities. Phase I included administrative standards for hazardous waste facilities with RCRA permits (40 CFR Part 264) and administrative and technical standards for hazardous waste facilities in interim status (40 CFR Part 265). As part of those May 19, 1980 regulations, EPA issued interim status standards for incineration under 40 CFR Part 265, Subpart O. Those Subpart O regulations are being promulgated today as final standards with few minor changes to reflect additional public comment.

EPA also announced on May 19, 1980, its intent to promulgate the technical standards for hazardous waste facilities with permits (40 CFR Part 264) as Phase II of the regulations in the fall of 1980. (For a discussion of the phased approach to the regulations see the background and overview discussion accompanying the Parts 264 and 265 regulations published on May 19, 1980, at 45 FR 33154. For a discussion of the Phase II regulations overall, see the introductory material accompanying the January 12, 1981 regulations at 46 FR 2802.)

Early in January of this year, EPA promulgated the first portion of Phase II of the technical standards for facilities with permits. These included standards addressing financial requirements, closure and post-closure, location, and storage in containers, tanks, piles, and surface impoundments.

The regulations for incinerators that EPA is issuing today represent an additional part of the Phase II standards. Another part of Phase II, standards for land disposal, is being promulgated elsewhere in today's **Federal Register.**

The Agency has also made additions in today's promulgation to the permitting regulations in Part 122 to correspond with the new technical requirements of Part 264, Subpart O. These include information required for Part B of a permit application (§ 122.25(b)(5)) and criteria for trial burn permits (§ 122.27). Elsewhere in today's **Federal Register,** the Agency is proposing additions to the Part 264, Subpart O standards being promulgated today. These additions will necessitate future additions to the Part 122 permitting standards.

Many of the terms used in today's regulation are defined in the Part 260 regulations which were issued on May 19, 1980, at 45 FR 33066. For example one key point underlying the regulations promulgated today is that incineration of hazardous waste is a form of "treatment" as treatment is defined under § 260.10(73).

The definintion of incinerator in § 260.10(30) notes that the primary purpose is to "thermally break down hazardous waste." This should be differentiated from the combustion of wastes primarily for the recovery of their thermal value, which is not "incineration" and, in accordance with the exclusion of reused or recycled wastes under § 261.6, is exempt from these incinerator regulations.

Today's regulations should also be distinguished from "thermal treatment" standards for which the Agency has published interim status standards (Part 265, Subpart P) which it intends to finalize sometime soon. The Agency has not yet issued technical permit standards for thermal treatment under Part 264. When promulgated, these standards will address thermal treatment processes which do not come under the definition of incineration.

As a result of adding Subpart O to Part 264, the Agency has also made a number of technical conforming changes to other sections, including §§ 264.10, 264.13, 264.15, 264.73, 264.112, and 264.142.

III. Synopsis of the 1978 Proposal for Incinerators

A. The Regulations as Proposed

Proposed regulations for incineration of hazardous waste were published as 40 CFR § 250.45–1 on December 18, 1978 (45 FR 59008). They required owners and operators to meet a number of performance standards coupled with various operating requirements, most of which were intended to help ensure that the performance criteria were continuously met.

The performance criteria required that all incinerators burning hazardous wastes achieve a destruction efficiency (DE) of 99.99%, and a combustion efficiency of at least 99.9%; that particulate emissions be less than 270 mg./scm^3 (0.12 gr/scf) at zero excess air; that fugitive emissions be controlled; and that emission controls remove more than 99% of the halogens when hazardous wastes containing more than 0.5% halogens were burned.

Proposed operating regulations required that owners or operators monitor and record significant variables at 15 minute intervals; that trial burns be conducted, analyzed and reported to the Regional Administrator before each new and "significantly different" hazardous waste was incinerated; and that the wastes be retained for 2 seconds at 1000° C. combustion temperature (1200° C. for halogen containing wastes). A "note" or variance provided that incinerators need not comply with the detailed combustion criteria if an equivalent combustion efficiency could be achieved by other means. A device to automatically cut off waste feed whenever combustion or scrubber conditions changed significantly was a final requirement.

B. Comments on the Proposed Regulations

The Agency received more than 250 comments on the proposed incinerator regulations. The most significant of these are discussed in Section V of this

preamble. All of them are considered in the accompanying "Background Document."

Many comments dealt with broad and general issues such as the propriety of applying any design and operating requirements, rather than relying solely on performance standards. Some comments questioned the Agency's statutory authority to regulate hazardous waste incineration under RCRA at all, rather than under the Clean Air Act.

On the other hand, many comments were essentially technical. One comment suggested that turbulence criteria be added to the time and temperature requirements. Others suggested that the measurement methodology was unclear or difficult to apply and that the measurement locations and frequencies for emission and effluent temperature measurements need to be specified. Three comments pointed to dangers inherent in automatic cut-off devices, and suggested that gradual shut-downs were preferable.

A middle range of comments accepted the general framework of the proposed regulations but stated that specific criteria were unnecessary or infeasible. In particular it was claimed that the halogen removal levels appropriate for chlorine were more stringent than those necessary or possible for other halogens, such as bromides or iodides. Similar comments suggested that the general 99.99% Destruction Efficiency requirement was impractical and very costly and would divert wastes from the relatively "safe" incineration option into "dangerous" longterm disposal in landfills. Some comments suggested varying Destruction Efficiency in accord with each waste's degree of hazard.

The high cost of trial burns and of trial burn analyses was frequently mentioned. There was considerable concern about the requirement that a new trial burn be performed before each "significantly different" new waste was incinerated. Several commenters pointed out that the almost infinite variety of chemical mixtures making up waste feeds made this requirement both expensive and impossible to apply with certainty, depending on the definition of "significantly different." A few comments suggested that the requirement that fugitive emissions be controlled should be more specific.

A final category of comments suggested specific exemptions or additional inclusions for the regulations when finally promulgated. The most important of these dealt with exempting wastes which were hazardous solely because of ignitability. Others recommended clarifying the status of incinerator ash residue and scrubber effluents as hazardous wastes, and of cement kiln incinerators and utility boilers burning hazardous wastes for their thermal value.

IV. The Incinerator Regulations Promulgated Today

A. Part 264—General Standards for Hazardous Waste Incineration

1. Applicability (§ 264.340)

This regulation and § 122.27(b) provide the substantive basis for all incinerator permits to be issued under Section 3005 of RCRA. In accord with §§ 261.2(c)(2) and 261.6, Part 260 defines "incinerator" so that combustion of wastes *primarily* for the recovery of their thermal value is not "incineration" and thus, is exempt from these standards. EPA plans to reconsider, and perhaps narrow, the § 261.6 exclusions in the future. The Agency specifically solicits comments on appropriate regulation of emissions from combustion of hazardous waste for purposes of thermal recovery.

The Agency may soon move to integrate these regulations with those promulgated under the Toxic Substance Control Act (TSCA) to control incineration of polychlorinated biphenyls (PCBs). EPA welcomes comments on the form and substance of that integration. Until that time the incineration of wastes which are subject to EPA's TSCA disposal criteria (40 CFR Part 761) will continue to be subject to control under TSCA rather than RCRA. Those requirements are more stringent than, but not inconsistent with, the requirements of this Subpart.

Thermal treatment of hazardous waste in systems other than incinerators is seldom utilized now, but EPA expects that practice to grow in importance. Interim Status Standards for such treatment were published, on an interim final basis, as Subpart P of Part 265. The Agency expects to finalize those standards soon and to promulgate permitting standards for non-incinerator thermal treatment at some time in the future. These are expected to be Subpart P of 40 CFR Part 264.

Finally, the regulation provides that wastes which are hazardous solely because of ignitability (and which contain no constitutents listed as toxic in Part 261, Appendix VIII) must be burned in accordance with a permit, but are exempted from most of the substantive requirements of the Subpart O regulations.

2. Waste Analysis (§ 264.341)

Required waste analysis takes two forms.

First, on an on-going basis, the operator must ensure that waste feed to the incinerator does not deviate from that defined in his permit. Such a deviation would be a violation of the permit. The permit, under § 264.345(b), will be written to specify wastes which the facility has demonstrated its ability to treat adequately. Thus, for waste feeds not specified in the permit, there is no assurance that the required performance standards can be met, especially in the absence of defined operation conditions. As a result, the Agency will require facilities to analyze waste feeds adequately to ensure that they remain within the terms of their permits, and to indicate in their waste analysis plans (required by § 264.13) how they will do this.

A second, and more intensive, form of waste analysis is required as part of each permit application and whenever a permit modification or a trial burn permit is sought. In these cases the applicant must describe certain physical properties of his waste feed and must analyze his waste sufficiently to identify the presence of any hazardous organic constituents listed in Part 261, Appendix VIII, except that the applicant need not analyze for Appendix VIII constituents which would not reasonably be expected to be in the waste. This analysis must be performed using the techniques specified in EPA's publication SW–846, or techniques of at least equivalent sensitivity and reliability.

A comprehensive analysis of the hazardous organic constituents of a waste as it is to be incinerated is necessary to identify the waste components to which the performance standard (especially the destruction and removal requirement) will apply. Analytical techniques such as capillary column gas chromatography and a "reverse search" of mass spectra are well within the capability of widely available laboratory services, so long as the constituents to be searched for are specified in some way. In order to identify hazardous components of waste feeds and, at the same time, limit the scope of the waste analysis to practical limits, the scope of the search is initially specified as those constituents listed in Part 261, Appendix VIII. In almost all cases the scope of the mass spectral analysis will be further limited by deleting analysis for those Appendix VIII constituents which would not reasonably be expected to be present in the waste.

Incinerators commonly receive wastes from a wide variety of generating processes and mix them for combustion

on the basis of BTU value and physical characteristics. Thus analysis of waste feed that will actually be burned is more important than analysis of wastes as they are received or as they are stored prior to blending as a waste feed. Further, reliance on information provided on the manifest or data considered as part of EPA's listing process will seldom be adequate. Therefore, the analysis required by § 264.341 is necessary to allow EPA to define operating conditions necessary to incinerate the waste feed in compliance with appropriate performance standards.

3. Principal Organic Hazardous Constituents (POHCs) (§ 264.342)

Waste feed mixtures will be specified in each facility's permit. For each waste feed mixture, identified in a facility permit, the permit will specify Principial Organic Hazardous Constituents (POHC's) which must be destroyed or removed as required by the applicable performance standard. Identification of those waste feed constitutents to which the performance standard will be applied is central to application of the standard. The Agency has chosen to designate specific POHC's rather than require that *all* hazardous constituents of the waste feed meet the performance standard. This reduces the analytical burden and associated cost of verifying compliance with the performance standard. Selecting limited POHCs avoids the necessity for measuring compliance against perhaps dozens of constituents that may be present in a given waste in insignificant quantities. Finally, designating as POHCs those waste constituents which are most difficult to destroy will generally ensure that less stable hazardous organic constituents are also destroyed.

For those reasons POHC selection will be made by the permit writer primarily on the basis of difficulty of incineration, but the permit writer may then consider concentration or quantity of constituents and need not designate as POHCs those present only in insignificant quantities. Thus the regulation says that difficult-to-burn constituents are those "most likely" to be selected as POHCs, while larger quantity constituents are "more likely" to be selected than those present in lesser quantities.

4. Performance Standards (§ 264.343)

Three performance standards are the heart of this regulation. The most important of these is the requirement that incinerators burning hazardous waste must achieve a destruction and removal efficiency (DRE) of 99.99% for each POHC designated for each waste feed. This requirement (which includes particulate removal) is based on extensive data indicating that such a destruction efficiency is attainable in industrial incinerators burning a wide range of organic hazardous wastes. EPA has now defined the required performance standard to include credit for removal efficiencies as well as destruction efficiencies. This approach makes the performance standard more easily attainable since it allows credit for removal by air pollution control equipment as well as for destruction in a combustion zone, and it avoids the technical difficulties associated with precise measurements within the extreme conditions of a combustion zone. Yet the reliance on destruction and removal efficiency, rather than mere destruction efficiency, poses no environmental hazards since the standard still covers all emissions *before* their release to the environment, and since waste residues trapped by emission control equipment must still be treated as hazardous wastes and managed properly within the RCRA system.

There are limits to the destruction and removal efficiency approach. It does not control the actual mass of POHCs emitted since, for any given destruction and removal efficiency, mass emissions vary directly in proportion to variations in mass feed rate. Perhaps most importantly, the approach fails to account for emissions of hazardous combustion by-products which may be equally or more hazardous than POHCs themselves. Finally, metals, since they are not combustible, are not now controlled using this approach.

EPA has considered, and is still considering, the feasibility of additional approaches to the control of emissions from hazardous waste incinerators. The Agency is today proposing, elsewhere in today's **Federal Register**, a set of procedures for varying the performance standard to address the problems just mentioned. However, until it is clear that the proposed variance procedure is practicable, the Agency is relying upon the approach promulgated today. The effect of these combined approaches is that in the absence of data showing that lesser emission levels are safe or that greaters levels are necessary, the Agency will require that hazardous wastes not be incinerated under standards less stringent than those known to be currently attainable by the existing technology of high quality commercial hazardous waste incineration. Initial analysis of data available to the Agency indicates that, for typical waste feed rates, most organic wastes will present no significant health hazards when treated to a 99.99% destruction and removal efficiency.

An additional performance standard is a requirement that incinerators burning hazardous waste containing more than 0.5% chlorine must remove 99% of the hydrogen chloride from their exhaust gas. The level of 0.5% chlorine content was chosen as the threshold level for the 99% hydrogen chloride removal requirement since the chlorine content of American coal ranges up to almost that concentration. Current Clean Air Act regulations do not specify hydrogen chloride or chlorine limits for emissions for the combustion of such coal. The small additional emissions from incineration of low-chlorine hazardous wastes are not likely to be a serious problem. Some potential candidates for incineration (for example hexochlorobenzene) do include high chlorine levels and will produce significant emissions. Thus the hydrogen chloride removal requirement is necessary.

The final performance standard is that incinerators not emit particulate matter exceeding 180 milligrams per dry standard cubic meter. Particulates from hazardous waste combustion can absorb hazardous constituents onto their surface, or may themselves be hazardous, making their control important. Control is addressed through the DRE standard because particulates are included in the analysis of the stack emissions for POHC's. However, neither combustion by-products nor metals are controlled through the performance standards promulgated today. Thus, some control of these substances can be achieved by controlling the emissions of particulates. The emission limits required are the same as those required by the Clean Air Act's New Source Performance Standards for municipal incinerators. Data indicate that they are achievable by all hazardous waste incinerators except, perhaps, for cement kilns. Cement kilns are exempt from this Subpart when burning waste for re-use or for recovery of thermal value.

It is very important to note that, while these three performance standards are the goal of this regulation, it is not technically practicable to directly monitor compliance with the performance standards on a continuous basis. Enforcement instead will be based on compliance with operating conditions demonstrated (by trial burns or alternative data) to be adequate to achieve these performance standards, and then specified in the permit. However, EPA may require verification

tests of compliance with the performance standard either periodically, as specified in the permit, or when there is an indication that the performance standards are not being met. If the test, or other data, indicate non-compliance with the performance standard, then the Agency will have grounds to modify, revoke, or re-issue a permit so as to ensure that the performance standards will be met. In most cases the Agency does not expect verification tests to be necessary more frequently than annually.

5. New Wastes: trial burns or permit modifications (§ 264.344)

Each permit will specify the waste feeds which it allows and the operating conditions required for each waste feed. When an owner or operator wishes to burn waste feeds for which operating conditions have not been set in a permit he must either secure a permit modification, or, if the burn is to be of short duration and for the specific purposes listed in § 122.27(b), he must secure a temporary trial burn permit.

The criteria for granting trial burn permits are specified in § 122.27(b) which is summarized later in this preamble. The criteria for granting new permits and permit modifications are those outlined in Part 264, Subpart O. These criteria require demonstration, for a defined waste feed, of operating conditions adequate to achieve the performance standards of § 264.343. This demonstration may be based either on the results of an approved trial burn, or on alternative data adequate to demonstrate that the performance standard can be met and adequate to define operating conditions necessary to meet the standard. Obviously, if an owner or operator wishes to avoid repeated applications for permit modifications, it is in his interests to demonstrate, in each permit application, the widest possible variety of waste feeds that can be adequately incinerated under each set of operating conditions. Furthermore, for economic reasons, applicants may wish to define their waste feeds in varying groups, seeking less stringent operating requirements for easily combusted waste feeds, while narrowing the class of waste feeds that are subject to more demanding and expensive operating requirements. To the extent that the applicant can demonstrate in his permit application that the required performance standards can be met for each of these classes of waste feed, he is, of course, free to make these separations.

6. Operating Requirements (§ 264.345)

Each permit will specify, on a case-by-case basis, operating conditions which have been demonstrated (in the trial burn) to be adequate to meet the performance standard and with which compliance is required. The regulation specifies several operating parameters which will almost always be significant variables for attainment of the performance standards. Limits will be set for these operating parameters in every permit. However, if any specific incinerator's design or waste feed makes it necessary, the permit writer may also specify other operating requirements necessary to ensure that the applicable performance standards are met.

Three further operating requirements will be applied uniformly. During start-up and shut-down of an incinerator, hazardous waste must not be fed unless the incinerator is at a steady state of operation. This requirement is aimed at the problem of inconsistent performance and incomplete combustion when wastes are burned in a zone where combustion conditions have not stabilized within limits defined in the permit.

The regulation also requires that fugitive emissions must be controlled. Where feasible this should be through total sealing of the combustion zone. Where that is impossible (as with rotary kilns) incinerators should maintain "negative pressure", i.e. a combustion zone pressure lower than atmospheric pressure. Alternative means of control may be allowed where they are demonstrated to provide effectiveness equivalent to maintenance of "negative pressure." These requirements are necessitated by the danger of escape of fugitive emissions—including hazardous waste constituents—that could threaten human health or the environment. They are already generally practiced in commercial hazardous waste incineration.

Finally, incinerators must be operated with a functioning system to shut off waste feed when operating requirements are violated. This requirement will protect against deviation from the performance standard; in fact, it is implicit in the requirements that hazardous wastes can be incinerated only in compliance with a permit and that the operating requirements are conditions of the permit. After shutting off hazardous waste feed, the facility may take appropriate steps to either shut-down the incinerator or to return to operating conditions defined in its permit.

7. Monitoring and Inspections (§ 264.347)

EPA has made every effort to reduce monitoring and inspection to the minimum level necessary to ensure that operation of the incinerator does not deviate from the required performance standards. In fact, the recognition that it is technically not practical to continuously monitor for compliance with the performance standard is a major factor underlying the monitoring which is required. The regulation requires, as a minimum, continuous monitoring of combustion temperature, waste feed rate, and air feed rate.

These are the variables which most significantly affect destruction and removal efficiency; they are also continuously controllable by incinerator operators. Continuous monitoring of carbon monoxide emissions is also required. This monitoring is the simplest procedure for approximate verification that adequate combustion actually is taking place. Finally, the regulation requires daily inspection of the incinerator and associated equipment, including alarm systems and emergency shut-down controls. Since the incinerator is a complex system, subject to high stress conditions, this inspection is necessary to control against leaks, spills, or fugitive emissions, and to ensure that stand-by systems will actually operate when needed.

8. Closure (§ 264.351)

At closure the owner must remove all hazardous waste and hazardous waste residues from the incinerator site. Wastes which are hazardous solely because of ignitability are *not* exempt from this provision, since the risk they pose to human health and the environment is very real when they are not being burned in the controlled combustion zone of a permitted hazardous waste incinerator.

B. Part 122—Incinerator Facility Permits

Part 122 includes regulations covering the permitting process. Two portions of Part 122 are particularly related to hazardous waste incinerator operation. Section 122.25 describes information required in Part B of an owner or operator's permit application; § 122.25(b)(5) describes the particular information required in applications for permits to incinerate hazardous waste. Section 122.27 describes short-term permits; § 122.27(b) sets out the procedures and standards for obtaining a permit to conduct a trial burn of hazardous waste.

1. Permit Application Information (§ 122.25(b)(5))

Permit writer's will have to make significant judgments, based on information contained in facility permit applications. EPA has limited the information required in Part B of a permit application for an incinerator to that necessary to make those judgments properly. As § 122.25(b)(5) specifies, applicants must meet one or more of three sets of information requirements.

If the facility is seeking to incinerate hazardous waste under the exemption available for waste which is hazardous solely because it is ignitable, the permit application must provide analytical results adequate to determine that hazardous constituents listed in Part 261, Appendix VIII, are not present in the waste. The reasons for this are explained above, in the substantive discussion of the ignitability exemption.

Initially, information will be submitted for most facilities under § 122.25(b)(5)(ii). This requires that an applicant submit the results of a trial burn of the relevant waste feed, conducted under § 122.27(b). This submission must include all the waste analyses, engineering data, analytical results, and calculations related to the trial burn and its results. This information must be adequate to allow the permit writer to determine operating conditions that will ensure that the facility will meet the performance standards for the relevant waste feeds.

Finally, applicants may seek to avoid the trial burn requirement by submission of alternative data. This information, specified in § 122.25(b)(5)(iii), is essentially a re-statement of the information required to obtain a trial burn permit under § 122.27(b). It is supplemented by such further information as the permit writer may require to determine that the alternative data in adequate to ensure that the performance standards will be met, and to set adequate operating parameters.

2. Trial Burn Permits (§ 122.27(b))

Destruction and removal efficiencies for any given waste feed can vary greatly, and are dependent both on operating conditions and on specific aspects of any incinerator's design. Thus, compliance with applicable performance standards will often have to be demonstrated by empirical measurement, rather than by prediction. Trial burns are the mechanisms for these measurements.

Each trial burn can be conducted only with the specific approval of a permitting official. However, the full procedural requirements for general permits need not be followed. This is because short term permits will be of limited duration (generally less than a dozen hours of combustion, spread over operating periods of up to two weeks), and for the limited purposes of determining feasability of compliance, and the operating conditions necessary to comply, with applicable performance standards. In addition, trial burns will not be allowed if they pose an imminent hazard to human health or the environment.

Applications for a trial burn permit must include a trial burn plan which, if approved, will become a condition of the trial burn permit. This plan will include a waste analysis (indentical to that required for general permits) which describes certain physical properties of the proposed waste feed and which includes an analysis sufficient to identify the presence of any hazardous organic constituents listed in Part 261, Appendix VIII, which may be present in the waste.

In addition, the applicant must provide a detailed description of his incinerator and of the sampling and monitoring procedures to be followed, along with descriptions of safety equipment and full information about the time, waste quantity, and operating conditions of the proposed trial burn.

The permitting official may ask to have this information supplemented if he needs further data to determine whether the trial burn is likely to demonstrate compliance with the performance standards, identify associated operating conditions, and will not itself present an imminent hazard to human health and the environment. When the permitting official determines that the data meet these objectives, he will approve the trial burn plan, will specify the trial Principal Organic Hazardous Constituents (trial POHCs) for which the facility must calculate destruction and removal efficiencies during the trial burn, and will issue a trial burn permit incorporating the conditions in the trial burn plan.

When trial burns are carried out, EPA may wish to have an observor present and, if necessary, can insist upon doing so under the authority of Section 3007 of RCRA, and 40 CFR 122.(7)(i). In any case the trial burn must be conducted in accordance with the trial burn permit and waste feed must cease when specified operating conditions are violated.

Determinations specified in the trial burn permit must be made during the trial burn, or as soon after it as is practical. In all cases, these will include a quantitative analysis of the trial POHCs in the waste feed to the incinerator and a quantitative analysis of the trial POHCs in the exhaust gas emitted from the incinerator. These analyses are necessary to make the required computation of destruction and removal efficiency (DRE) in accordance with the formula specified in § 264.343(a). This DRE computation must be supported and verified by a total mass balance of the trial POHCs in the waste feed, and must be compared with required quantitative analyses of scrubber water and other residues for trial POHCs. Measurement of hazardous combustion by-products will be used to verify attainment of the DRE performance standard, through comparison with the mass balance of POHCs. It may also help meet public concern about the presence of by-products in incinerator emissions. Data accumulated from these trial burn analyses may lead to reductions in the number and complexity of subsequent trial burns, either by reducing the need for those burns, or by aiding the selection of surrogates to simplify such analyses.

Compliance with the other performance standards must be demonstrated by direct measurement of particulate emissions and hydrogen chloride removal efficiencies. Sources of fugitive emissions and their means of control must also be identified.

Measurements of average, maximum, and minimum temperatures in the combustion zone and of air feed rates are always necessary to help establish operating conditions which will assure continued compliance with the performance standard. In addition, the trial burn permit may specify other data collection, if necessary to determine compliance with applicable performance standards, or to establish operating requirements.

Since § 122.27 Short-Term Permits are somewhat separate from the normal permitting procedures, and since they will not always include public participation, for purposes of clarity the Agency has specified that all submissions required by this subsection shall be certified by signature. Since repeated submissions may be required to establish acceptable waste analyses, trial burn plans, and trial burn analyses, the Agency has decided to require only that the certification be made by a person authorized to make reports, rather than requiring that each submission be signed by a person of vice-presidential or equivalent corporate rank.

C. Part 265—Interim Status Standards for Hazardous Waste Incineration

Facilities which qualify for interim status may continue to operate until final Agency action on their permit applications. Throughout that time owners or operators must comply with all relevant interim status standards. If the owner or operator of a facility which has interim status wishes to burn a waste which he has not listed in Part A of his permit application, he must supplement his Part A application as required by § 122.23(c)(1).

EPA is today finalizing the Interim Status Standards which were issued, on an interim final basis, on May 19, 1980 (45 FR 33250). With small exceptions the regulations follow the text of the interim final promulgation. They are discussed in the preamble accompanying that promulgation. The Agency has, however, modified those regulations in two significant ways. First, the regulation now prevents hazardous waste feed during shut-down situations, in addition to forbidding it during start-up conditions. On the other hand, the Agency has recognized that wastes which are hazardous solely because of ignitability can be burned safely even when operating conditions are unstable. Thus the final regulations allow exemptions for ignitable wastes, conditional upon the owner or operator performing and maintaining analyses that show that the waste feed would not reasonably be expected to contain hazardous constituents listed in Part 261, Appendix VIII.

V. Issues Raised by Comments, and Changes in the Regulation

A. General Concepts Underlying the Regulation

1. *Authority*

Several commenters argued that RCRA granted EPA no authority to regulate hazardous waste incineration since legislative history did not label incineration a form of "disposal" and since the Clean Air Act adequately controlled incinerator emissions.

Whether hazardous waste incineration falls within the Section 1004(3) definition of "disposal" is not a controlling issue. The Agency is regulating incineration as "treatment" of hazardous wastes. Section 1004(34) defines treatment:

> (34) The term "treatment", when used in connection with hazardous waste, means any method, technique, or process, including neutralization, designed to change the biological character or composition of any hazardous waste so as to neutralize waste and render it non-hazardous, safe for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it non-hazardous.

As a process designed to render hazardous waste non-hazardous and reduced in volume, incineration certainly falls within this definition. The Agency's statutory mandate to regulate such treatment pocesses is then found in Section 3004, which requires that the Administrator promulgate performance standards for the treatment of hazardous wastes.

This also fits the broad structure of RCRA, which requires that hazardous wastes be sent only to facilities which have RCRA permits to treat them. The Administrator's authority in this matter is make even more clear in Section 3004 which says that the standards set by the Agency "shall include, but need not be limited to, requirements respecting—

> (3) Treatment . . . of all such wastes . . . pursuant to such operating methods, techniques, and practices as may be satisfactory to the Administrator.

This mandate also serves the objectives of the statute, defined by Congress in Section 1003(4) as, among other things, "regulating the treatment . . . of hazardous wastes which have adverse affects on health and the environment". Furthermore, incineration of hazardous wastes was discussed extensively in EPA's 1974 *Report to Congress: Disposal of Hazardous Wastes,* a document that strongly influenced Congressional development of RCRA. Additionally, EPA has consistently indicated in both Federal Register proposals and Congressional testimony that it will control incinerators under RCRA. Congress gave no signs of disapproval of this in the 1980 RCRA amendments.

The Agency cannot agree with those commenters who suggested that the proposed regulations should be replaced by, or were in conflict with, the Clean Air Act. Current Clean Air Act regulations address only a portion of the potential emissions from a hazardous waste incinerator. The Clean Air Act is oriented toward control of emissions on a pollutant-by-pollutant basis, and current regulations are focused largely on wide-spread, large-volume, pollutants (particulates, NO_x, SO_x, etc) and on specified hazardous emissions from specific sources. In contrast, the pollutants which could be emitted from hazardous waste incinerators are far more numerous and diverse. Many are acutely toxic or carcinogenic. A case-by-case, chemical by chemical, regulatory approach under the Clean Air Act is not practical in this situation.

RCRA provides authority to control emissions broadly through destruction and combustion performance standards and direct operating and design standards. Such a regulatory approach is necessary in order to adequately protect human health and the environment as required by RCRA. To the exent that standards can be developed in the future under the Clean Air Act to deal with specific hazardous air emissions, this may aid in the task of regulating hazardous waste incineration. Moreover, since hazardous waste incinerators will often store and generate hazardous waste, they will already be within the RCRA system for manifests and permitting. Thus regulating hazardous waste incineration under RCRA (rather than the Clean Air Act) may be the simplest way to minimize the regulatory burden on applicants.

2. Performance Standards and Engineering Judgment

Several comments on the proposed regulations criticized as too inflexible two facets of the proposed regulations: (1) universally applicable specific design and operating requirements, and (2) performance requirements that did not allow waste-specific variances.

Both of these concerns were seriously considered. As discussed in the next paragraph, the Agency has revised the regulations so that they now rely heavily on performance standards, with few operating requirements specified. Facility-specific and waste-specific variances proved, however, to be technically and procedurally complex. They required techniques and procedures which were not proposed and which relied on much scientific knowledge not included in the 1978 proposal. EPA, therefore, is proposing today a waste-specific and facility-specific variance and a procedure for applying it. The Agency specifically solicits comments and data relevant to the proposed variance and procedure; but, until the variance is shown to be feasible and is finalized, permits will be issued under the performance standards promulgated today.

The other general comment was easier to address. The proposed regulations included specific, universally applicable operating requirements for temperature, dwell-time, combustion efficiency, and quantity of excess air. Commenters persuasively argued that these standards did not provide enough flexibility to account for the many differences in wastes and incinerator

designs, and that they were often not necessary, even to meet the performance standards EPA required. On more abstract grounds they also argued that performance standards were inherently better than operating standards since they adequately protected human health and the environment, while not stifling innovative approaches which might be more economical, more efficient, or more effective.

The Agency concluded that these comments had merit. Different wastes and different incinerator designs have been shown in EPA tests to attain the required destruction and removal efficiencies under a variety of operating conditions. Thus some flexibility to tailor operating standards on a case-by-case basis can more effectively assure protection of human health, while, at the same time, avoiding needless requirements. The regulations now include few nationally applicable design and operating standards, but rely instead on selected performance standards. However, as many industry comments pointed out, it is technically impractical to continuously monitor the most important of these performance requirements (destruction and removal efficiency) especially when quick response times may be important. Thus pure reliance on performance standards is not feasible and specific operating criteria will have to be observed for proper facility operation and to demonstrate compliance with the required DRE. These specific operating standards will now, however, be specified on a case-by-case basis during the permit drafting process based primarily on the results of trial burns (or alternative data) which demonstrate the operating conditions necessary to achieve compliance with the performance standards. The permit writer will need to exercise some measure of scientific and engineering judgment in interpreting the trial burn data and defining acceptable limits on operating conditions and waste feed variations. The procedural mechanisms for making these case-by-case determinations (including data compilations from trial burns) are necessarily complex, but they appear the best alternative to uniform national standards.

This approach—tailoring of regulatory requirements to specific wastes and facilities, based on the trial burn (or alternative data)—is consistent with the approach EPA has adopted for other regulations for management of hazardous waste. It recognizes that case-by-case judgments, based on site-specific circumstances can be applied in establishing the operating requirements applicable to an incinerator. In making such scientific and engineering judgments, the permit writers will be able to apply the latest state-of-the-art information on incinerator technology and the thermal destruction characteristics of waste to the facility-specific information obtained from trial burns and contained in permit applications. To aid this process, EPA is publishing a "Permit Writer's Guidance Document for Hazardous Waste Incineration" and an "Engineering Handbook on Hazardous Waste Incineration." The Agency expects to make these manuals available to the public in the near future. The latest drafts of these manuals are now available for inspection in the RCRA docket room, but the Agency expects to update them periodically.

B. Significant Comments; and Changes to Part 264

The Agency has considered each comment relevant to hazardous waste incineration. Significant ones are summarized here; others are included in the detailed discussions in the companion "Background Document."

Commenters suggested that incineration of wastes which are hazardous solely because of ignitability should not be subject to incineration regulations. EPA agrees in principle and, as mentioned above, has exempted such wastes from most of the substantive requirements of Part 264, Subpart O. However, applicants must show in a permit application that an ignitable waste does not contain toxic organic constituents listed in Part 261, Appendix VIII. This showing must be based on an analysis of the waste for any organic constituents listed in Appendix VIII, except those that can be demonstrated not to be reasonably likely to be in the waste. This showing is necessary because wastes which fail the ignitability characteristic described in Part 261 may also contain toxic organic constituents. Even wastes listed solely for ignitability may contain such constituents if the Agency did not have exhaustive composition data at the time of listing. Since toxic organic constituents must be destroyed in an incinerator in accordance with the performance standard, any ignitable waste containing such constituents is subject to all of the Subpart O standards.

Incineration of ignitable wastes which are exempted from most of Subpart O will, however, still be covered by RCRA permits. This allows generators and transporters of ignitable hazardous wastes to ship them to the facilities. It also ensures that they will be safely stored and otherwise handled until and through the facility's closure period.

Commenters challenged the waste analysis requirement both on the general grounds that it was ambiguous and unnecessary (since manifest data should suffice) and on the specific ground that determination of "principal hazardous components" was ambiguous and, perhaps, ruinously expensive. The waste analysis requirements are now far more detailed and linked more closely to the determination of the "principal hazardous components"—now called "principal organic hazardous constituents (POCHs)." The requirements clearly require more information than is shown on the manifest, as indeed they must since further information is requred to determine DRE and set operating conditions. EPA has also improved the clarity of the regulation by specifying that it is the waste *feed* to the incinerator that must be analyzed for burn-related information (thus assuring that affects of combination and blending are given credit and consideration), and by specifying which detailed waste analyses requirements are required only on permit application and which simplified analyses must be performed on an on-going basis.

Finally, EPA has responded to concern about determination of "principal hazardous components" by establishing a procedure for identification of POHCs during each permit writing process. The applicant may suggest certain POHCs for designation, but the determination will be made by the permit writer, using all available data (including trial burns) to determine those organic hazardous constituents most difficult to burn and present in significant quantities. This POHC selection analysis, while costly, will not be prohibitive since, even where necessary, GC/MS analysis against an identified list of constituents (those organics listed in Part 261, Appendix VIII) will give adequate qualitative and quantitative results at a reasonable cost. Even this analysis can be reduced if the applicant demonstrates that listed constituents would not reasonably be expected to be present in the waste feed.

Commenters often favored performance standards in theory but criticized the proposed Destruction Efficiency requirement of 99.99% for several reasons. Some criticized its general attainability, others argued that measurement near combustion zones was dangerous and inherently

unreliable; others pointed out that *inorganic* materials such metallic as elements, could not be "destroyed" by any combustion process short of nuclear transformation.

The regulations now call for a "Destruction and Removal Efficiency (DRE)" of 99.99% rather than 99.99% Destruction Efficiency (DE). This very significant change avoids the risks and unreliability of combustion zone gas measurement, and it gives facilities credit for pollutant removals made by their air pollution control equipment. It also means that measurements will be made at the point of release to the atmosphere—the real point of concern for protection of human health and the environment. Yet adequate protection is assured because air pollution control residues must be safely managed; in fact protection may be enhanced by the greater reliability of measurement.

EPA also now applies the DRE only to hazardous *organic* constituents, thus recognizing that inorganics are not "destroyed" by combustion. Inorganics can, of course, be "removed" from incinerator emissions, however the Agency has not yet analyzed data on what removal efficiencies represent the state of the art for inorganics removal controls. EPA is today proposing a procedure for case-by-case determinations of acceptable inorganic emissions. The Agency specifically solicits comments on that procedure and data on attainable inorganic removal standards.

Finally, on the most important point (attainability), EPA surveyed U.S. and international technical literature to obtain all available data on performance of incinerators destroying hazardous waste. EPA has now identified 54 waste/incinerator combinations for which an efficiency determination has been reported. This survey included all of the applicable full scale test work performed by EPA's Office of Solid Waste in 1975 and 1976, as well as all known and relevant test burns reported by industry, including a test-burn report submitted by the American Society of Mechanical Engineers.

In reviewing the 54 incinerator tests, all but nine achieved at least a 99.99% destruction efficiency. The remaining nine achieved efficiencies very close to 99.99%, and, upon close examination of the test reports, all of those nine tests had explainable and correctable problems which prevented attaining a 99.99% destruction efficiency. Since the final regulation is based on destruction and *removal* efficiency, the 99.99% performance level is more readily attainable than that monitored in test burns. Data clearly indicate that commercial hazardous waste incinerators can attain a 99.99% DRE for a wide-range of organic hazardous wastes, including those most difficult to burn.

Commenters objected to the proposed 99% removal requirement for all halogens, noting the difficulty of achieving 99% removal of halogens other than hydrogen chloride and claiming that other halogens were less dangerous than hydrogen chloride. Some argued for case-by-case determinations of necessary halogen removals.

EPA has retained the 99% removal requirement for hydrogen chloride from wastes containing significant amounts of chlorine. The comments received, and surveys of the technology in place, indicate that 99% removal for hydrogen chloride is attainable. EPA's Office of Solid Waste determined hydrogen chloride removals for four of its test burns in 1975 and 1976. All exceeded the required removals. Industry reports confirm this. The Agency, however, does not yet have data to support the attainability of, or need for, similar removals for other hydrogen halides. EPA is today proposing a procedure for case-by-case determination of acceptable hydrogen halide emissions, based on assessment of impacts on human health and the environment. The Agency specifically solicits comments on that procedure and on attainable hydrogen halide control levels.

Commenters criticized the proposed regulatory standard for particulate emissions. Some felt that it was too stringent, and others saw it as more permissive than existing Clean Air Act standards. Both groups criticized the complex formula for correcting for carbon dioxide in the exhaust stream.

EPA has clarified the formula to make it clear that the formula, calculations, and final standard are equivalent to the New Stationary Source Performance Standard for municipal incinerators promulgated under the Clean Air Act. Industry information and EPA's own full-scale tests indicate that this standard is attainable for facilities regulated under this Subpart.

Commenters objected to EPA's reliance on a combination of continuous monitoring of carbon monoxide emissions and a requirement of 99.9% combustion efficiency as an indicator of destruction efficiency. Determination of the combustion efficiency involves monitoring of both CO and CO_2 from the combustion process on a continuous basis. Commenters argued that a 99.9% combustion efficiency, as defined in the proposed regulation, is not achievable. Commenters also argued that measurement is a problem because absorption of CO_2 in wet scrubber systems can produce errors in the measurement of combustion efficiency.

The Agency has decided to drop the specification of combustion efficiency, as a result of these and related comments, and because the objectives of the proposed combustion efficiency standard can be obtained more simply. Thus, carbon dioxide no longer needs to be monitored. The final standard states that the carbon monoxide in the exhaust stack will be monitored on a continuous basis, but the maximum concentration limit in the emissions will be specified as an operating condition on a case-by-case basis in each permit. The permit limit will be determined based on a trial burn test or on other data submitted in lieu of a trial burn.

Carbon Monoxide monitoring is important because it provides a continuous indicator of the completeness of combustion which has taken place in an incinerator. When CO monitoring is combined with continuous monitoring of temperature, waste feed rate, and air feed rate, it is possible to determine on a continuous basis whether the incinerator is operating within limits defined in the trial burn as necessary to achieve 99.99% DRE.

As discussed above, commenters critized reliance on uniform operating requirements. The Agency agrees and these requirements will now be set on a case-by-case basis. The final regulations specify several incinerator operating parameters which are to become part of the permit issued by the Agency. These are combustion temperature, waste feed rate, air feed rate, and CO level in the exhaust gas. Also specified will be allowable variations in waste composition of the incinerator feed, and allowable changes in incinerator design and operating procedures. Standards regarding changes in design, operation, and feed composition are now specified.

The first reason for this is the shift from uniform requirements to those set on a case-by-case basis. It is now necessary to ensure that incinerator practices do not change (from those specified in permit applications) in ways that could make the specified conditions inadequate. A related reason is that DRE is now not monitored directly or continuously and the proposed combustion efficiency requirement has been dropped. Modifications to incinerators after trial burns could affect DRE without detection. Permit writers, therefore, will specify acceptable changes in incineration design, configuration, operating methods, and waste feed character.

Commenters criticized the proposed standard for control of fugitive

emissions of unburned hazardous waste and combustion products. Most stated that the level of control required was vague, or that EPA should state it as the level of best practical technology. Others argued that limited fugitive emissions are inevitable in some types of incinerators, particularly rotary kilns.

The Agency has now made the standard more precise. It now specifies two control techniques in current usage—sealing the combustion zone, and operating so that pressures in the combustion zone are less than in ambient air. Data indicate that the first technique can be used in all incinerators except rotary kilns, while "negative pressure" is the norm for all incinerators except fluidized bed incinerators. In any case, each facility may rely on either or both practices, or on any new method demonstrated to meet a performance standard equivalent to that achieved by "negative pressure" systems.

Commenters criticized the proposal for requiring that incinerators be shut-down and that waste feed be cut off whenever permit deviations occurred. Some argued that automatic shut-downs would in fact be harmful since rapid cooling would damage refractory liners.

The Agency has modified the regulation to make clear that, while hazardous waste *feed* must be cut-off, a total facility shutdown is not required. Human health and the environment will be protected if waste feed ceases. Non-hazardous auxiliary fuel feed may continue. Having ceased waste feed, the facility is free to correct deviations through whatever control modifications the situation requires.

Commmenters critized the proposed monitoring and facility inspection requirements. They questioned the expense and reliability of the required gaseous monitoring equipment, the frequency of inspections, and the specification of monitoring points. In these final rules, the Agency has specified a minimum schedule for monitoring and inspecting the operation of incinerators. Combustion and CO monitoring equipment must be monitored continuously, and operating corrections made to ensure that critical conditions are not allowed to vary outside permit limits. In addition, the regulation requires that equipment be inspected in accordance with both the minimum frequencies specified in the Subpart O standard and in the facility inspection schedule.

The permit writer may require measurements and calculations (similar to those used in a trial burn) to verify compliance with the DRE. The Agency expects that generally this will not be required more frequently than annually, and in most cases even less frequently.

C. Significant Comments; and Changes to Part 122

Comments suggested that trial burns should not be subject to the incinerator performance standard since the purpose of the trial burn is to determine the feasibility of, and the conditions necessary for, compliance with that standard. They also argued that failures to meet the performance standard might be inevitable, instructive, in good faith, and of minor environmental consequence. EPA agrees with much of this argument and, as discussed above, has created a special, simplified, permit process for trial burns. This procedure, codified as § 122.27(b), effectively exempts trial burns from Subpart O and subjects them only to conditions directly relevant to trial burns. In substance, these parallel §§ 264.341 (waste analysis) and 264.342 (POHC selection). These are combined with required compliance with approved operating conditions set forth in an approved trial burn plan. They provide an alternative basis for protection of human health and the environment, adequate for the limited mass and duration of trial burn emissions.

Trial burns are essential to the application of this regulation. The evaluation of trial burn data, and the setting of permit conditions which result from those data, represent the major focus of scientific and engineering judgment by the permitting official. It is in that process that the permit writer:

(1) applies scientific and engineering judgment to identify the principal organic hazardous constituents to which the performance standard applies, and

(2) establishes the operating conditions that will be placed in the permit.

The Agency intends that new trial burns should be minimized to the extent possible and conduct of those burns should proceed quickly so that they do not become an administrative barrier to the utilization of hazardous waste incineration. This is a particular concern with off-site facilities that burn a wide variety of hazardous wastes from many different generators. The regulations deal with this concern in several ways.

First, the simplified permit process described in § 122.27(b) has been set up. Second, as § 122.25 and Subpart O make clear, a trial burn may be waived, if the facility owner or operator can provide data equivalent to that which would be developed in a trial burn. This may be data from previous operational burns in a similar incinerator on similar waste, burns in pilot facilities, etc. Finally, trial burns can be minimized by prudent planning and structuring of trial burns by the facility owner or operator.

Although the DRE performance standard applies to each waste feed burned, this does not mean that a separate trial burn for each waste or each different mixture of wastes is required. To the extent practicable, the Agency intends to establish a ranking of wastes based on difficulty of thermal destruction. If an owner or operator established (through a trial burn) operating conditions for those wastes which are most difficult to destroy, this could provide the alternative documentation for the permitting official to allow certain other wastes to be burned at the same conditions. To avoid overly stringent burn conditions for easily combusted wastes, the facility owner might want to carry out, at different operating conditions, trial burns on two or more basic group of wastes, or waste mixtures, so that permit conditions could be established for each.

As an aid to this approach, EPA is working to construct a hierarchy of waste incinerability. Currently, data are available to develop comparative and predictive assessments, but not to define a complete hierarchy. It is now possible, based on current knowledge, to make some judgments of relative incinerability of different wastes. Data indicate that each of several predictive theories are reasonably accurate and that various theories generally agree in outcome. As more test burns are completed, and as more research and pilot incineration tests are conducted by EPA, a more complete incinerability hierarchy will be developed. As this data base is developing, the permit writer will need to exercise judgment in establishing the bounds on wastes and waste mixtures that can be burned at a given set of incinerator conditions. Thus, initially the trial burn burden may be large, but it should diminish substantially over time.

The Agency has placed a specific requirement in the trial burn section requiring that data collected from any approved trial burn be submitted to the Agency. This information is to be submitted whether or not the trial burn was successful in demonstration compliance with the performance standards. This data will allow the Agency to determine if excessive amounts of POHC's were emitted during the trial burn, to add to the information base being developed by the Agency, and to determine the reliability of successful trial burn results that are reported to the Agency.

D. Significant Comments; and Changes to Part 265

Commenters argued that banning the use of high BTU hazardous waste as fuel to start-up incinerators was contrary to sound practice. Some also argued that wastes which contain only carbon, hydrogen, and oxygen should be allowed as start-up fuel. Finally they asserted that EPA had failed to recognize degree of hazard of wastes.

The Agency has concluded that use of clean auxiliary fuel (such as fuel oil or natural gas) to start-up incinerators is a prudent practice. EPA realizes, however, that some wastes may be hazardous due solely to ignitability and might well be suitable for start-up. Thus, the final regulations for interim status incineration exempt wastes which are hazardous due solely to ignitability from the substantive requirements of this Subpart. The Agency has also modified the operating requirements to require that hazardous waste not be fed to the incinerator during shut down.

The Agency, however, disagrees with the comment that wastes which have only hydrogen, oxygen, and carbon in their structure should be exempted from the pre-heating requirement. An example of such a waste material is benzene, which contains only hydrogen and carbon, but which is hazardous because of its carcinogenic properties.

Finally, EPA has decided not to incorporate a degree of hazard approach into these Interim Status Standards since, even if feasible at all, it would require greater interaction between facilities and the Agency than interim status makes practical.

VI. Regulatory Analysis

Executive Order 12044 requires EPA to prepare a regulatory analysis for all new significant regulations. This analysis includes a comprehensive economic impact analysis and a discussion of the regulatory alternatives considered.

A. Economic Analysis

EPA plans to complete its formal analysis of the total Part 264 RCRA program and make it available for public review and comment in mid-1981. The Agency has, however, completed a fairly substantial preliminary analysis of the cost of the regulation published today. A copy of the preliminary cost analysis will shortly be available in the EPA Regional libraries, the EPA Headquarters library and the Docket Room in the Office of Solid Waste.

While total costs and impacts of the entire Part 264 regulation cannot be determined yet, EPA is building a model which allows such determinations. Inputs to this model are quantities of waste by waste stream and industry, unit costs of waste management, lists of feasible management methods for each waste stream, and capacity for existing management processes. The output from the model is the cost of the regulation by industry. These costs then serve as input to determining impacts. The incinerator costs discussed here will be used in this model.

The incremental costs by which RCRA regulations will increase the costs of current practice of managing hazardous waste are now being determined. These are the incremental costs of treating (or storing or disposing) of waste by a given method (e.g., in a incinerator) which is in compliance with the regulations. Preliminary costs have been developed for incinerators. In the following analysis these costs are presented on an incremental annualized after tax basis. Because they are incremental, they represent the additional cost of waste management imposed by the Part 264 general status regulations (over and above the costs imposed by the Part 265 interim status standards) on those owners or operators required to obtain a RCRA permit for incinerating hazardous waste. Because they are annualized, they represent the cost (in 1980 dollars) the owner or operator would incur if he incurred the same cost each year.

As a result of the permitting standards for incinerator, (Subpart O of Part 264), operators of incinerators will face higher costs. The regulations require the owners or operators of incinerators to achieve a destruction and removal efficiency (DRE) of 99.99%, to perform trial burns, to monitor continuously for carbon monoxide, to install an automatic shut down system which will automatically keep waste from entering the combustion chamber when incinerator operating conditions do not comply with the permit conditions, to close the incinerator against fugitive emissions, and to determine the principle organic hazardous constituents of the waste.

In the cost analysis, EPA determined that different types of wastes will incur different incremental costs. The primary reasons for cost differences among waste types is that some wastes require a higher temperature than others to assure a DRE of 99.99%, and that some types of wastes must be incinerated in a rotary kiln, while others can be incinerated in a liquid injector. The following table shows the annualized unit baseline (or pre-RCRA) cost for incineration, the cost increment due to the Part 265 Subpart O and financial requirements regulations, the increment due to the Part 264 Subpart O and Financial requirements regulations, and the cost of incineration following the Part 264 regulations. These figures show that the cost increment due to these Part 264 incinerator regulations is very low, and adds less than 6% to current costs even for the most toxic materials to be burned.

Annualized Incremental Unit Cost of Compliance With Part 264 for Incinerators[1]

[Unit cost (dollars per ton)]

Cost	Nonhalogenated liquids	Halogenated liquids	Nonhalogenated solids and sludges	Halogenated solids and sludges	Highly toxic materials
Baseline	$53.57	$259.29	$357.14	$556.79	$556.79
Part 265 without financial requirements	.97	1.94	.97	.97	.97
Part 265 financial requirements	1.86	7.04	12.34	12.34	12.34
Part 264 without financial requirements	3.62	7.23	3.62	11.62	45.46
Part 264 financial requirements	.22	.87	1.52	1.52	1.52
Total	60.24	276.37	375.59	563.24	617.10

[1] These costs are based on waste streams being incinerated as follows:

- Nonhalogenated liquids are incinerated in a liquid injection incinerator without pollution control devices and with a design capacity of 20,000 MT per year.
- Halogenated liquids are incinerated in a liquid injection incinerator with pollution control devices and with a design capacity of 10,000 MT per year.
- Nonhalogenated solids and sludges, halogenated solids and sludges, and highly toxic materials are incinerated in a rotary kiln incinerator with pollution control devices and with a design capacity of 20,000 MT per year.

The cost for Part 265 without financial requirements includes costs for monitoring, recordkeeping and reporting, administration, training and contingency plans, and equipment. It excludes the cost of waste analysis, which is dependent on the annual quantity of particular waste streams incinerated.

The cost for Part 265 financial requirements includes the cost of closure as well as providing a trust fund for closure. To the extent that owners or operators are able to use letters of credit or surety bonds to comply with the financial requirements, these costs will be significantly lower. The cost for Part 264 without financial requirements reflects costs for achieving the requisite DRE, performing trial burns, monitoring for CO, installing and operating an automatic waste feed cut-off system, determining the principal hazardous organic components of the waste, and periodically inspecting and analyzing burns to insure compliance with permit conditions. The cost for Part 264 financial requirements reflects the fact that the analysis assumes that owner or operators will build trust funds over 10 years for Part 264 and 15 years for Part 265.

The annualized incremental unit costs for Part 264 were derived from estimates of capital and operating and maintenance costs (O & M costs). The following table shows the capital and O & M costs, and serves as the basis for these Part 264 estimates.

Total Incremental Capital and Operating and Maintenance Cost of Compliance With Part 264 for Incinerators

[Cost in thousands of dollars]

Cost	Liquid injection—non-halogenated and halogenated liquids	Rotary kiln		
		Non-halogenated solids and sludges	Halogenated solids and sludges	Highly toxic materials
Capital	222.2	222.2	222.2	352.2
O & M	84.0	84.0	308.0	1,246.0

The cost analysis indicates that an owner or operator will incur capital costs for the following requirements: a) conducting trial burns; b) attaining the required destruction and removal efficiency; c) monitoring CO continuously; d) installing an automatic waste feed shut-off system; and e) determining the principal organic hazardous constituents of the waste feed. In addition, the owner or operator will incur annual operating and maintennce costs for (a) through (e), plus annual costs for periodic inspections and analyses of burns.

B. Regulatory Alternatives

EPA plans to prepare and make available for public comment in mid-1981 a full Regulatory Analysis for the entire RCRA program. This will include both the economic impact analysis and a summary of the regulatory approaches considered.

The Regulatory Flexibility Act (PL–96–354) requires all Federal agencies to consider the effects of their regulations on "small entities", i.e. small businesses, small organizations, and small governmental jurisdictions. It requires agencies to propose for public comment "Regulatory Flexibility Analysis" for any regulations proposed *after* January 1, 1981, and which will cause a significant impact on a substantial number of small entities. Since the Agency proposed this regulation before January 1, 1981, it is not legally required to comply with the Regulatory Flexibility Act.

However, the Agency is concerned about small entity impacts and has already considered them. EPA believes that a significant portion of the impact of the hazardous waste regulations on small businesses is caused by the regulations previously promulgated under § 3001 of RCRA. These rules define hazardous waste and thus determine who must comply with the regulation. For primarily administrative reasons, the Agency included a special exemption in the regulations promulgated on May 19, 1980 for small quantity generators (§ 261.5). This provision exempts from full regulation generators that produce less than 1000 kilograms of hazardous waste per calendar month (except that there are lower exemptions for certain acutely hazardous wastes). This exemption applies to firms that are small quantity generators which also incinerate their waste on-site. Such incinerators would not be subject to the Subpart O regulations for incinerators. Thus, EPA believes it has directly addressed the objectives of this Act.

VII. OMB Review

Under the Federal Reports Act of 1942, as amended by the Paperwork Reduction Act of 1980, OMB reviews reporting requirements in proposed forms and regulations in order to minimize the reporting burden on respondents and the cost to government. Although EPA has initiated discussions with the staff of OMB, time has prevented the completion and submission to OMB of the reporting requirements, and supporting materials, contained in these regulations. These regulations, pursuant to Section 3010(b) of the Act, do not take effect until six months after their promulgation. EPA anticipates that OMB review will be completed well before the reporting requirements take effect.

VIII. Supporting Documents

A. Background Documents

Included in the record supporting these regulations are two background documents providing response to public comments and rationale for how and why the regulations have come to be written the way they are. In conjunction with the references listed in them, these documents provide the basis for and defense of the promulgated regulations.

The background documents include: (1) summaries and responses to comments on the May 19 interim final, interim status, regulations; (2) summaries and responses to comments on the propriety of certain May 19 regulations as interim status requirements; (3) summaries and responses to comments on the proposed (December 1978) general standards; and (4) rationale for the general standards promulgated today.

Copies of these documents are available for review in the EPA regional office libraries and at the EPA headquarters library, Room 2404, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460.

B. Guidance Documents

To assist owners and operators of facilities as well as regulatory officials to implement these regulations, EPA has prepared guidance manuals. These will not have the effect of regulations, but will provide guidance on how to apply the regulations and will include certain operation information on incineration.

EPA has prepared the following manuals in support of the hazardous waste incinerator regulations: Engineering Handbook on Hazardous Waste Incineration; Permit Writers Guidance Document on Hazardous Waste Incineration.

For a more complete list of manuals that EPA is preparing in support of the entire hazardous waste regulatory program see the preamble discussion in the January 12, 1981 regulation.

(Secs. 1006, 2002(a), 3004, 3005, and 3007 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6905, 6912(a), 6924, 6925 and 6927)

Dated: January 13, 1981.

Douglas M. Costle,

Administrator.

For the reasons set out in the Preamble, 40 CFR Parts 264, 265, and 122 are amended as set forth below. Part 264, Subpart O, and §§ 122.25(b)(5) and 122.27(b) are published in the **Federal Register** as interim final rules, and Part 265, Subpart O, is published in the

Federal Register as a final rule (see preamble for discussion).

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. In § 264.10, paragraph (b) is revised to read as follows:

§ 264.10 Applicability.

* * * * *

(b) Section 264.18(b) is applicable only to facilities subject to regulation under Part 264, Subparts I, J, K, L, and O.

2. In § 264.13, paragraph (b)(6) is revised to read as follows:

§ 264.13 General waste analysis.

* * * * *

(b) * * *

(6) Where applicable, the methods which will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 264.17 and 264.341.

* * * * *

3. In § 264.15, paragraph (b)(4) is revised to read as follows:

§ 264.15 General inspection requirements.

* * * * *

(b) * * *

(4) The frequency of inspection may vary for the items on the schedule. However, it should be based on the rate of possible deterioration of the equipment and the probability of an environmental or human health incident if the deterioration or malfunction of any operator error goes undetected between inspections. Areas subject to spills, such as loading and unloading areas, must be inspected daily when in use. At a minimum, the inspection schedule must include the terms and frequencies called for in §§ 264.174, 264.194, 264.226, 264.254, and 264.347, where applicable.

* * * * *

4. In § 264.73, paragraph (b) is amended by revising paragraph (b)(3), adding new paragraph (b)(6), and redesignating paragraph (b)(6) and (b)(7) as (b)(7) and (b)(8) respectively revised to read as follows:

§ 264.73 Operating Record.

* * * * *

(b) * * *

(3) Records and results of waste analyses performed as specified in §§ 264.13, 264.17, and 264.341;

* * * * *

(6) Monitoring, testing, or analytical data where required by § 264.347;

(7) For off-site facilities, notices to generators as specified in § 264.12(b); and

(8) All closure cost estimates under § 264.142, and, for disposal facilities, all post-closure cost estimates under § 264.144.

* * * * *

5. In § 264.112, paragraph (a) and paragraph (a)(1) are revised to read as follows:

§ 264.112 Closure plan; amendment of plan.

(a) The owner or operator of a hazardous waste management facility must have a written closure plan. The plan must be submitted with the permit application, in accordance with § 122.25(a)(13) of this Chapter, and approved by the Regional Administrator as part of the permit issuance proceeding under Part 124 of this Chapter. In accordance with § 122.29 of this Chapter, the approved closure plan will become a condition of any RCRA permit. The Regional Administrator's decision must assure that that approved closure plan is consistent with §§ 264.111, 264.113, 264.114, 264.115 and the applicable requirements of §§ 264.178, 264.197, 264.228, 264.258, and 264.351. A copy of the approved plan and all revisions to the plan must be kept at the facility until closure is completed and certified in accordance with § 264.115. The plan must identify steps necessary to completely or partially close the facility at any point during its intended operating life and to completely close the facility at the end of its intended operating life. The closure plan must include, at least:

(1) A description of how and when the facility will be partially closed, if applicable, and finally closed. The description must identify the maximum extent of the operation which will be unclosed during the life of the facility, and how the requirements of §§ 264.111, 264.113, 264.114, 264.115, and the applicable closure requirements of §§ 264.178, 264.197, 264.228, 264.258, and 264.351 will be met;

* * * * *

6. In § 264.142, paragraph (a) is revised to read as follows:

§ 264.142 Cost estimate for facility closure.

(a) The owner or operator must have a written estimate of the cost of closing the facility in accordance with the requirements in §§ 264.111–264.115 and applicable closure requirements in §§ 264.178, 264.197, 264.228, 264.258, and 264.351. The owner or operator must keep this estimate, and all subsequent estimates required in this Section, at the facility. The estimate must equal the cost of closure at the point in the facility's operating life when the extent and manner of its operation would make closure the most expensive, as indicated by its closure plan [see § 264.112(a)].

[*Comment:* For example, the closure cost estimate for a particular landfill may be for the cost of closure when its active disposal operations extend over 20 acres, if at all other times these operations extend over less than 20 acres. The estimate would not include costs of partial closures that the closure plan schedules before or after the time of maximum closure cost.]

* * * * *

7. In 40 CFR Part 264, Subpart O is added to read as follows:

Subpart O—Incinerators

Sec.

264.340 Applicability.
264.341 Waste analysis.
264.342 Principal organic hazardous constituents (POHCs).
264.343 Performance standards.
264.344 New wastes: Trial burns or permit modifications.
264.345 Operating requirements.
264.346 [Reserved]
264.347 Monitoring and inspections.
264.348–264.350 [Reserved]
264.351 Closure.
264.352–264.999 [Reserved]

Subpart O—Incinerators

§ 264.340 Applicability.

(a) The regulations in this Subpart apply to owners and operators of facilities that incinerate hazardous waste, except as § 264.1 provides otherwise.

(b) If the Regional Administrator finds, after an examination of the waste analysis included with Part B of the applicants permit application, that the waste to be burned:

(1) Is either (i) listed as a hazardous waste in Part 261, Subpart D, of this Chapter only because it is ignitable (Hazard Code I) or, (ii) that the waste has been tested against the characteristics of hazardous waste under Part 261, Subpart C, of this Chapter and that it meets only the ignitability characteristic; and

(2) That the waste analysis included with Part B of the permit application includes none of the hazardous constituents listed in Part 261, Appendix VIII;

then the Regional Administrator may, in establishing the permit conditions, exempt the applicant from all requirements of this Subpart except § 264.341 (Waste Analysis) and § 264.351 (Closure).

(c) The owner or operator of an incinerator may conduct trial burns, subject only to the requirements of § 122.27(b) of this Chapter (Trial Burn Permits).

§ 264.341 Waste analysis.

(a) As a portion of a trial burn plan required by § 122.27(b) of this Chapter, or with Part B of his permit application, the owner or operator must have included an analysis of his waste feed sufficient to provide all information required by § 122.27(b)(2) or § 122.25(b)(5) of this Chapter.

(b) Throughout normal operation the owner or operator must conduct sufficient waste analysis to verify that waste feed to the incinerator is within the physical and chemical composition limits specified in his permit (under § 264.345(b)).

§ 264.342 Principal organic hazardous constituents (POHCs).

(a) Principal Organic Hazardous Constituents (POHCs) in the waste feed must be treated to the extent required by the performance standard of § 264.343.

(b)(1) One or more POHCs will be specified in the facility's permit, from among those constituents listed in Part 261, Appendix VIII of this Chapter, for each waste feed to be burned. This specification will be based on the degree of difficulty of incineration of the organic constituents in the waste and on their concentration or mass in the waste feed, considering the results of waste analyses and trial burns or alternative data submitted with Part B of the facility's permit application. Organic constituents which represent the greatest degree of difficulty of incineration will be those most likely to be designated as POHCs. Constituents are more likely to be designated as POHCs if they are present in large quantities or concentrations in the waste.

(2) Trial POHCs will be designated for performance of trial burns in accordance with the procedure specified in § 122.27(b) of this Chapter for obtaining trial burn permits.

§ 264.343 Performance standards.

An incinerator burning hazardous waste must be designed, constructed, and maintained so that, when operated in accordance with operating requirements specified under § 264.345, it will meet the following performance standards:

(a) An incinerator burning hazardous waste must achieve a destruction and removal efficiency (DRE) of 99.99% for each principal organic hazardous constituent (POHC) designated (under § 264.342) in its permit for each waste feed. DRE is determined for each POHC from the following equation:

$$DRE = \left(\frac{W_{in} - W_{out}}{W_{in}}\right) \times 100\%$$

Where:

W_{in} = Mass feed rate of one principal organic hazardous constituent (POHC) in the waste stream feeding the incinerator, and

W_{out} = Mass emission rate of the same POHC present in exhaust emissions prior to release to the atmosphere.

(b) An incinerator burning hazardous waste containing more than 0.5% chlorine must remove 99% of the hydrogen chloride from the exhaust gas.

(c) An incinerator burning hazardous waste must not emit particulate matter exceeding 180 milligrams per dry standard cubic meter (0.08 grains per dry standard cubic foot) when corrected for 12% CO_2, using the procedures presented in the Clean Air Act regulations, "Standards of Performance for Incinerators", 40 CFR 60.50, Subpart E.

(d) For purposes of permit enforcement, compliance with the operating requirements specified in the permit (under § 264.345) will be regarded as compliance with this Section. However, evidence that compliance with those permit conditions is insufficient to ensure compliance with the performance requirements of this Section may be "information" justifying modification, revocation, or reissuance of a permit under § 122.15 of this Chapter.

§ 264.344 New wastes: trial burns or permit modifications.

(a) The owner or operator of a hazardous waste incinerator may burn only wastes specified in his permit and only under operating conditions specified for those wastes under § 264.345, except:

(1) In approved trial burns under § 122.27(b) of this Chapter; or

(2) Under exemptions created by § 264.340.

(b) Other hazardous wastes may be burned only after operating conditions have been specified in a new permit or a permit modification as applicable. Operating requirements for new wastes may be be based on either trial burn results or alternative data included with Part B of a permit application under § 122.25(b)(5) of this Chapter.

§ 264.345 Operating requirements.

(a) An incinerator must be operated in accordance with operating requirements specified in the permit. These will be specified on a case-by-case basis as those demonstrated (in a trial burn or in alternative data as specified in § 264.344(b) and included with Part B of a facility's permit application) to be sufficient to comply with the performance standards of § 264.343.

(b) Each set of operating requirements will specify the composition of the waste feed (including acceptable variations in the physical or chemical properties of the waste feed which will not affect compliance with the performance requirement of § 264.343) to which the operating requirements apply. For each such waste feed, the permit will specify acceptable operating limits including the following conditions:

(1) Carbon monoxide (CO) level in the stack exhaust gas;

(2) Waste feed rate;

(3) Combustion temperature;

(4) Air feed rate to the combustion system;

(5) Allowable variations in incinerator system design or operating procedures; and

(6) Such other operating requirements as are necessary to ensure that the performance standards of § 264.343 are met.

(c) During start-up and shut-down of an incinerator, hazardous waste (except ignitable waste exempted in accordance with § 264.340) must not be fed into the incinerator unless the incinerator is operating within the conditions of operation (temperature, air feed rate, etc.) specified in the permit.

(d) Fugitive emissions from the combustion zone must be controlled by:

(1) Keeping the combustion zone totally sealed against fugitive emissions; or

(2) Maintaining a combustion zone pressure lower than atmospheric pressure; or

(3) An alternate means of control demonstrated (with Part B of the permit application) to provide fugitive emissions control equivalent to maintenance of combustion zone pressure lower than atmospheric pressure.

(e) An incinerator must be operated with a functioning system to automatically cut off waste feed to the incinerator when operating conditions deviate from limits established under paragraph (a) of this Section.

(f) An incinerator must cease operation when changes in waste feed,

incinerator design, or operating conditions exceed limits designated in its permit.

§ 264.346 [Reserved]

§ 264.347 Monitoring and inspections.

(a) The owner or operator must conduct, as a minimum, the following monitoring while incinerating hazardous waste:

(1) Combustion temperature, waste feed rate, and air feed rate must be monitored on a continuous basis.

(2) CO must be monitored on a continuous basis at a point in the incinerator downstream of the combustion zone and prior to release to the atmosphere.

(3) Upon request by the Regional Administrator, sampling and analysis of the waste and exhaust emissions must be conducted to verify that the operating requirements established in the permit achieve the performance standards of § 264.343.

(b) The incinerator and associated equipment (pumps, valves, conveyors, pipes, etc.) must be completely inspected at least daily for leaks, spills, and fugitive emissions. All emergency waste feed cut-off controls and system alarms must be checked daily to verify proper operation.

(c) This monitoring and inspection data must be recorded and the records must be placed in the operating log required by § 264.73.

§§ 264.348-264.350 [Reserved]

§ 264.351 Closure.

At closure the owner or operator must remove all hazardous waste and hazardous waste residues (including, but not limited to, ash, scrubber waters, and scrubber sludges) from the incinerator site.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(d) of this Chapter, that the residue removed from the incinerator is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with applicable requirements of Parts 262–266 of this Chapter.]

§§ 264.352-264.999 [Reserved]

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. In § 265.73, paragraph (b)(3) is revised to read as follows:

§ 265.73 Operating record.

* * * * *

(b) * * *

(3) Records and results of waste analysis and trial tests performed as specified in §§ 265.13, 265.193, 265.225, 265.252, 265.273, 265.341, 265.375, and 265.402;

* * * * *

2. 40 CFR Part 265, Subpart O, is revised to read as follows:

Subpart O—Incinerators

Sec.

265.340 Applicability.
265.341 Waste analysis.
265.342–265.344 [Reserved]
265.345 General operating requirements.
265.346 [Reserved]
265.347 Monitoring and inspection.
265.348–265.350 [Reserved]
265.351 Closure.
265.352–265.369 [Reserved]

§ 265.340 Applicability.

(a) The regulations in this Subpart apply to owners or operators of facilities that treat hazardous waste in incinerators, except as § 265.1 and paragraph (b) of this Section provide otherwise.

(b) Incineration of wastes which:

(1) Meet only the ignitability characteristic under Part 261, Subpart C, of this Chapter, or

(2) Are listed in Part 261, Subpart D, of this Chapter for ignitability only (Hazard Code I),

are exempted from the requirements of this Subpart, except § 265.351, if the owner or operator can document that the waste feed would not reasonably be expected to contain constituents listed in Part 261, Appendix VIII of this Chapter. Such documentation must be in writing and must be kept at the facility.

§ 265.341 Waste analysis.

In addition to the waste analyses required by § 265.13, the owner or operator must sufficiently analyze any waste which he has not previously burned in his incinerator to enable him to establish steady state (normal) operating conditions (including waste and auxiliary fuel feed and air flow) and to determine the type of pollutants which might be emitted. At a minimum, the analysis must determine:

(a) Heating value of the waste;

(b) Halogen content and sulfur content in the waste; and

(c) Concentrations in the waste of lead and mercury, unless the owner or operator has written, documented data that show that the element is not present.

[*Comment:* As required by § 265.73, the owner or operator must place the results from each waste analysis, or the documented information, in the operating record of the facility.]

§§ 265.342–265.344 [Reserved]

§ 265.345 General operating requirements.

During start-up and shut-down of an incinerator, the owner or operator must not feed hazardous waste unless the incinerator is at steady state (normal) conditions of operation, including steady state operating temperature and air flow.

§ 265.346 [Reserved]

§ 265.347 Monitoring and inspections.

The owner or operator must conduct, as a minimum, the following monitoring and inspections when incinerating hazardous waste:

(a) Existing instruments which relate to combustion and emission control must be monitored at least every 15 minutes. Appropriate corrections to maintain steady state combustion conditions must be made immediately either automatically or by the operator. Instruments which relate to combustion and emission control would normally include those measuring waste feed, auxiliary fuel feed, air flow, incinerator temperature, scrubber flow, scrubber pH, and relevant level controls.

(b) The stack plume (emissions) must be observed visually at least hourly for normal appearance (color and opacity). The operator must immediately make any indicated corrections necessary to return visible emissions to their normal appearance.

(c) The complete incinerator and associated equipment (pumps, valves, conveyors, pipes, etc.) must be inspected at least daily for leaks, spills, and fugitive emissions, and all emergency shutdown controls and system alarms must be checked to assure proper operation.

§§ 265.348–265.350 [Reserved]

§ 265.351 Closure.

At closure, the owner or operator must remove all hazardous waste and hazardous waste residues (including but not limited to ash, scrubber waters, and scrubber sludges) from the incinerator.

[*Comment:* At closure, as throughout the operating period, unless the owner or operator can demonstrate, in accordance with § 261.3(d) of this Chapter, that the residue removed from his incinerator is not a hazardous waste, the owner or operator becomes a generator of hazardous waste and must manage it in accordance with all applicable requirements of Parts 262–266 of this Chapter.]

§§ 265.352–265.369 [Reserved]

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE HAZARDOUS WASTE PERMIT PROGRAM

1. In § 122.25, paragraph (b)(5) is added to read as follows:

§ 122.5 Contents of Part B

* * * * *

(b) * * *

(5) For facilities that *incinerate hazardous* waste, except as § 264.340 of this Chapter provides otherwise, the applicant must fulfill the requirements of paragraph (b)(5) (i), (ii), or (iii) of this Section.

(i) When seeking exemption under § 264.340(b) (Ignitable waste only):

(A) That the waste is either (1) listed as a hazardous waste in Part 261, Subpart D of this Chapter, only because it is ignitable (Hazard Code I) or, (2) that the waste has been tested against the characteristics of hazardous waste under Part 261, Subpart C of this Chapter, and that it meets only the ignitability characteristic, and includes none of the hazardous constituents listed in Part 261, Appendix VIII of this Chapter; or

(ii) Submit results of a trial burn conducted in accordance with § 122.27(b) including all the determinations required by § 122.27(b); or

(iii) In lieu of a trial burn, the applicant may submit the following information:

(A) An analysis of each waste or mixture of wastes to be burned including:

(*1*) Heat value of the waste in the form and composition in which it will be burned.

(*2*) Viscosity (if applicable), or description of physical form of the waste.

(*3*) An identification of any hazardous organic constitutents listed in Part 261, Appendix VIII, of this Chapter which are present in the waste to be burned, except that the applicant need not analyze for constituents listed in Part 261, Appendix VIII, of this Chapter which would reasonably not be expected to be found in the waste. The Constituents excluded from analysis must be identified and the basis for their exclusion stated. The waste analysis must rely on analytical techniques specified in EPA document SW–846 (referenced in 40 CFR Part 261, Appendix III) or their equivalent.

(*4*) An approximate quantification of the hazardous constituents identified in the waste, within the precision produced by the analytical methods specified in EPA document SW–846.

(*5*) A quantification of those hazardous constituents in the waste which may be designated as POHC's based on data submitted from other trial or operational burns which demonstrate compliance with the performance standard in § 264.343 of this Chapter.

(B) A detailed engineering description of the incinerator, including:

(*1*) Manufacturer's name and model number of incinerator.

(*2*) Type of incinerator.

(*3*) Linear dimension of incinerator unit including cross sectional area of combustion chamber.

(*4*) Description of auxiliary fuel system (type/feed).

(*5*) Capacity of prime mover.

(*6*) Description of automatic waste feed cutoff system(s).

(*7*) Stack gas monitoring and pollution control monitoring system.

(*8*) Nozzle and burner design.

(*9*) Construction materials.

(*10*) Location and description of temperature, pressure, and flow indicating devices and control devices.

(C) A description and analysis of the waste to be burned compared with the waste for which data from operational or trial burns are provided to support the contention that a trial burn is not needed. The data should include those items listed in § 122.25(b)(5)(iii)(A). This analysis should specify the POCH's which the applicant has identified in the waste for which a permit is sought, and any differences from the POCH's in the waste for which burn data are provided.

(D) The design and operating conditions of the incinerator unit to be used, compared with that for which comparative burn data are available.

(E) A description of the results submitted from any previously conducted trial burn(s) including:

(*1*) Sampling and analysis techniques used to calculate performance standards in § 264.343 of this Chapter.

(*2*) Methods and results of monitoring temperatures, waste feed rates, air feed rates, and carbon monoxide.

(*3*) Identification of any hazardous combustion by-products detected.

(*4*) The certification and results required by § 122.27(b)(5)(ii).

(F) The expected incinerator operation information to demonstrate compliance with §§ 264.343 and 264.345 of this chapter including:

(*1*) Expected carbon monoxide (CO) level in the stack exhaust gas.

(*2*) Waste feed rate.

(*3*) Combustion zone temperature.

(*4*) Air feed rate.

(*5*) Expected stack gas volume, flow rate, and temperature.

(*6*) Computed residence time for waste in the combustion zone.

(*7*) Expected hydrochloric acid removal efficiency.

(*8*) Expected fugitive emissions and their control procedures.

(*9*) Proposed waste feed cut-off limits based on the identified significant operating parameters.

(G) Such supplemental information as the Director finds necessary to achieve the purposes of this paragraph.

(H) Waste analysis data, including that submitted in paragraph (b)(5)(iii)(A), sufficient to allow the Director to specify as permit Principal Organic Hazardous Constituents (permit POHC's) those constituents for which destruction and removal efficiencies will be required.

(iv) The Director shall approve a permit application without a trial burn if he finds that:

(A) The wastes are sufficiently similar; and

(B) The incinerator units are sufficiently similar, and the data from other trial burns are adequate to specify (under § 264.345 of this Chapter) operating conditions that will ensure that the performance standards in § 264.343 of this Chapter will be met by the incinerator.

2. Section 122.27 is amended by revising the title, redesignating the existing Section as paragraph (a) and making conforming redesignations within paragraph (a), and adding a new paragraph (b) to read as follows:

§ 122.27 Short term permits.

(Applicable to State RCRA Programs, see § 123.7)

(a) *Emergency permits.* Notwithstanding any other provision of this part or Part 124, in the event the Director finds an imminent and substantial endangerment to human health or the environment the Director may issue a temporary emergency permit to a facility to allow treatment, storage, or disposal of hazardous waste for a non-permitted facility with an effective permit. This emergency permit:

(1) May be oral or written. If oral, it shall be followed in five days by a written emergency permit;

(2) Shall not exceed 90 days in duration;

(3) Shall clearly specify the hazardous wastes to be received, and the manner and location of their treatment, storage, or disposal;

(4) May be terminated by the Director at any time without process if he or she determines that termination is appropriate to protect human health and the environment;

(5) Shall be accompanied by a public notice published under § 124.11(b) including:

(i) Name and address of the office granting the emergency authorization;

(ii) Name and location of the permitted HWM facility;

(iii) A brief description of the wastes involved;

(iv) A brief description of the action authorized and reasons for authorizing it; and

(v) Duration of the emergency permit; and

(6) Shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of this Part and 40 CFR Parts 264 and 266.

(b) *Trial burn permits.* For the purposes of determining feasibility of compliance with the incinerator performance standard of § 264.343 of this Chapter and of determining adequate incinerator operating conditions under § 264.345 of this Chapter, the Director may issue a trial burn permit to a facility to allow short term operation of a hazardous waste incinerator subject to paragraphs (b)(1)–(5) of this Section.

(1) The trial burn must be conducted in accordance with a trial burn plan prepared by the applicant and approved by the Director. The trial burn plan will then become a condition of the permit. The trial burn plan will include the following information:

(i) An analysis of each waste or mixture of wastes to be burned which includes:

(A) Heat value of the waste in the form and composition in which it will be burned.

(B) Viscosity (if applicable), or description of physical form of the waste.

(C) An identification of any hazardous organic constituents listed in Part 261, Appendix VIII of this Chapter, which are present in the waste to be burned, except that the applicant need not analyze for constituents listed in Part 261, Appendix VIII, of this Chapter which would reasonably not be expected to be found in the waste. The constituents excluded from analysis must be identified and the basis for their exclusion stated. The waste analysis must rely on analytical techniques specified in EPA document SW–846 (referenced in 40 CFR Part 261, Appendix III), or their equivalent.

(D) An approximate quantification of the hazardous constituents identified in the waste, within the precision produced by the analytical methods specified in EPA document SW–846.

(E) A quantification of those hazardous constituents in the waste which may be designated as POHC's based on data submitted from other trial or operational burns which demonstrate compliance with the performance standard in § 264.343 of this Chapter.

(ii) A detailed engineering description of the incinerator for which the trial burn permit is sought including:

(A) Manufacturer's name and model number of incinerator (if available).

(B) Type of incinerator.

(C) Linear dimensions of the incinerator unit including the cross sectional area of combustion chamber.

(D) Description of the auxiliary fuel system (type/feed).

(E) Capacity of prime mover.

(F) Description of automatic waste feed cut-off system(s).

(G) Stack gas monitoring and pollution control equipment.

(H) Nozzle and burner design.

(I) Construction materials.

(J) Location and description of temperature, pressure, and flow indicating and control devices.

(iii) A detailed description of sampling and monitoring procedures, including sampling and monitoring locations in the system, the equipment to be used, sampling and monitoring frequency, and planned analytical procedures for sample analysis.

(iv) A detailed test schedule for each waste for which the trial burn is planned including date(s), duration, quantity of waste to be burned, and other factors relevant to the Director's decision under paragraph (b)(4) of this section.

(v) A detailed test protocol, including, for each waste identified, the ranges of temperature, waste feed rate, air feed rate, use of auxiliary fuel, and any other relevant parameters that will be varied to affect the destruction and removal efficiency of the incinerator.

(vi) A description of, and planned operating conditions for, any emission control equipment which will be used.

(vii) Procedures for rapidly stopping waste feed, shutting down the incinerator, and controlling emissions in the event of an equipment malfunction.

(viii) Such other information as the Director reasonably finds necessary to determine whether to approve the trial burn plan in light of the purposes of this paragraph and the criteria in paragraph (b)(4) of this section.

(2) The Director, in reviewing the trial burn plan, shall evaluate the sufficiency of the information provided and may require the applicant to supplement this information, if necessary, to achieve the purposes of this paragraph.

(3) Based on the waste analysis data in the trial burn plan, the Director will specify as trial Principal Organic Hazardous Constituents (trial POHC's), those constituents for which destruction and removal efficiencies must be calculated during the trial burn. These trial PHOC's will be specified by the Director based on his estimate of the difficulty of incineration of the constituents identified in the waste analysis, the concentration or mass in the waste feed, and, for wastes listed in Part 261 of this Chapter, the hazardous waste constituent or constituents identified in Appendix VII of that Part as the basis for listing.

(4) The Director shall approve a trial burn plan if he finds that:

(i) The trial burn is likely to determine whether the incinerator performance standard required by § 264.343 of this Chapter can be met;

(ii) The trial burn itself will not present an imminent hazard to human health or the environment;

(iii) The trial burn will help the Director to determine operating requirements to be specified under § 264.345 of this Chapter; and

(iv) The information sought in paragraphs (b)(4)(i) and (iii) of this section cannot reasonably be developed through other means.

(5)(i) During each approved trial burn (or as soon after the burn as is practicable), the applicant must make the following determinations:

(A) A quantitative analysis of the trial POHC's in the waste feed to the incinerator.

(B) A quantitative analysis of the exhaust gas for the concentration and mass emissions of the trial POHC's, CO_2, O_2, and hazardous combustion by-products.

(C) A quantitative analysis of the scrubber water (if any), ash residues, and other residues, for the trial POHC's.

(D) A total mass balance of the trial POHC's in the waste.

(E) A computation of destruction and removal efficiency (DRE), in accordance with the DRE formula specified in § 264.343(a) of this Chapter.

(F) If the waste feed contains more than 0.5 percent chlorine, a computation of chlorine removal efficiency, in accordance with § 264.343(b).

(G) A computation of particulate emissions, in accordance with § 264.343(c) of this Chapter.

(H) An identification of sources of fugitive emissions and their means of control.

(I) A measurement of average, maximum, and minimum temperatures, and air feed rates.

(J) A continous measurement of CO in the exhaust gas.

(K) Such other information as the Director may specify as necessary to ensure that the trial burn will determine compliance with the performance standard in § 264.343 of this Chapter and to establish the operating conditions required by § 264.345 of this Chapter as necessary to meet that performance standard.

(ii) The applicant shall submit to the Director a certification that the trial burn has been carried out in accordance with the approved trial burn plan, and the results of all the determinations required in paragraph (b)(5)(i) of this Section. To the extent possible, this submission shall be made within 30 days of the completion of the trial burn, or sooner if the Director so requests.

(iii) All data collected during any trial burn must be submitted to the Director following the completion of the trial burn. The results of the trial burn must be included with Part B of the permit application, if a permit application is submitted.

(iv) All submissions required by this paragraph shall be certified on behalf of the applicant by the signature of a person authorized to sign a permit application or a report under § 122.6.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 264

[SWH-FRL 1730-6]

Incinerator Standards for Owners and Operators of Hazardous Waste Management Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rules.

SUMMARY: The Environmental Protection Agency is proposing to amend the Part 264, Subpart O, general (permit) standards published today in the Federal Register. The proposed amendments apply primarily to the incinerator performance standards (§ 264.343) and include emission limits for hazardous combustion by-products, a variance standard based on an assessment of risk to human health, and a procedure to set emission limits for toxic metals and hydrogen halides based on an assessment of risk. In addition the procedure for designation of POHC's (§ 264.342) is proposed to be amended to include hazardous combustion by-products.

EPA is proposing these additions to the Part 264 general standards because they are major changes from the proposed rules published on December 18, 1978 [43 FR 58982].

DATES: Comments are due on or before April 23, 1981. A public hearing will be held March 19, 1981.

ADDRESS: Comments should be addressed to Deborah Villari, Docket Clerk, Office of Solid Waste (WH-562), U.S. Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460. Comments should identify the regulatory docket as follows: "Docket No. 3004, Proposed Amendment, Hazardous Waste Incineration."

The official record for this rulemaking is available at Room 2711, U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460 and is available for viewing from 9 a.m. to 4:30 p.m., Monday through Friday excluding holidays.

A public hearing will be held at the Auditorium, Department of Health and Human Services, 330 Independence Ave. SW., Washington, D.C. on March 19, 1981, from 9 a.m. to 4 p.m.

FOR FURTHER INFORMATION CONTACT: Mr. Ed Martin, Office of Solid Waste (WH-565) U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460, (202) 755-9203.

SUPPLEMENTARY INFORMATION: A public hearing will be held at the Auditorium, Department of Health and Human Services, 330 Independence Ave. SW., Washington, D.C. on March 19, 1981, from 9 a.m. to 4 p.m. Anyone wishing to make a statement at the hearing should notify in writing Ms. Geraldine Wyer, Public Participation Officer, Office of Solid Waste (WH-562) U.S. Environmental Protection Agency, 401 M Street SW., Washington, D.C. 20460.

Oral and written comments may be submitted at the public hearing. Persons who wish to make oral presentations must restrict their presentations to 10 minutes and are encouraged to have written copies of their complete comments for inclusion in the official record.

Preamble Outline

I. Authority
II. Background
III. Summary of Proposed Rules
IV. Regulatory Analysis
V. Supporting Documents

I. Authority

This regulation is proposed under the authority of Sections 1006, 2002(a), and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended [RCRA] 42 U.S.C. 6905, 6912(a), and 6924.

II. Background

Early last year EPA began issuing regulations which comprise the Subtitle C hazardous waste management system and announced that the regulations would be issued in two phases. In January of this year EPA promulgated a large portion of the Phase II technical standards for facilities that treat and store hazardous wastes (Part 264). Elsewhere in today's Federal Register, the Agency promulgated interim final standards for incinerators under Part 264.

However, some of the requirements which the Agency believes may be necessary for adequate control of the incineration of hazardous wastes are substantially different than those proposed in December 18, 1978 [43 FR 58982]. The Agency is therefore proposing these requirements herein, to give the regulated community and the general public the opportunity to comment on them. As a result of the comments received the Agency may abandon these proposed requirements or change them substantially before promulgating them.

III. Summary of Proposed Rules

A. Introduction

On December 18, 1978, EPA proposed permitting standards for the incineration of hazardous waste. (43 FR 58946). After consideration of comments the Agency is promulgating those standards on an interim final basis elsewhere in today's Federal Register. At the heart of those interim final standards is the requirement that incinerators must achieve a destruction and removal efficiency (DRE) of 99.99% for each designated principal organic hazardous constituent (POHC) in the waste feed mixture. The principal organic hazardous constituents are to be designated by the permit writer based on the difficulty of incineration and quantity of the hazardous organic constituents in the waste feed mixture. Operating conditions capable of achieving 99.99% destruction and removal of these POHC's will then be incorporated into the permit on the basis of trial burns or equivalent information.

Concurrently with the promulgation of these interim final permitting standards, EPA is today proposing a number of amendments to the standard which are designed to supplement the standards and make them more comprehensive.

The proposed additonal requirements in this package include the following: (1) a revision to the designation of POHCs to include hazardous combustion by-products (§ 264.342); (2) an emission limit for the hazardous combustion by-products formed during incineration (§ 264.343(d)); (3) a variance to the 99.99% DRE performance standard for principal organic hazardous constituents and the emission limit on hazardous combustion by-products based on an assessment of risk to human health (§ 264.343(e)); and, (4) a procedure to set emission limits on toxic metals, elemental halogens, and hydrogen halides based on assessment of risk to human health (§ 264.343(f)).

B. Emissions Limits for Hazardous Combustion By-Products (§ 264.343(d))

An important shortcoming in the incinerator performance standards promulgated today is their failure to address hazardous combustion by-products formed during incineration. If combustion in an incinerator is not complete many hazardous wastes break down and recombine into other forms of hazardous organic compounds. Thus even if the principal organic hazardous constituents (POHC's) in the waste feed are destroyed in accordance with the destruction and removal efficiency standard, the stack gases may contain other hazardous constituents formed during incineration. In some cases the combustion by-products produced may be more toxic than the unburned POHC's.

In order to remedy this problem, the Agency is proposing an amendment to the incinerator regulations which requires that the mass emission rate of hazardous combustion by-products not exceed 0.01% of the total mass feed rate of POHC's feed to the incinerator. This mass emission rate is analogous to the 99.99% DRE based mass emission rate of POHC's. However, the mass emission rate is calculated, not as a percentage of the quantity of combustion products generated, but as a percentage of the quantity of POHC's fed into the incinerator. Consequently, where the DRE for POHC's is 99.99%, this mass emission rate will allow a total emission rate for by-products equal to the mass emission for POHC's. The rationale behind allowing a mass emission of hazardous combustion by-products equal to the mass emission allowed for POHC's is that (1) such hazardous combustion by-products are believed to be as hazardous as POHC's and should thus be equally limited to the extent technologically feasible, and (2) a total mass emission limit for hazardous combustion by-products equal to the total mass emission limit for POHC's is technologically feasible since the chemical constitutents of both are the same. EPA specifically solicits comments on the technological feasibility of the proposed emission limit, and on alternate means of setting emission limits on hazardous combustion by-products.

As a supplement to the proposed 0.01 emission limit, the Agency is also proposing to allow more or less stringent mass emission limits for hazardous combustion by-products on a case-by-case basis pursuant to the variance procedure being proposed at § 264.343 (e) and (g).

The Agency intends that the hazardous combusion by-products subject to the proposed emission limit will be designated by the permit writer on the basis of information supplied by the permit applicant. This designation cannot be made until the components of the stack gas have been identified. The identification of stack gas components and designation of hazardous cumbustion by-products will generally take place following analysis of data from the trial burn, which analysis will encompass only Part 261, Appendix VIII, constituents and will be based on the same considerations upon which POHC designation is based. Where the trial burn data show that the designated hazardous by-products of combustion have not been destroyed in accordance with the required emission limit, the operating conditions will have to be adjusted to achieve compliance with this limit and the trial burn will have to be repeated to show that the required emission limit could be met.

In some instances, it may be possible for the permit applicant to provide a prediction of hazardous combustion by-products based on data from the literature or from laboratory burns or previous pilot or full scale burns where hazardous combustion by-products have been identified. These data would be included in the trial burn plan, and would allow a tentative designation of hazardous by-products by the permit writer. This would allow the applicant to plan for the destruction of these substances in the trial burn and might obviate the necessity of a second trial burn. In cases where a trial burn waiver is requested, the applicant's prediction of combustion by-products, as described above, would provide the only basis for designation of hazardous combustion by-products by the permit writer and for designation of the operating conditions necessary to achieve the required emission limit. Thus, if a trial burn waiver is requested, the permit writer must be convinced before granting the waiver that the prediction of combustion by-products and their emission rates is accurate.

C. Limits on Toxic Metals, Hydrogen Halides and Elemental Halogens § 264.343(f))

The proposed incineration regulations (43 FR 58946) required incinerators to meet the destruction efficiency requirement for toxic metals and non-organic halogen compounds. Commenters objected to this proposal on the basis that non-organic components cannot be thermally destructed.

Commenters correctly discerned that the originally proposed destruction efficiency requirement was inapplicable to metals and other non-organics. However, the destruction and *removal* efficiency approach adopted in today's interim final regulations can be applied to metals and non-organic halogen compounds, because that approach considers removal of waste constituents in the emission control system as well as destruction in the combustion zone. This approach recognizes that metals and non-organic halogens emitted can be controlled through removal and included in a destruction and removal efficiency calculation. However, the Agency elected not to apply a destruction and removal efficiency standard to metals and non-organic halogens in the interim final regulation because the Agency does not now have test data to indicate what specific removal levels are achievable, except in the case of hydrogen chloride emissions.

Instead, the Agency is proposing at § 264.343(f) to require that emission limits for metals and non-organic halogens (other than HC1) be set on a case-by-case basis by assessing the risk to human health, using the approach established for assessing a variance to the 99.99 percent DRE standard and the proposed hazardous combustion by-products standard. The methodology for these assessments and the manner in which these assessments are to be integrated into the permitting process is discussed in Section E of this preamble.

The Agency anticipates that a risk assessment will be required whenever the permit applicant's waste analysis reveals the presence of toxic metals or non-organic halogens in the waste. Comments on the necessity and feasibility of such a risk assessment and/or the removal efficiencies demonstrated to be technologically feasible are specifically requested.

In proposing the risk assessment based limits for toxic metals, hydrogen halides and elemental halogens, the Agency considered whether metals and non-organic halogens were adequately addressed through standards developed under the Clean Air Act, and determined that they were not. The only existing Federal point source standards applicable to hazardous waste incinerators address beryllium and mercury. These metals are controlled through National Emission Standards for Hazardous Air Pollutants (NESHAPS). However, the NESHAP for mercury applies to sludge incinerators, and thus would not be applicable to all hazardous waste incinerators. Additionally, an ambient standard for lead has been promulgated under the Clean Air Act and is applied through the State Implementation plan (SIP) process. However, some incinerators, due to their small size, may not be covered by this standard.

D. Variance to the Destruction and Removal Efficiency (§ 264.343 (e) and (g))

A number of comments on the December 18, 1978 proposed incineration standards argued for flexibility in the proposed destruction efficiency. The Agency agrees that such flexibility is desirable because the Destruction and Removal Efficiency (DRE) performance standard may be either more or less stringent than necessary to provide assurance of protecting human health and the environment in all circumstances. A basic reason is that destruction and removal efficiency is a percentage

removal standard, and, thus, allows for varying mass emission rates. For any DRE, mass emission rates can vary based on the mass feed rate.

As a result of the comments and EPA's further analysis, EPA is proposing to add a variance procedure to the incinerator regulations providing the permit writer with discretion to alter the basis performance requirements of 99.99 percent destruction and removal efficiency. Under this proposal, the permit writer may establish permit limitations based on an assessment of the risk to human health. If the risk assessment indicates that a more restrictive emission rate is needed to protect human health, the permit writer may strengthen the performance standard either by requiring a higher destruction and removal efficiency or by specifying a lower waste feed rate. In a like manner, the permit writer may reduce the performance standard by approving a lower destruction and removal efficiency (or higher feed rate) if the risk assessment indicates that the lower rate limit will pose no significant hazard to human health. Section d (Estimating risk to human health) of this preamble describes the procedures for conducting these risk assessments.

Although the proposed variance procedure allows the permit writer to either raise or lower the mass emission rate the Agency considered the option of allowing use of the variance only to raise the performance standard. The primary reason for including the variance is to ensure protection of human health in those instances where either a highly toxic stack emission or a very high through-put results in potential risk to humans even at a 99.99% DRE. Although a 99.99% DRE may not be required to protect human health in other instances, the Agency is reluctant to allow incinerators to operate below performance levels that are widely attainable by current technology. The Agency is concerned that until the value of risk assessments is proven and the method of conducting them is perfected, using 99.99% DRE as the minimum acceptable performance, with risk assessment as a tool to increase that standard, provides a more conservative approach which is more certain of protecting human health. On the other hand, the Agency recognizes that there are competing considerations which argue for making the variance flexible in both directions. For example, the 99.99% DRE may not be necessary to protect human health in a location remote from population or where the waste being burned is only marginally hazardous.

Accordingly, the Agency is requesting comment on the question of whether the variance procedure should be used to both raise or lower the destruction and removal efficiency, or only to raise it. If the variance is flexible in both directions, will the variance dominate the standard, in essence making the 99.99% target moot? Is risk assessment sufficiently developed that a relaxed standard based on such an assessment would be acceptable, or should a minimum, i.e. 99.99% DRE, be established?

The Agency recognizes that in some instances it may not be possible, due to lack of data, to conduct a scientifically supportable risk assessment. When a risk assessment is not possible or is not conducted at the behest of the applicant, the public, or permit writer, the performance standard of 99.99% DRE will be the basis for permitting. Over time, data will be developed to expand risk assessment capabilities.

E. Implementation of the Agency's Proposed Risk Assessment Provisions

1. *Procedures for developing a permit requirements based on a human health "risk assessment."* The manner in which the risk assessment-based variance procedure should be integrated with the permitting process has deliberately been left somewhat flexible in the proposed regulations. Before discussing the many ways in which these two can be integrated, some overview of the permitting process should be provided.

There are basically two routes by which a permit applicant can obtain an incinerator permit according to the regulations promulgated today under Parts 264 and 122. In one, the permit applicant submits to the permit writer a trial burn plan which contains an analysis of his waste feed, a description of the operating conditions believed to be capable of achieving a 99.99% DRE of POHC's, and a description of the test protocol he intends to employ in demonstrating achievement of this DRE. On the basis of this submission, the permit writer tentatively designates the POHC's in the applicant's waste and issues a trial burn permit allowing the applicant to conduct a trial burn. The purpose of the trial burn is to demonstrate that the operating conditions specified in the trial burn plan are indeed sufficient to achieve the desired DRE. After the trial burn is completed the applicant submits data to the permit writer containing the results of the trial burn. The permit writer then reviews this data, and issues a draft permit which is subject to public review and comment before being finalized.

The other route, is essentially the same as the first, but the permit applicant does not conduct a trial burn. Instead, he secures a trial burn waiver. Such a waiver will only be granted where the applicant can supply data demonstrating that particular operating conditions for his incinerator will achieve the desired DRE.

The Agency believes that the risk assessment procedure can be effectively integrated into the permit process described above. The integration could occur several possible ways, depending on whether the risk assessment is initiated by the permit writer, the permit applicant or the public. It can also be carried out at several different points of the process—either prior to the trial burn, following the trial burn but before issuance of a draft permit for public comment, or after public comment. These are discussed below.

A risk assessment variance analysis will in most instances be performed by the applicant prior to conduct of a trial burn. This would be advantageous in that the applicant would know prior to the trial burn whether he would need to demonstrate a performance other than 99.99% DRE. Thus, he may be able to avoid having to repeat a trial burn, although the POHC's and hazardous combustion by-products will not be finally determined until the trial burn is complete. In most instances, the trial POHC's, designated by the permit writer from waste analysis data included with the trial burn plan, will also be the final POHC's. Thus the permit applicant, on the basis of waste analysis data in his possession, will be able to compute stack POHC emissions at the 99.99% DRE and at other destruction and removal efficiencies and to compute the risks associated with those DRE's. Hazardous combustion by-products present a more difficult problem. While a prediction can be made, the trial burn may indicate different or additional by-products than those predicted. Should this occur, a risk assessment for those new hazardous by-products would have to be performed after the trial burn.

In cases where the applicant requests that a risk assessment for a variance be performed, this request would be included in a "variance assessment plan" submitted as a part of the trial burn plan. It would include a description of the proposed methodology to be used in the assessment. In reviewing the variance assessment plan, the permit writer would accept or, require modification of, the risk assessment methodology, and would designate the trial POHC's and trial hazardous combustion by-products to be included

in the risk assessment. The risk assessment would then be performed and the results submitted to the permit writer for incorporation into the trial burn plan.

In cases where the applicant does not request a variance assessment, but instead it is required by the permit writer, upon review of the trial burn plan, the applicant would be requested to amend the plan with a methodology for the risk assessment. Then the process would proceed as described above. In either case, the performance of the risk assessment prior to conduct of a trial burn would add a step to the trial burn application process. That step would require that a new part be added to the trial burn plan, that the permit writer approve that part of the plan, and that the applicant complete the assessment and submit it to the permit writer to complete the trial burn plan. In addition, the applicant or permit writer might decide to provide opportunity for public comment on the results of the risk assessment and the variances determined by the permit writer prior to conduct of the trial burn.

In cases where a waiver of the trial burn is requested in Part B of the permit application, the same procedure would be followed regarding a risk assessment variance. Part B would not be considered final until a determination of the need for, and, where appropriate, completion of, a risk assessment was made.

The second option for integrating a risk assessment into the permit process is to conduct the assessment following the trial burn. A probable basis for requiring a risk assessment at this time would be that the data from the trial burn revealed hazardous by-products which were not predicted. A risk assessment at this juncture might be requested by the applicant in his submittal of trial burn results in Part B of the permit application, required by the permit writer upon review of those results prior to issuance of a draft permit, or requested by the public as a part of their review of the permit application or draft permit. In any of these cases the applicant may be requested (at the permit writer's descretion) to submit a methodology for the risk assessment, and upon approval, to conduct the assessment and submit the results to the permit writer, essentially as a modification of Part B of the permit. If review of the results causes the permit writer to use the variance and alter the performance standard, a repeat of the trial burn may be necessary. If so, a new trial burn plan will be required, thereby forcing a repeat of the permit application process.

2. *Calculation of the human health "risk assessment."* Section 264.343(g) proposes four elements which must be considered in performing any risk assessment. These elements include (1) data on the mass and concentrations of POHC's, hazardous combustion by-products, metals and hydrogen halides which may be omitted from the stack; (2) air dispersion estimates of these substances for determining ground level ambient concentrations of emitted pollutants; (3) expected human and environmental exposure; and (4) the consequences of exposure, including dose response curves for carcinogens and or estimated toxic effects for noncarcinogens. Based on this data, the Regional Administrator must determine the maximum level of pollutants which may be emitted without posing an unacceptable risk to human health or the environment. Operating conditions necessary to ensure that these levels are not exceeded would be included in the incinerator permit.

These regulations do not specify any one methodology for performing the risk assessment. Permit writers may, as long as they address the factors identified in the regulation, develop risk assessments in the manner most appropriate to the nature of the incinerator and waste feeds in question. The Agency has, however, identified approaches to risk assessment which it believes can feasibly be employed by permit writers and which satisfy the requirements of today's proposal. These approaches are discussed in detail in "Background Document: Hazardous Waste Incineration Proposal."

One major issue on which comment is requested is whether the regulations should specify a methodology, including (as discussed below) an acceptable risk level to be employed by the permit writer in developing permit limitations based on a risk assessment. The following discussion identifies one approach which could be used by permit writers. EPA requests comments on the appropriateness of the method and the assumptions which are used.

a. *Emission rate estimates.* Emission rates can be determined from sampling and analysis during trial burns or they can be calculated based on feed rates, POHC concentrations in the food, and assumed DRE's. In order to conduct a risk assessment *prior to* a trial burn, the latter approach would be required, and is straight-forward using the equation for DRE in § 264.343(a).

b. *Air dispersion modeling.* The role of air dispersion modeling is to estimate the ground level concentrations of hazardous wastes emitted by incinerators. This data is used, along with health effects data discussed below to calculate human health risks from exposure to the emissions, and, ultimately, the levels of emissions which will be allowed by the permit writer.

One appropriate source of information in developing air dispersion models is the *Guideline on Air Quality Models* (EPA publication 450/2–78–027). The Guideline recommends specific air dispersion models appropriate for various situations. The guideline also makes recommendations concerning the source and meteorological data to be used in these models. This document has undergone extensive review by the scientific community and is incorporated into regulations under the Clean Air Act.

The *Guideline on Air Quality Models* discusses both screening and refined modeling techniques. The screening techniques involve simple calculation and are based on generally conservative assumptions. Thus, if screening shows that an allowable concentration is not exceeded, more detailed modeling need not be performed. If, however, screening indicates that allowable concentrations are exceeded, it is desirable to use a more refined technique to confirm these results.

In performing air quality modeling for purposes of risk assessments, two factors should be noted. First, assessments of impact on human health are generally based on long-term exposure to emissions. Thus, there will usually be no need to estimate daily or hourly fluctuations. For some substances which demonstrate acute effects, shorter averaging times may, however, be necessary. Second, hazardous pollutants should generally be considered chemically unreactive in the atmosphere. Unless applicants can demonstrate that the hazardous emissions are degraded to non-hazardous substances in the atmosphere, an inert pollutant model should be used.

c. *Exposure estimates.* An approach to risk assessment which the Agency believes can most simply be applied is a determination of incremental individual risks at the point of maximum ground level concentration of emissions from the incinerator. The actual presence of individuals at this point, or the number of individuals, would not be considered.

This is a relatively simplified and conservative approach to risk assessment. It assumes, in essence, that an individual is exposed to the greatest ambient concentration of hazardous constituents, regardless of where that may be. An alternative approach would

be to assess the aggregate risk to total exposed populations. The determination of individual risk at the point of maximum concentration avoids the difficult and often disputed estimates of actual total population exposure to different concentrations. Nothing in the regulation, of course, precludes the permit applicant or other interested persons from preparing such estimates for consideration by the permit writer.

d. *Estimating risk to human health.* Numerous models exist for predicting the human health effects of exposure to various concentrations of pollutants. The fundamental question in selecting the appropriate model is whether the pollutant has a threshold below which no adverse effects to human health are expected. Carcinogens are generally considered to be non-threshold substances; pollutants displaying other toxic effects may have a threshold. In calculating the risk from several pollutants with both threshold and non-threshold effects, the lowest safe levels should be employed in setting emission limits.

Non-threshold pollutants (Carcinogens). An appropriate methodology for estimating the risk to human health from carcinogens is the Linearized Multistage Model for Cancer Induction employed by EPA's Cancer Assessment Group. The general formula for this model is $P=q_1^*x$, in which P represents the lifetime risk to an individual of cancer due to an average daily exposure, x, to the substance. q_1^* is a value representing the carcinogenic potency of the carcinogen from inhalation exposure. Currently q_1^* values for inhalation exposure have beeen developed for 21 carcinogens; these values are listed in the background document for this proposal. Additional values will be prepared by the Agency in the near future.

In estimating the daily average exposure assumptions which must be employed include the weight of the exposed individual, the amount of air inhaled on a daily basis and the amount of pollutant retained by the individual. Values which have been developed, and which could be used by the permit writer, include a reference weight of 70 kg, inhalation of 20 m3/day of air, and retention of 50% of inhaled pollutants. The last value may vary with particulate size. A detailed discussion on this methodology and these assumptions is contained in the background document.

To derive permit limitations based on a risk assessment, permit writers must determine an acceptable level of risk. Two qualitative measures of risk have been used by the Agency in evaluating carcinogenic hazards to populations exposed to an agent. These are: (1) individual lifetime cancer risk, which is defined as the probability that an exposed person will die of cancer, as opposed to other causes, as a result of exposure, and (2) the number of cancer cases per year which can be attributed to the exposure. The individual risk depends on the carcinogenic potency of the compound and the concentration of the agent in the exposure medium, whereas the number of cases depends on the individual risk and the size of the exposed population.

In deciding what risk is acceptable from a public health protection point of view the Environmental Protection Agency regulatory offices have concentrated on the individual risk. For example, EPA's Office of Pesticides and Toxic Substances is considering a lifetime risk of less than 10^{-6} as acceptably low in the case of nitrosamine contamination of pesticide products. EPA's Water Quality Office is requiring the reporting of hazardous material spills into navigable water that could be used as a source of drinking water if the risks are greater than 10^{-5}. In the Food and Drug Administration regulations of animal feed additives that could cause residues of carcinogenic substances in edible meat, a risk of less than 10^{-6} is considered safe enough to require no use restriction. The Agency's recently promulgated Water Quality Criteria for the protection of human health present values based on a risk range of 10^{-7} to 10^{-5}.

The attitude of many scientists and policy makers seems to be that risk of less than 10^{-7} is too small to justify the resources required to issue and enforce a regulation. However, a risk of above 10^{-4} is usually considered serious enough either to take regulatory action or to require a determination that the costs of control are prohibitively large. Within the range of roughly 10^{-7} to 10^{-4} the acceptability of a risk is usually a result of cost-benefit balancing.

Under the regulation proposed today, the determination of acceptable risk has been left to the permit writer. This determination will be made on a case-by-case basis as a part of the permitting process. However, to ensure reasonable consistency from one case to another, the Agency anticipates establishing a "Risk Review Board" to review individual risk decisions.

The Agency considered establishing an acceptable risk level in the regulation, but has determined that such a risk determination, affecting a local area, can best be made on a case-by-case basis after reviewing the local circumstances associated with the incinerator. However, the Agency is requesting comment on the issue of how acceptable risk levels can be established, and whether that should be done in the regulation or as part of the permit process.

Threshold Pollutants (Non-carcinogens) For pollutants which display threshold effects, risk assessment calculations require development of an acceptable daily intake from inhalation of the pollutant. Unlike risk assessments for carcinogens, no social judgment need be made as to acceptable levels of risk. Rather, the issue involves a scientific determination of safe levels of exposure.

One basis for calculating these values is by use of the "Threshold Limit Values" ("TLV") developed by the American Conference of Governmental Hygienists. TLV's represent 8-hour, and Industrial time-weighted average concentrations in air that are intended to protect workers from various adverse health effects over a normal working lifetime. For purposes of the risk assessment associated with today's proposal, TLV's would have to be reduced by an appropriate factor to reflect the fact that exposure would not be limited to a healthy population and for a limited period during the day.

Additionally, acceptable intake levels may be derived from toxicological data defining "No Observed Adverse Effect Levels" ("NOAELs") or similar appropriate concepts. Derivation of acceptable intake values in this case would require application of "safety factors" to account for extrapolation from animal data to man. Guidelines for applying such safety factors have been developed by the National Academy of Science.

IV. Regulatory Analysis

Under Executive Order 12044, the Agency is required to prepare a regulatory analysis for all new significant regulations. This analysis includes a comprehensive economic impact analysis and a discussion of the regulatory alternatives considered. The Agency has not yet prepared the economic impact analysis for this proposal. However, the Agency plans to complete it and make it available for public review and comment before a final rule is promulgated. In addition, EPA plans to prepare and allow public comment on a full Regulatory Analysis before promulgation of this rule which will include both the economic impact analysis and summary of approaches considered.

The Federal Report Acts of 1942 requires federal agencies to minimize the reporting burden created by their regulations. For all new regulations,

agencies must estimate the size of the reporting burden, describe who must report and apply to OMR for a clearance. Accordingly EPA is estimating the reporting burden of this rule and will submit a clearance package to OMB as soon as possible. Congress has recently amended this Act with the Paperwork Reduction Act of 1980. After the effective date of this new Act (April 1, 1980) all Agencies must have OMB's approval of the reporting burden before any regulation is published as a proposal or promulgation.

The Regulatory Felxibility Act requires all Federal agencies to consider the effects of their regulations on "small entities", i.e., small businesses, small organizations, and small governmental jurisdictions. It requires agencies to propose for public comment a "Regulatory Flexibility Analysis" for any regulations proposed after January 1, 1981 which will cause a significant impact on a substantial number of small entities.

The analysis should include primarily a description of the impact of the rule on small entities, an estimate of the number of small entities affected, a description of the reporting and other compliance requirements, and a description of any alternatives considered to minimize the impacts.

Although EPA has not yet prepared a Regulatory Flexibility Analysis of the small entity impacts of the rules it is proposing today, it believes that a significant portion of the potential impact of these rules on small entities has already been substantially reduced by the small quantity generator exemption contained in EPA's May 19, 1980, regulations; an exemption granted primarily for administrative reasons. (See 40 CFR § 261.5.) EPA intends to analyze the impact of these rules on small entities more thoroughly in the future, and publish its analysis for public comment. In the meantime, the Agency expressly invites the public to address the impact of this rule on small entities in their comments.

V. Supporting Documents

A. Background Documents

Two background documents have been prepared to support these regulations, providing rationale for the need to supplement the interim final regulations, and the rationale for the proposals as written. In conjuction with the references listed in them, these documents provide most of the basis for and defense of the proposed regulations. However, the background document in support of the interim final Part 264, Subpart O regulations also provides background information that may help in understanding the proposed regulations. Finally, the guidance documents that EPA is developing for the Subpart O regulations provide useful background information.

Thus, the following documents and others referenced in them support the Subpart O regulations proposed today: (1) "Background Document, 40 CFR Part 264 Subpart O, and 40 CFR Part 265 Subpart O: Incineration"; (2) "Background Document, 40 CFR Part 264 Subpart O: Incineration—Proposed Standards"; (3) "Engineering Handbook on Hazardous Waste Incineration"; and (4) "Permit Writer's Guidance Document for Hazardous Waste Incineration".

Copies of these documents are available for review in the EPA regional office libraries and at the EPA headquarters library, Room 2404, Wasterside Mall, 401 M Street, S.W., Washington, D.C. 20460.

B. Guidance Documents

Reliance on performance standards and the incorporation of case-by-case consideration of many factors provide considerable flexibility to accommodate new technologies, special needs of specific locations, and variations in waste characteristics. To assist both owners and operators of facilities and regulatory officials, EPA is preparing guidance manuals. These will not have the effect of regulations, but will provide guidance on how facilities may be designed and operated to meet the standards. Future manuals will also provide guidance on what modifications and variations are likely to be effective under the variance procedures. They will be organized to correspond closely to the regulations and will be based on the collective knowledge of the Agency, the literature, and experts throughout the world.

EPA has already prepared the following manuals in support of the hazardous waste incinerator regulations:

(1) Engineering Handbook on Hazardous Waste Incineration;

(2) Permit Writer's Guidance Manual on Hazardous Waste Incineration.

For a more complete list of guidance manuals that EPA is preparing in support of the entire hazardous waste regulatory program see the preamble discussion in the January 12, 1981 regulation.

(Section 1006, 2002(a), 3004, 3005, and 3007 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. §§ 6905, 6912(a), 6924, 6925 and 6927.)

Dated: January 13, 1981

Douglas M. Costle,

Administrator.

For the reasons set out in the preamble, it is proposed to amend 40 CFR Part 264, Subpart O as set forth below:

PART 264—STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

1. In § 264.342; the section heading and paragraphs (a) and (b) are revised to read as follows:

§ 264.342 Designation of principal organic hazardous constituents and hazardous combustion by-products.

(a) Principal organic hazardous constitutents (POHCs) and hazardous combustion by-products must be treated to the extent required by the performance standards specified in § 264.343. (b)(i) For each waste feed to be burned, one or more POHCs and hazardous combustion by-products will be specified from among those constituents listed in Part 261, Appendix VIII of this Chapter. This specification will be based on the degree of difficulty of incineration of the organic constituents of the waste feed and its combustion by-products, their concentration or mass, considering the results of waste analyses and trial burns or alternative data submitted with Part B of the facility's permit application. Organic constituents or by-products which represent the greatest degree of difficulty of incineration will be those most likely to be designated as POHCs or hazardous combustion by-products. Constituents are more likely to be designated as POHCs or hazardous combustion by-products if they are present in large quantities or concentrations. (ii) Trial POHCs will be designated for performance of trial burns in accordance with the procedure specified in § 122.27(b) for obtaining trial burn permits. Trial hazardous combustion by-products may be designated under the same procedures.

* * * * *

2. Section 264.343 is amended by redesignating paragraph (d) as paragraph (h) and adding new paragraphs (d), (e), (f), and (g) as follows:

§ 264.343 Performance standards.

* * * * *

(d) Incinerators burning hazardous waste must destroy hazardous combustion by-products designated under § 264.342 so that the total mass emission rate of these by-products

emitted from the stack is no more than .01% of the total mass feed rate of POHCs fed into the incinerator.

(e) After consideration of the factors listed in paragraph (g) of this Section, the Regional Administrator may, on a case-by-case basis, establish performance standards which are either more or less stringent than those required by paragraphs (a) and (d) of this Section based on a finding that:

(1) More stringent standards are necessary because the emission rates achieved by the application of the performance standards otherwise required by this Section may pose an unacceptable risk to human health and the environment, or

(2) Less stringent standards will achieve emission rates which do not pose an unacceptable risk to human health and the environment.

(f) After consideration of the factors listed in paragraph (g) of this section, the Regional Administrator may, on a case-by-case basis, stipulate performance standards for metals, hydrogen halides, and elemental halogens, based on a finding that such standards are necessary to limit the emission rates of these constituents to levels which do not pose an unacceptable risk to human health and the environment.

(g) The findings under paragraphs (e) and (f) of this Section will be made after evaluating the following data, which the Regional Administrator may require from the permit applicant:

(1) Emissions of POHC's, hazardous combustion by-products, metals, and hydrogen halides, including:

(i) Mass emission rates from the stack, and

(ii) Concentration in the gas stream exiting the stack;

(2) Air dispersion estimates for these substances, including:

(i) Meteorological data,

(ii) Description of the air dispersion models,

(iii) Assumptions underlying the air dispersion models used;

(3) Expected human and environmental exposure, including:

(i) Topographic considerations,

(ii) Population distributions,

(iii) Population activities, and

(iv) Modes, intensity and duration of exposure;

(4) Consequences of exposure, including:

(i) Dose-response curves for carcinogens,

(ii) Health effects based on human or animal studies for other toxic constituents,

(iii) Potential for accumulation of toxic constituents in the human body, and

(iv) Statements of expected risk to individuals or populations.

(h) For purposes of permit enforcement, compliance with the operating requirements specified in the permit (under § 264.345) will be regarded as compliance with this Section. However, evidence that compliance with those permit conditions is insufficient to ensure compliance with the performance requirements of this Section may be "information" justifying modification, revocation, or reissuance of a permit under § 122.15 of this Chapter.

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Friday
January 23, 1981

Part V

Department of Labor

Occupational Safety and Health Administration

Hazardous Materials; Request for Comments

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S-013]

Hazardous Materials

AGENCY: Occupational Safety and Health Administration, U.S. Department of Labor.

ACTION: Advance notice of proposed rulemaking; request for comments and notice of an informal public meeting.

SUMMARY: The Occupational Safety and Health Administration (OSHA) (the Agency) is planning to revise its safety standards concerning hazardous materials which are contained in Subpart H of 29 CFR Part 1910, §§ 1910.101 through 1910.116. The existing hazardous materials standards cover safety hazards associated with compressed gases; flammable and combustible liquids including those used in spray finishing or dip tank operations; explosives and blasting agents; liquefied petroleum gases; and anhydrous ammonia.

The purpose of this notice is to solicit information regarding the content, scope and format of a complete revision of Subpart H. This information will also be used by the National Institute for Occupational Safety and Health (NIOSH) which is seeking to supplement its safety research in the area of petroleum refinery maintenance.

In addition, this notice announces the scheduling of an informal public meeting to give the public an opportunity for making oral presentations of comments and information regarding the issues discussed here.

DATES: Notice of intention to appear at the public meeting scheduled below must be received by March 13, 1981.

The informal public meeting will be held on April 8 and 9, 1981.

The written information requested in this notice must be submitted on or before July 30, 1981.

ADDRESSESS: Send notices of intention to appear 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.

The informal public meeting will be held in the Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Written comments requested in this notice should be submitted, in quadruplicate, to the Docket Officer, Docket S-013, Room S6212, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202)523-7894.

FOR FURTHER INFORMATION CONTACT:

Public Meeting:

Mr. Tom Hall, Division of Consumer Affairs, at the address above, (202) 523-8024.

Directorate of Safety Standards Programs:

Mr. Glen E. Gardner or Ms. Joanne E. Slattery, Directorate of Safety Standards Programs, Office of Fire Protection Engineering and Systems Safety Standards, Occupational Safety and Health Administration, U.S. Department of Labor, Room N3463, 200 Constitution Avenue, N.W., Washington, D.C. 20210, (202) 523-7225.

SUPPLEMENTARY INFORMATION:

Background

The present OSHA standards covering safety hazards associated with hazardous materials are contained in Subpart H of 29 CFR Part 1910, §§ 1910.101 through 1910.116. The hazardous materials addressed in Subpart H include compressed gases; flammable and combustible liquids including those used in spray finishing or dip tank operations; explosives and blasting agents; liquefied petroleum gases; and anhydrous ammonia. These Subpart H standards became effective on August 27, 1971, after promulgation under Section 6(a) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. 655(a). Section 6(a) of the Act authorized OSHA to promulgate standards based on national consensus standards such as those published by the National Fire Protection Association (NFPA) and the American National Standards Institute (ANSI), and on established Federal standards.

Several factors indicate to OSHA that a comprehensive revision of its Subpart H standards may be necessary. One factor is that since the original promulgation of OSHA standards, NFPA and ANSI have revised and updated their standards. OSHA has been petitioned by these organizations and other interested persons to adopt the more recent versions of these standards or to make other changes to the existing standards.

Another factor concerns the possible need for extending coverage to some industrial operations that are not currently addressed in Subpart H. For example, current OSHA standards may not adequately address significant hazards associated with oil refineries, chemical processing plants, or combustible dust processes.

OSHA also recognizes that since the adoption of Subpart H in 1971, there have been advances in technology and industrial practices associated with hazardous materials. These changes may have created a need for revising the present hazardous materials standards to better address current safety problems.

In addition, although OSHA has already revoked many public and property protection provisions in its standards which were not directly relevant to employee safety and health (43 FR 49726; October 24, 1978), OSHA still feels that there is a need to revise these hazardous materials standards so that they more directly address significant employee safety hazards.

Finally, this advance notice is another step in the Agency's continuing program of using a common sense approach by streamlining and simplifying standards while focusing on the more serious workplace hazards. In this regard, OSHA has already undertaken the comprehensive revision of its fire protection standards (Subpart L of 29 CFR Part 1910; 45 FR 60656 (September 12, 1980)) and its electrical standards (Subpart S of 29 CFR Part 1910; 46 FR 4034 (January 16, 1981)).

For these reasons, OSHA has concluded that a comprehensive revision of its Subpart H standards may be necessary to provide more effective protection for employees who work with and around hazardous materials which pose a risk of fire, explosion, acute exposure and other safety hazards. Any rulemaking proceeding to revise Subpart H will be conducted in accordance with Section 6(b) of the Act (29 U.S.C. 655(b)) and 29 CFR Part 1911, and will provide adequate public notice of and opportunity to comment on proposed changes.

Comments and Information Requested

Through this advance notice, OSHA invites interested persons and organizations to provide written and oral comments relating to the need for and content of a Subpart H revision. In particular, OSHA invites comments regarding any needed changes, additions or deletions to Subpart H and information in response to the questions below. OSHA also invites comments pertaining to any economic considerations (including, but not limited to, costs) and environmental impact regarding the questions posed in this notice. OSHA further requests that

any available injury data be provided where applicable.

A revision of OSHA's hazardous materials standards may have a significant economic impact on a substantial number of small entities, particularly small businesses. In accordance with the provisions of the Regulatory Flexibility Act (Pub. L. 96-354, 94 Stat. 1164 [5 U.S.C. 601 *et seq.*]), OSHA invites information regarding the economic impact which any of these contemplated changes to Subpart H might have on small businesses, including, but not limited to, compliance, reporting and recordkeeing costs. OSHA also requests comments regarding alternatives which would minimize the economic impact on small businesses while at the same time accomplishing the objective of protecting worker safety and health.

OSHA realizes that this notice addresses a large amount of material. However, the Agency anticipates that interested persons and organizations will concentrate their remarks on those areas of concern to them. OSHA also anticipates that the information received will provide OSHA with some guidance on the sequence in which the hazardous materials standards should be revised or developed.

As noted above, NIOSH is particpating with OSHA in this information gathering process. Material concerning petroleum refinery maintenance is of particular interest. It is the intention of the Division of Safgety Research, NIOSH, both to develop standards recommendations to assist OSHA and, simultaneously, to develop safety guidelines for petroleum refinery maintenance. Therefore, a copy of all relevant communications received in response to this notice will be forwarded to NIOSH for it use.

It should be noted that safety requirements concerning the storage and handling of anhydrous ammonia, presently § 1910.111, will not be discussed in this notice. Revision of the anhydrous ammonia provisions was the subject of an April 23, 1976, advance notice of proposed rulemaking in the **Federal Register** (41 FR 17227).

Additionally, grain handling facilities will not be specifically addressed in this notice. Grain handling facilities were the subject of a February 15, 1980, request for information published in the **Federal Register** (45 FR 10732). Comments and information received in response to the anhydrous ammonia and grain handling facilities notices will be considered in any development of standards for these acres which may be included in Subpart H.

The remaining standards in Subpart H will be discussed in this advance notice. Discussion will be limited to safety issues and will not address health issues. OSHA invites written or oral comments and information regarding the following general and specific issues concerning Subpart H.

A. *General Issues:* Several issues have been raised which are common to a number of the hazardous materials standards contained in Subpart H. OSHA invites comments on these general issues which are set forth below.

(1) Should OSHA use a new format in revising its hazardous materials standards? On September 12, 1980, OSHA published in the **Federal Register** (45 FR 60656) a revision of its fire protection standards contained in Subpart L of 29 CFR Part 1910. Revised Subpart L utilizes a new format consisting primarily of performance, or goal-oriented mandatory standards. These performance standards are accompanied by several nonmandatory appendices which contain compliance guidelines intended to provide compliance flexibility. Compliance can be effected through the means suggested in the appendices or in some other manner as long as the level of performance required by the standard is met. Additionally, Appendix C to Subpart L contains a list of applicable references intended to provide the employer with additional information which will be helpful in the implementation of the mandatory performance standards. OSHA is considering the use of this format in revising its hazardous materials standards. Comments are invited on the advantages or disadvantages of such a format.

(2) Do particular provisions of Subpart H need simplification or clarification? For example, would it be simpler to have all of the definitions applicable to Subpart H contained in one section, or would it be simpler to continue to have applicable definitions accompany each section to Subpart H? Comments which identify other Subpart H provisions in need of simplification or clarification are invited as well as suggested corrections to such provisions.

(3) Are there gaps in the coverage of Subpart H with regard to both the hazards and types of workplaces covered? For example, current OSHA standards may not adequately address significant hazards associated with oil refineries, chemical processing plants, or combustible dust processes. OSHA invites public comment on these issues by posing the following questions: (a) what are these significant gaps; (b) how can OSHA best eliminate these gaps: through the revision of existing standards, the development of new standards, or both; and, (c) should new standards apply to all industries (horizontal standards) or only to a particular industry (vertical standards), or should a combination of both types of standards be used?

(4) Should OSHA expand the coverage of Subpart H in order to more fully address the problems involved with hazardous materials? Should OSHA also recognize and change the section titles? Such expansion and reorganization of Subpart H as envisioned by OSHA would include section designations for any new standards that are developed to cover gaps which exist in current standards.

The following outline for Subpart H is under consideration by OSHA and is being presented to solicit comments from the public regarding its content and the need for expansion, deletion, and reorganization:

Subpart H—Hazardous Materials

1910.10 Scope and application.
.102 Definitions.

Gases

1910.103 General requirements (including containers, storage, handling, and use).
.104 Liquefied energy gases (LEG).
.105 Hydrogen.
.106 Oxygen.
.107 Acetylene.
.108 Cryogens (cryogenic gases including refrigerants).

Liquids and oxidizers

1910.109 Flammable and combustible liquids.
.110 Anhydrous ammonia.
.111 Oxidizing materials (liquids and solids).
.112 Corrosive liquids.

Solids

1910.113 Explosive materials (manufacturing, storage, handling, and use).
.114 Ammonium nitrate.
.115 Fireworks.
.116 Combustible dusts (metal and organic).
.117 Flammable solids.
.118 Reserved.
.119 Reserved.

Operations involving hazardous materials

1910.120 Grain handling facilities.
.121 Spray application using flammable or combustible liquids.
.122 Dip tanks containing flammable or combustible liquids.
.123 Oil refineries.
.124 Chemical plants.
.125 Reserved.

Is the scope of this expanded version of Subpart H too broad? Should some of the subject areas be consolidated and are there any subject areas that should be eliminated entirely? Conversely, is

the scope of this expanded revision of Subpart H too narrow? What other hazardous materials should OSHA include in Subpart H?

(5) Should OSHA require controls such as labeling or other means of marking piping and hose transfer systems to prevent the inadvertent mixing of chemicals or other materials at loading and unloading points? What information is available on the number of employee injuries and fatalities caused by the inadvertent mixing of chemicals or other materials at these points? What type of controls are currently in use to prevent these occurrences? How effective are such controls in preventing employee injuries and fatalities? What additional controls would provide greater employee protection?

(6) Should OSHA specifically require special protective equipment for employees who repair piping containing hazardous materials? (See present OSHA requirements for protective equipment in Subpart I of 29 CFR Part 1910, particularly §1910.132(a).) For example, should breathing apparatus be made available and ready for use during repair work? Should fire-resistive protective clothing be required when repair work is performed on piping which contains flammable material? Should emergency ventilation equipment and, when necessary, a water supply and hose, be accessible and ready for use to dilute vapors or liquid leaks that occur during repair work taking place inside of buildings? Should OSHA require written emergency rescue procedures? What other measures should OSHA consider?

(7) Should OSHA develop standards for the hazards of in-plant piping systems that use flammable premixed gases? How should OSHA define flammable gas? What test procedures should be used? What source materials should be used?

(8) Should OSHA require testing of piping used for flammable, combustible, or toxic gases or liquids? For example, should OSHA require an acceptance static pressure test on piping that is newly installed or has been repaired, to assure that the piping will not leak? If static pressure testing of piping were to be required, what test methods and testing equipment should be acceptable to OSHA?

(9) Should employers be required to provide information and training to those employees who handle or use materials covered in Subpart H? Should OSHA require material safety data sheets or equivalent forms for those substances covered in Subpart H? What information should be contained in these material safety data sheets, e.g., manufacturer name, chemical and trade name, physical and chemical properties, hazards? By what other means should OSHA require employers to inform employees of hazards? What employee training should OSHA require? Is there a need for requirements in addition to those which would be created by the proposed Hazards Identification standard (46 FR 4412; January 16, 1981)?

(10) What types of personal protective equipment and clothing should be required for handling hazardous materials (e.g., gloves, full body clothing, boots, eye protection)? What specifications should be used and what test methods and pass/fail criteria should be applied to such equipment? Are specifications possible for broad industry application? What would be an alternative to the use of specifications that would assure appropriate protection from specific hazards? What protective equipment and clothing are presently being used and how effective are they? How oftern must equipment and clothing be replaced? What training should employees have is the use of protective equipment and clothing? How often should such training be provided? Should OSHA standards include provisions for a broad class or general use type of protective equipment and clothing for handling a class of similar materials? For which substances should protective equipment and clothing be addressed only on a substance by substance basis? Is further research on the question of protective equipment and clothing necessary for the materials or processes covered by this notice before suitable protection can be specified?

(11) What injury data is available concerning the storage, handling, and use of hazardous materials? What circumstances were involved in such accidents? Were there control or safeguard failures, pipeling ruptures, uncontrolled sources of ignition, procedural errors, or the inability of personal protective equipment and clothing to prevent injury?

(12) Should OSHA require the use of monitoring devices for various hazardous materials which would indicate when an unsafe condition is beginning to develop? For example, a device which monitors the hazardous material-to-air volume ratio would serve as a warning when a hazardous atmosphere is being approached. OSHA invites comments on the types of monitoring devices which are available (both fixed and portable types) and on devices which are presenty being used to monitor gases, vapors, and dusts. Should these devices produce an audible alarm? Are common monitoring devices available which are approved for use in hazardous (explosive) atmospheres? If so, when should OSHA require such monitoring devices? What degree of accuracy should be required of such monitoring devices?

(13) Should OSHA require planning for workplace disasters as a part of a written emergency action plan as addressed in the new § 1910.38, Subpart E, as revised September 12, 1980 (45 FR 60656)? Under what conditions? What type of training should be required for employees who will be affected by such plans? How often should such training activities be conducted? Should such plans require planning and coordination with outside resources such as hospitals, ambulance services, and police and fire departments to ensure appropriate response to workplace disasters? Can allowances be made for an employer's inability to control performance of such outside agencies? Should OSHA encourage the development of community cooperation in planning for workplace disaster situations? If so, how?

(14) Should OSHA require communication devices such as radio, telephone, etc., to be available for emergency use by employees who work with hazardous materials while alone or in isolated areas?

(15) Should OSHA require some form of systems safety analysis such as failure mode and effects analysis for operations involving hazardous materials? If so, what sizes and types of operations should be covered?

(16) Should fire retardant coatings and mastics be acceptable under Subpart H with respect to protection against fire? For example, certain OSHA standards, such as § 1910.106(d)(4)(ii), require walls to have a specified fire-resistance rating when used to protect employees from exposure to hazardous materials. Should walls having fire retardant coatings and mastics which afford a specified level of protection, be acceptable to OSHA as alternatives to fire-resistance rated walls? What criteria and test methods should be specified to evaluate the protective characteristics of fire retardant coatings and mastics? What field compliance techniques or devices are available to determine if the fire retardant coatings and mastics are capable of providing the intended level of protection?

B. *Specific Issues:* In addition to the general issues discussed above, OSHA invites comments on the following specific issues relating to hazardous materials.

(1) *Compressed gas cylinders.* (a) Should OSHA develop inspection

procedures for compressed gas cylinders? Should cylinder inspection continue to be conducted in accordance with the Hazardous Materials Regulations of the Department of Transportation (DOT) (49 CFR Parts 171–179) and with Compressed Gas Association (CGA) Pamphlets C–6 and C–8 as prescribed in § 1910.101(a)?

(b) Should standards for compressed gas cylinders be contained in Subpart H or should such standards be contained in Subpart M, Compressed Gas and Compressed Air Equipment?

(c) Should OSHA standards include quality assurance provisions for compressed gas cylinders manufactured outside of the United States? Should DOT approval of such cylinders be acceptable to OSHA?

(d) Is there a need for standards which specifically address the use of compressed gas cylinders in hospitals and laboratories?

(e) Should OSHA develop requirements for the handling, in-plant transportation, securing during use, and storage of compressed gas cylinders?

(f) Should OSHA require a color coding system for compressed gas cylinders that would serve to identify the contents? What type of system should be required?

(2) *Liquefied petroleum gas (LPG).* (a) Should MAPP (methylacetylene-propadiene) gas be considered a liquefied petroleum gas? Although MAPP gas possesses some of the same characteristics as LP gases (especially the LP gas, propane) it does not technically conform to the definition in the National Fire Protection Association (NFPA) Standard 58, "Liquefied Petroleum Gases, Storage and Handling," nor to the OSHA definition of LP gases in § 1910.110(a)(7). Consequently, MAPP gas is not presently covered by a specific OSHA standard. A new section is being considered (§ 1910.104 in the outline discussed above) entitled "liquefied energy gases" which would include liquefied natural gas (LNG), liquefied synthetic natural gas (SNG), MAPP gas, and LP gases. OSHA invites comments concerning the appropriateness and effectiveness of such an approach.

(b) Should OSHA adopt applicable provisions of the latest edition of the NFPA standard for LP gases (NFPA 58)? The 1968 edition of NFPA 58 was used as the source for the present OSHA standard for LP gases (§ 1910.110) and OSHA has not revised or updated this standard since its promulgation in 1971.

(c) Should LP gas-fired temporary heaters (salamanders) be tested and approved in accordance with the American National Standards Institute (ANSI) standard for gas-fired construction heaters (ANSI Z83.7)? Who should perform the testing? Should testing and approval by the American Gas Association (AGA) be acceptable?

(d) Should OSHA standards include maintenance provisions for LP gas distribution equipment? What maintenance provisions should be specified?

(e) Should OSHA incorporate applicable provisions of ANSI Standard B138–1, "Design and Construction of LP-Gas Installations at Marine and Pipeline Terminals, Natural Gas Processing Plants, Refineries and Tank Farms," for all of general industry?

(f) Should OSHA adopt standards to cover aerosol container filling processes which use LP gases or some other flammable gas as the propellent? Are injury data available which would indicate a need for such standards? Should OSHA use the provisions of the latest edition of NFPA 58 which apply to filling LP gas containers as a basis for any requirements pertaining to aerosol container filling processes? What precautions and special procedures are presently being used for filling rooms? What are proper procedures for disposal of leaking containers?

(3) *Liquefied natural gas (LNG) and synthetic natural gas (SNG).* (a) Should OSHA develop standards for LNG and SNG? What source standards should be used? What hazards need to be addressed?

(b) Should OSHA develop standards for underground and above-ground storage of LNG and SNG?

(4) *Cryogens.* Should OSHA develop standards which address the safe handling, use, in-plant transportation, and storage of cryogens (gases compressed to a liquid state of extremely low temperatures)? Should cryogens be defined in terms of temperature alone or both temperature and pressure? Should OSHA develop design criteria for pressure vessels and other storage containers based on the extreme low temperature properties of cryogens?

(5) *Flammable and combustible liquids.* (a) Should OSHA allow storage tanks for flammable and combustible liquids to be constructed of materials other than steel? What minimum criteria should these other materials meet? If storage tanks were constructed of other materials, would there be an increased risk of leaks? What other hazards, if any, would be presented by the use of other materials?

(b) Should certain industries which are presently exempted from the OSHA standard for flammable and combustible liquids as specified in § 1910.106 (j) (6) be covered by a revised OSHA standard for flammable and combustible liquids? What requirements should be provided to cover these industries?

(c) Should OSHA require safety coated (plastic-coated) glass containers to be used for the storage of flammable and combustible liquids where plain glass containers are presently permitted? Should OSHA permit greater quantities of flammable and combustible liquids to be stored in plastic-coated glass containers than those which are presently premitted in plain glass containers? What should the maxium quantity be? Should OSHA continue to permit plain glass containers and then, as an alternative, permit greater quantities to be stored in plastic-coated glass containers? What types of accidents or incidents, whether they produced injury or not, have occurred with plain glass containers that might have been prevented if plastic-coated glass containers were used? What criteria for coating glass containers are already available and how were they developed? What criteria should be developed?

(d) Should any container acceptable to DOT for the shipment of flammable and combustible liquids also be acceptable to OSHA for the storage of flammable and combustible liquids in the workplace? If so, what limitations should be placed on the use of the containers and their storage facilities? What hazards can be expected during the transfer of flammable and combustible liquids from storage containers? Is there a hazard in transferring flammable and combustible liquids from shipping containers acceptable to DOT, to storage containers acceptable to OSHA? What hazards are associated with the storing of flammable and combustible liquids in the shipping containers? Which specific operations involving storage, handling, or transferring of liquids, can be considered more hazardous than others and why? What problems can be encountered during the storage and handling of non-metallic containers? Are there significant hazards associated with the generation of static electricity during the transfer of flammable and combustible liquids from non-metallic containers? What procedures are used to dissipate the static electrical charge normally associated with the transfer of flammable and combustible liquids? Are sufficient charges of electrical energy generated and stored in non-metallic contaniers which can be later released as a potential ignition source? What level of static electrical charge is necessary to ignite flammable and

combustible liquid vapors found in dispensing areas and what distance can this electrical charge be expected to travel if the conductor is: (1) the ambient atmosphere, or, (2) the rack or holding device that holds the container during dispensing operations? Does the construction material of spouts or spigots (i.e. metallic versus non-metallic) affect the dissipation of the electrical charge developed during dispensing of flammable and combustible liquids?

(e) Should OSHA limit vapor concentrations to a specific percentage of a liquid's lower flammable limit (LFL) (also known as lower explosive limit (LEL)) when determining hazardous concentrations? If so, what should that specific percentage be for nonhazardous, or Class I, Division 1, Class I, Division 2 locations?

(f) Should OSHA develop separate standards for the storage of flammable and combustible liquids in laboratories? If so, how should they differ from general storage requirements?

(g) Should OSHA permit the use of automatic closing nozzles with latch open devices on Class I liquid dispensers (such as gasoline service pumps) used in industrial occupancies? Automatic closing nozzles with latch open devices are currently allowed on Class I liquid dispensers in service stations accessible to the public when dispensing is done by the attendant (§ 1910.106(g)(3)(vi)(*b*)) but they are not allowed in industrial occupancies. Would spillage increase if automatic closing nozzles with latch open devices were permitted in industrial occupancies?

(h) Should OSHA continue to require that all rebuilt or repaired nozzle valves be recertified as specified in § 1910.106(g)(3)(iv)(*b*)(2)? Why or why not?

(i) Should OSHA permit the use of military-type "jerry cans" for the storage of flammable and combustible liquids? Under what conditions?

(j) Should OSHA recognize alternative flash point determination test methods (such as the Setaflash closed cup tester) in addition to those specified in § 1910.106(a)(14)?

(k) Should OSHA change the drainage requirements as prescribed in § 1910.107(b)(2)(vii) for outdoor storage facilities for flammable and combustible liquids? What should be required?

(l) Should OSHA change its definition of a liquid as specified in § 1910.106(a)(17) to exclude the more viscous liquids such as certain paints and coatings? What test method should be used for flash point determination of such viscous liquids?

(m) Should OSHA continue to limit the size of indoor storage rooms as specified in § 1910.106(d)(4)(ii)? If OSHA does not continue to limit the size, what additional requirements should apply?

(n) Should OSHA redefine flammable and combustible liquids in order to exclude those water base liquids (such as water base paints) which have a flash point but do not have fire points? Should liquids (such as wine) containing 24 percent or less alcohol by volume by excluded provided that the remainder of the liquid does not present a hazard? What criteria and test methods should OSHA use to define flammable and combustible liquids?

(6) *Oxidizing materials.* (a) Should OSHA develop standards which address the storage, handling and use of oxidizing materials? What source materials should be used?

(b) Would fire protection measures and storage provisions alone be appropriate and adequate for protecting employees involved with the storage, handling and use of oxidizing materials?

(c) Should oxidizing materials be classified? In what manner should they be classified? What criteria and test methods should OSHA use to define oxidizing materials?

(7) *Corrosive liquids.* (a) Should OSHA develop standards which address the storage, handling and use of corrosive liquids? What sources of information should OSHA use to develop standards?

(b) Should OSHA require the employer to have special safety procedures for treatment of in-plant accidents involving corrosive liquids? Should OSHA prohibit the use of plain glass containers and require the use of plastic-coated glass containers for storage and handling of corrosive liquids?

(c) Should corrosive liquids be classified? In what manner should they be classified? What criteria and test methods should OSHA use to define corrosive liquids?

(8) *Explosives and blasting agents.* (a) Should OSHA develop standards for the manufacture of explosives? Section 1910.109 of the current OSHA Subpart H covers the transportation, storage, and use of explosives and blasting agents, but does not cover the manufacture of explosives.

Standards of the Bureau of Alcohol, Tobacco and Firearms (BATF) contain requirements for the storage of explosives (Subpart J of 27 CFR Part 181, Sections 181.181 through 181.200); standards of the Department of Transportation (DOT) contain requirements for the transportation of explosives (49 CFR Parts 171 through 179); and, the OSHA Construction Standards (29 CFR Part 1926, Subpart U) contain requirements for the use of explosives in blasting.

It has been suggested that § 1910.109 be revised to include provisions for the manufacture of explosives and to incorporate the above noted standards by reference where appropriate. OSHA is interested in receiving comments concerning the usefulness and feasibility of this approach.

(b) Should OSHA develop a separate standard for the manufacture, storage, and handling of fireworks? In the alternative, should requirements for fireworks be more clearly delineated in the context of present standards for explosives?

(c) Should OSHA permit the transportation of blasting caps in the same vehicle with other explosives when the safety procedures specified by DOT in 49 CFR 177.835(g) are followed?

(d) Should OSHA ever permit blasting operations to be performed during non-daylight hours? Under what conditions? Present OSHA standards (§ 1910.109(e)(1)(v)) require blasting operations to be performed only during daylight hours.

(e) Are present OSHA definitions for "explosive" as specified in § 1910.109(a)(3) and "blasting agent" as specified in § 1910.109(a)(1) technically accurate? Are there other definitions which would be as accurate but would also be consistent with those of other agencies, such as DOT?

(f) When testing circuits to charged holes, should OSHA require that blasting galvanometers, which verify that circuitry is completed, be equipped with a silver chloride cell which is especially designed for this purpose? Are there alternative batteries available which are equally safe? There has been some controversy concerning this issue. Some experts state that specifying the use of a silver chloride battery is necessary to ensure against accidental detonation of the charged holes. Other experts argue that specifying the use of a silver chloride battery creates a monopoly market for this type of battery, restricts innovative technology, and needlessly excludes other types of batteries which could be used without jeopardizing employee safety.

(9) *Combustible dusts.* (a) Should OSHA develop standards in Subpart H which define and regulate combustible dusts? If so, should various classes of combustible dusts be individually addressed, e.g., metal, organic, plastic? Or would it be sufficient to develop general requirements applicable to all combustible dusts? What source standards should be used?

(b) Should OSHA require specific dust control criteria for those industries whose manufacturing processes involve combustible dusts, e.g., the pharmaceutical industry and food processing industry? Under what condition, if any, should explosion venting be required?

(10) *Flammable solids.* Should OSHA develop standards for the use, handling, and storage of flammable solids (such as camphor, potassium, sodium, and phosphorus)? What source standards should be used? What definitions and test methods should OSHA specify to accurately identify these substances?

(11) *Spray application using flammable or combustible materials.* (a) Should ventilation requirements for spray finishing operations presently contained in § 1910.94(c) be incorporated into a Subpart H standard for spray application using flammable or combustible materials? Confusion frequently exists when reference must be made to to § 1910.94(c) concerning spray booth ventilation requirements when the other spray application requirements are contained in Subpart H, § 1910.107. Would this confusion be eliminated if requirements for ventilation and spray finishing were contained in one standard?

(b) Should the requirement for a 20 foot distance between a spray booth and electrical equipment as specified in § 1910.107(c)(2) be reduced to ten feet, and under certain conditions, five feet, to be consistent with the latest editions of the National Fire Protection Association (NFPA) Standard 33, "Spray Application Using Flammable and Combustible Materials" and the National Electrical Code. The 20 foot distance requirement was originally adopted from the 1968 edition of NFPA 33. Would employee safety be adequate at these reduced distances?

(c) Should OSHA ever permit the recirculation of air exhausted from a spray operation back to the same spray operation? If so, under what conditions? What precuations should OSHA require? Present OSHA standards (§ 1910.107(d)(9)) prohibit the recirculation of air exhausted from spray operations. However, recirculation is permitted by the latest edition of NFPA 33 under certain conditions.

(d) Should OSHA permit open spraying, i.e., spraying outside of a spray booth or spray room, as is presently permitted in the latest edition of NFPA 33? If so, under what conditions should OSHA permit this practice?

(e) The present OSHA ventilation standard for spray operations (§ 1910.94(c)(6)) requires specific ventilation rates. It further requires that ventilation must dilute solvent vapors to less than 25 percent of the lower flammable limit (LFL) (also called the lower explosive limit, LEL). Is compliance with the specified percentage alone, sufficient to provide for employee safety? If not, what else should be required?

(f) Should OSHA ever permit the placing of electric motors (approved for use in hazardous locations) in exhaust ducts that are less than five feet in length? This practice is currently prohibited by § 1910.107(d)(5). Should this practice be allowed provided that: (1) the motors are shielded from direct overspray; (2) the fan blades are mounted directly on the motor shaft; and (3) inspections, cleaning, and maintenance are conducted on a regularly scheduled basis? Are there other precautions that are necessary?

(g) Should OSHA permit the use of thin plastic or paper bags as protective covers on sprinkler heads? It has been suggested that thin coverings on sprinkler heads would not slow the activation of the sprinkler heads to any significant extent and would protect the heads from overspray which could slow their activation. OSHA is seeking any data on the use of such protective coverings.

(h) Should OSHA permit the use of strippable coatings or kraft paper in spray areas to facilitate cleaning? It has been suggested that the use of kraft paper to cover exposed areas in spray operations facilitates cleaning and does not significantly increase the fire hazard once it is covered with a thin coating of overspray. Under what conditions, if any, should OSHA permit this practice to be used?

(i) Should OSHA develop standards which specifically address the use of water base finishes in spray operations? Most of these finishes involve little or no hazard in the liquid state but leave highly combustible residue upon the vaporation of the liquid carrier.

(j) Should ventilation requirements for powder coating operations be different from those for liquid spray operations? For example, the latest edition of NFPA 33 addresses ventilation for powder coating operations by requiring sufficient airflow to maintain the exhaust duct at a powder concentration that will not exceed one half of the lower flammable limit or minimum explosive concentration (MEC) of the powder in use as compared with 25 percent of the lower flammable limit (LFL) for liquids. IF the MEC of the powder has not been established, the NFPA standard requires that the exhaust duct powder concentration be maintained below 0.015 ounces per cubic fot (15 g/m^3). Does this approach provide an adequate margin of safety for employees?

(k) Should OSHA allow the use of spray buildings? A spray building is a detached building where only spray operations are conducted. What special conditions should be required for this type of building? Are the present OSHA requirements in § 1910.107 unnecessarily stringent for application to spray buildings?

(l) Should OSHA change the title of § 1910.107, "Spray Finishing Using Flammable and Combustible Materials," to the NFPA title, "Spray Application Using Flammable and Combustible Materials," to be consistent with the source standard as well as to eliminate confusion in the application of the standard?

(12) *Dip tanks containing flammable or combustible liquids.* (a) Should the title of the present standard, § 1910.108, "Dip Tanks Containing Flammable or Combustible Liquids," be changed to be consistent with the proposed title of the National Fire Protection Association (NFPA) Standard 34, "Standard for Dipping and Coating Processes Using Flammable or Combustible Liquids?"

(b) At present all dip tanks containing flammable or combustible liquids are covered by § 1910.108 without regard to the flash point of the liquid. Should OSHA limit coverage only to those liquids with flash points below 200 degrees F, and to those liquids with flash points above 200 degrees F whose temperatures are raised to within 50 degrees F below their flash point? Would this approach provide adequate employee safety?

(c) Should the present requirements for dip tank bottom drains (§ 1910.108(c)(3)) be revoked? It has been suggested that bottom drains are for the protection of the tank contents rather than for employee safety. Additionally, it has been suggested that in the event of fire, draining the tanks may not contribute significantly to employee safety, and may actually decrease safety because draining the tanks results in exposing more residue-laden surfaces.

(d) Should OSHA permit alternatives to its present requirement that overflow piping lead to a safe location outside the building as specified in § 1910.108(c)(2)? Suggested alternatives include overflow piping which leads to a safe location inside the building or, instead of overflow piping, having a dike around the dip tank in conjunction with limiting employee exposures? What criteria should be applied?

(e) Should OSHA ever permit the heating of liquids in dip tanks to temperatures above their flash points? Under what conditions? Present OSHA standards prohibit the heating of liquids in dip tanks to within 50 degrees F below their flash points as specified in § 1910.108(c)(7). However, the latest edition of NFPA 34 permits the heating of liquids to their boiling points or to within 100 degrees F below their autoignition temperatures. Should OSHA revise its standard in this regard? If so, what additional requirements should be specified for ventilation and employee safety?

(f) Should applicable provisions of § 1910.94(d) concerning ventilation for open surface tanks be incorporated into the Subpart H standard for dip tanks?

(g) Should present provisions addressing hardening and tempering tanks as specified in § 1910.108(h)(1) be made applicable to internal quench tanks, i.e., fully enclosed tank systems used in heating-treating materials?

(h) Should ventilation required for dip tanks be based on a percentage of the lower flammable limit (LFL)? The proposed NFPA Standard 34 would require that ventilation systems maintain vapor concentrations at or below 25 percent of the LFL five feet or more from the vapor source. If OSHA adopts this approach, what type of monitoring should be used to ensure that the vapor concentration does not exceed specified levels?

(13) *Molten metal operations.* Should OSHA develop standards for operations involving molten metal? If so, what problems should be addressed? What measures are available to minimize the incidence of steam explosions resulting from spills or the introduction of moisture into furnaces? Should OSHA require monitoring for carbon monoxide (CO) in areas of employee exposure near furnaces to prevent employees from being overcome by acute exposures?

(14) *Oil refineries, gas, chemical and petrochemical plants.* (a) Oil refineries, gas, chemical and petrochemical plants have been modified to operate at higher output and with greater stroage capacity than contemplated in their original layout. Does improper spacing between certain equipment, resulting from these plant modifications, contribute to substantial safety hazards? Should OSHA propose general spacing requirements for equipment in refineries and plants which are being modified or planned? What should be the basis for these requirements?

(b) Should OSHA require an emergency action plan as addressed in new § 1910.38, Subpart E, as revised September 12, 1980 (45 FR 60656) for all employees including contractors? What specific elements should be contained in such a plan?

(c) Should OSHA require a "hot work" permit system for types of work which may cause fire or explosion?

(d) Can some flammable vapor or gas concentration (percentage of lower flammable limits) be specified as the upper bound at which regular electrical wiring can be used without hazard to employees? What monitoring and ventilation should be provided to ensure that the concentrations of flammable vapors or gases are kept below an upper limit? What level of accuracy should be required of the monitoring equipment? What monitoring equipment is currently available or in use?

(e) Should OSHA require special safety procedures for employees, including employees of outside contractors, for work performed during breakdown process repairs, refinery turnaround procedures, and other planned process modifications or changes? Should all such procedures be in writing?

(f) Should compressed air be permitted to be used as a purge gas for flammable or combustible material containers and piping? Under what conditions? If compressed air is permitted for purging flammable and combustible material containers and piping, what is the potential for a flammable vapor-air mixture occurring?

(g) Should OSHA develop standards for high pressure steam or water equipment used in the cleaning of equipment?

(h) Should OSHA propose requirements for the use of system safety analysis, such as failure mode and effects analysis, for new operations, shutdowns, and turnarounds involving hazardous materials? Such analysis would be conducted before any new operation, shutdown, or turnaround occurred and would include a study of conditions and environments that effect system failures, the modes in which failure could take place, the problems that could be generated, and the preventive or safety measures to be taken.

(i) Should OSHA require employers to prepare and implement a system safety program which identifies all hazards capable of causing a disabling injury or death in each operation and defines the alternative measures to eliminate or control those hazards?

(j) Shoud a system safety program include all of the following: failure mode and effect analysis; fault tree analysis; sneak circuit analysis including risk assessment and hazard control?

(h) Should the scope of the system safety plan include: (1) design of new systems/facilities; (2) modifications to existing system/facilities; and, (3) operations and maintenance of systems/facilities?

Public Participation

Written Comments and Information

The written comments and information requested in this notice must be submitted on or before July 30, 1981, in quadruplicate to the Docket Officer, Docket S-013, Room S6212, U.S. Department of Labor, Occupational Safety and Health Administration, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Public Meeting

In order to provide an informal forum in which interested persons can orally present comments and information regarding the issues discussed in this notice or on any other aspect concerning the regulation of hazardous materials in Subpart H, OSHA has scheduled a public meeting for April 8 and 9, 1981, in the Auditorium, Frances Perkins Department of Labor Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

The meeting on each day will begin promptly at 9:00 a.m., will recess from 12 noon until 1:30 p.m. and then continue until 5:00 p.m. The chairperson will be a representative of the U.S. Department of Labor, designated by the Assistant Secretary, and will have the necessary authority to regulate the conduct of the meetings.

OSHA requests that any person wishing to make oral presentations submit a notice of intention to appear by March 13, 1981. Notice should be addressed 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. The notice should identify the person and/or organization intending to testify, the amount of time requested for oral presentation, the subject, and a brief summary of the intended oral presentation. All persons giving writtern advance notice will have time reserved for oral presentations. Persons who do not submit advance notice, but who still wish to testify, are requested to register at the meeting they attend.

As long as time permits, all persons who wish to be heard will be allowed to make oral presentations. Howevr, priority will be given to those who register in advance.

Additional Public Meetings

OSHA would like to determine if holding additional public meetings in locations other than Washington, D.C. will enable more person to participate. Specifically, OSHA wants to know whether there are significant numbers of persons who cannot attend the April public meetings in Washington, D.C., but who would be able to participate in a public meeting held on a different date in a more convenient location. Such persons should request the Agency to hold additional meetings and indicate when such meetings should be held and the city or region of the country in which to hold the meetings. (Such requests should be sent to the address provided above for written comments.) OSHA will carefully consider such request in determining whether and where to hold additional meetings. Notice of any additional meetings will be published in the **Federal Register.**

All written and oral submissions, as well as other information gathered by the Agency, will be considerd by OSHA in the development of proposed standards or revisions to Subpart H. In addition, these submissions will be available for inspection and copying during normal business hours at the OSHA Docket Office.

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, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

(Sec. 6, 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 19th day of January, 1981.

Eula Bingham,

Assistant Secretary of Labor.

[FR Doc. 81-2398 Filed 1-22-81; 8:45 am]

BILLING CODE 4510-26-M

federal register

Friday
January 23, 1981

Part VI

Department of Labor

Wage and Hour Division, Employment Standards Administration

Minimum Wages for Federal and Federally Assisted Construction; General Wage Determination Decisions, Modifications and Supersedeas 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

Virgin Islands: VI81–3011

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.

Alaska: AK80–5130	Sept. 26, 1980.
California:	
CA80–5135	Oct. 3, 1980.
CA80–5147	Nov. 28, 1980.
Connecticut:	
CT80–2074	Aug. 15, 1980.
NY80–3079	Dec. 30, 1980.
Delaware: NY80–3079	Dec. 30, 1980.
Florida:	
FL79–1039	Feb. 16, 1979.
FL80–1039	Jan. 4, 1980.
FL81–1166	Jan. 6, 1981.
FL81–1167	Jan. 6, 1981.
FL81–1168	Jan. 6, 1981.
FL81–1169	Jan. 6, 1981.
Louisiana: LA81–4002	Jan. 6, 1981.
Maine: NY80–3079	Dec. 30, 1980.
Maryland:	
MD80–3061	Oct. 30, 1980.
NY80–3079	Dec. 30, 1980.
Massachusetts:	
MA80–2045	July 7, 1980.
NY80–3079	Dec. 30, 1980.
Michigan: MI80–2062	Aug. 15, 1980.
New Hampshire: NY80–3079	Dec. 30, 1980.
New Jersey:	
NJ79–3029	Jan. 4, 1980.
NY80–3079	Dec. 30, 1980.
New York:	
NY80–3022	April 4, 1980.
NY80–3035	April 25, 1980.
NY80–3079:	Dec. 30, 1980.
Pennsylvania: NY80–3079	Dec. 30, 1980.
Puerto Rico:	
PR80–3063	Oct. 17, 1980.
PR80–3070	Oct. 24, 1980.
PR80–3069	Oct. 24, 1980.
Texas:	
TX80–4085	Nov. 7, 1980.
TX80–4086	Nov. 7, 1980.
TX80–4097	Dec. 5, 1980.
TX80–4099	Dec. 5, 1980.
TX81–4007	Jan. 6, 1981.
TX81–4009	Jan. 6, 1981.
Rhode Island: NY80–3079	Dec. 30, 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.

Connecticut: CT80-2073 (CT81-3001)..... Aug. 15, 1980.
Florida: FL80-1040 (FL81-1180)..... Jan. 4, 1980.
New Hampshire:
NH80-2056 (NH81-3009)..... Aug. 15, 1980.
NH80-2057 (NH81-3010)..... Aug. 1, 1980.
New York: NY79-3028 (NY81-3003)..... Sept. 7, 1979.
North Carolina:
NC81-1137 (NC81-1182)..... Dec. 30, 1980.
NC81-1141 (NC81-1182)..... Dec. 30, 1980.
NC81-1145 (NC81-1181)..... Dec. 30, 1980.

Cancellation of General Wage Determination Decision

The general wage decision listed below is cancelled. Agencies with construction projects pending to which the cancelled decision would have been applicable should utilize the project determination procedure by submitting Form SF-308. See Regulations Part 1 (29 CFR), Section 1.5. Contracts for which bids have been opened shall not be affected by this notice. Also consistent with 29 CFR, 1.7(b)(2), the incorporation of the cancelled decision in contract specifications, the opening of bids is within ten (10) days of this notice, need not be affected.

AZ80-5124—Pima County Arizona dated August 1, 1980, in 45 FR 51388—Residential Construction

Signed at Washington, D.C., this 16th day of January 1981.

Dorothy P. Come,

Assistant Administrator, Wage and Hour Division.

BILLING CODE 4510-27-M

[FR Doc. 81-2320 Filed 1-23-81; 8:45 am]

BILLING CODE 4510-27-C

NEW DECISION

STATE: Virgin Islands COUNTY: Island Wide
DECISION NO.: VI81-3011 DATE: Date of Publication
DESCRIPTION OF WORK: Building Construction Projects including Residential Construction Projects (single family homes and apartments up to and including 4 stories).

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Air Conditioning Mechanics	5.00				
Carpenters	4.51				
Cement Masons	4.43				
Electricians	4.62				
Ironworkers	4.50				
Laborers:					
Unskilled	3.41				
Mason Tenders	3.51				
Painters	3.50				
Plumbers & Pipefitters	4.00				
Power Equipment Operators:					
Backhoe	4.50				
Compressor	4.00				
Crane	5.00				
Truck Drivers	5.00				
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)).					

Modification Page 1

DECISION NO. AK80-5130 Mod. #2
(45 FR 64040 September 26, 1980)

STATEWIDE, ALASKA	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ADD:					
Elevator Constructor	$11.22	1.195	.95		.035
Probationary Helper					
CHANGE:					
Electricians					
Residential Electricians	12.00	1.20	3%		.10
Elevator Constructors	22.445	1.195	.95	a	.035
Painters					
Area 1					
Zone 1 and 3					
Brush, Roller, Paper, Vinyl	20.24	1.35	2.00		.21
Utildor, Swing, Sign Bosun	20.51	1.35	2.00		.21
Structural Steel, Pot Tender, Sand Blast	20.77	1.35	2.00		.21
Finish Metal	21.29	1.35	2.00		.21
Spray Painter	21.24	1.35	2.00		.21
Hand Taper	20.53	1.35	2.00		.21
Machine Taper	21.58	1.35	2.00		.21
Buffer Operator	20.80	1.35	2.00		.21
Hardwood Finisher	21.03	1.35	2.00		.21
Zone 2					
Brush, Roller, Paper, Vinyl	21.14	1.35	2.00		.21
Utildor, Swing, Sign Bosun	21.40	1.35	2.00		.21
Structural Steel, Pot Tender, Sand Blast	21.66	1.35	2.00		.21
Finish Metal	22.14	1.35	2.00		.21
Spray Painter	22.14	1.35	2.00		.21
Hand Taper	21.42	1.35	2.00		.21
Machine Taper	22.47	1.35	2.00		.21
Buffer Operator	21.69	1.35	2.00		.21
Hardwood Finishers	21.92	1.35	2.00		.21

DECISION NO. AK80-5130 Mod. No. 2 cont'd

STATEWIDE, ALASKA	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Painters					
Area 2 and 3					
Brush, Roller, Sign	$19.95	1.10	2.00		.25
Paper and Vinyl, Swing Stage, Taper/Drywall, Structural Steel	20.35	1.10	2.00		.25
Spray and Sand Blast, Pot Tender	20.55	1.10	2.00		.25
Epoxy and Tar Applicator	20.95	1.10	2.00		.25
Steeple Jack and Tower	21.75	1.10	2.00		.25
Residential Painters	11.34	1.10	2.00		.25
Plumbers					
Area 1	21.12	1.35	2.90		.35
Roofers					
Area 1	19.00	1.40	3.30		.05
Area 2 and 3	18.70	1.40	3.30		.05
Asbestos Workers	25.17	.78	1.45		.10
Boilermakers	20.97	1.30	1.25	1.00	.04
DELETE:					
Power Equipment Operators					
Dredging					
Group 1	16.33	1.20	3.00		
Group 2	17.35	1.20	3.00		
Group 3	17.81	1.20	3.00		
Group 4	18.30	1.20	3.00		
Group 5	19.43	1.20	3.00		

DECISION NO. CA80-5135 - Mod. #4

(45 FR 65867 - October 3, 1980)

Imperial, Inyo, Kern, Los-Angeles, Mono, Orange, Riverside, San Luis Obispo, Santa Barbara and Ventura Counties, California	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Change:					
ELECTRICIANS:					
Area 8:					
Electricians	$18.25	1.10	3%+1.50		.03
Cable Splicers	19.75	1.10	3%+1.50		.03
Area 10:					
Electricians	21.00	1.10	3%+1.50		.03
Cable Splicers	22.50	1.10	3%+1.50		.03
LINE CONSTRUCTION:					
Area 9:					
Groundman	16.44	1.10	3%+1.50		.03
Lineman, Equipment Op.	21.00	1.10	3%+1.50		.03
Cable Splicer	22.50	1.10	3%+1.50		.03
Add:					
LINE CONSTRUCTION:					
Area 11:					
Santa Barbara County (Remainder of County):					
Groundman	13.69	1.10	3%+1.50		.03
Lineman	18.25	1.10	3%+1.50		.03
Cable Splicer	19.75	1.10	3%+1.50		.03
Equipment Operator	18.25	1.10	3%+1.50		.03

Modification Page 4

DECISION NO. CA80-5147 - Mod. #3
(45 FR 79275 - November 28, 1980)
Imperial, Kern, Los Angeles, Orange, Riverside, San Luis Obispo, Santa Barbara and Ventura Counties, California

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Change:					
ELECTRICIANS:					
Area 9:					
Electricians	$21.00	1.10	3%+1.50		.03
Cable Splicers	22.50	1.10	3%+1.50		.03
Area 10:					
Electricians	18.25	1.10	3%+1.50		.03
Cable Splicers	19.75	1.10	3%+1.50		.03

Modification Page 5

DECISION NO. CT80-2074 - Mod. #3
(45 FR 54602 - August 15, 1980)
Hartford, Middlesex, New Haven, New London, & Tolland Counties, Connecticut

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Change:					
Asbestos Workers					
New London Co.: Griswold, Ledyard, Lisbon, N. Stonington, Preston, Stonington, & Voluntown	12.28	1.45	1.33		.03
Boilermakers	14.63	1.275	1.46		.03
Bricklayers (Building)					
Hartford Co.: Berlin, New Britain, Newington, & Southington; New Haven Co.: Meriden, Wallingford, Cheshire (North of Route 68)	11.05	.75	.75		
Hartford Co.: Canton	11.05	.75	.75		
New Haven Co.: Ansonia, Derby, Oxford, Seymour, & Southbury	11.05	.75	.75		
Hartford Co.: Bristol, Plainville, Naugatuck, Prospect, Waterbury, & Wolcott	11.05	.75	.75		
New Haven Co.: Milford (West of Indian River to the Orange Town line)	11.05	.75	.75		
Bricklayers (Heavy & Highway)	11.15	.75	.75	b	
Electricians					
Hartford Co.: Hartland; New Haven Co.: Beacon Falls, Middlebury, Naugatuck, Oxford, Prospect, Seymour, Southbury, Waterbury, & Wolcott	12.10	1.22	3%+ .60	b	1/8%
Middlesex Co.: Remainder of County; Hartford Co.: Berlin, Bristol, New Britain, Newington, Plainville, Southington; New Haven Co.: Remainder of County; New London Co.: Fishers Island, Sound Old Lyme, Groton, Waterford, & Ledyard (Submarine Base Only)	13.10	1.07	3%+ .65		1%
Glaziers					
New Haven Co.: Except Wallingford	12.33	1.10	.47	k	.01

DECISION NO. CT80-2074 - Mod. #3 (Cont'd)

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Lathers					
Hartford Co.: Windsor Locks, Granby, Windsor, New Britain, Plainville; New London Co.: Groton, Mystic, Norwich; Middlesex Co.: Deep River, Middletown, Haddam; Tolland Co. Tolland & Rockville	11.15	.50	.40		.01
Roofers					
New Haven Co.: Ansonia, Beacon Falls, Bethany, Brandford, Derby, E. Haven, Guilford, Hamden, Madison, Milford, Middlebury, Naugatuck, New Haven, N. Branford, N. Haven, Orange, Oxford, Seymour, Union City, W. Haven, & Woodbridge	13.15	1.35	.50		
Hartford Co.; Middlesex Co.; New Haven Co.: Cheshire, Meriden, Prospect, Wallingford, & Wolcott; New London Co.; Tolland Co.					
Composition	11.85	.575	.85	.55	
Slate, Tile	11.35	.575	.85	.55	
Sheet Metal Workers	13.24	.61	1.23		.09
Sprinkler Fitters	14.00	.85	1.20		.08
Steamfitters					
Hartford Co.: Avon, Bloomfield, Burlington, Canton, E. Granby, E. Hartford, E. Windsor, Enfield, Farmington, Glastonbury, Granby, Hartford, Manchester, Marlborough, Newington, Rocky Hill, Simsbury, S. Windsor, Suffield, W. Hartford, Wethersfield, Windsor, & Windsor Locks; Middlesex Co.: Chester, Cromwell, Deep River, E. Haddam, Hampton, Haddam, Maromas (Atomic River Project), Middlefield, Middletown, & Portland; Tolland Co.: Andover, Bolton, Columbia, Coventry, Ellington, Hebron, Mansfield, Somers, Stafford, Storrs, Tolland, Union, Vernon, & Wellington	13.57	1.16	1.51		.13

Decision #FL79-1039 - Mod. #6 (44 FR 10228 - Febuary 16, 1979)	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Volusia County (except Cape Kennedy Space Flight Center and Cape Canaveral Air Force Station, Florida)					
Change:					
Carpenters	9.25	.55	.80		.12
Decision #FL80-1039 - Mod. #1 (45FR 1344 - January 4, 1980) Gadsden, Jefferson, and Leon					
Change:					
Laborers	3.35				
Truck Drivers	3.35				

Decision #FL81-1166-Mod. #1 (46 FR-1518- January 6,1981)	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Alachua, Bradford, Calhoun, Citrus, Columbia, Dixie, Franklin, Gadsden, Gilbrist, Hamilton, Hernando, Holmes, Jackson, Jefferson, Lake, Lafayette, Leon, Levy, Liberty, Madison, Marion, Pasco, Putnam, Sumter, Suwannee, Taylor, Union, Wakulla, and Washington					
Change: Description of Work To Read: Highway Construction Projects (excluding tunnels, building structures in rest area projects and railroad construction; bascule, suspension and spandrel arch bridges; bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)					

Decision #FL81-1167- Mod. #1 (46 FR-1518- January 6, 1981)	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Bay, Escambia, gulf, Okaloosa, Santa Rosa, and Walton					
Change: Description of Work to Read: Highway Construction Projects (excluding tunnels, building structures in rest area projects and railroad construction: bascule, suspension, and spandrel arch bridges; bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)					
Decision #FL81-1168- Mod. #1 (46 FR - 1519- January 6, 1981)					
Baker, Clay, Duval, Flagler, Nassau, and St. Johns					
Change: Description of Work to Read: Highway Construction Projects (excluding tunnels, building structures in rest area projects and railroad construction: bascule, suspension and spandrel arch bridges; bridges designed for commercial navigation: bridges involving marine construction; and other major bridges)					

Decision #FL81-1169 - Mod. #1 (46 FR - 1519- January 6, 1981)	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
Brevard and Volusia (excluding Cape Canaveral Air Force Station, Patrick Air Force Base, Kennedy Space Flight Center and Melabar Radar Site), Hillsborou ' Indian River, Manatee, Martin, Orange, Osceola, Pinellas, Polk, St. Lucie, Sarasota, and Seminole Counties, Florida					
Change:					
Description of Work to Read:					
Highway construction projects (excluding tunnels, building structures in rest area projects and railroad construction; bascule, suspension and spandrel arch bridges; bridges designed for commercial navigation; bridges involving marine construction; and other major bridges)					
DECISION NO. LA81-4002 - MOD. #1 (46 FR 1520 - January 6, 1981)					
Allen, Beauregard, Bossier, Caddo, Calcasieu, Cameron, Jefferson, Jefferson Davis, Orleans, Plaquemines, St. Bernard & St. Charles Parishes, Louisiana					
CHANGE:					
Laborers:					
Zone 1 - Group 4	$ 8.93	.30	.27		.05

DECISION NO. MD80-3061 - MOD. #2 (45 FR 70696 - October 30, 1980)	Basic Hourly Rates	Fringe Benefits Payments: H & W	Pensions	Vacation	Education and/or Appr. Tr.
Counties of Anne Arundel (excluding the D.C. Training School), Baltimore, Baltimore City, Maryland, and for Heavy Construction Projects in Harford and Howard Counties, Maryland					
ADD:					
SHEET METAL WORKERS	11.45	1.10	.92		.07
CHANGE:					
ASBESTOS WORKERS	$12.45	.85	.95		.02
BOILERMAKERS	14.275	1.275	1.00		.04
ROOFERS, WATERPROOFER:					
(All types)	10.25	.60	.45		
TILE & TERRAZZO WORKERS	10.66	.90	.50		.04
POWER EQUIPMENT OPERATORS:					
Building and Heavy Construction:					
Group I	12.83	1.00	1.15		.15
Group II	11.95	1.00	1.15		.15
Group III	11.34	1.00	1.15		.15
Group IV	10.75	1.00	1.15		.15
Group V	9.57	1.00	1.15		.15

POWER EQUIPMENT OPERATOR CLASSIFICATIONS

Group I - Operators handling or setting steel, stone prestressed concrete or machinery. Tower cranes.

Group II - Backfiller, backhoe, batching plants, boat captain, cableway, case type hoe (with a front end bucket over 1-1/4 yds.), concrete mixing plants, concrete paver, crane, derrick boat, double concrete pump, dragline, Eimco type overhead loader, elevating grader, excavating scoop (25 yds. and over), front end loader (1-3/4 yds. and over), gradalls, grader, hoist (2 active drums or more), multiple conveyor, pile driving machine, power trenching machine, tunnel mucking machine, twin engine scraper, welder, whitley rig and bulldozers (d-9 or equivalent and above)

DECISION NO. MD80-3061 - CONT'D

POWER EQUIPMENT OPERATOR CLASSIFICATIONS CONT'D

Group III - Asphalt spreader, bull float, Case type backhoe (with a front end bucket 1-1/4 yds. and under), concrete mixer (with skip), concrete pump, concrete spreader, excavating scoop (under 25 yds.), finishing machine, front end tractor loader (under 1-3/4 yds.), hi-lift fork lift, longitudinal float, narrow gauge locomotive, one drum hoist, power roller on hot mix asphalt, screeding machine, stone crusher, stone spreader, sub-grader, tractor with attachments (2 or more provided both attachments are being used) and all bulldozers except D-9 or equivalent and above.

Group IV - Caterpillar type tractor, compressors, elevator operator, fireman, fuel truck, grease truck, grout pump, light plant, mighty midget with compressor, single conveyor, space heaters, welding machines, well-drill, wellpoint system, and all power rollers except on hot mix asphalt.

Group V - Deck hands, oilers (all types)

Welders - receive rates prescribed for craft performing operation to which welding is incidental.

PAID HOLIDAYS:
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day.

FOOTNOTES:
a. Holidays: A through F.
b. Employer contributes 8% of basic hourly rate for 5 years or more of service or 6% of the basic hourly rate for 6 months to 5 years of service as vacation pay credit.
c. Employer with 1 year of service - 1 week's paid vacation; 2 - 3 weeks paid vacation, provided the employee has worked 125 days in the previous contract year.
d. Holidays: A through F plus the employee's birthday; the day after Thanksgiving Day and Christmas Eve (provided the employee has worked one day and has been available for work during holiday week).
e. Employee working Christmas Eve shall work 4 hours and receive 8 hours pay.
f. Holidays: A through F.

DECISION NO. MA80-2045 - MOD. #3 (45 FR 45794 - July 7, 1980) Worcester County, Massachusetts	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CHANGE:					
BOILERMAKERS	14.63	1.275	10%		.03
ELECTRICIANS:					
Ashburnham, Athol, Bolton, Fitchburg, Gardner, Harvard, Hubbardston, Lancaster, Leominster, Lunenburg, Phillipston, Westminster and Winchendon	12.90	.75	3%+1.00		.02
PAINTERS:					
Warren, West Warren:					
Brush and Tapers	10.02	1.20	.65		.08
Spray-epoxys & interior dry fogs & materials thinned with anything other than water &/or mineral spirits	13.36	1.60	.8667		.1067
Spray-materials thinned with water &/or mineral spirits, excluding epoxys & interior dry fogs	13.89	1.20	.65		.08
Swing stage under 40' steel	10.207	1.20	.65		.08
Swing stage over 40' steel	10.52	1.20	.65		.08
Holedale, Mendon, Milford, Southboro, Upton and Westboro:					
Brush (New Construction), paperhangers and tapers	11.40	.85	.80		.03
Brush (Repaint)	10.85	.85	.80		.03
Remainder of County:					
Brush	12.73	.90	1.65		.04
Steel	14.85	.90	1.65		.04
Sandblasting, Spray	13.73	.90	1.65		.04
Repaint	10.82	.90	1.65		.04
Residential	9.55	.90	1.65		.04

DECISION NO. MA80-2045 - CONT'D

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
SIGN PAINTERS, ERECTORS & FABRICIATORS	10.25	.84	.50	.82	.04
PIPEFITTERS:					
Holedale and Southboro	15.07	1.30	1.08		.05
Pondville	15.61	.94	1.45		.07
Remainder of County	12.38	.80	1.00		.05
PLUMBERS:					
Holedale and Southboro	15.07	1.30	1.08		.05
Ashburnham, Athol, Bolton, Fitchburg, Gardner, Harvard, Hubbardston, Lancaster, Leominster, Lunenburg, Petersham, Phillipston, Royalston, Templeton, Westminster and Winchendon	11.71	.80	.65	.47	.05
Remainder of County	12.83	1.15	.90		.05
ROOFERS	12.00	1.12	.98		.02
POWER EQUIPMENT OPERATORS					
Building Construction: Royalston, Phillipston, Athol, Petersham, Hardwick, New Braintree, Brookfield, E. Brookfield, N. Brookfield, Oakham, Barre, Templeton, Winchendon, Sturbridge, W. Brookfield, and Warren					
Class I	11.63	.95	1.00	a	.07
Class II	11.43	.95	1.00	a	.07
Class III	11.23	.95	1.00	a	.07
Class IV	10.86	.95	1.00	a	.07
Class V	9.84	.95	1.00	a	.07
Class VI	9.29	.95	1.00	a	.07
Class VII	8.39	.95	1.00	a	.07

DECISION NO. MA80-2045 - CONT'D

CLASSIFICATIONS

Class I Shovels, Cranes, Hydraulic Cranes 10 ton capacity or over, Draglines, Derricks, Elevators with Chicago Boom, Backhoes, Gradalls, Elevating Graders, Pile Driving Rigs, Concrete Road Pavers, three drum Hoisting and Trenching Machines, Belt-type Loaders, Front End Loader 5½ yards or over, Dual Drum Paver, Automatic Grader (i.e. C.M.I.) Combination Back Hoe Loader 3/4 yard hoe or over

Class II Rotary Drill (with mounted compressor), compressor hoes (3 to 6 compressors), Rock and Earth Boring Machines (excluding McCarthy and similar drills), Graders Front End Loaders-4 yards to 5½ yards, two Drum Hoist, High Fork Lifts with capacity of 15 feet and over, Scrapers-21 yards and over (struck load), sonic Hammer Console

Class III Combination Backhoe-Loader-up to 3/4 hoe, Bulldozer, Push Cats, Scraper-up to 21 yards (struck load)-self propelled or tractor drawn, Fireman, Front End Loaders-up to 4 yards, Asphalt paver, Asphalt Roller-10 ton or over, Well Drillers, Mechanics, Welders, Pumpcrete Machines, Concrete pumps and similar type pumps, Engineer or Fireman on High Pressure Boiler (on site), Self Loading Batch Plant, Well Point, Electric Pumps used in Well Point System, Pumps-12 inches and over (total discharge), compressor (one or two)900 cu. ft. and over, Powered Grease Truck, Automatic Elevators, (manually or remote controls), Groute Pumps, Boom Truck, Hydraulic Cranes-under 10 ton

Class IV Asphalt Roller-under 10 ton

Class V Single Drum Hoist, Self-Propelled Roller, Self-Propelled Compactors Power Pavement Breakers, Concrete Pavement Finishing Machines, Two Bag Mixers with Skip, McCarthy and similar drills, Batch Plants (not self-loading) Bulk Cement Plants, Self-Propelled Material Spreaders, A Frame Trucks, Fork Lifts up to 15 feet

Class VI Compressors (one or two) 315 cu. ft. to 900 cu. ft. Pumps-4 inches to 12 inches (total discharge), Tractor (without blade or machines used for pulverizing, Grading or Seeding

DECISION NO. MA80-2045 - CONT'D

CLASSIFICATIONS CONT'D

Class VII Compressors (up to 315 cu. ft.), Small Mixers, Pumps (Up to 4 inches), Power Heaters, Welding Machines, Conveyors, Oiler, Helpers on Grease Truck, and Grease Trucks with hand greasing equipment

PAID HOLIDAYS:
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTES:
a. Holidays: A through F, Veterans' Day and Columbus Day

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS:					
Building Construction:					
Remainder of County					
Class I	13.76	1.18	1.15	a	.03
Class II	13.64	1.18	1.15	a	.03
Class III	11.52	1.18	1.15	a	.03
Class IV	12.55	1.18	1.15	a	.03
Class V	10.21	1.18	1.15	a	.03
Class VI	10.83	1.18	1.15	a	.03

DECISION NO. MA80-2045 - CONT'D

CLASSIFICATIONS

Class I Cranes, shovels, truck cranes, cherry pickers, dragline, trench hoes, backhoes, three drum machines, derricks, pile drivers, elevator towers, hoists, gradalls, shovel dozers, front end loaders, fork lifts, augers, boring machines, rotary drills, post hole hammers, post hole diggers pumpcrete machines, asphalt plant (on site), concrete batching and/or mixing plant (on site, crusher plant (on site), paving concrete mixers, timber jacks, Boom over 150' including jib additional $.50 per hour' Boom over 185' including jib - additional $.90 per hour; Boom 210' including jib - additional $1.25 per hour; Boom over 250' including jib - additional $1.90 per hour; Boom over 295' including jib - additional $2.65 per hour

Class II Sonic or vibratory hammers, graders, tandem scrapers, concrete pumps, bulldozers, tractors, york rakes, mulching machines, portable steam boiler, portable steam generators, rollers, spreaders, tampers (self propelled or tractor drawn), asphalt pavers, mechanic maintenance, paving screed machines, stationary steam boilers, paving concrete finishing machines, cal trucks, ballast regulators, switch tampers, rail anchor machinery, tire trucks (when operated by the employer on the job site)

Class III Pumps (1-3 grouped), compressors, welding machines (1-3 grouped), generators, concrete vibrators, lighting plants, heaters (power driven 1-5), well-point systems (operating and installing), syphones-pullsometers, concrete mixers, values controlling permanent plant air or steam, conveyors, Jackson type tampers, single diaphragn pump, lighting plants

Class IV Assistant engineers (firemen)

Class V Oilers (other than truck cranes and gradalls)

Class VI Oilers on truck cranes and gradalls

DECISION NO. MA80-2045 -
CONT'D

PAID HOLIDAYS:
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE:
A. Holidays: A through F, Washington's Birthday, Columbus Day, Veterans' Day and Patriots Day.

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS: Heavy and Highway Construction: Sturbridge, Brookfield, N. & E. Brookfield, Oakham, Barre, Templeton, Winchendon, Royalston, Phillipston, Athol, Petersham, Hardwich, New Braintree, W. Brookfield, and Warren:					
Class I	11.63	.95	1.00	a	.07
Class II	11.43	.95	1.00	a	.07
Class III	11.23	.95	1.00	a	.07
Class IV	10.86	.95	1.00	a	.07
Class V	9.84	.95	1.00	a	.07
Class VI	9.29	.95	1.00	a	.07
Class VII	8.39	.95	1.00	a	.07
Class VIII	12.13	.95	1.00	a	.07

DECISION NO. MA80-2045 -
CONT'D

CLASSIFICATIONS

Class I Shovels, Crawler and Truck Cranes, Derricks, Backhoes, Trenching Machines, Elevating Graders, Belt-type Loaders, Gradalls, Pile Drivers, Concrete Pavers, on site Processing Plant (Engineer in charge), Dragline, Clam Shell, Cableways, Shaft Hoists, Mucking Machines, Front End Loader-5½ yards and over Tower Cranes, Self-propelled Hydraulic Cranes-10 tons and over, Dual Paver, Automatic Graders-Excavator (C.M.I or equal), Scrapers towing pan or wagon, Tandem Dozers or Push Cats (2 units in tandem), Welder using semi automatic Welding Machine, Shotcrete Machine, Tunnel Boring Machine

Class II Rotary Drill (with mounted Compressor), Compressor House 3 to 6 Compressors), Rock and Earth Boring Machines (excluding McCarthy and similar drills), Grader, Front End Loaders-4 yards to 5½ yards, Scraper-21 yards and over (struck Load), Forklifts-7 ft. lift and over or 3 ton capacity and over, Sonic Hammer Console

Class III Bulldozer, Push Cats, Scrapers-up to 21 yards (struck load) self-propelled or Tractor Drawn, Self-powered Asphalt Paver, Front End Loaders-up to 4 yards, Mechanics, Welders, Well Driller, Pumpcrete Machine, Engineer or Fireman on High Pressure Boiler (on job), Well point Operators, ELectric Pumps used in well Point system, Tireman, Pumps-16 inches or over total discharge, Compressors (1 or 2) cu. ft. and over Powered Grease Truck, Asphalt Roller-10 ton and over, Tunnel Locomotive and Dinkys, Grout Pumps, Hydraulic Jacks (jacking pipe, slip forms, etc.), Boom Truck Self-Propelled Hydraulic Cranes up to 10 ton, Self-loading Batch Plant (on job).

Class IV Asphalt Roller-up to 10 ton

Class V Hoists, Conveyors, Self-powered Rollers and Compactors, Power Pavement Breaker, Self-propelled Material Spreader, Self-powered Concrete Finishing Machine, Two Bag Mixer with skip, McCarthy and similar Drills, Batch Plant (not self-loading), Bulk Cement Plant

DECISION NO. MA80-2045 - CONT'D

CLASSIFICATIONS (CONT'D)

Class VI Compressor (315 cu. ft. to 900 cu. ft., 1 or 2), Pumps 4" to 16" total discharge, Tractor without blade drawing sheepsfoot roller, Rubber tired roller or other type of compactors including machines for pulverizing and aerating soil

Class VII Compressor (up to 315 cu. ft.), Small Mixers with skip, Oiler, Pumps up to 4", Grease Truck, Helper on powered Grease Truck, Power Heaters, Welding Machines, A-Frame Trucks, Forklifts-up to 7 ft. lift and up to 3 ton capacity, Hydro Boom, Parts Man (in repair shop), Power Safety Boat

Class VIII Operator of Cranes with 200 ft. of boom or more

FOOTNOTES:
a. Holidays: New Year's Day; Washington's Birthday; Memorial Day; Independence Day; Labor Day; Columbus Day; Veteran's Day; Thanksgiving Day and Christmas Day

DECISION NO. MA80-2045 - CONT'D

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS HEAVY & HIGHWAY CONSTRUCTION:					
Remainder of County:					
Group I	13.76	1.18	1.15	a	.03
Hourly premium for boom lengths including jib					
Over 150 feet + $.50					
Over 185 feet + .90					
Over 210 feet + 1.25					
Over 250 feet + 1.90					
Over 295 feet + 2.65					
Group II	13.64	1.18	1.15	a	.03
Group III	11.52	1.18	1.15	a	.03
Group IV	12.55	1.18	1.15	a	.03
Group V	10.21	1.18	1.15	a	.03
Group VI	10.83	1.18	1.15	a	.03

CLASSIFICATIONS

Group I Power shovels, cranes, truck cranes, derricks, pile drivers, trenching machines, mechanical hoist pavement breakers, cement concrete pavers, draglines, hoisting engines, three drum machines, pumpcrete machines, uke loaders, shovel dozers, front end loaders, mucking machines, shaft hoists, steam engines, backhoe, gradalls, cable ways fork lifts, cherry pickers, boring machines, rotary drills, post hole hammers, post hole diggers, asphalt plant on job site, concrete batching and/or mixing plant on job site, crusher plant on job site, paving concrete mixers, timber jacks

Group II Sonic or vibratory hammers, graders, scrapers, tandem scrapers, bulldozer, tractor, mechanic maintenance, York rakes, mulching machines paving screed machine, stationary steam boilers, paving concrete finishing machine, grout pumps, portable steam boilers, portable steam generators, rollers, spreaders, asphalt pavers, locomotives or machines used in place thereof, tampers, self propelled or tractor drawn, cal tracks, ballast regulators, rail anchor machines, switch tampers

DECISION NO. MA80-2045 - CONT'D

CLASSIFICATIONS CONT'D

Group III Pump (1-3 grouped), compressors, welding machine (1-3 grouped), generators, lighting plants, heaters (power driven) 1-5), syphons, pulsometers, concrete mixers, valves controlling permanent plant air steam, conveyors, wellpoint system (operating and installing)

Group IV Assistant Engineers (fireman)

Group V Oilers (other than truck cranes & gradalls)

Group VI Oilers (on truck cranes & gradalls)

FOOTNOTES:

a. Holidays - New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Washington's Birthday, Columbus Day, Veterans Day and Patriots Day

DECISION NO. MI80-2062 Mod#2 (45 FR 54615 August 15,1980)	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
COUNTIES: Alpena, Alcona, Charlevois, Emmet, Grand Traverse, Leelanau, Mason, Montmorency, Muskegon, Oceana, Oscoda & Presque Isle; Michigan					
OMIT:					
Montmorency County - Building Construction Only					

DECISION NO. NJ79-3029 - MOD. #7 (44 FR 1350 - January 4, 1980)	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Union and Warren Counties, New Jersey					
CHANGE:					
DOCKBUILDERS & PILEDRIVERMEN	$13.25	1.85	1.78	1.01	.05
IRONWORKERS-STRUCTURAL, REINFORCING & ORNAMENTAL: Bergen, Essex, Hudson, Hunterdon, Middlesex, Morris, Passaic, Somerset, Sussex & Union Counties	11.39	.91	2.54	1.15	.11
LINE CONSTRUCTION (Excluding Railroad Construction):					
Zone 3					
Linemen, Cable Splicers, Line Equipment Operators and Groundmen	15.35	12%	9%+.58		.75%
Zone 5					
Linemen, Cable Splicers, Line Equipment Operators and Groundmen	14.88	7%	3%+1.40		.75%
SHEET METAL WORKERS: Zone 3	12.80	1.22	1.72	.58	.04

DECISION NO. NJ79-3029 - CONT'D	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS: (Excluding Steel Erection):					
Group 1	16.91	7%	15%		3%
Group 2	15.09	7%	15%		3%
Group 3	14.21	7%	15%		3%
Group 4	14.10	7%	15%		3%
Group 5	13.87	7%	15%		3%
Group 6	13.38	7%	15%		3%
Group 7	13.09	7%	15%		3%
Group 8	12.92	7%	15%		3%
Group 9	12.87	7%	15%		3%
Group 10	12.75	7%	15%		3%
Group 11	12.70	7%	15%		3%
Group 12	12.46	7%	15%		3%
Group 13	12.06	7%	15%		3%
Group 14	11.89	7%	15%		3%
Group 15	11.55	7%	15%		3%
Group 16	9.57	7%	15%		3%
POWER EQUIPMENT OPERATORS: Steel Erection:					
Group 1	18.72	7%	15%		3%
Group 2	16.91	7%	15%		3%
Group 3	16.00	7%	15%		3%
Group 4	15.26	7%	15%		3%
Group 5	13.48	7%	15%		3%
Group 6	13.09	7%	15%		3%
Group 7	12.94	7%	15%		3%
Group 8	12.57	7%	15%		3%
Group 9	12.01	7%	15%		3%

DECISION NO. NY80-3022 - Mod. #3
(45 FR 23264 - April 4, 1980)
Monroe County, New York

Change:

LINE CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Electrical Overhead & Underground Distribution 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 Transimission Line Work and Lighting for Athletic Fields					
Journeyman Lineman & Technician	13.23	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. NY80-3022 - 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.

Painters:					
Basic rate	11.90	1.67	1.04		.10
Wiper, Drywall	12.10	1.67	1.04		.10
Stilts (drywall), Epoxy (brush & roll), Wall Covering	12.15	1.67	1.04		.10
Swing Scaffold, Window Brackets, Structutral Steel (up to 40'), Cherry Picker mechanical, Aerial Lift	12.40	1.67	1.04		.10
Spray, Water Hydroblasting, Metalizing, Mechanical taper	12.50	1.67	1.04		.10
Spray (epoxy), Structural Steel (over 40')	12.60	1.67	1.04		.10
Sandblasting (from solid platform)	12.65	1.67	1.04		.10
Sandblasting (benging platform), Steeple Jack	12.90	1.67	1.04		.10
Bridges	13.15	1.67	1.04		.10

DECISION NO. NY80-3035 - Mod. #2
(45 FR 28040 - April 25, 1980)
Broome & Chenango Counties, New York

Change:	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Boilermakers	14.63	1.275	10%		.03
Bricklayers					
Chenango County (Remainder of County)					
Bricklayers, Cement Masons, Plasterers, & Stone Masons (Building)					
Total project cost over $250,000	12.81	1.00	.69		.01
Total project cost under $250,000	11.21	1.00	.69		.01
Marble Mason, Tile & Terrazzo Workers	12.41	1.00	.69		.01
Electricians					
Chenango County (New Berlin and Sherburne)					
Electricians	13.55	.80	3%+.60		.07
Cable Splicer	14.75	.80	3%+.60		.07
Ironworkers					
Broome County & Chenango County (Remainder of County)					
Structural, Ornamental, Reinforcing, Rodmen, Riggers, Machinery Movers, Fence Erector, & Stone Derrickmen	11.80	.96	1.16		.02
Sheeters	12.05	.96	1.16		.02
Sheeters, Bucker-up	11.925	.96	1.16		.02
Laborers, Building					
Chenango County (twps. of Columbus, New Berlin, South New Berlin, and Sherburne)					
Total project cost over $500,000					
Unskilled and Flagmen	9.26	.85	1.27		
Mortar Mixer, Plaster Mixer, Power Buggy, Signal Man, Asphalt Worker, Chipping Hammer 12 lbs. or over, Tamp Operator, Vibrator Operator, & Chain Saw Operator	9.41	.85	1.27		
Powderman, Pipelayer, Form & Joint Setter, Concrete Bootman, Gunite, Sandblasting, Epoxy, Wagon Drill, Jackhammer & Air Track Drill	9.51	.85	1.27		
Blasters	9.86	.85	1.27		

DECISION NO. NY80-3035 - Mod #2 (Con't)

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Laborers, Building					
Chenango County (Twps. of Columbus, New Berlin, South New Berlin, and Sherburne)					
Total project cost under $500,000					
Unskilled and Flagmen	8.01	.85	1.00		
Mortar Mixer, Plaster Mixer Power Buggy, Signal Man, Asphalt Worker, Chipping Hammer 12 lbs. or over, Tamp Operator, Vibrator Operator, and Chain Saw Operator	8.16	.85	1.00		
Powderman, Pipelayer, Form & Joint Setter, Concrete Bootman, Gunite, Sandblasting, Epoxy, Wagon Drill, Jackhammer & Air Track Drill	8.26	.85	1.00		
Blasters	8.61	.85	1.00		
Painters:					
Broome County, Chenango County (Remainder of County)					
Brush	9.30	.55	.60		
Spray Epoxy	10.55	.55	.60		
Bridges	10.77	.55	.60		
Structural Steel, Spray, Steeple Jack	10.30	.55	.60		
Epoxy	9.55	.55	.60		
Swing Chair, Swing Scaffold, Roll over 10" & Sandblasting	9.80	.55	.60		

DECISION NO. NY80-3035 - Mod. #2 (Con't)

LINE CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Electrical Overhead & Underground Distribution 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 Transimission 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	10.515	1.40	3%+1.00	a	

DECISION NO. NY80-3035 - Mod. #2 (Con't)

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.

DECISION NO. NY80-3079 - MOD. #1 (45 FR 86192 - December 30, 1980) STATES: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ADD:					
DRILL BOATS:					
Engineer	13.22	.73	.70	b	
Blaster	13.36	.73	.70	b	
Driller, Welder or Machinist	13.23	.73	.70	b	
Fireman	12.82	.73	.70	b	
Oiler	12.61	.73	.70	b	

FOOTNOTES:

b. Holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day and Christmas Day
Vacation: 6½ days vacation with pay for 84 days of service, plus one additional day for each additional period of 21 2/3 days of service, all in one calendar year. Employees not qualifying for vacation as set forth above will receive one day's vacation with pay for each full 20 days of service in one calendar year.

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
DECISION NO. PR80-3063 - Mod. #1 (45 FR 69137 - October 17, 1980) Puerto Rico, Island Wide					
Change:					
Carpenter's Helpers	3.35				
Electrician's Helpers	3.35				
Ironworkers, Reinforcing	3.35				
Laborers	3.35				
Mason Tenders	3.35				
Painters, Bursh	3.35				
Painters, Spray	3.35				
Plumber's Helpers	3.35				
DECISION NO. PR80-3070 - Mod. #1 (45 FR 70668 - October 24, 1980) Puerto Rico, Island Wide					
Change:					
Carpenter's Helpers	3.35				
Electrician's Helpers	3.35				
Laborers:					
Unskilled	3.35				
Mason Tenders	3.35				
Painters, Brush	3.35				
Plumber's Helpers	3.35				
DECISION NO. PR80-3069 - Mod. #1 (45 FR 70665 - October 24, 1980) Puerto Rico, Island Wide					
Change:					
Carpenter's Helpers	3.35				
Ironworkers, Reinforcing	3.35				
Laborers:					
Unskilled	3.35				
Mason Tenders	3.35				
Painters, Brush	3.35				

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
DECISION NO. TX80-4085 - MOD. #3 (45 FR 74365 - November 7, 1980) Armstrong, Carson, Castro, Childress, Collingsworth, Dallam, Deaf Smith, Donley, Gray, Hansford, Hartley, Hemphill, Hutchinson, Lipscomb, Moore, Ochiltree, Oldham, Potter, Randall, Roberts, Sherman, Swisher & Wheeler Cos., Texas					
CHANGE:					
Sheet metal workers	$13.12	.50	.72		.12
DECISION NO. TX80-4086 - MOD. #3 (45 FR 74368 - November 7, 1980) Collin, Dallas, Denton, Ellis, Grayson, Hood, Hunt, Johnson, Kaufman, Palo Pinto, Rockwall, Tarrant & Wise Cos., Texas					
CHANGE:					
Bricklayers & stonemasons:					
Zone 3	12.97	.57	.50		.04
DECISION NO. TX80-4097 - MOD. #2 (45 FR 80644 - December 5, 1980) Lubbock County, Texas					
CHANGE:					
Painters:					
Brush	9.85				
Spray; sandblasters	10.60				
Sheet metal workers	13.12	.50	.72		.12

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
DECISION NO. TX80-4099 - MOD. #2 (45 FR 80640 - December 5, 1980) Bell, Bosque, Coryell, Falls, Hill & McLennan Cos., Texas					
CHANGE: Building Construction: Carpenters: Zone 2 - Millwrights	$11.68	.42			
DECISION NO. TX81-4007 - MOD. #1 (46 FR 1548 - January 6, 1981) Ector & Midland Cos., Texas					
CHANGE: Painters: Brush	9.68		.35		
Spray	10.555		.35		
DECISION NO. TX81-4009 - MOD. #1 (46 FR 1549 - January 6, 1981) Taylor County, Texas					
CHANGE: Painters: Brush, tape & bedding, paperhanger	9.68		.35		
Spray	10.555		.35		

SUPERSEDEAS DECISION

STATE: Connecticut COUNTIES: Fairfield, Litchfield & Windham

DECISION NO. CT81-3001 DATE: Date of Publication

Supersedes Decision No. CT80-2073 dated August 15, 1980 in 45 FR 54594

DESCRIPTION OF WORK: Building, Residential, Highway, and Heavy (excluding tunnel construction) Construction Projects

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Asbestos Workers					
Fairfield Co., Litchfield Co. (Barkhamsted, Bethlehem, Bridgewater, Cornwall, Goshen, Harwinton, Kent, Litchfield, Morris, New Hartford, New Milford, Plymouth, Roxbury, Sharon, Torrington, Warren, Washington, Watertown, Winchester, Woodbury, & Thomaston), Windham Co. (Ashford, Chaplin, Eastford, Hampton, Scotland & Windham)	14.04	.85	1.46		
Litchfield Co. (Canaan, Colbrook, Norfolk, N. Canaan, & Salisbury), Windham Co. (Woodstock)	11.95	1.04	1.40		.01
Windham Co. (Brooklyn, Canterbury, Killingly, Plainfield, Pomfret, Putnam, Sterling, & Thompson)	13.18	1.45	1.63		
Boilermakers	14.63	1.275	1.46		.03
Bricklayers, Cement Masons, Finishers, Masons, Plasterers, Stone Masons, Terrazzo Workers, Tile Setters					
Building Construction: Fairfield Co. (Bridgeport, Easton, Fairfield, Monroe, Stratford, & Trumbull)	11.05	.75	.75		
Fairfield Co. (Ansonia, Derby & Shelton)	11.05	.75	.75		
Fairfield Co. (New Canaan, Norwalk, Ridgefield, Weston, Westport, & Wilton)	11.05	.75	.75		
Fairfield Co. (Darien & Stamford)	11.47	.83	.25		
Fairfield Co. (Greenwich)	11.78	.80	.95		
Fairfield Co. (Bethel, Brookfield, Danbury, New Fairfield, Newtown Redding, & Sherman), Litchfield Co. (Bridgewater, Kent, New Milford, & Roxbury)	11.05	.75	.75		

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Litchfield Co. (Barkhamsted, Bethlehem, Canaan, Colebrook, Cornwall, Goshen, Harwinton, Litchfield, Morris, New Hartford, Norfolk, N. Canaan, Salisbury, Sharon, Torrington, Warren, Washington, & Winchester)	11.05	.75	.75		
Windham Co.	11.05	.75	.75		
Litchfield Co. (Plainville, Plymouth, Prospect, Thomaston, Watertown, & Woodbury)	11.05	.75	.75		.03
Bricklayers					
Heavy & Highway Construction:					
Except Darien, Greenwich & Stamford	11.15	.75	.75	a	
Darien & Stamford	11.57	.83	.25	a a	
Greenwich	10.95	.80	.95	a	
Carpenters, Millwrights, Pile-drivermen, & Soft Floor Layers					
Building Construction:					
Fairfield Co. (Bridgeport, Easton, Fairfield, Monroe, Shelton, Stratford, Trumbull, Weston, & Westport)	12.00	.90	.65	c	n
Fairfield Co. (Bethel, Brookfield, Danbury, Darien, Greenwich, New Canaan, New Fairfield, Newtown, Norwalk, Redding, Ridgefield, Sherman, Stamford, & Wilton)	11.80	.90	.65		.10
Litchfield Co. (Barkhamsted, Bethlehem, Bridgewater, Canaan, Colebrook, Cornwall, Goshen, Kent, Litchfield, Morris, New Hartford, New Milford, Norfolk, North Canaan, Roxbury, Salisbury, Sharon, Torrington, Warren, Washington, Winchester, & Woodbury)					
Commercial	11.55	.90	.65		.10
Residential	10.20	.90	.50		.10

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Litchfield Co. (Harwinton, Plymouth, Thomaston, & Watertown)	12.00	.90	.65		.05
Windham Co.	12.00	.90	.65		.03
Heavy & Highway Construction:					
Fairfield Co. (Bridgeport, Easton, Fairfield, Monroe, Shelton, Stratford, Trumbull, Weston, & Westport)	11.70	.90	.65	d	.05
Fairfield Co. (Bethel, Brookfield, Danbury, Darien, New Canaan, New Fairfield, Newton, Norwalk, Wilton, Redding, Ridgefield, Sherman, & Stamford)					
Litchfield Co. (Remainder of Co.)	11.70	.90	.65	d+ .70	.10
Litchfield Co. (Harwinton, Thomaston, & Watertown)	11.70	.90	.65	d	.05
Windham Co.	11.70	.90	.65	d	.03
Electricians					
Fairfield Co. (Norwalk - east of Five Mile River -, Weston, Westport)	12.03	1.08	3%+ .45	6%	4%
Fairfield Co. (Bethel, Bridgeport, Brookfield, Danbury, Easton, Fairfield, Monroe, New Fairfield, Newton, Redding, Ridgefield, Shelton, Sherman, Stratford, & Trumbull)					
Litchfield Co. (Bridgewater & New Milford)	11.05	1.10	3%+1.05		4%
Fairfield Co. (Darien, Greenwich, New Canaan, Stamford, and that portion of Norwalk lying West of the Five Mile River)	14.27		9¾%+e	10%	4%+.02
Litchfield Co. (Plymouth)	13.10	1.07	3%+.65		4%
Windham Co.	13.05	1.50	3%+1.60		4%
Litchfield Co. (Remainder of County)	12.10	1.22	3%+.60	f	1/8%

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Elevator Constructors	12.745	1.195	.95	a+b+g	.032
Elevator Constructors' Helpers	8.92	1.195	.95	a+b+g	.032
Elevator Constructors' Helpers Probationary	6.37				
Glaziers					
Fairfield Co. (Greenwich	13.75	.66	1.91	.67	.01
Fairfield Co. (Remainder of County), Litchfield Co.	12.33	1.10	.47	h	.01
Windham Co.	11.81	.84	.55	h	
Ironworkers:					
Ornamental, Reinforcing, Structural, and Precast Concrete Erection	14.75	1.03	1.45	i	.10
Lathers					
Fairfield Co. (Bridgeport, Easton, Fairfield, Monroe, Redding, Ridgefield, Shelton, Stratford, Trumbull, Weston, Westport, & Wilton)	10.60	.50	.40		.01
Fairfield Co. (Greenwich, New Canaan, Norwalk & Stamford)	10.01	.50	.20	.75	.01
Fairfield Co. (Bethel, Brookfield, Danbury, New Fairfield, Newton, & Sherman), Litchfield Co. (Bethlehem, Bridgewater, Cornwall, Goshen, Harwinton, Litchfield, Morris, New Milford, N. Canaan, Plymouth, Roxbury, Thomaston, Terrington, Warren, Washington, Watertown, & Woodbury)	10.60	.50	.50		.01
Litchfield Co. (Barkhamsted, Colebrook, New Hartford, Norfolk, & Winchester)					
Windham Co. (Chaplin, Hampton, Scotland, & Windham)	11.15	.50	.40		.01
Windham Co. (Danielson)	9.99	.65	.75		.01

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Line Construction					
Fairfield Co. (Darien, Greenwich, New Canaan, Stamford, & that portion of Norwalk, West of Five Mile River)					
Railroad Construction:					
Lineman	10.71	6%	9½%	10%	.02+½%
Dynamite Man	9.53	6%	9½%	10%	.02+½%
Boring Machine Operator	9.32	6%	9½%	10%	.02+½%
Compressor Operator	8.67	6%	9½%	10%	.02+½%
Driver Groundman	8.14	6%	9½%	10%	.02+½%
Groundman	7.28	6%	9½%	10%	.02+½%
Underground Railroad Construction:					
Linemen	13.26	6%	9½%	10%	.02+½%
Equipment Operator	12.20	6%	9½%	10%	.02+½%
Dynamite Man & Transitman	11.80	6%	9½%	10%	.02+½%
Mechanic	11.54	6%	9½%	10%	.02+½%
Heavy Driver Groundman	10.87	6%	9½%	10%	.02+½%
Driver Groundman	10.21	6%	9½%	10%	.02+½%
Groundman	9.68	6%	9½%	10%	.02+½%
Fairfield Co. (Remainder of County), Litchfield Co., & Windham Co.					
Utility Work and Railroads:					
Linemen, Cable Splicer, & Dynamite Man	13.90	.70	3%+.75	j	
Heavy Equipment Operator	12.26	.70	3%+.75	j	
Equipment Operator, Tractor Trailer Driver, Field Mechanic	11.55	.70	3%+.75	j	
Material Man	11.43	.70	3%+.75	j	
Groundman Truck Driver	10.35	.70	3%+.75	j	
Groundman, Experienced	9.28	.70	3%+.75	j	
Groundman, Inexperienced	8.25	.70	3%+.75	j	
Commercial Rates:					
Lineman	11.92	.70	3%+.75	j	
Equipment Operator	11.19	.70	3%+.75	j	
Driver Groundman	8.87	.70	3%+.75	j	
Traffic Control, Illumination & Maintenance:					
Lineman & Cable Splicer	12.95	.70	3%+.75	j	
Groundman Truck Driver	9.92	.70	3%+.75	j	
Equipment Operator	11.07	.70	3%+.75	j	
Groundman, experienced	8.90	.70	3%+.75	j	

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Marble Setters' Helpers					
Fairfield Co. (Darien, Greenwich, Norfolk, Stamford, & Westport)	10.55	1.21	1.71		
Marble Setters' helpers, Terrazzo Workers' Helpers, & Tile Setters					
Fairfield Co. (Remainder of County), Litchfield Co., & Windham Co.	8.75	.50	.65		
Painters					
Bridge:					
Structural Steel	14.20				
Spray	17.70				
Sandblasting or Power Tools	15.20				
Painters					
Fairfield Co. (Greenwich)					
Brush, Structural Steel, Paperhangers, Tapers	11.00	.20	.75	.30	
Spray	16.50	.20	.75	.30	
Fairfield Co. (Bridgeport, Easton, Fairfield, Southport, Stratford, & Trumbull)					
Brush	10.55	.50	.65	k	
Bosun Chair, Swing Stage	11.30	.50	.65	k	
Spray, Epoxy	13.05	.50	.65	k	
Taper	11.05	.50	.65	k	
Sandblasting	12.53	.50	.65	k	
Fairfield Co. (Darien, Stamford, New Canaan, Norwalk, Weston, Westport, & Wilton)					
Brush	10.80	.50	.75	.30	.01
Roller, Paperhangers, Tapers, Epoxy	11.30	.50	.75	.30	.01
Spray	14.00	.50	.75	.30	.01
Fairfield Co. (Bethel, Brookfield, Newton, Redding, Ridgefield, Sandy Hook, & Sherman)					
Litchfield Co. (New Milford)					
Brush	12.60	.50	1.00	k	
Steel	14.40	.50	1.00	k	
Paperhangers, Tapers	12.60	.50	1.00	k	
Epoxy	15.50	.50	1.00	k	
Residential	10.85	.50	1.00	k	
Spray	18.90	.50	1.00	k	

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Painters, Cont'd					
Fairfield Co. (Byram)					
Brush	10.65	.65	1.13	.50	.05
Spray	11.65	.65	1.13	.50	.05
Steel, Swing Stage, Boatswain Chair	12.175	.65	1.13	.50	.05
Drywall, Taper	11.45	.65	1.13	.50	.05
Fairfield Co. (Monroe & Shelton)					
Brush	12.25	.50	1.00	1	.01
Hand Rooler, Paperhangers	12.75	.50	1.00	1	.01
Structural Steel, Epoxy, Polyester	13.25	.50	1.00	1	.01
Spray	16.25	.50	1.00	1	.01
Windham Co. (Willimantic & Windham) Litchfield Co. (Remainder of County)					
Brush Tapers	11.00	.60	.70		.01
Paperhangers	11.50	.60	.70		.01
Riding Steel, Steamcleaning, Sandblasting, Tanks, Towers, & Hazardous Work	11.58	.60	.70		.01
Spray	14.00	.60	.70		.01
Windham Co. (Remainder of County)					
Brush	12.00	.70	.80		.01
Paperhangers, Sign, Taping	12.96	.70	.80		.01
Roller	12.51	.70	.80		.01
Structural Steel, Swing Stage	12.81	.70	.80		.01
Spraying Oil Paint	15.16	.70	.80		.01
Spraying Epoxy	17.69	.70	.80		.01
Residential	10.00	.70	.80		.01
Plumbers					
Windham Co. (Windham)	12.26	1.10	1.39		.15
Fairfield Co. (Greenwich)	11.43	.75	.80	.91	.06
Fairfield Co. (Bridgeport, Easton, Fairfield, Monroe, Shelton, Stratford, & Trumbull)	11.74	.75	.70	4%	.01
Fairfield Co. (Georgetown, Norwalk, S. Norwalk, Weston, Westport, & Wilton)	11.40	.75	.80	.36	.02
Fairfield Co. (Bethel, Brookfield, Danbury, New Fairfield, Newton, Redding, Ridgefield, & Sherman), Litchfield Co. (Bridgewater, New Milford)	13.40	.75	.80	.70	.02

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Plumbers, Cont'd					
Fairfield Co. (Darien, New Canaan & Stamford)	11.75	.75	.80	4%	.02
Fitchfield Co. (Remainder of County)	13.50	.88	.80	m	.05
Windham Co. (Remainder of County)	14.77	.80	1.00	o	.10
Roofers					
Fairfield Co., Litchfield Co. (Bethlehem, Bridgewater, Kent, New Milford, Roxbury, Washington, & Woodbury)	12.65	1.35	.50		
Litchfield Co. (Bantam, Canaan, Colebrook, Cornwall, Cornwall Bridge, E. Canaan, Falls Village, Gaylordsville, Goshen, Lakeside, Litchfield, Marbledale, Morris, New Hartford, New Preston, Norfolk, Northfield, Oakville, Prequabuck, Pine Meadow, Pleasant Valley, Plymouth, Riverton, Salisbury, Sharon, S. Kent, Taconic, Terryville, Thomaston, Torrington, Washington, Depot, Watertown, W. Cornwall, W. Goshen, Winchester Center, & Winsted), Windham Co.					
Composition	10.95	.575	.85	.55	
Slate & Tile	11.45	.575	.85	.55	
Sheet Metal Workers					
Fairfield Co, Litchfield Co.	13.98	9½%	7%		.03
Windham Co.	13.24	.81	1.23		.09
Sprinkler Fitters	14.00	.85	1.20		.08
Steamfitters					
Windham Co. (Windham	13.57	1.16	1.51		.13
Tile Setters' Helpers					
Fairfield Co. (Darien, Greenwich, Stamford, Norfolk, & Westport)	12.71				
Welders - receive rate prescribed for craft performing operations to which welding is incidental					

PAID HOLIDAYS:
A-New Year's Day, B-Memorial Day, C-Independence Day, D-Labor Day, E-Thanksgiving Day, F-Christmas Day

FOOTNOTES:

a. Paid Holidays: A through F, and Good Friday.

b. Paid Holiday: Good Friday. Employee must work 3 days during the work week in which the holiday falls, if scheduled, and if scheduled, the working day before and the working day after the holiday

c. Paid Holidays: B, C, D, and Good Friday. Employee must be employed 14 consecutive days immediately prior to the holiday

d. Paid Holidays: B, C, and D

f. The last 4 regular working hours prior to christmas shall be paid half day off.

g. Employer contributes 8% of basic hourly rate for 5 years or more of service or 6% of basic hourly rate for 6 months to 5 years of service as vacation pay credit.

h. Paid Holidays: A through F, Washington's Birthday, Good Friday, and Columbus Day.

i. The last 4 hours off on Christmas Eve paid if employee has worked 5 consecutive days prior to Christmas Eve

j. Paid Holidays: A through F, Washington's Birthday, Good Friday, and a floating holiday per year provided the employee has been employed for a period of 5 working days prior to the holidays and works the scheduled work days immediately preceding and following the holidays.

k. Paid Holidays: C and D providing the employee works the day before and the day after the holiday

l. Paid Holidays: B,C,D, and E providing the employee works the day before and the day after the holiday

m. Paid Holidays: B and D, half day paid holiday the Friday after Thanksgiving, the last working day before Christmas, and Good Friday.

n. Employer contributes $100 per year to the apprenticeship and training fund

o. Paid Holiday: D and four hours the day after Thanksgiving

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)).

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LABORERS BUILDING CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Laborer	8.65	.60	.80		.10
Asphalt rakers, concrete & power buggy ops., concrete saw ops., chain saw ops., fence & guard rail erectors, form setters, pipelayers, dry stone wall builders, mason tenders, pneumatic drill ops., pneumatic gas & electric drill ops., powdermen & wagon drill ops. and precast erectors	8.90	.60	.80		.10
Air track operators, block pavers, and curb setters, sandblasters	9.15	.60	.80		.10
Open air caisson, cylindrical work and boring crew:					
Top man	8.65	.60	.80		.10
Bottom man	9.15	.60	.80		.10
HEAVY & HIGHWAY CONSTRUCTION					
Laborers	8.65	.60	.80		.10
Acetylene burners, asphalt raker, chain saw operator, concrete & power buggy operators, concrete saw operators, fence & guard rail erectors, form setters, hand operated vibratory compactor operators, hand operated vibrator compactor operators, mason tenders, pipelayers, pneumatic gas & electric drill operators, powdermen & wagon drill operators	8.90	.60	.80		.10
Air track operators, block paver, curb setters	9.15	.60	.80		.10
Blasters	9.40	.60	.80		.10

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POWER EQUIPMENT OPERATORS BUILDING CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Derrick, Hoisting engineer 2 drums and over, Hoisting structural steel, pile driver & setting stone	13.67	1.10	1.10	a	.15
Dragline Forklift - over 5' lift, Front end loader - 7 cy. or over, Gradall, Hoisting engineer (all types of equipment where a drum and cable are used to hoist, pull, motive power or operatoon), Koehring scooper loader and/or hoe, master mechanic, shovel, & tower crane	13.53	1.10	1.10	a	.15
Maintenance engineer	13.41	1.10	1.10	a	.15
Central mix operator, Coleman loader and screening plant or similar equipment, combination hoe and loader over ½ yd, conveyors - regardless of motive power, Front end loader 3 cy. up to 7 cy., Joy drill limited to joy heavy weight champion or equivalent, Mucking machine, Post hole digger, pumpcrete machine, rock boring machine, vibratory hammer, welder & well digger	13.09	1.10	1.10	a	.15
Asphalt Spreader	12.83	1.10	1.10	a	.15
Bulldozer, Carry-all Operators, Grader, & Scraper pan	12.75	1.10	1.10	a	.15
Combination hoe and loader machine, concrete mixer - 5 bags and over, Front end loader under 3 cy., powerstone spreader	12.69	1.10	1.10	a	.15
Air and steam valve	11.78	1.10	1.10	a	.15
Compressor, generator, pump and well point, welding machine	11.65	1.10	1.10	a	.15
Fork lift not over 4', & Steam Jenny	12.56	1.10	1.10	a	.15
Mechanical Heater	11.46	1.10	1.10	a	.15
Roller	12.43	1.10	1.10	a	.15
Dinky machine, power pavement breaker	12.23	1.10	1.10	a	.15
Fireman (High Pressure)	11.20	1.10	1.10	a	.15
Oiler	10.62	1.10	1.10	a	.15

POWER EQUIPMENT OPERATORS
BUILDING CONSTRUCTION (CONT'D)

Crane with boom, excluding jib, over 150' - $.25 extra

Crane with boom, excluding jib, over 200' - $.50 extra

FOOTNOTE:
a. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and Good Friday

POWER EQUIPMENT OPERATORS HEAVY & HIGHWAY	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	13.70	1.10	1.10	a	.15
CLASS 2	13.51	1.10	1.10	a	.15
CLASS 3	13.11	1.10	1.10	a	.15
CLASS 4	12.87	1.10	1.10	a	.15
CLASS 5	12.68	1.10	1.10	a	.15
CLASS 6	12.45	1.10	1.10	a	.15
CLASS 7	12.19	1.10	1.10	a	.15
CLASS 8	11.09	1.10	1.10	a	.15
CLASS 9	11.22	1.10	1.10	a	.15
CLASS 10	11.66	1.10	1.10	a	.15
CLASS 11	12.10	1.10	1.10	a	.15
CLASS 12	10.65	1.10	1.10	a	.15
CLASS 13	11.58	1.10	1.10	a	.15
CLASS 14	7.05	1.10	1.10	a	.15
Crane with 150' boom $.25 extra					
Crane with 200' boom $.50 extra					
Survey Crew					
Chief of Party	11.65	1.10	1.10	a	.15
Ass't Chief of Party	10.81	1.10	1.10	a	.15
Instrument Man	9.97	1.10	1.10	a	.15
Rodman & Chainman	7.43	1.10	1.10	a	.15

Class 1: Erecting and handling structural steel; front end loader (7 cy. or over)
Class 2: Piledriver; Power shovel and crane; Dragline; gradall; trenching machine; lighter derrick; paver (concrete); derrick (stiff leg and guy); steel pile sheeting; koehring loader (scooper) master machine
Class 3: Drill (joy heavy weight champion or equivalent); side boom; loader (euclid); mucking machine; pumpcrete; rock and earth boring machine; Post hole digger; well digger; & hammer (vibratory); central mix; combination hoe & loader (over ½ yd.)
Class 4: Asphalt spreader
Class 5: Front end loader (3 yds. or over); Grader; power stone spreader; combination hoe and loader
Class 6: Asphalt roller; bulldozer; carryall; maintenance engineer; concrete mixer (5 bags and over); Welder
Class 7: Front end loader (under 3 yds.); roller; power chipper; fork lift; finishing machine; asphalt plant; power pavement breaker; dinky machine
Class 8: Compressor; pump
Class 9: Fireman (high pressure)
Class 10: Well point system
Class 11: Compressor battery
Class 12: Oiler
Class 13: Batch plant; bulk cement plant
Class 14: Track Backhoe oiler

FOOTNOTE:
a. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and Good Friday

TRUCK DRIVERS	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	9.26	1.04	1.10	a	
CLASS 2	9.36	1.04	1.10	a	
CLASS 3	9.46	1.04	1.10	a	
CLASS 4	9.41	1.04	1.10	a	
CLASS 5	9.51	1.04	1.10	a	
CLASS 6	9.56	1.04	1.10	a	

CLASS 1: Two axle trucks; helpers
CLASS 2: Three axle trucks; two axle ready mix
CLASS 3: Four axle trucks; heavy duty trailer-up to 40 tons
CLASS 4: Three axle ready-mix
CLASS 5: Four axle ready-mix; specialized earth moving equipment other than conventional tye on-the road trucks and semi-trailer (including Euclids)
CLASS 6: Heavy duty trailer-40 tons and over

FOOTNOTE:
a. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, and Good Friday

SUPERSEDEAS DECISION

STATE: Florida COUNTIES: Lake, Orange, Osceola and Seminole

DECISION NUMBER: FL81-1180 DATE: Date of Publication

Supersedes Decision Number: FL80-1040, dated January 4, 1980, in 45 FR 1342

DESCRIPTION OF WORK: Residential Construction Projects consisting of single family homes and apartments up to and including 4 stories

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
A/C Mechanic	5.77				
Carpenters	6.59				
Cement Masons	8.00				
Drywall Hangers	10.19				
Drywall Finishers	9.00				
Electricians	6.23				
Insulation Installers	8.00				
Iron Workers	6.25				
Laborers					
Unskilled	3.50				
Mason Tenders	5.00				
Painters	7.00				
Plasterers	6.93				
Plumbers	7.00				
Sheet Metal Workers	5.93				
Soft Floor Layers	5.00				
P.E.O.					
Backhoe	5.13				
Front End Loader	5.17				
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: NEW HAMPSHIRE COUNTIES: HILLSBOROUGH & MERRIMACK
DECISION NUMBER NH81-3009 DATE: DATE OF PUBLICATION
Supersedes Decision No. NH80-2056, dated August 15, 1980 in 45FR 54631
DESCRIPTION OF WORK: BUILDING AND HEAVY CONSTRUCTION PROJECTS

HILLSBOROUGH COUNTY
BUILDING & HEAVY CONSTRUCTION

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ASBESTOS WORKERS	14.31	1.40	1.15		.05
BOILERMAKERS	14.63	1.275	10%		.03
BRICKLAYERS, CEMENT MASONS, MARBLE SETTERS, PLASTERERS, STONE MASONS, TERRAZZO WORKERS & TILE SETTERS	10.19	1.01	.89		.01
CARPENTERS:					
Pelham					
Carpenters & Soft Floor Layers	12.25	1.00	1.00		.07
Millwrights	13.65	1.00	1.00		.10
Greenville:					
Carpenters & Soft Floor Layers	12.50	.75	1.00		.07
Millwrights	13.65	1.00	1.00		.10
Remainder of County					
Carpenters & Soft Floor Layers	10.13	.65	.85		.03
Piledrivermen & Millwrights	10.98	.65	.85		.03
ELECTRICIANS					
Pelham	12.37	1.00	3%+.60		.02
Remainder of County	12.40	.80	3%		.03
ELEVATOR CONSTRUCTORS					
Constructors	13.88	1.195	.95	a+b	.035
Helpers	9.72	1.195	.95	a+b	.035
GLAZIERS	9.47	.77	.69		.03
IRONWORKERS					
Structural, Ornamental, and Reinforcing	12.45	1.15	1.55		.02
LINE CONSTRUCTION					
Linemen	8.35	.70	3%+.50	d	3/8of1%
Equipment Operator	7.69	.70	3%+.50	d	3/8of1%
Groundman	5.25	.70	3%+.50	d	3/8of1%
Driver Groundman	5.71	.70	3%+.50	d	3/8of1%
PAINTERS					
Brush	9.10	.50			
Paperhangers	9.35	.50			
Spray & Sandblasting	10.60	.50			
Open Structual Steel	10.35	.50			
Enclosed Structural Steel & Steeple Jack	9.60	.50			

DECISION NO. NH81-3009

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
PLUMBERS & STEAMFITTERS					
Hudson & Pelham	13.22	1.10	1.10		.02
Remainder of County	12.55	.88	.75		.02
ROOFERS	7.80				
SHEET METAL WORKERS	10.92	.85	.85		.02
SPRINKLER FITTERS	12.93	.85	1.20		.08

DECISION NO. NH81-3009

MERRIMACK COUNTY
BUILDING & HEAVY CONSTRUCTION

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ASBESTOS WORKERS	14.31	1.40	1.15		.05
BOILERMAKERS	14.63	1.275	10%		.03
BRICKLAYERS, CEMENT MASONS, MARBLE SETTERS, PLASTERERS, STONE MASONS, TERRAZZO WORKERS, & TILE SETTERS	10.19	1.01	.89		.01
CARPENTERS & SOFT FLOOR LAYERS	10.13	.65	.85		.03
Millwrights & Piledrivers	10.98	.65	.85		.03
ELECTRICIANS					
Hookset	12.40	.80	3%		.03
Remainder of County:					
Gen. contracts $400,000. & over	13.07	.80	3%+.50		.02
Gen. contracts less than $400,000.	8.05	.80	3%+.50		.02
ELEVATOR CONSTRUCTORS					
Constructors	13.88	1.195	.95	a+b	.035
Helpers	9.72	1.195	.95	a+b	.035
GLAZIERS	9.47	.77	.69		.03
IRONWORKERS					
Structural, Ornamental & Reinforcing	12.45	1.15	1.55		.02
LINE CONSTRUCTION					
Linemen	8.35	.70	3%+.50	d	3/8of1%
Equipment Operator	7.69	.70	3%+.50	d	3/8of1%
Groundman	5.25	.70	3%+.50	d	3/8of1%
Driver Groundman	5.71	.70	3%+.50	d	3/8of1%
PAINTERS					
Brush	9.10	.50			
Open Structural Steel Work	10.35	.50			
Enclosed Structural Steel Work & Steeplejack	9.60	.50			
Paperhangers	9.35	.50			
Spray & Sandblasting	10.60	.50			
PLUMBERS & STEAMFITTERS	12.55	.88	.75		.02
ROOFERS	7.80				
SHEET METAL WORKERS	10.92	.85	.85		.02
SPRINKLER FITTERS	12.93	.85	1.20		.08

DECISION NO. NH81-3009

Welders - receive rate prescribed for craft performing operation to which welding is incidental

PAID HOLIDAYS

A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas

FOOTNOTES:

a. Employer contributes 6% basic hourly rate for 5 years or more of service or 8% basic hourly rate for 6 months to 5 years of service as Vacation Pay credit.

b. Holidays: A through F

c. Holidays: A through F: Washington's Birthday, Christmas Eve and Good Friday, providing employee has worked 45 full days during the 120 calendar days prior to the holiday, and the regular scheduled work days immediately preceding and following the holiday

d. Holidays: B through F, provided the employee has been employed 5 working days prior to the holiday and provided the employee works the scheduled work days immediately preceding and following the holiday

e. Holidays: B, C, and E provided employee works the day before and after each holiday

DECISION NO. NH81-3009

LABORERS: Building Construction	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Laborers	8.07	.75	1.10		.10
Plasterers' Tenders	8.24	.75	1.10		.10
Pipelayers, Fence & Guard Rail Erectors	8.36	.75	1.10		.10
Pneumatic Tool Ops., Pavement Breakers, Drillers, Chipping Gun Op., Chipping Gun Op., Powdermen & Blasters	8.65	.75	1.10		.10
All other Pneumatic Tool Ops. on Boiler and Stack Work	9.11	.75	1.10		.10
Heavy Construction					
Laborers and Pipelayers	7.67	.60	.80	e	.10
Pneumatic Tool Op., Drillers, Concrete Vibrators, & Electric Chipping Machines	8.17	.60	.80	e	.10
Blasterers and Powdermen	8.42	.60	.80	e	.10

DECISION NO. NH81-3009

POWER EQUIPMENT OPERATORS BUILDING CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	11.10	.95	.75	a	.05
CLASS 2	10.85	.95	.75	a	.05
CLASS 3	10.65	.95	.75	a	.05
CLASS 4	9.83	.95	.75	a	.05
CLASS 5	9.81	.95	.75	a	.05
CLASS 6	8.99	.95	.75	a	.05
CLASS 7	9.19	.95	.75	a	.05
CLASS 8	12.10	.95	.75	a	.05
CLASS 9	11.60	.95	.75	a	.05

CLASS 1 - Shovel, Crane, Dragline, Derrick, Backhoe, Elevator with Chicago Boom, Gradall, Elevating Grader, Front End Loader 6 yds. and over, Cherry Picker, Pile Driving Rigs, Concrete Road Pavers, all three Drum Hoisting and Trenching Machines

CLASS 2 - Rotary Drill with Mounted Compressor, Compressor House (3-6 comepressors), Rock and Earth Boring Machines excluding McCarthy and similar Drills, Graders, 4 yds. and over Front End Loader, Two Drum Hoists, High Fork Lifts with Capacity of 15' & over, Scrapers, Sonic Hammer, Vibratary Hammer

CLASS 3 - Bulldozers, Push Cats, Scrapers (tractor drawn), Asphalt Paver, Front End Loader 3/4 yds. to 4 yds., Well Driller, Mechanics, Pumpcrete Machines, Concrete Pumps and Similar Type Pumps, Engineer or Fireman on High Pressure Boiler (on job), Self Loading Batch Plant, Well Point Operators including installing, Engineer-in-charge of Power Grease Truck, all Automatic Elevators permanent or Temporary operated manually or by remote controls

CLASS 4 - Single Drum Hoist, Self powered Roller, Self Propelled Compactors, Power Pavement Breakers, Concrete Pavement Finishing Machines, Two Bag Mixers with Skip, Front End Loaders under 3/4 yds., McCarthy and similar Drills, Batch Plant not Self Loading, Bulk Cement Plants Self-Propelled Material Spreaders, A-Frame Trucks, Fork Lifts up to 15'

CLASS 5 - Compressor 315 Cubic ft. and over, (one or two), Pumps (4 inches & over total discharge) when total discharge is over 12 inches, Classification 3 will be paid, Tractor (without blade or Bucket) Drawing Roller Compactors or other Machines

CLASS 6 - Compressors (up to 315 cubic feet) Small Mixers, Pumps (up to 4 inches), Power Heaters, Welding Machines (when 3 or more heaters or Welding Machines are used on one Job, classification 4 rate will be paid), Conveyor Oiler including Helpers on Grease Trucks and Grease Trucks with Hand Greasing Equipment

CLASS 7 - Oilers on Truck Cranes and Gradalls

CLASS 8 - Cranes with boom lengths of 200 feet or more

CLASS 9 - Crane with boom length of 150 feet or more

PAID HOLIDAYS: A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; e-Thanksgiving Day; F-Christmas Day

FOOTNOTE: A. Holidays: A through F, Veterans Day, Washington's Birthday and Columbus Day.

DECISION NO. NH81-3009 NH 2-PEO-2-3-S

POWER EQUIPMENT OPERATORS
HEAVY CONSTRUCTION

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	10.48	.95	75	a	.05
CLASS 2	10.19	.95	.75	a	.05
CLASS 3	9.96	.95	.75	a	.05
CLASS 4	9.33	.95	.75	a	.05
CLASS 5	8.965	.95	.75	a	.05
CLASS 6	8.36	.95	.75	a	.05
CLASS 7	11.05	.95	.75	a	.05

CLASS 1 - Shovels, Crawler & Truck Crane, Derricks, Backhoes, Trenching Machines, Elevating Graders, Gradalls, Piledrivers, Concrete Pavers, Engineers on Site Processing Plant, Dragline, Clamshell, Cableways
CLASS 2 - Rotary Drill (with mounted compressor), Compressor House (3 to 6 compressors) Rock and earth Boring Machine (excluding McCarthy and similar drills), Grader, Front End Loader (4 yds. or over)
CLASS 3 - Bulldozer, Push Cats, Scraper (Self propelled or tractor drawn), Self-Powered Asphalt Paver. (Front End Loader 3/4 to 4 yds.), Mechanics, Well driller, Pumpcrete Machine, Engineer or Fireman on High Pressure Boiler (on job) Self-loading Batch Plant (on job), Well Point Operators
CLASS 4 - Hoists, Conveyors, Self-powered Rollers and Compactors, Self-propelled Material Spreaders, Self-powered Concrete Finishing Machine Mixers (2 bag with skip), Front End Loader (Under 3/4 yd.), McCarthy & similar Drills, Batch Plant (not a self-loading), Bulk Cement Plant
CLASS 5 - Compressor (315 C.F. or over-one or two), Pump 4" or over, Tractor without blades, Drawing Sheeps-foot, Rubber Roller or other type Compactor including Machines for Pulverizing and aerating Soil
CLASS 6 - Compressor (up to 315 C.F.), Small Mixers with skip, Oiler Pumps up to 4", Grease Truck, Power Heaters, Welding Machines (when 3 or more Welding Machines Class 4 rate applied), A-Frame, Forklifts, (Where grease truck contains powered grease equipment, engineer in charge shall be paid Class 3 rate)
CLASS 7 - Crane with boom length of 200 feet or more including jib

PAID HOLIDAYS: A-New Year's Day; B-Memorial Day; C-Independence Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE: a. Holidays: A through F; Washington's Birthday; Veteran's Day and Columbus Day

DECISION NO. NH81-3009

POWER EQUIPMENT OPERATORS
MARINE CONSTRUCTION

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	13.76	1.18	1.15	a	.03
CLASS 2	13.71	1.18	1.15	a	.03
CLASS 3	13.64	1.18	1.15	a	.03
CLASS 4	13.64	1.18	1.15	a	.03
CLASS 5	12.55	1.18	1.15	a	.03
CLASS 6	11.52	1.18	1.15	a	.03
CLASS 7	10.21	1.18	1.15	a	.03
CLASS 8	11.40	1.18	1.15	a	.03
CLASS 9	10.83	1.18	1.15	a	.03

Booms over 150' including jib-additional $.25 per hour
Booms over 185' including jib-additional $.50 per hour
Booms 220' including jib-additional $.75 per hour
Booms over 275' including jib-additional $1.00 per hour

CLASS 1 - Power Shovel, Crane, Truck Crane, Derrick, Cherry Picker, Pile Driver, 2 or more Drum Machine, Lighter, Derrick Boat, Trenching Machine, Mechanical Hoists, Pavement Breaker, Cement Concrete Paver, Dragline, Hoisting Engine, Pumpcrete Machine, Elevating Grader, Shovel Dozer (except when pushing) Front End Loader, (except when pushing) Backhoe, Gradall, Cableway, Boring Machine, Rotary Drill Post Hole Hammer, Post Hole Digger, Fork Lift
CLASS 2 - Swinger Engine
CLASS 3 - Sonic or Vibratory Hammer, Grader, Scraper (over 21 yds. struck), Tandem Scraper Concrete Pump, Bulldozer, scraper (21 yds. or less)
CLASS 4 - Portable Steam Boiler, Portable Steam generator, Roller, Tractor, Mechanic (maintenance), Concrete Mixer with Side Loader
CLASS 5 - Assistant Engineer (fireman)
CLASS 6 - Pump, Compressor, Welding Machine, Heater (power driven), Valve Controlling Permanent Plant (air or steam), Wellpoint System, Auger (powered by independent engine and attached to pile driver), Hydraulic Saw, Generator, Lighting Plant, Syphon, Pulsometer, Concrete Mixer
CLASS 7- Oiler (other than truck crane and gradall)
CLASS 8 - Oiler on Scow
CLASS 9 - Oiler on Truck Crane and Gradall

PAID HOLIDAYS: (WHERE APPLICABLE)
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE: A. Holidays: A through F; Washington's Birthday, Patriots Day, Columbus Day; & Veteran's Day; Provided the employee has worked 3 days during the week in which which the holidays falls and is available for work the days preceding the holidays.

DECISION NO. NH81-3009 NH -TD-1-2-3-L

TRUCK DRIVERS	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	6.41	.80	.50	a	
CLASS 2	6.64	.80	.50	a	
CLASS 3	6.87	.80	.50	a	

CLASS 1 - Two Axle Equipment
CLASS 2 - Three Axle Equipment including Low Beds
CLASS 3 - Special Earth Hauling Equipment other than Conventionnl Type on the road Truck and Semitrailers Trailer Dumps.

PAID HOLIDAYS: A-New Year's Day; B-Memorial Day; c-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE: A. Holidays: A through F, plus Washington's Birthday, Veteran's Day and Columbus Day; (provided employee works two days in the calendar week in which the holiday falls; reports for work the last day assigned prior to the holiday and the first assigned following 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)).

SUPERSEDEAS DECISION

STATE: New Hampshire COUNTIES: Rockingham & Strafford
DECISION NUMBER: NH81-3010 DATE: Date of Publication
Supersedes Decision No. NH80-2057, dated August 1, 1980 in 45 FR 51411
DESCRIPTION OF WORK: Building, Heavy and Marine Construction Projects

ROCKINGHAM COUNTY

BUILDING & HEAVY CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ASBESTOS WORKERS	14.31	1.40	1.15		.05
BOILERMAKERS	14.63	1.275	10%		.03
BRICKLAYERS, CEMENT MASONS, Marble Masons, Plasterers, Stonemasons, Tile setters & Terrazzo Workers	10.19	1.01	.89		.01
CARPENTERS:					
Salem:					
Carpenters & Soft Floor Layers	12.10	1.00	1.00		.05
Remainder of county:					
Carpenters & Soft Floor Layers	10.13	.65	.85		.03
Piledrivers, Wharf & Dock Builders & Millwrights	10.98	.65	.85		.03
ELECTRICIANS					
Twps. of Exeter, Greenland, Hampton, Hampton Falls, Portsmouth, Newington, Newmarket, Northwood, Nottingham, Rye, Seabrook, Strathan & S. New Market	12.65	.75	3%+.25		.02
Kingston, Kensington, N. Kingston, Hampstead, Plaistow, Westville, Atkinson, N. Salem & Salem	12.37	1.00	3%+.60		.02
Remainder of County	12.40	.80	3%		.03
ELEVATOR CONSTRUCTORS					
Constructors	13.88	1.19%	.95	a+b	.035
Helpers	9.72	1.19%	.95	a+b	.035
IRONWORKERS					
Sructural, Ornamental and Reinforcing	12.45	1.15	1.55		.02
LABORERS: BUILDING					
Laborers	8.07	.75	1.10		.10
Plasterers Tenders	8.24	.75	1.10		.10
Drillers, Pavement Breakers, Pneumatic Tool Ops., Chipping Gun Ops., Blasters & Powdermen	8.65	.75	1.10		.10
All other Pneumatic Tool Ops. on Boiler & Stack Work	9.11	.75	1.10		.10

DECISION NO. NH81-3010

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Pipelayers, Fence & Guard Rail Erectors	8.36	.75	1.10		.10
LABORERS, HEAVY					
Laborers & Pipelayers	7.67	.60	.80	d	.10
Pneumatic Tool Op., Drillers Concrete Vibrators & Powderman	8.17	.60	.80	d	.10
Blasters & Powdermen	8.42	.60	.80	d	.10
LINE CONSTRUCTION					
Linemen	8.35	.70	3%+.50	c	3/8of1%
Equipment Operator	7.69	.70	3%+.50	c	3/8of1%
Groundman	5.25	.70	3%+.50	c	3/8of1%
Driver Groundman	5.71	.70	3%+.50	c	3/8of1%
PAINTERS					
Brush	8.96		.25		
Spray & Sandblasting	10.08		.25		
Open Structural Steel	9.63		.25		
Salem:					
Brush	13.41	.82	1.40		.04
Structural Steel	15.82	.82	1.40		.04
Spray & Sandblasting	14.41	.82	1.40		.04
Repaint	12.07	.82	1.40		.04
PLUMBERS & STEAMFITTERS					
Plaistow, Atkinson, Danville, Hampstead, and Kingston	11.80	1.65	.87		.05
Salem and Windham	11.15	.87	1.00		.05
Remainder of County	12.55	.88	.75		.02
ROOFERS	7.80				
SHEET METAL WORKERS	10.92	.85	.85		.02
SPRINKLER FITTERS	12.93	.85	1.20		.08

DECISION NO. NH81-3010

STRAFFORD COUNTY BUILDING AND HEAVY CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
ASBESTOS WORKERS	14.31	1.40	1.15		.05
BOILERMAKERS	14.63	1.275	10%		.03
BRICKLAYERS, CEMENT MASONS, Marble Setters, Plasterers, Stone Masons, Terrazzo Workers and Tile Setters	10.19	1.01	.89		.01
CARPENTERS & SOFT FLOOR LAYERS	10.13	.65	.85		.03
Pile Drivers, Dock Builders & Millwrights	10.98	.65	.85		.03
ELECTRICIANS	12.65	.75	3%+.25		.02
ELEVATOR CONSTRUCTORS					
Constructors	13.88	1.195	.95	a+b	.035
Helpers	9.72	1.195	.95	a+b	.035
IRONWORKERS					
Structural, Ornamental & Reinforcing	12.45	1.15	1.55		.02
LABORERS					
Laborers	8.07	.75	1.10		.10
Plasterers Tenders	8.24	.75	1.10		.10
Boilers, Stack Work, Pneumatic Tool Op., Drillers, Pavement Breakers, Electric Chipping Ops., Blasters, Powdermen & Creosote Work	8.65	.75	1.10		.10
Pipelayers, Fence & Guardrail Erectors	8.36	.75	1.10		.10
Pneumatic Tool on Boiler & Stack Work	9.11	.75	1.10		.10
LINE CONSTRUCTION					
Linemen	8.35	.70	3%+.50	c	3/8of1%
Equipment Operator	7.69	.70	3%+.50	c	3/8of1%
Groundman	5.25	.70	3%+.50	c	3/8of1%
Driver Groundman	5.71	.70	3%+.50	c	3/8of1%
PAINTERS					
Brush	8.96		.25		
Spray and Tender	10.08		.25		
Structural Steel	9.63		.25		
PLUMBERS & STEAMFITTERS	12.55	.88	.75		.02
ROOFERS	7.80				
SHEET METAL WORKERS	10.92	.85	.85		.02
SPRINKLER FITTERS	12.93	.85	1.20		.08

DECISION NO. NH81-3010

Welders - receive rate prescribed for craft performing operation to which welding is incidental.

PAID HOLIDAYS:
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTES:

a. Employer contributes 8% basic hourly rate for 5 years or more of service or 6% basic hourly rate for 6 months to 5 years of service as Vacation Pay credit.

b. Holidays: A through F

c. Holidays: B through F provided employee has been employed 5 working days prior to the holiday and provided employee works the scheduled work days immediately preceding and following the holidays.

d. Holiday: B, C, & E provided employee works the scheduled work days before and after each holiday

DECISION NO. NH81-3010
BUILDING CONSTRUCTION
POWER EQUIPMENT OPERATORS

NH-1-PEO

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	12.60	1.18	1.15	a	.03
CLASS 2	12.48	1.18	1.15	a	.03
CLASS 3	11.62	1.18	1.15	a	.03
CLASS 4	10.73	1.18	1.15	a	.03
CLASS 5	10.24	1.18	1.15	a	.03
CLASS 6	9.74	1.18	1.15	a	.03

Boom lengths including jib over 150' add $.55; over 185' add $.90 over 210' add $1.25; over 250' add $1.90; over 295' add $2.65

CLASS 1 - Shovels, Cranes, Truck Cranes, Cherry Pickers; Dragline, Trench Hoe, Backhoe, 3 Drum Machine, Derricks, Pile, Elevator Tow Boist, Gradall, Shovel Dozer (except when pushing), Front End Loa (except when pushing), Fork Lift Auger, Boring Machine, Rotary Dr Post Hole Hammer, Post Hole Digger, Pumpcrete Machine
CLASS 2 - Sonic or Vibratory Hammer, Grader, Scraper more than 21 yds. struck, Tandem Scraper, Concrete Pump, Bulldozer, Scraper 21 yds. struck or less, Portable Steam Boiler, Portable Steam Generator, Roller, Spreader, Tamper, Asphalt Paver, Mehcanics, Maintenance.
CLASS 3 - Assistant Engineers (firemen)
CLASS 4 - Pumps (1-3 grouped), Compressor, Welding Machine (1-3 grouped), Generator, Concrete Vibrator, Lighting Plant, Heater (Power driven 1-5), Wellpoint (operating & installing), Syphons-Pulsometers, Conc. Mixers, Valves controlling Permanent Plant Air or Steam Conveyor, Jackson Type Tamper Cranes & Gradalls
CLASS 5 - Oilers on Truck Cranes & Gradalls
CLASS 6 - Oilers (other than truck cranes & gradalls)

FOOTNOTE: a. 10 paid holidays; New Year's Day; Memorial Day; Independnece Day, Labor Day, Thanksgiving Day, Christmas Day, Washington's Birthday, Fast Day, Columbus Day, and Armistice Day

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HEAVY CONSTRUCTION POWER EQUIPMENT OPERATORS	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS 1	11.67	1.18	1.15	a	.03
CLASS 2	12.59	1.18	1.15	a	.03
CLASS 3	11.54	1.18	1.15	a	.03
CLASS 4	10.205	1.18	1.15	a	.03
CLASS 5	10.97	1.18	1.15	a	.03
CLASS 6	9.31	1.18	1.15	a	.03
CLASS 7	9.41	1.18	1.15	a	.03

Boom length including jib: over 150' - additional $.25 per hour; over 185' additional $.50 per hour; over 220' additiona $.75 per hour; over 275' additional $1.00 per hour; over 295' additional $2.00 per hour.

CLASS 1 - Power Shovels, Cranes, Truck Cranes, Derrick, Pile Drivers, Trenching Machines, Mechanical Hoist, Pavement Breakers, Cement Concrete Pavers, Draglines, Hoisting Engines, Three Drum Machines, Pumpcrete Machines Elevating Graders, Shovel Dozers, (when used for digging or loading), Front End Loaders (when used for digging dr loading), Mucking Machines (when used as in shafts and tunnels), Shaft Hoists, Steam Engineers, Backhoes, Gradalls and cableways
CLASS 2 - Master Mechanics
CLASS 3 - Grader, Scrapers, more than 21 yds., Struck and Tandem Scrapers, Bulldozers, Scrapers 21 yds., Struck or less, Grout Pumps, Portable Steam Boilers, Roller, Spreaders, Asphalt Pavers, Locomotive and Tampers Self-propelled or Tractor-drawn, Mechanics, Maintenance, Sonic or Vibratory Hammers
CLASS 4 - Pumps (s) (1-3 grouped), Compressors Welding Machine (s) (1-3 grouped) Generators, Lighting Plants, Heaters (power driven (105), Syphons, Pulsometers, Concrete Mixers, Valves Controlling permanent Plant Air or Steam, Conveyors, Wellpoint System (operating and installing)
CLASS 5 - Assistant Engineers (Firemen)
CLASS 6 - Oilers (other than truck Cranes and Gradalls)
CLASS 7 - Oilers on Truck cranes and Gradalls

PAID HOLIDAYS: A-New Year's; B-Memorial Day; C-Independence Day; D-Labor D-Labor; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE: a Holidays: A through F; Washington's Birthday; Columbus Day; Veterans' Day; Fast Day

DECISION NO. NH81-3010

POWER EQUIPMENT OPERATORS MARINE CONSTRUCTION	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS I	13.76	1.18	1.15	a	.03
CLASS II	13.71	1.18	1.15	a	.03
CLASS III	13.64	1.18	1.15	a	.03
CLASS IV	13.64	1.18	1.15	a	.03
CLASS V	12.55	1.18	1.15	a	.03
CLASS VI	11.52	1.18	1.15	a	.03
CLASS VII	10.21	1.18	1.15	a	.03
CLASS VIII	11.40	1.18	1.15	a	.03
CLASS IX	10.83	1.18	1.15	a	.03

Booms over 150' including jib-additional $.25 per hour
Booms over 185' including jib-additional $.50 per hour
Booms 220' including jib additional $.75 per hour. Booms over 275' including jib-additional $1.00 per hour

CLASS 1 - Power Shovel, Crane, Truck Crane, Derrick, Cherry Picker, Pile Driver, 2 or more Drum Machine, Lighter, Derrick Boat, Trenching Machine, Mechanical Hoist, Pavement Breaker Cement Concrete Paver, Dragline, Hoisting Engine, Pumpcrete Machine, Elevating Grader, Shovel Dozer (except when pushing) Front End Loader (except when Pushing), Backhoe, Gradall, Cableway, Boring Machine, Rotary Drill, Post Hole Hammer, Post Hole Digger for Lift
CLASS 2 - Swinger Engine
CLASS 3 - Sonic or Vibratory Hammer, Grader, scraper (over 21 yds. Struck), Tandem Scraper Concrete Pump, Bulldozer, Scraper (21 yds. Struck or less).
CLASS 4 - Portable Steam Boiler, Portable Steam Generator, Roller, Tractor Mechanic (maintenance), Concrete Mixer with Side Loader
CLASS 5 - Assistant Engineer (fireman).
CLASS 6 - Pump, Compressor, Welding Machine, Heater (power Driven), Valve Controlling Permanent Plant (air or steam), Wellpoint System, Auger (powered by independent engine and attached to pile drivers), Hydraulic Saw, Generator, Lighting Plant, Syphon, Pulsometer, Concrete Mixer
CLASS 7 - Oiler (other than truck crane and gradall)
CLASS 8 - Oiler on Scow
CLASS 9 - Oiler on Truck Crane and Gradall

PAID HOLIDAY: (WHERE APPLICABLE)
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day

FOOTNOTE: A. Holidays: A through F; Washington's Birthday, Patriot's Day, Columbus Day; & Veteran's Day; Provided the employee has worked 3 days during the week in which the holidays falls and is available for work the days preceding the Holidays.

DECISION NO. NH81-3010

TRUCK DRIVERS

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
CLASS I	6.41	.80	.50	a	
CLASS II	6.64	.80	.50	a	
CLASS III	6.87	.80	.50	a	

Class 1-Two axle equipment
Class 2-Three axle equipment including low beds
Class 3-Special earth hauling equipment other than conventional type on the road truck and semitrailers trailer dumps

PAID HOLIDAYS: A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day; F-Christmas Day.

Footnote: a Holidays: A through F, plus Washington's Birthday, Veteran's Day and Columbus Day; (provided employee works two days in the calender week in which the holiday falls; reports for work the last day assigned prior to the holiday and the the first assigned following the holiday).

SUPERSEDEAS DECISION

STATE: New York COUNTY: Orange
DECISION NO.: NY81-3003 DATE: Date of Publication
Supersedes Decision No. NY79-3028 dated September 7, 1979 in 44 FR 52570
DESCRIPTION OF WORK: Building Construction, (does not include single family homes and apartments up to and including 4 stories), Heavy and Highway Construction Projects.

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Asbestos Workers	15.6654	.9138	1.8276		
Boilermakers	16.34	5%	5%		
Bricklayers, Cement Masons, Plasterers and Stonemasons					
All that portion bounded on the East by the Hudson River to Woodbury Twp. line South of Bear Mt., thence along this line to a point South of Lake Mombasha, thence due West to the Lehigh-Hudson River R.R. line, thence Northerly along this R.R. line to Maybrook, then Northerly along the Pen Central R.R. line to the Ulster County line and along this line Easterly to the starting point, the Hudson River. All that portion lying within these boundaries including the towns on the East side of the above named R.R. lines:					
Building	11.46	1.45	1.85		
Heavy & Highway	11.71	1.45	1.85		
Starting at the junction of Ulster County, Sullivan County, and Orange County, along Ulster County line, Southeast to the New York New Haven and Hartford R.R. line to a point South of Wisner, thence East to the top of the Bellvale Mt. Range, thence Southerly to the New Jersey State line, including the Towns of Warwick, New Millford & Bellvale					
Building	11.30	1.25	2.20		
Heavy & Highway	11.55	1.25	2.20		
Carpenters, Soft Floor Layers, Bridge, Dock and Wharf:					
Twps. of Tuxedo, Woodbury, Part of Cornwall, Monroe, Chester, Blooming Grove and Highlands	11.30	1.20	.60	1.45+a	.15
Carpenters, Piledrivermen & Dock Builders:					
Remainder of County	11.20	.80	1.15	.55	.05

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Electricians					
Twps. of Otisville, Middletown, Goshen, Florida, Warwick, Port Jervis, Sparrow Bush, Monroe, Harman, Southfield, Tuxedo Lake and Tuxedo	12.00	8%	19%	10%	1%
Remainder of County	12.50	7.4%	3%+1.20	.70	4%
Elevator Constructors	13.53	1.195	.95	a+b	.035
Elevator Constructors Helpers	9.47	1.195	.95	a+b	.035
Elevator Constructors Helpers Probationary	6.765				
Elevator Constructors Modernization	9.35	.495	.32+c	a+b	.02
Elevator Constructors Modernization Helpers	7.01	.495	.32+c	a+b	.02
Elevator Constructor Repair	8.50	.495	.32+c	a+b	.02
Elevator Constructor Repair Helper	6.38	.495	.32+c	a+b	.02
Glaziers	13.75	.66	1.91	.67	.01
Ironworkers	11.10	1.86	3.75	1.60	.01
Laborers, Building					
Common Laborers, Mason Tenders, Mortar Mixers, Hod Carriers, Scaffold Builders, Concrete men, Vibrator men, poured gypsum, Roof work, wrecking, walking power buggy men, Landscaper, Chipping Hammer (air or electric 1" and under)	10.00	1.15	1.15	d	
Asphalt men, Pipelayers, Air or Electric Jackhammer, Powdermen, Gunnite, Sandblasting, Air Trac, Barmen, Chain Saw, Riding Power Buggy, Vibro, Barco, Joy Tamper or similar, Joy or Jib Drills, Walk Behind Roller, Wagon Drill, All Fork Lifts	10.25	1.15	1.15	d	
Grade, Pipe, Concrete Clearing, Black Top, Drill, Paving etc., Blaster, Form Setter, Burner (acetylene torch), Ingersoll-Rand, Heavy Duty Crawler Type HCM2, Drill Machines or Equivalent, All wrecking work fifty feet or more above grade	10.65	1.15	1.15	d	

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Lathers	9.57	1.05	.15	1.00	.01
Marble Setters, Terrazzo Workers & Tile Setters:					
West Newburgh, Little Britain, Rock Tavern, Lagrange, New Hampton, Ridgeburg & Johnson to County Line and all areas inclusive South thereof					
Marble Setters, Cutters	12.55	1.21	1.71	e	
Marble Setters' Helpers	10.55	1.21	1.71	e	
Terrazzo Workers	11.88	1.32	1.50		
Terrazzo Workers' Helpers	9.48	1.21	1.50		
Terrazzo Machine Operator	7.68	.475	.475		
Tile Setters	12.325	1.15	1.10		
Tile Setters' Helpers	10.71	.50	1.27		
That area in Orange County following within a 50 mile radius from Columbus Circle, NYC. (Arced boundary line is just south of Newburgh; South of Maybrook; North of Goshen, South of Middletown; North of Johnson; North of Unionville					
Marble Setter Helpers	9.65	1.85		f	
Tile Setter Helper	9.05	1.85		f	
Terrazzo Helper	9.65	1.85		f	
Painters:					
Commercial	10.60	1.00	.65		
Spray, Sandblasting, Steel, Smoke Stacks, Bridges, Power Plants, Radio Towers, Epoxy and other toxic materials	11.60	1.00	.65		
Plumbers & Steamfitters					
Twps., Villages and Hamlets and/or portions thereof: Lakeville, Four Corners, Sterling Forest, Tuxedo, Tuxedo Park, Southfield, Arden, Newburgh Junction, Greenwood Lake, Monroe, Harriman, Woodbury Falls, Woodbury Station, Central Valley, and the Palisades Interstate Park and Bear Mountain Park	13.86	1.00	1.76		.10
Jobbing & alterations Under $5,000	9.80	1.00	1.76		.10

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Roofers:					
Pitch, Pitch built up	12.25	1.10	1.95	g	.35
Asphalt Shingle	9.25	1.10	1.95	g	.35
Asbestos, Slate & Tile, Slab, & Asphalt Built up	11.75	1.10	1.95	g	.35
Sheet Metal Workers	14.56	2.336	2.20		.13
Sprinkler Fitters	14.52	.85	1.20		.08
Welders receive rate prescribed for craft performing operation to which welding is incidental					
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)).					

FOOTNOTES:

a. In the event of a death in the family of the member of the unit he shall be paid 3 days wages, family means husband, wife, mother, father, sister, brother or children. Wages are only paid on the condition that the member of the unit attends the funeral of the deceased.

b. Employer contributes $7.00 per day to Annuity Fund.

c. Employer contributes 6.4% of basic hourly rate for 5 years or more service or 4.2% basic hourly rate for 6 months to 5 years of service as Vacation Pay Credit.

d. Election Day shall be observed in accordance with New York State Law.

e. Paid Holidays: New Year's Eve & Christmas Eve.

f. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Good Friday, Columbus Day, Providing employee works any one of three days preceeding or following the holiday.

g. Two hours off with pay on General Election Day, provided the employee has received 4 hours pay that day.

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
HEAVY & HIGHWAY CONSTRUCTION LABORERS:					
GROUP I	10.15	1.15	1.15	a	
GROUP II	10.40	1.15	1.15	a	
GROUP III	10.80	1.15	1.15	a	

HEAVY AND HIGHWAY CONSTRUCTION

GROUP I
Laborers, pitman, chuck tender, dump men, placing and maintenance of all flares, lights, barracades and all reflective type materials for traffic control

GROUP II
Concrete men, vibrator men, asphalt men, joint setter, signal men, mason tenders, mortar men, pipelayers, rip rap and dry stone layers, steel rod carriers, jackhammer, pavement breaker, wagon drill, air track, jib rig and joy drill op., power buggy op., gunnite and sandblasting, coal passers and other machine op., sprayer and nozzle men on mulching and seeding machines, all seeding and sod laying, all landscape work, grade checkers, all bridge work, walk behind self-propelled power saw walk behind rollers and tampers of all types, wrecking laborers (including barmen and burnermen), sheeting and shoring laborers, bit grinder, operator of form pin pullers and drivers, joint and jet sealers and filling and wiring of baskets for gabion walls, permanent signal man

GROUP III
Concrete finisher on highways, form setter, granite stone layer, ingersoll rand heavy duty crawler - master type HOMI or equivalent or any drill using a 4" or larger bit

FOOTNOTE:
a. Holidays: New Year's Day; Memorial Day; Independence Day; Labor Day; Thanksgiving Day; Christmas Day; Lincoln's Birthday; Washington's Birthday; Columbus Day; Election Day; Veteran's Day; provided employee works one day in the calendar week in which the holiday falls and reports for work the first working day following the holiday.

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 Transimission 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	

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

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS: BUILDING, HEAVY, HIGHWAY, ROAD, STREET AND SEWER CONSTRUCTION:					
GROUP 1	16.91	12%+.40	10%	a	3%
GROUP 2	15.09	12%+.40	10%	a	3%
GROUP 3	14.21	12%+.40	10%	a	3%
GROUP 4	14.10	12%+.40	10%	a	3%
GROUP 5	13.87	12%+.40	10%	a	3%
GROUP 6	13.38	12%+.40	10%	a	3%
GROUP 7	13.09	12%+.40	10%	a	3%
GROUP 8	12.92	12%+.40	10%	a	3%
GROUP 9	12.87	12%+.40	10%	a	3%
GROUP 10	12.75	12%+.40	10%	a	3%
GROUP 11	12.70	12%+.40	10%	a	3%
GROUP 12	12.46	12%+.40	10%	a	3%
GROUP 13	12.06	12%+.40	10%	a	3%
GROUP 14	11.89	12%+.40	10%	a	3%
GROUP 15	11.55	12%+.40	10%	a	3%

POWER EQUIPMENT OPERATORS: BUILDING, HEAVY, HIGHWAY, ROAD, STREET AND SEWER CONSTRUCTION

GROUP 1
Helicopters pilot/engineer

GROUP 2
Autograde-combination subgrader, base MTL spreader & base trimmer (CMI & similar type); autograde placer-trimmer-spreader-combination (CMI & similar types); autograde slip form paver (CMI & similar types); back hoes (all types, including all combination hoe loaders); central power plants (all types); concrete paving machines; cranes (all types, including overhead & straddle travelling type); cranes, gantry; derricks- land or floating (building & heavy construction rate only), drill master, quarry master (down the hole drill); draglines; elevator graders; engines, large diesel (1625 HP) and staging pump; front end loaders (5 yds & over); gradalls; grader, rago; helicopters co-pilot and communication engineer; jacks, screw air hydraulic power operated unit or console type (not hand jack or pile load test type); locomotive (large); mucking machines; pavers (21E and over); paver, ~~cesinous~~, Broyhill; pavement and concrete breaker (i.e. superhammer); pavement breaker truck mounted; piledriver; scooper (loader and shovel) Koehring; shovels; treechopper with boom; trench machines

POWER EQUIPMENT OPERATORS: BUILDING, HEAVY, HIGHWAY, ROAD, STREET AND SEWER CONSTRUCTION (CONT'D)

GROUP 3
Pump, staging

GROUP 4
A-frame, boom attachment on loaders; boring & drilling machines; brush chopper, shipper & shredder; cableways; carryalls; cherry pickers - 6 tons & under (over 6 tons - crane rate applies); concrete pump; concrete pump system, pumpcrete, squeezecrete & similar types; equipment); forklifts; front end loaders (2 yds but less than 5 yds); groove cutting machines (ride or type); heater planer; hoist (Chicago Boom); Pans, LeTourneau, DW's Ukes, pumpcrete machines, squeezecrete & concrete pumping; scrapers-LeTourneau, Dw's Ukes; side booms; squeezecrete; "straddle" carrier, Ross and similar types; winch trucks (hoisting)

GROUP 5
Aerial platform (used as hoist); hoists all types except Chicago Boom type (building & heavy construction rate only); elevator or house cars (building and heavy construction rate only); roof hoists

GROUP 6
Asphalt spreaders; bridge deck finisher; grader, finish only; rollers-backtop

GROUP 7
Asphalt curbing machines; asphalt plant engineer; autograde tube finisher & texturing machine (CMI & similar types); autograde concrete machine (CMI & similar types); autograde curb trimmer & sidewalk shoulder, slipform (CMI & similar types); barbending machines (power); batchers, batching plant & crusher on site; bet convey or system; boilers and steam jennies (building & heavy construction rate only); boom type skimmer machines (building & heavy construction rate only); car dumpers (railroad); compressor and blower type units; concrete breaking machines; concrete finishing machines; concrete saws & cutters (ride on type); concrete spreaders-hetzel, recomatic & similar types; concrete vibrators (highway, road, street & sewer construction rate only); conveyors, under 125 ft.; crushing machines; ditching machine, small (Ditch witch or

POWER EQUIPMENT OPERATORS: BUILDING, HEAVY, HIGHWAY, ROAD, STREET AND SEWER CONSTRUCTION (CONT'D)

GROUP 7 (CONT'D)
similar); drill doctor (duties include dust collector); dope pots (mechanical with or without pump); dumpsters; fine grade machine (large type); front end loaders (1 yd & over but less than 2 yds) - highway, road, street & sewer construction rate only; front end loaders (under 2 yds) - building and heavy construction rates only; generators; giraffe grinders; graders and motor patrols; gunnite machines (excluding nozzle); hammer vibratory (in conjunction with generator); hoppers; hopper doors (power operated); ladders (motorized) - building & heavy construction rate only; laddervator; lights, portable generating light plants; locomotive (dinky type); mechanic; mixers (excepting paving mixers); motor patrols & graders; pavers (under 21E); pavement breakers - small, self-propelled ride on type (also maintains compressor or hydraulic unit); pipe bending machine (power); pitch pump; plasterer pump (regardless of size) - building & heavy construction rate only; post hole digger; rod bending machines (power); scales, power; seaman oulverizing mixer; silos; skimmer machines (boom type) - highway, road, street & sewer construction rate only; steam jennies and boilers; steel cutting machines, services & maintains; vibrating plants (used in conjunction with unloading); welder and repair mechanic

GROUP 8
Compressors (2 or 3 within a total distance of 100' constitutes a battery) - building & heavy construction rate only; welding machines, gas or electric converters of any type - (2 or 3 in battery) - building and heavy construction rates only; welding system, mutiple (rectifier transformer type) - building & heavy construction rate only

GROUP 9
Brooms & sweepers; bulldozer, D5 and over; fireman, sprinkler and water pump trucks (used on job site or in conjunction with jobsite); stone spreaders; sweepers & brooms; tractor, D8 & over; water and sprinkler trucks (used on job site or in conjunction with job site)

POWER EQUIPMENT OPERATORS: BUILDING, HEAVY, HIGHWAY, ROAD, STREET AND SEWER CONSTRUCTION (CONT'D)

GROUP 10
Compressors (2 or 3 within a total distance of 100' constitutes a battery) - highway, road, street and sewer construction rate only

GROUP 11
Front end loaders (under 1 yd.) - highway, road, street & sewer construction rate only

GROUP 12
Bulldozer under D5; rollers - grade fill or stone base; tractors, under D8

GROUP 13
Compressor (single); heaters (Nelson or other type including propane, natural gas of flow type units); pumps (4 inch suction & over including submersible pumps); pumps (2 or less than 4 inch suction including submersible pumps); pumps, diesel engiher & Hydraulic (immaterial of power) - highway, road, street & sewer construction rate only; temporary heating plant (Nelson or other type, including propape, natural gas or flow type units); welding machines, gas or electric converters of any type - single (building & heavy construction rate only); welding machines, gas or electric converters of any type (2 or 3 in battery) - highway, road, street & sewer construction rate only; wellpoint systems (including installation and maintenance)

GROUP 14
Concrete spreaders, (small type) convey or loaders (not including elevator graders) - highway, road, street & sewer construction rate only, farm tractors (highway, road, street & sewer construction rate only); fertilizing equipment; fine grade machine (small type) - highway, road, street and sewer construction rate only; form line graders (small type) - highway, road, street & sewer construction rate only; grease, gas, fuel and oil supply trucks; mixers, concrete small (highway, road, street and sewer construction rate only);mulching equipment; road finishing machines (small type) - highway, road, street and sewer construction only; seeding equipment; tamping machines, vibrating self-propelled; welding machines, gas or electric converters of any type-single (highway, road, street and sewer construction rate only)

GROUP 15
Assistant engineer/oiler; mechanics helper; tire repair and maintenance

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
POWER EQUIPMENT OPERATORS: STEEL ERECTION					
GROUP 1	18.72	12%+.40	10%	a	3%
GROUP 2	16.91	12%+.40	10%	a	3%
GROUP 3	16.00	12%+.40	10%	a	3%
GROUP 4	15.26	12%+.40	10%	a	3%
GROUP 5	13.48	12%+.40	10%	a	3%
GROUP 6	13.09	12%+.40	10%	a	3%
GROUP 7	12.94	12%+.40	10%	a	3%
GROUP 8	12.57	12%+.40	10%	a	3%
GROUP 9	12.01	12%+.40	10%	a	3%

50¢ per hour on machines where "Cat Head" or "Sheave Point" is at least 100 feet above groung level and less than 140 feet; 75¢ per hour on machines where "Cat Head" or "Sheave Point" is 140 feet, or "Sheave Point" is 140 feet, or over above ground level.

FOOTNOTES:

a. Paid Holidays: New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Washington's Birthday, Presidential Election Day, and Veterans Day provided the employee works any of the 3 days in the 5 work days preceeding the holiday and the first work day after the recognized holiday.

POWER EQUIPMENT OPERATORS - STEEL ERECTION

GROUP 1
Helicopters pilot/engineer

GROUP 2
Cranes (all cranes - land or floating with booms - including jib, 140 feet and over above the ground); derricks (land or floating with booms including jib, 140 feet and over above the ground); helicopters co-pilot & communications engineer

GROUP 3
Cranes (all cranes - land or floating with booms - including jib, less than 140 feet above the ground); derricks (land or floating, with booms including jib, less than 140 feet above the ground)

GROUP 4
Aerial platform used as hoist; a-frame; cherry pickers - 6 tons and under (over 6 tons - crane rate applies); fork lifts; hoists (all types except Chicago Boom type); jacks (screw air hydraulic power operated unit or console type, not hand jack or pile load test type); side booms

GROUP 5
Compressors (2 or 3 in battery); generators; welding machines (gas Or electric convertors of any type 2 or 3 in battery multiple welders) welding system mutiple (rectifier transformer type)

GROUP 6
Maintenance engineer

GROUP 7
Fireman

GROUP 8
Compressor (single); rod bending machines (power); welding machines (gas or electric converters of any type-single)

GROUP 9
Assistant engineer/oiler; straddle carrier

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	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
TRUCK DRIVERS					
Drivers on LeTourneau Tractors, double barrel Euclids, Athey wagon and similar equipment (except when hooked to scrapers), low beds, I-Bean, pole trailers, road oil distributors, tire trucks tractors and trailers with 5 axle and over	11.30	1.00	1.05	a	
Equipment 25 yards and over up to and including 30 yard bodies cable dump trailers, powder and dynamite trucks	11.40	1.00	1.05	a	
Equipment up to and including 24 yards bodies, mixer trucks, dump crete trucks and similar types of equipment, fuel trucks and all other tractor trailers	11.20	1.00	1.05	a	
Ten wheelers, grease trucks and tiller men	10.60	1.00	1.05	a	
Straight trucks	11.00	1.00	1.05	a	
Pick-up trucks used for hauling material parts escort man over the road	11.00	1.00	1.05	a	

PAID HOLIDAYS:
A-New Year's Day; B-Memorial Day; C-Independence Day; D-Labor Day; E-Thanksgiving Day and F-Christmas Day

FOOTNOTE:
a. Holidays: A through F

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: NORTH CAROLINA COUNTIES: Bladen, Chatham, Cumberland, Duplin, Harnett, Hoke, Lee, Moore, Pender, Robeson, Sampson, and Scotland

DECISION NUMBER: NC81-1182 DATE: Date of publication
Supersedes Decision Nos.: NC81-1137, December 30, 1980, 45 FR 86194
NC81-1141, December 30, 1980, 45 FR 86196

DESCRIPTION OF WORK: Building Construction (excluding single family homes and apartments up to and including four stories)

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Air conditioning mechanics	$6.24				
Bricklayers	8.00				
Carpenters	5.88				
Cement masons	5.39				
Electricians	6.94				
Electronic technicians	6.70				
Glaziers	5.25				
Insulators	7.72				
Ironworkers:					
structural & ornamental	6.77				
reinforcing	9.45				
Laborers:					
lathers	8.80				
mason tenders	4.00				
pipelayers	4.52				
unskilled	3.72				
Millwrights	9.45				
Painters	5.00				
Plasterers	7.25				
Plumbers & Pipefitters	9.45				
Power Equipment Operators:					
asphalt paver	4.75				
asphalt raker	4.50				
asphalt roller	4.25				
backhoe	6.77				
bulldozer	8.55				
crane	10.00				
forklift	6.30				
front end loader	6.25				
mechanic	6.00				
scraper	5.89				
Roofers	5.00				
Sheet metal workers	5.54				
Soft floor layers	5.75				
Sprinkler fitters	8.75				
Tile setters	5.75				
Truck drivers	3.72				

Unlistal classifications needed for work not included within the scope of this classification may be added only after award as provided in the labor standards contract clauses (29 CFR, 5.5 (a)(1)(ii)).

SUPERSEDEAS DECISION

STATE: NORTH CAROLINA COUNTIES: Carteret, Craven, Jones, Lenior, Onslow, and Pamlico

DECISION NUMBER: NC81-1181 DATE: Date of publication

Supersedes Decision No. NC81-1145, December 30, 1980, 45 FR 86195

DESCRIPTION OF WORK: Building Construction (excluding single family homes and apartments up to and including four stories)

	Basic Hourly Rates	Fringe Benefits Payments			
		H & W	Pensions	Vacation	Education and/or Appr. Tr.
Asbestos workers	$7.26				
Bricklayers	7.10				
Carpenters	6.02				
Cement masons	5.68				
Drywall mechanics	7.00				
Electricians	5.94				
Electronic technicians	4.50				
Glaziers	5.38				
Insulation mechanics	6.50				
Ironworkers	6.66				
Laborers:					
mason tenders	3.78				
pipelayers	4.94				
unskilled	3.78				
Painters	5.00				
Plasterers	6.00				
Plumbers	6.07				
Power Equipment Operators:					
asphalt raker	4.27				
backhoe	5.32				
bulldozer	5.25				
crane	6.80				
distributor	4.70				
forklift	6.50				
loader	4.50				
motor grader	5.36				
pans - scraper	4.60				
paver - screed	4.25				
roller	5.00				
tractor	5.00				
Roofers	5.91				
Sheet metal workers	5.77				
Soft floor layers	7.00				
Sprinkler fitters	7.95				
Tile setters	6.00				
Truck drivers	3.85				

Unlisted classifications needed for work not included within the scope of this classification may be added only after award as provided in the labor standards contract clauses (29 CFR, 5.5 (a)(1)(ii)).

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January 23, 1981

Part VII

Department of Agriculture

Food and Nutrition Service

Food Stamp Program; Photo Identification

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Parts 272, 273, 274, and 278

[Amendment 19]

Food Stamp Program; Photo Identification

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rulemaking proposes to amend the current regulations published October 17, 1978 (43 FR 47846) concerning the identification of food stamp participants. The amendment proposed in this rulemaking would mandate photo identification in certain areas as a result of changes in the Food Stamp Act enacted by Pub. L. 96-249, 94 Stat. 357, May 26, 1980. The purpose of this proposed rule is to improve program integrity without creating barriers to households with a legitimate need of food assistance.

DATE: Comments must be received on or before March 24, 1981 to be assurred 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 open to public inspection at the offices 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, S.W., Washington, D.C. 20250. Phone (202) 447-8-9075.

FOR FURTHER INFORMATION CONTACT: Larry R. Carnes, Chief, Policy and Regulations Section, Program Standards Branch, Program Development Division, Food and Nutrition Service, Washington, D.C. 20250. Phone (202) 447-9075. The Draft Impact Analysis is available on request from the above-named individual.

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 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 require use of photo ID cards in the food stamp program in project areas (defined in 7 CFR 271. 2) with over 50,000 participants. Therefore, small government jurisdictions are not affected. Small business and small organizations are affected only to the degree that they serve as food stamp issuing agents in jurisdictions where photo ID's would be required—and the only impact on them is that they must check the photo ID and record the ID number before issuing stamps. This is not a requirement with a significant economic impact.

Section 117 of Pub. L. 96-249 directs that food stamp households present a photo identification card to obtain food stamps in those food stamp project areas (defined in 7 CFR 271.2), or parts of project areas, where the Secretary, in consultation with the Department's Inspector General, finds this would be useful to protect program integrity.

Current regulations (7 CFR 273.10 (g)(4)) require State agencies to issue an ID card to each certified household as proof of eligibility. The household presents the ID card when it receives its food stamp allotment. In addition, if a food retailer has any cause to believe that a person presenting coupons has no right to use the coupons, then that person is requested to show the household's card.

States may currently use photo ID cards but may not require households to accept and use photo ID cards as a condition of receiving food stamps as this was not specified as a condition of eligibility by the Act prior to passage of Pub. L. 96-249.

Areas where photo ID's would be mandated

The principal question addressed by this proposed rule is where to mandate use of photo ID cards. The House Committee Report accompanying Pub. L. 96-249 (Report No. 96-788) states that: "Use of the card should be restricted to large urban areas, although the Secretary would have the discretion, after consulting with the Department's Inspector General, to require use of such a card in any project area(s) or part(s) thereof where he determined that resort to the card as an anti-fraud device would be useful to protect program integrity. . . . The Committee expects the Department to apply the photo identification requirement sparingly and with discrimination because of its cost and because of its tendency to deter genuinely needy households from receiving food stamps. The requirement should not be applicable, other than in rare instances, to predominantly rural areas. It is definitely a useful tool in curtailing program abuses and highly cost-beneficial when applied somewhat surgically to duplicate redemptions problem areas, such as those in large metropolitan centers."

As the Report indicated, the principal utility of photo ID cards is in preventing duplicate issuances. If a food stamp authorization card is stolen from the mails, a photo ID card can prevent its being illegally transacted. Duplicate issuances have been a problem in New York City and a number of other large cities. New York City estimates that about 2,500 authorization cards a month are stolen and transacted, and that use of photo ID cards should eliminate most of these illegal transactions. Duplicate redemptions have not been a problem in non-metropolitan areas.

In accordance with both the House Committee Report and the Department's own data which indicate the need for photo ID's in major urban centers but not in rural areas, and based on consultation with the Departments Inspector General, this rulemaking proposes to mandate the use of photo ID's in project areas with 50,000 or more food stamp participants. These project areas cover urban areas, where photo ID's are likely to be cost-effective, and include nearly half of the entire food stamp caseload.

In addition, the proposed rule would also allow FNS, in conjunction with the Department's Inspector General, to mandate photo identification in project areas with less than 50,000 food stamp participants if there is evidence that this is necessary in such areas to protect program integrity. Factors to be considered would include, but are not limited to, the history of the level of duplicate issuances in that project area (the higher the level of replacement cards issued, the greater the need for photo identification) and results of management evaluation reviews of the area's issuance problems.

At the same time, the Department recognizes that not every project area in the nation with 50,000 or more food stamp participants may have a need for photo identification. A project area may have a very low level of duplicate issuances, in which case the photo identification requirement may not be cost-effective. Also, a project area using mail issuance for a sizeable portion of its food stamp caseload may not need photo identification. To allow for these and other such factors, the Department proposes to allow States to submit justification to FNS which demonstrates that this requirement is not necessary in particular project areas. FNS, in conjunction with the Inspector General, will determine when to grant requests for exemptions for such project areas.

There is one circumstance where the 50,000 participant rule may not really accomplish its intended purpose of targeting urban areas and other locations with a high concentration of food stamp recipients. This occurs where the entire State is a single food stamp project area, or where project areas cover multi-county welfare districts. If a heavily rural State constitutes a single project area, the State as a whole may have participation over 50,000 even though no part of the State approaches this level of participation. In this situation, photo identification may not be necessary in the State, and certainly is not likely to be necessary or cost-effective in the entire State.

The proposed rule therefore contains special provisions for treating these project areas. Where project areas with more than 50,000 participants cover welfare districts or entire States, as opposed to individual counties, cities, or parishes, the State agency would work with FNS to identify those areas where photo identification is needed. The Department would, in consultation with the State agency, establish which (if any) parts of the project area would be required to apply the photo identification requirement. The Department is especially interested in receiving comments on this approach.

These provisions covering which areas are subject to the photo ID requirement are designed to be targeted to areas where photo ID's should save funds through reduction of duplicate issuances, while excluding those areas where photo ID's are likely to cost more than they save. Due to the cost of the photo ID cards, the requirement is likely to be cost-ineffective in areas without duplicate issuance problems.

The requirements for photo ID's set forth in these rules should be read in conjunction with proposed rules to restrict or control issuance of replacement authorization documents. The proposed rules on replacement issuances should, themselves, have a significant impact on reducing duplicate issuances.

Upon publication of final rules on photo ID requirements, the Department would notify States of which project areas (except for multi-county and Statewide project areas) have 50,000 or more food stamp participants and are subject to the photo ID requirement. FNS would use the latest data available in making this determination. In addition, shortly after publication of the final rule, the Department would determine, in consultation with State agencies, which parts of multi-county or Statewide project areas with more than 50,000 participants are subject to the requirement. Thereafter, the Department would notify States at the beginning of each fiscal year of any additions to or deletions from the list of areas subject to the requirement. The Department would be authorized, at any time (including times other than the publication of final rules or the beginning of the fiscal year), to determine that an area with fewer than 50,000 participants should be subject to the photo ID requirement or that an area with more than 50,000 participants should, in response to a State agency request, be exempt from the requirement.

Use of photo ID's in ATP and HIR systems

Pub. L. 96-249 and the House Committee Report indicate that the photo ID should be used in areas using authorization cards (ATPs) as an intermediate step in the coupon issuance process. Since the authorization card can be lost or stolen, the photo ID can be used to ascertain whether the person attempting to transact the card at a food stamp issuance point is a legitimate recipient. By contrast, in a coupon mail-out system, photo ID's would serve no purpose. The recipient never appears at an issuance point to exchange an intermediary authorization document for coupons. The House Committee Report states that the photo ID requirement should not be applied to areas with mail issuance. This proposed rulemaking reflects this approach.

Some project areas use a third system, however, known as the household issuance record (HIR) system. In these issuance systems, the household is not mailed an intermediary authorization document, but must appear in person at an issuance point each month. The issuance point maintains a household issuance record document indicating the amount of benefits the household has been certified to receive for that month. Since no intermediary authorization document is used, and therefore no document can be lost or stolen and transacted by another person, the House Committee Report suggests that the photo ID requirement also should not apply where HIR systems are used. At the same time however, since a household member must still appear in person to receive coupons, a photo ID card may serve a useful purpose in preventing improper acquisition of food stamps at the issuance point. Therefore, the proposed rule would require that project areas with either ATP or HIR systems be subject to the photo ID requirement (areas with mail issuance would not be covered). The Department is especially interested in comments on whether areas with HIR systems should be subject to the requirement.

It should be noted that most urban areas use ATP issuance systems, and that most areas using HIR or mail issuance systems have fewer than 50,000 participants and would normally not be subject to the photo ID requirement, anyway.

Photo ID exemptions

Section 11(e)(2) of the Food Stamp Act of 1977 directs that certain persons, principally those who cannot come to the food stamp office because they are elderly or handicapped, and who are unable to appoint an authorized representative, are to be provided out-of-office certifications. Since such persons do not come to the food stamp office, it is not practicable to provide them with a photo ID. Pub. L. 96-249 recognizes this fact, and contains an exception for persons who must be certified out of the food stamp office. Therefore this rule proposes that a photo ID not be required of households certified by out-of-office interviews. Additionally, the proposed rule would exempt elderly and disabled households processed under SSI/SSA joint processing rules from photo ID requirements because such households are interviewed at the SSA office and do not visit the food stamp office. If, however, any of these households, or their authorized representatives, visit the food stamp local office (e.g., to report a coupon loss), the State agency should attempt to issue them a photo ID card.

State agencies would issue photo ID's to households certified for expedited service unless this could not be done within the expedited service timeframes. If this occurs, a nonphoto ID card would initially be issued, and would then have to be replaced with a photo ID prior to issuance of the next allotment. However, issuance of a photo ID within the expedited service timeframes should normally be possible, as the photo ID could generally be made at the time the household is in the food stamp office for its interview.

Finally, the House Committee Report directs that a "good cause" exemption be granted to those persons whose religion does not permit them to be photographed. The proposed rule would implement this directive, which the Department envisions would be used in few circumstances.

A household that did not receive a photo ID card for one of these reasons would be issued an ID card which meets the photo ID card specifications (discussed later in this preamble), except that, in lieu of a photograph, the

State agency would annotate the card in some fashion to indicate that it is valid without the photograph.

Noncompliance

The proposed rule would permit any responsible household member to comply with the photo identification requirement. The person whose picture appeared on the photo ID would be the only person authorized to obtain coupons for the household. If no member of the household agrees to be photographed, and the household does not designate an authorized representative to be photographed and obtain the household's coupons, then the household would not be permitted to participate in the food stamp program. The household would be ineligible to participate in the program until the photo identification requirement is complied with.

This rule proposes that when an authorized representative designated by the household to obtain coupons for the household does not comply with the photo identification requirement that person would not be allowed to act in this capacity on the household's behalf. The household would be required to either designate another authorized representative or have a household member comply with the requirement for the household to be considered in compliance.

Photo ID card specifications

Current regulations on food stamp ID's specify that the ID be issued in the name of the household member to whom the ATP was issued, and that the household member and any authorized representative sign the ID prior to its use. Other specifications such as serialization, address, and format are at the State agency's option.

This rule would add several requirements where photo ID's are used. While States would have a wide degree of latitude, subject to FNS approval, on what to require on the photo ID card, the photo ID would have to be laminated, serialized, include a color picture, and provide space for the signature of the person pictured in the ID. These specifications have been recommended by the Department's Office of Inspector General as being necessary to prevent unauthorized use of the photo ID card. State agencies would be allowed to require other identifying information, such as an expiration date or the household's address. The photo ID card would be subject to FNS approval.

With regard to the use of serial numbers, the rule proposes that, at coupon issuance, the cashier annotate the photo ID number on either the ATP card or HIR card, whichever is applicable. Annotating the ID number on the ATP/HIR card should ensure that the cashier checks the photo ID card, and would provide a means for determining in reviews whether issuance agents were properly performing this function. Also, the annotation would show whether two ATP's for a particular allotment were issued to the same household. Finally, households would be discouraged from attempting to receive duplicate issuances if they know that their photo ID number is being recorded on the ATP/HIR card. If a household falsely reported nonreceipt of an ATP card, received a replacement ATP, and transacted both cards, the presence of the household's photo ID number on both cards would constitute important substantiation of fraud.

In the interests of cost efficiency, the Department envisages a food stamp photo identification system that, whenever possible, builds off existing photo ID systems. Some areas already use photo ID's in public assistance and/or general assistance programs. The Department does not wish to require separate photo ID's for cash assistance and food stamps where this is not necessary.

Accordingly, State agencies would be allowed to use a single photo ID card in conjunction with other programs where the card meets the minimum specifications required for food stamp ID's (i.e., it is laminated, serialized, has a color picture, and has a space for the signature of the person in the photograph).

There is one difficult question in this area, however. If a photo ID card from another program is to be used, should the Department require that a notation be made on the photo ID indicating that the person receives food stamps?

On the one hand, such a notation would be useful if the retail store asked to see an ID. If no such notation appeared on the card, the retailer would not be certain that the person presenting the card was a food stamp recipient.

On the other hand, the requirement for a notation of the card might cause a considerable expense and administrative burden in some areas. Metropolitan areas now using photo ID's in cash assistance programs might have to redesign and replace ID's for their entire cash assistance caseload, or alternatively, they would have a unlaminate the cards. Since the overwhelming majority of cash assistance recipients in most jurisdictions also receive food stamps, an argument can be made that the problems arising from not requiring a notation are marginal and do not justify the administrative burden.

A third approach could be to require the notation but to give State agencies an extended period of time (beyond the implementation timeframes required in this rulemaking) to annotate the existing photo ID cards, and to allow unannotated photo ID's to be used in the meantime.

The Department is especially interested in comments on this issue. While the proposed rule does require that the notation be on the photo ID (and does not provide for an extended period of time), the purpose of this provision is principally to generate comment on this issue. The Department's final decision will be based to a significant degree on the information on this matter that is provided by commenters.

Authorized representatives

Under current regulations, ID cards are issued in the name of the household member to whom the ATP card is issued or for whom issuance is authorized. If no member of the household can pick up the household's coupons, the household may designate an authorized representative to do so on its behalf. If the authorized representative is to be used on a regular basis, i.e., it is not on a one-time emergency situation that has suddenly arisen, then the State agency must have the authorized representative's signature put on the ID card as well. Thus, in these situations the person in whose name the issuance is authorized and the household's authorized representative (not an emergency authorized representative) are both designated on the household's ID card.

In areas photo ID cards are used, the use of authorized representatives can be problematical. As proposed, the photo ID cards that would be issued in compliance with these rules would contain a double check against fraud. First, they would contain the photo of the person who is to obtain the household's allotments. Second, they would be serialized so that State agencies ensure that only one issuance is made to each household each month. Since it normally would not be possible to have two photographs (that of a household member and that of an authorized representative) on a single photo ID, the problem is how to reconcile the need for two ID cards that some households have with the necessity of being able to trace ID cards back to specific households through serial numbers.

Some systems used by State agencies may employ photo ID cards that are

preprinted with serial numbers. In these systems, issuing two photo ID cards with the same serial number would normally be impossible. As a result, it may not be possible to provide a second photo ID in these areas. This does not present an insuperable problem, however. In such areas, if the household needed to designate someone other than the person pictured on the photo ID card to obtain the household's coupons, that person could function as an emergency authorized representative. Sections 274.2(e)(7) and 274.2(f)(3) of existing regulations prescribe procedures for emergency authorized representatives. These procedures have their own built-in safeguards. The household member must sign a form (which can be the ATP, itself) designating the person as the emergency authorized representative, and the representative must also sign the form. The representative must present the household's ID at the issuance point and the signature on the designation form must match the signature on the ID. In addition, the representative must sign the ATP/HIR card at the issuance point for receipt of coupons, and this signature must match the signature on the designation form.

In some areas, State agencies may be able to issue two photo ID cards to households each with the same ID number. These rules would allow such a system to be used, provided the control function the serial number are intended to serve is not compromised.

In still other systems, State agencies may be able to issue two ID cards with different numbers to the same household, yet be able to trace each to the household thereby ensuring that the household is not participating twice a month. This system would also be allowed by the proposed rules.

The Department invites all comments on this provision and would especially like to hear alternative suggestions. Those that address the problems of administrative feasibility would be especially welcome.

Under any of these systems, there would still be a need for a system to provide for written designation of an emergency authorized representative to obtain a particular allotment. This is specifically envisioned by the House Committee Report. The current regulatory provisions set forth in § 274.2(e)(7) and § 274.2(f)(3) contain (as noted above) appropriate safeguards, and would not be affected by this proposed rule. However, some areas that would be subject to the photo ID requirement might need to change the form they use to designate an emergency authorized representative. Some State agencies currently use a tear-off section to the ID to designate an emergency authorized representative. Designating an emergency authorized representative on a photo ID card would not be possible, however, because of the proposed requirement that the card be laminated (which precludes alterations). In such areas, either the ATP or an alternative form would need to be used to designate an emergency authorized representative.

Mutilated or altered ID cards

Existing regulations do not address the subject of mutilated and/or altered food stamp ID cards. This issue is addressed in this proposed rule.

This rule proposes to deny the issuance of benefits when a food stamp photo ID card that appears to have been mutilated/altered is present. In such instances, the household would be required to obtain a new photo ID card prior to issuance of its benefits. If a household's opportunity to participate expires between the time the household requested a replacement photo ID card and the delivery of that card to the household, the household would be entitled to benefits lost as a result of not being able to obtain that particular allotment.

The Department is proposing to delay the issuance of benefits until valid identification has been presented to minimize issuance losses. Issuing benefits without assurance of proper identification would defeat the purpose of mandating photo ID cards in high risk areas.

In addition, to assure tight controls on issuance of ID cards, the rule proposes that the State agency limit issuance of ID cards to the time of initial certification, with replacements made only in instances of loss, mutilation/alteration, destruction, or change in the person authorized to obtain coupons, or where the State agency determines that new ID's are needed to keep the photographs up-to-date or is otherwise changing its ID format or system.

Use of photo ID's at issuance points and retail stores

The proposed rules require that the photo ID be checked at the issuance point, and prohibit the issuance of food stamps to any person other than the person pictured on the ID card (except in the case of a duly designated emergency authorized representative, in which case two signature comparisons must be made).

The proposed rules do not apply the same requirement to the purchase of food with food stamps at retail stores. Since various members of the household can purchase food with food stamps, such a requirement would be impractical. This is recognized in both the statute and the House Committee Report. Pub. L. 96-249 directs that a household use photo ID cards "when using its authorization card in order to receive its coupons". The House Committee Report states: "The need to present a photo identification card would apply only to the point of issuance (surrender of card for coupons) and not at the point of using the coupons in a retail food store. This is because of the numerous members of any household who can buy food for it with the coupons as opposed to the one authorized representative (household head or spouse or other responsible member) who can obtain coupons in its behalf."

As the House Committee Report directs, existing rules on the identification of food stamp users by retail stores would remain in effect. Section 278.2(h) requires that if a food retailer has any cause to believe that a person presenting coupons has no right to use the coupons, the retailer should ask the person to show the ID card of the household to establish the right of that person to use the coupons. Where photo ID cards are in use, it would not be necessary for the person presenting the ID cards to the retailer to be pictured on the card. Presentation of the household's ID would establish the right of the person to use the coupons. Language is added to § 278.2(h) to make this explicit.

Implementation

Implementation of photo ID requirements is different from implementation of most other food stamp regulations. Normally, the Department sets a timeframe (usually 120 days after publication of final rules) for a new requirement to begin being applied to all new applicants and at all recertifications. The rest of the caseload is converted to the new requirement as it is recertified.

However, photo ID requirements cannot really be effective until the entire caseload is converted to photo ID's. There needs to be a point in time at which issuance agents will not issue coupons unless the person seeking coupons presents a photo ID. This entails that the entire caseload have been converted to photo ID's in that time.

The Department is proposing that areas subject to the photo ID requirement have issued all photo ID's, and begin requiring presentation of photo ID's at issuance points, no later than the first day of the month nine months after publication. This would

allow approximately three months for the purchase and installation of photo ID cards, and about six months to issue photo ID's to the area's caseload. The six month period would allow a large majority (although not all) of the caseload to be issued photo ID's at their normal recertifications. The Department is especially interested in comments on the nine-month requirement.

As noted above, FNS would notify all project areas with more than 50,000 participants at the time of publication of final rules. To meet the nine month timeframe, FNS and State agencies would need to resolve expeditiously the matter of which parts of multi-county or Statewide project areas with more than 50,000 participants are to be subject to the new requirements. In addition, State agencies wishing to secure an exemption of any project areas from the requirement would need to submit justification to FNS for such exemptions in an expeditious manner. FNS would rule on all such requests within 30 days of their receipt.

For the reasons set out in the preamble, it is proposed that Parts 272, 273, 274 and 278 of Title 7, *Code of Federal Register*, are amended as set forth below.

PART 272—REQUIREMENTS FOR PARTICIPATING STATE AGENCIES

1. In § 272.1, a new paragraph (g)(30) is added to read as follows:

§ 272.1 General terms and conditions.

* * * * *

(g) *Implementation.* * * *

* * * * *

(30) Amendment 191. Areas subject to the photo ID card requirement must have issued photo ID cards (or cards annotated to indicate that the card is valid without a photograph, in accordance with § 273.10(g)(4)(ii)(c)) to all participating households, and shall require presentation of photo ID cards (or the annotated cards) at issuance points as a precondition of issuing coupons to households, no later than the first of the month that is nine months after the publication of final regulations. Any areas that become subject to the photo ID card requirement at a later date shall also come into full compliance no later than the first of the month that occurs nine months after FNS notifies the State agency that the area is subject to the requirement.

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

2. In § 273.10, paragraphs (g)(4)(i), (ii) and (iii) are revised and (g)(4)(v) is removed. The revised paragraphs read as follows:

§ 273.10 Determining household eligibility and benefit level.

* * * * *

(g) *Certification notices to households.*

* * * * *

(4) *Identification (ID) cards.* The State agency shall issue an ID card to each certified household as proof of program eligibility. Areas designated by FNS for the mandatory use of photo ID cards shall follow the requirements of paragraphs (i) and (ii) and (iv) below. Non-mandated photo ID areas shall follow the requirements of paragraphs (i), (iii) and (iv) below.

(i) *General Provisions:* (A) All ID cards shall be issued in the name of the household member who is authorized to receive the household's issuance. Photo ID cards shall contain the photograph of the person who will receive the household's issuance; i.e., who will either transact the household's ATP card or, in an HIR system, pick up the household's allotment. A photo ID card shall be signed by the person pictured on the card, be it the household member or authorized representative designated to pick up the household's allotment. A nonphoto ID card shall be signed by the household member in whose name it is issued and by other persons designated on the ID as authorized to pick up the allotment, whether it is another household member or authorized representative.

(B) The State agency shall limit issuance of ID cards to the time of initial certification, with replacements made only in instances of loss, mutilation, destruction, or changes in the person authorized to obtain coupons, or where the State agency determines that new ID cards are needed to keep the photographs up-to-date or is otherwise changing its ID card format or system.

(C) The State agency shall place an expiration date only on those ID cards issued to households certified for delivered meals for a temporary period.

(D) ID cards delivered to households by mail shall not be mailed in the same envelope with the ATP or coupons.

(ii) *Mandatory Photo ID Cards.* (A) FNS mandates the use of photo ID cards in those project areas (defined in 7 CFR 271.2) or portions thereof with 50,000 or more food stamp participants, except for those project areas serviced entirely by mail issuance, or where FNS, in consultation with the Office of the Inspector General, approves a State agency's request for an exemption. FNS will notify State agencies at the beginning of each fiscal year of any areas that either require or no longer require the use of photo ID cards. In addition, FNS, in consultation with the Office of the Inspector General, may designate at any time, project areas or portions thereof with less than 50,000 participants as requiring the use of photo ID cards upon a determination that the level of duplicate redemptions justifies the institution of photo ID cards.

(B) In project areas where photo ID cards are mandatory, the State agency shall issue a photo ID card to each eligible household at the time of certification, except for the following:

(1) Households certified by out-of-office interviews as specified in § 273.2 (e)(2) or under the SSI-food stamp joint processing rules in § 273.2(k). However, the Sate agency should attempt to replace the nonphoto ID card issued to these households with a photo ID card if and when the appropriate household member or authorized representative is in the office for any other reason. The State agency may not require such households to make a special trip into the office solely for the purpose of issuing a photo ID card.

(2) Households whose religion does not allow them to be photographed. The State agency shall verify the household's statement regarding its religion if the statement is questionable in accordance with § 273.2(f)(2).

(3) Households entitled to expedited service if the State agency's photo ID card system is incapable of producing a photo ID card in time for the household to participate as required by § 273.2(i). A photo ID card shall be obtained prior to issuance of the household's next allotment.

(C) Mandated photo ID cards shall be serially numbered, laminated after signature by the person photograhed, include a color photograph of the person designated by the household to obtain coupons, and contain the household's case number or other identifying information. A photo ID card used in another program may be adapted for food stamp purposes if it meets these specifications and can be annotated to indicate food stamp eligibility. Households exempt from mandated photo ID cards shall be issued an ID card which also meets these specifications except that in lieu of a photograph the State agency shall annotate the card to show an exception was granted to the household and that the ID card is valid.

(D) A household subject to the mandatory photo ID card requirement shall not participate until such time as a household member or a designated authorized representative complies. If a

designated authorized representative does not comply, the household may designate a household member or another authorized representative to be photographed. Only the signature of the person photographed shall be on the photo ID card and only that person may obtain the household's coupons. If, at a later date, the person who is photographed is unable to travel to the issuance point to obtain a particular allotment, the household may use the emergency authorized representative procedures provided in § 273.1 (f)(1)(ii), § 274.2 (e)(7) and § 274.2(f)(3). In addition, State agencies which have the capability may develop systems to issue more than one photo ID card to households needing either an additional household member, or an authorized representative as well as a household member, authorized to obtain coupons. These systems must assure that the safeguards provided by photo ID cards are maintained.

(E) If a mutilated or altered photo ID card is presented at the issuance point, the household shall obtain a replacement photo ID card prior to issuance. If a household's opportunity to participate expires between the time the household requested a replacement photo ID card and the delivery of that card to the household, the household shall be entitled to benefits lost as a result of not being able to obtain that particular allotment.

(F) The state agency shall, to the extent practicable, permit the household to complete the photo ID card requirements at the time of the interview so the household does not need to make a special trip to that office or to a separate location solely to obtain a photo ID card. Only in those instances where the applicant wishes another household member or an authorized representative to be designated to obtain coupons should a separate trip be required.

(iii) *Nonphoto ID Card Areas.* (A) In areas not designated by FNS as requiring photo ID cards, the ID card shall contain space for the name and signature of household member to whom the coupon allotment is to be issued and for any authorized representatives designated by the household. All persons listed on the ID card shall sign the card prior to its use. If the household does not name an authorized representative, the State agency shall void that area of the ID card to prevent names and signatures being entered at a later date. The ID card may be serially numbered at the State agency's option.

(B) State agencies may use photo ID cards in these areas provided the State Agency shall not delay or deny benefits because household members or their authorized representatives are unable or refuse to be photographed.

(iv) * * *

(v) Deleted.

PART 274—ISSUANCE AND USE OF FOOD COUPONS

3. In § 274.2 (e)(8) and (f)(4) are amended by adding the following language to read as follows:

§ 274.2 Issuance systems.

* * * * *

(e) *ATP Issuance.* * * *

(8) * * * If the household is required to present a photo ID card in accordance with § 273.10(g)(4), coupons shall be issued only when the person presenting the ATP is pictured on the ID card. The cashier shall write the serial number of the photo ID card on the ATP. If the photo ID card appears to be mutilated or altered, the cashier shall not issue the coupons, but shall advise the household to obtain a replacement ID card from the State agency.

* * * * *

(f) *HIR Card issuance system.* * * *

(4) * * * If the household is required to present a photo ID card in accordance with § 273.10(g)(4), coupons shall be issued only when the person requesting food stamps is pictured on the ID card. The cashier shall write the serial number of the photo ID card on the HIR card. If the photo ID card appears to be mutilated or altered, the cashier shall not issue the coupons, but shall advise the household to obtain a replacement ID card from the State agency.

* * * * *

4. In § 274.7, introductory paragraph of (c) is revised.

§ 274.7 Issuance record retention and security

* * * * *

(c) *Accountable Documents.*

HIR cards, ATP's, forms FNS–286, and mandated photo ID cards shall be considered accountable documents. The State agency shall provide the following minimum security and control procedures for these documents: * * *

* * * * *

PART 278—PARTICIPATION OF RETAIL FOOD STORES, WHOLESALE FOOD CONCERNS AND BANKS

5. In § 278.2 (h) is amended by adding the following sentence to read as follows:

§ 278.2 Participation of retail food stores.

* * * * *

(h) Identifying coupon users.

* * * Where photo ID cards are in use, the person presenting the ID card need not be pictured on the card.

* * * * *

Authority: 91 Stat. 958 (7 U.S.C. 2011–2027).

(Catalog of Federal Domestic Assistance Program, No. 10.551 Food Stamps)

Dated: January 9, 1981.

Robert Greenstein,

Administrator.

[FR Doc. 81–2529 Filed 1–22–81; 8:45 am]

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Friday
January 23, 1981

Part VIII

Department of Labor

Office of the Assistant Secretary for Labor-Management Relations

Hospital Employee Protection Program

DEPARTMENT OF LABOR

Office of the Assistant Secretary for Labor-Management Relations

29 CFR Part 225

Hospital Employee Protection Program; Procedures and Guidelines Followed by Secretary for Determining That Fair and Equitable Arrangements Have Been Made for Protection of Employees Affected by Program To Assist and Encourage the Discontinuance of Unneeded Hospital Services

AGENCY: Labor-Management Services Administration, Labor.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: This proposed rule prescribes guidelines and procedures relating to the Department of Labor's responsibility for reviewing applications for grants filed with the Secretary of Health and Human Services. The purpose of such responsibility is to assure that fair and equitable arrangements have been made to protect the interests of hospital employees against a worsening of their positions with respect to their employment when such employees are affected by the discontinuance of services.

DATES: Written comments concerning the proposed regulation must be received by the Department of Labor on or before March 24, 1981.

ADDRESS: Interested persons are invited to submit written comments (with four copies, if possible) concerning any part or all of the proposed regulation to the Division of Employee Protections; Labor-Management Services Administration; U.S. Department of Labor; Room N–5639; 200 Constitution Avenue, N.W.; Washington, D.C., 20210. Attention: Proposed Regulation.

FOR FURTHER INFORMATION CONTACT: Ron Glass, Division of Employee Protections, Labor-Management Services Administration; U.S. Department of Labor; Room N–5639; 200 Constitution Avenue, N.W., Washington, D.C., 20210; phone number (202) 523–6495. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

On October 4, 1979, the President signed the Health Planning and Resources Development Amendments of 1979, Public Law 96–79, 93 Stat. 592. These amendments, hereinafter called the Act, amend the Public Health Services Act of 1974. Included in Title III of this legislation is a new grant program, administered by the Department of Health and Human Services (hereinafter called HHS), designed to encourage and assist the discontinuance of unneeded hospital services. Section 1642(c)(1) of the Act requires certification of employee protective arrangements by the Secretary of Labor before the approval of grant applications by HHS. Section 1642(c)(2) states that "the Secretary of Labor shall by regulation prescribe guidelines for arrangements for the protection of the interests of employees affected by the discontinuance of hospital services".

Section 1642(c) requires such protective arrangements to include "arrangements to preserve the rights of employees under collective-bargaining agreements, continuation of collective-bargaining rights consistent with the provisions of the National Labor Relations Act, reassignment of affected employees to other jobs, retraining programs, protecting pension, health benefits, and other fringe benefits of affected employees, and arranging adequate severance pay, if necessary".

This regulation specifies procedures by which the Department of Labor will review proffered arrangements and notify HHS and the grant applicant of the Department's determination. The regulation is designed to aid hospitals and representatives of affected hospital employees in the development of the required arrangements. The regulation defines the term "employee" and other terms. The regulation also: (1) explains methods for preserving the rights of employees under collective-bargaining agreements and for the continuation of collective-bargaining rights consistent with the provisions of the National Labor Relations Act, and (2) establishes minimum standards for reassignment of affected employees to other jobs, for retraining programs and for protecting pension, health benefits and other fringe benefits of affected employees.

B. Discussion of the Proposed Regulation

The language in Section 1642(c) of the Act differs from earlier proposed versions of the legislation. In addition, there is little legislative history explaining the background and rationale for the specific requirements contained in the Act. The conferees for the Senate and House, in explaining the provisions of this section of the bill, said:

> The conferees recognize that the closing of unneeded facilities and services will affect many employees. In requiring the hospital discontinuing services to make fair and equitable arrangements to protect the interests of employees, the conferees intend for the hospital to protect employees against a worsening of their positions respecting employment. This means that the hospitals should make a reasonable effort to obtain comparable employment for affected employees. The Secretary of Labor should describe the issues which hospitals must address in making fair and equitable arrangements, and is expected to actively encourage and foster adequate protection for all employees affected by grants under this section.

The language in the Act could be interpreted literally as requiring complete maintenance of the earnings and benefits of employees affected by a discontinuance of hospital facilities. However, the phrase specifying protection "against a worsening of position" has appeared in other statutes where the legislative history makes it clear that Congress did not intend to provide earnings and benefit maintenance for employees.

In the development of this proposed regulation the costs of the employee protection provisions have been weighted. One of the purposes of the health planning law is reduction of hospital costs—or reduction in the rate of increase of hospital costs. The authorization limits in the law indicate that a large and costly program is not intended. If the costs of the employee protection arrangements are unreasonably high, the law's intent would be defeated. Again, any loss of hospital employment involves "a worsening of the positions of employees with respect to their employment", but to achieve Congressional intent, the costs of employee protections must be weighted against the objective of reducing costs by eliminating surplus hospital facilities.

Duration

The statute does not specify how long the arrangements for employee protections should continue after an employee becomes unemployed as a consequence of a discontinuance of hospital facilities. The proposed regulation generally provides that the duration of the protections shall be for a maximum of two years from the time an affected employee is reassigned or dismissed. During this period, pensions, health benefits, and other rights must be preserved and continued. However, monetary payments to replace some of the lost wages must be provided only for a maximum of 52 weeks.

Definitions

Section 225.2 defines many terms which are used throughout the regulation. One of the more important definitions is that of "employee". In drafting this definition, consideration was given to the possibility of using the

same definition of "employee" as that in other statutes such as the National Labor Relations Act and the Fair Labor Standards Act. Use of such statutory definitions has been tentatively rejected because they would limit too severely the application of protections for personnel affected by a closure of hospital facilities. The proposed definition would include supervisors and subordinate executives. It would exclude such top executives as the Administrator and Medical Director. Comments are especially invited on questions of where to draw the line between top executives and rank-and-file employees or whether even top executives should be included in the definition.

The definition of "employee" limits the term to paid personnel of the hospital receiving a grant in connection with the closure of facilities. It excludes employees of contractors who may be affected by closure of hospital facilities. Some hospitals operate directly the cafeterias, snack bars or restaurants for use by hospital staff and visitors, while other hospitals contract with firms which specialize in the operation of such facilities. If a hospital closes, the employees of contractors who work in the hospital might be affected to the same extent as employees on the hospital payroll. However, it is clear from Section 1642(a)(2)(C) of the Act that Congress intended to limit the use of funds for employee protections to employees of hospitals receiving grants from HHS. The proposed definition also is intended to resolve questions as to the treatment of part-time, temporary and probationary employees.

Another important proposed defintion is for the term "substantially equivalent employment". The proposed regulation provides that hospital employees who are affected by a discontinuance of facilities shall have the benefit of employee protection arrangements until they obtain substantially equivalent employment or refuse an offer of substantially equivalent employment. In drafting the definition, consideration was given to several issues, the most important of which concerned questions as to whether the term should be defined in a way which would limit its application to employment or offers of employment by other hospitals. It is recognized that in most cases professional hospital personnel may regard employment outside the hospital industry as not substantially equivalent, while non-professional personnel such as clerical, custodial and food service employees may find employment or receive offers from firms other than hospitals and may be indifferent as to whether it is a hospital or not. As proposed in the definition, the term does not limit "substantially equivalent employment" to the hospital industry because of the likelihood that even nurses, technicians and similar professional or semi-professional employees may find acceptable employment possibilities in industries other than health care.

Procedures

§ 225.3 of the proposed regulation describes the procedure under which the Department of Labor (DOL) will perform the functions required by the Act to certify to HHS "that fair and equitable arrangements have been made to protect the interests of employees affected by the discontinuance of service against a worsening of their positions with respect to their employment". This section puts the responsibility on a hospital applying for a grant to (1) plan the employee protection arrangements before applying for a grant, (2) describe the arrangements which have been made in its application to the HHS, and (3) supply certain other information needed by the DOL for its review of that portion of the application relating to employee protection arrangements.

Continuation of Bargaining Rights

§ 225.4 provides that where employees are represented by a labor organization, it is expected that the protective arrangements will be negotiated with such organization. § 225.7 requires bargaining in good faith about employee protection arrangements. If an impasse in bargaining occurs, the DOL would perform a role somewhat like that of an arbitrator in an impasse situation. However, any DOL decision which may be necessary would be based upon a written submission without a hearing.

Reassignment and Retraining

A hospital discontinuing some or all of its facilities can reduce the costs of employee protection arrangements if most of the affected employees can be transferred or placed in substantially equivalent positions. One of the important ways a hospital can reduce the costs of employee protection arrangements is by promptly providing retraining programs which can assist in the placement of affected employees in new jobs. Because the employee protection arrangements are limited in duration and are further limited in the amounts of wage replacements, employees have an incentive to obtain sustantially equivalent employment and to receive training for such purpose. Provisions in the statute concerning reassignment and retraining are covered in § 225.8 of the proposed regulations.

Because of the wide diversity of the occupations of hospital employees and their wide range of functions and skills, it is recognized that the reassignment and retraining may need to be different for different groups of employees. For purposes of this regulation, reassignment generally means transfer of employees within the hospital or placement of an employee outside the hospital; retraining includes, but is not limited to, (1) on-the-job training in connection with transfers within the hospital where only such minimum training may be necessary, and (2) arrangements for affected employees to receive more formal training where it is needed to qualify for substantially equivalent employment. § 225.8 sets forth in general the principles to be applied in planning these arrangements.

Reemployment Rights

§ 225.9 provides reemployment rights for affected employees who become unemployed as a result of the closure of some of a hospital facilities. In drafting this section, consideration was given to the possibility of imposing an obligation upon other hospitals in the area that before they hire new employees they must consider the affected employes who were laid off by the hospitals which is closing some of its facilities. It was concluded that the DOL lacks authority to impose such a duty on any hospital other than the hospital which receives an HHS grant. It is recognized, however, that a recipient of a grant will be closing its facilities in connection with a planning process that involves other hospital in the community; it is expected that in this planning process all hospitals involved will give serious consideration to hiring employees of the hospital closing its facilities. The planning process could include the development of a hospital priority hiring system which might coordinate a voluntary effort among hospitals in a local area to give priority in hiring displaced hospital employees over new entries in the job market.

Pensions

§ 225.10 is intended to ensure that an affected employee with more than 12 months of service will be entitled to receive credit toward vesting, participation and benefit accrual for the duration of the protected period of unemployment. If the affected employee is not reemployed by the facility and covered by the same plan at the end of the protected period, the employee will then become fully vested in his or her accured benefit or, in the case of a

defined contribution plan, the balance in his or her plan account. The reason for providing these protections is to ensure that affected employees with at least one year of service do not lose pension benefits to which they otherwise might have been entitled except for the closing of a facility under the Act.

Employees who are not yet plan participants will continue to be credited with time towards participation under the plan. Once employees are plan participants they will continue to be credited for both vesting and benefit accrual purposes during the protected period. Employees who are not reemployed and covered by the same plan at the end of the protected period of unemployment will become fully vested regardless of plan provisions and whether they are subsequently covered by a new plan. To do otherwise could result in non-vested employees losing potential benefits which had not vested under the old plan. In addition, such employees would have to begin again accruing credit toward a pension under a new plan. There is also a problem relating to multi-employer pension plans in the private sector which this proposed regulation does not purport to resolve. A hospital participating in a multiemployer plan may not be able to cause the trustees of such plan to provide the additional vested rights created by this regulation. It is not likely that a multiemployer plan would be terminated as a consequence of the closure of one of the hospitals sponsoring the plan; and employees affected by a closure of one hospital who obtain employment at another hospital in positions covered by the same plan would suffer no impairment of their pension rights. However, affected employees who do not obtain employment under the same plan would not have their pension rights fully protected, especially in cases where they have not satisfied the length of service requirements of the plan for vesting. Comments and suggestions are solicited with respect to this problem. Consideration is being given to the possibility of requiring a hospital receiving an HHS grant to provide whatever funding may be needed to assure the payment of vested benefits required by this proposed regulation.

Dismissal Allowances

The Act requires that the protections include "arrangements for adequate severance pay, if necessary". Possibly Congress intended lump sum payments to be made in lieu of all other protections if an employee is not reassigned within the hospital or placed in another position outside the hospital. However, lump sum payments could become costly, providing windfalls for those employees who quickly find other employment and for those who choose to retire. In addition, there would be a need to make lump sum payments large enough to ensure adequate protection for those who become unemployed and lose their health insurance and pension benefits as well as their wages.

The proposed regulation does not provide for severance pay in lump sums. However, § 225.13 of the proposed regulation provides for dismisssal allowances as a type of severance pay. The dismissal allowances are to be paid by the grant recipient for a period related to the affected employee's length of service, with a maximum duration of 52 weeks. The dismissal allowance would give the eligible worker a monthly or weekly payment from the hospital which when added to unemployment insurance and income from other employment would equal 85% of the average pay the employee was receiving prior to termination. The 85% level has been chosen to avoid the disincentive to return to employment which results under a 100% guarantee.

Notice to Employees

Section 225.15 provides that a hospital receiving an HHS grant shall give notice to affected employees at least 60 days before the closure of facilities.

C. Drafting Information

This regulation was drafted by the Division of Employee Protections, Labor-Management Services Administration. The principal staff contact is Ron Glass. The Department of Labor has consulted with the Department of Health and Human Services in the promulgation of this regulation.

E. Regulatory Analysis

The Department of Labor has determined that the proposal in this document is not a major regulation that requires the preparation of a regulatory analysis, within the meaning of Executive Order 12044 and the Department of Labor's guidelines published at 44 Fr 5570.

The Department of Labor has also certified, in accordance with 5 U.S.C. 605(b), that the regulation in this document will not have a significant economic impact on a substantial number of small business entities.[1]

Accordingly, a new Part 225, in Chapter II of Title 28 CFR is proposed to read as follows:

[1] Certification is filed as part of the original document.

PART 225—REGULATION AND GUIDELINES, SECTION 1642(c) OF PUBLIC HEALTH SERVICES ACT AS AMENDED BY HEALTH PLANNING AND RESOURCES DEVELOPMENT AMENDMENTS OF 1979

Sec.

225.1 Purpose.
225.2 Definitions.
225.3 Procedure.
225.4 Employees represented by a labor organization.
225.5 Employees not represented by a labor organization.
225.6 Preservation of rights under collective bargaining agreements.
225.7 Continuation of collective bargaining rights.
225.8 Reassignment and retraining.
225.9 Reemployment rights.
225.10 Pensions.
225.11 Health benefit.
225.12 Other fringe benefits.
225.13 Dismissal allowance.
225.14 Resolution of disputes.
225.15 Notice to employees.

Authority: Section 1642(c) of the Health Planning and Resources Development Amendments of 1979, Pub. L. 96-79, 93 Stat. 592.

§ 225.1 Purpose.

The purpose of this regulation is to prescribe procedures and guidelines for arrangements for the protection of the interests of employees affected by the discontinuance of hospital services, as provided in Section 1642(c) of the Public Health Services Act as amended by the Health Planning and Resources Development Amendments of 1979. Section 1642(c)(1) of the Act states that the Secretary of HHS may not approve an application submitted by a hospital under Section 1642(b) of the Act unless the Secretary of Labor has:

Certified that fair and equitable arrangements have been made to protect the interests of employees affected by the discontinuance of services against a worsening of their positions with respect to their employment, including arrangements to preserve the rights of employees under collective-bargaining agreements, continuation of collective-bargaining rights consistent with the provisions of the National Labor Relations Act, reassignment of affected employees to other jobs, retraining programs, protecting pension, health benefits, and other fringe benefits of affected employees, and arranging adequate severance pay, if necessary.

The Secretary of Labor shall by regulation prescribe guidelines for arrangements for the protection of interests of employees affected by the discontinuance of hospital services.

* * *

§ 225.2 Definitions.

As used in this regulation, unless the context otherwise indicates:

(a) Act means the Public Health Services Act as amended by the Health Planning and Resources Development Amendments of 1979, Public Law 96-79—October 4, 1979, 93 Stat. 592.

(b) DOL means the United States Department of Labor.

(c) HHS means the United States Department of Health and Human Services.

(d) Employee(s) means all paid hospital personnel with certain exceptions listed below. The term includes permanent part-time employees who are regularly employed for at least 20 hours per week. The term includes supervisors, subordinate executives, interns and residents. The following are excluded from the definition of employee:

(1) Temporary employees.

(2) Probationary employees if at the time of hire they were obligated to serve a probationary period and have not completed such period.

(3) Members of the Board of Directors and corporate officers.

(4) Top executives such as the Administrator and/or Medical Director.

(5) Self-employed persons and employees of contractors who perform their services within the hospital.

(e) Affected employee(s) means any employee(s) whose position is abolished or who otherwise is adversely affected with respect to wages, hours or terms and conditions of employment as a result of a discontinuance of facilities including actions in anticipation of a discontinuance of facilities. If an employee whose position is not abolished is displaced by another employee whose position is to be abolished, the person thereby removed shall be considered an affected employee for the purposes of this regulation.

(f) Substantially equivalent employment means permanent employment in any industry in the commuting area which:

(1) Requires the same or similar occupational skills as those required by the position in which the affected employee was serving at the hospital at which the employee was affected; and

(2) Provides approximately the same total value of wages, or salaries and fringe benefits as those covered by the affected employee's position at the time the employer was affected by the discontinuance.

(g) Period of protection means the duration of an affected employee's entitlement to the rights and benefits provided under this regulation. In no case shall the period of protection exceed an employee's period of employment with the hospital, nor shall the period for dismissal allowances provided in § 225.13 exceed 52 weeks. The employee's period of protection shall continue for two years beyond the date on which the employee was affected by a discontinuance or until:

(1) the employee obtains substantially equivalent employment;

(2) the employee refuses to accept substantially equivalent employment; or

(3) the employee voluntarily accepts employment either in or out of the commuting area which otherwise meets the requirements of § 225.2(f)(2).

Notwithstanding (1), (2) and (3) above, an employee's reemployment rights shall continue for a period equal to his or her period of protection despite the conclusion of the period of protection for other benefits.

(h) The terms "preservation of rights under collective-bargaining agreements", and "continuation of collective-bargaining rights consistent with the provisions of the National Labor Relations Act", "reassignment of affected employees to other jobs", "retraining programs", "protecting pension, health benefits, and other fringe benefits of affected employees", and "adequate severance pay" are defined and explained in § 225.6 through 225.13 of this regulation.

§ 225.3 Procedure.

(a) Upon receipt from HHS of an application for a grant under Section 1642(b) of the Act, together with a request for the certification of employee protective arrangements, the Department of Labor will review the application to determine if the arrangements comply with this requirement of Section 1642(c) of the Act and this regulation.

(b) To facilitate review, the section of the application dealing with employee protections should describe the employees whose status and rights may be affected by the discontinuance of the facilities. The application should identify any labor organization representing any such employees and include a copy of any collective bargaining agreement(s) in effect. Identification must include the name of a contact person for any such labor organization as well as a telephone number and address where the contact person may be reached.

(c) When a hospital files an application for a grant with HHS, it shall post notices where they can be seen by potentially affected employees who are not represented by labor organizations advising them that the application has been filed, where the portion of the application relating to employee protection arrangements may be examined, and of their right to send a letter commenting on such arrangements to the Division of Employee Protections, Labor-Management Services Administration; U.S. Department of Labor; Room N-5639; 200 Constitution Avenue, N.W.; Washington, D.C. 20210. A copy of this regulation shall also be included with the proposed protective arrangements for examination by employees.

(d) Section 1642(c)(3) of the Act limits the time within which the Department of Labor shall review each application. Therefore, the application should include a sufficiently detailed description of the employee protection arrangements which have been made so that it will be unnecessary for the DOL to request additional information. Upon the completion of its review, the DOL will send a letter to HHS either certifying or declining to certify that fair and equitable arrangements have been made. If the DOL declines to certify, the letter will contain an explanation of reasons for declining to certify. The DOL will send copies of such letters to the applicant and to any representative of affected employees identified in the application. A declination of certification, however, does not preclude or prejudice the filing of an amended application.

(e) As provided in Section 1642(c)(3)(A) of the Act, the DOL review will be completed within 90 days from the date of receipt by the DOL of a hospital's application for a grant. If the information required by this section of the regulation is incomplete, the DOL may decline to certify that adequate arrangements for employee protections have been made, without prejudice to the right of the applicant to file an amended application containing the required information. In that event the 90 day limit will apply to the receipt by the DOL of an amended application.

§ 225.4 Employees represented by a labor organization.

If employees of the grant application who may be affected are represented by a labor organization it is expected that protective arrangements shall be the product of negotiations with such organization pursuant to § 225.7(a) of this regulation.

§ 225.5 Employees not represented by a labor organization.

If there is no labor organization representing employees of the grant applicant who may be affected, the hospital in its application to HHS shall describe the wages or salaries and working conditions including fringe benefits in effect before the

discontinuance of facilities and shall describe what arrangements have been made to comply with this regulation. If a labor organization represents some but not all the employees of the grant applicant who may be affected, the application to HHS shall include a statement of the wages or salaries and working conditions of employees who are not represented and include a description of the employee protection arrangements that have been made for the unrepresented employees.

§ 225.6 Preservation of rights under collective bargaining agreements.

The grantee must preserve employees' rights under any existing collective agreement. The rights of affected employees under the collective agreement shall continue until the end of the period of protection. This does not require the continuation of wages or salaries applicable to positions from which affected employees are dismissed or displaced.

§ 225.7 Continuation of collective bargaining rights.

For purposes of this regulation, the statutory phrase "continuation of collective-bargaining rights consistent with the provisions of the National Labor Relations Act"—as distinguished from the preservation of rights under collective bargaining agreements—means the following:

(a) A hospital contemplating discontinuance of facilities which will affect employees represented by a labor organization must negotiate with such organization regarding the terms of the employee protection provisions. As under the National Labor Relations Act, both parties must bargain in good faith and reduce to writing any agreement which may be reached. If the hospital applying for a grant is operated by a State or local government and such hospital is prohibited by State or local law from engaging in collective bargaining as provided in the National Labor Relations Act, it shall inform the representative(s) of affected employees of its intent to file an application for the grant and give such representative(s) an opportunity to confer with management concerning the arrangements for employee protections.

(b) In the case of an impasse in bargaining, the hospital shall include in its application to HHS a statement setting forth its last offer to the organization. It shall also include a statement from the organization setting forth its objections to the hospital's last offer and the reasons for such objections. Upon a review of such documents the Assistant Secretary for Labor-Management Relations will prescribe fair and equitable arrangements which are a condition of certification to the HHS, or if certification is denied shall set forth the reasons for denial.

(c) In the event a hospital and the representative of affected employees cannot settle any dispute or controversy with respect to the interpretation, application, or enforcement of any provision of either (1) a negotiated employee protection arrangement, or (2) employee protection arrangements prescribed by the DOL in accordance with (b), such dispute shall be resolved by arbitration. A negotiated employee protection arrangement shall provide procedures for arbitration. If the arrangements are prescribed under (b) above, the DOL will include a procedure for the resolution of disputes.

§ 225.8 Reassignment and retraining.

(a) A hospital may use any one or a combination of several methods to satisfy the statutory requirements relating to reassignment of affected employees to other jobs and retraining programs. Reassignment means transfer of employees within the hospital or placement of employees outside the hospital. Retraining includes, but is not limited to:

(1) On-the-job training in connection with transfers within the hospital where only minimum training may be necessary; and

(2) Arrangements for affected employees to receive more formal training where it is needed to qualify for substantially equivalent employment as defined in § 225.2(f).

(b) The following principles shall apply:

(1) When a hospital plans to discontinue some of its facilities but to continue operating other facilities, the responsibility of the hospital is (i) if possible, to reassign affected employees to other positions in the hospital for which they may be qualified, and (ii) to provide retraining for affected emloyees so that they can serve in other positions which may be available or which are expected to become available in the foreseeable future.

(2) Where the employer has some discretion in determining which affected employees are to be reassigned or retrained, the selection among them should be guided by any existing affirmative action obligations. For purposes of this section and § 225.9, the term "affirmative action obligations" shall include such obligations existing under: Executive Order 11246, as amended; statute; court order; or settlement agreement (including a letter of commitment made to OFCCP and/or a conciliation agreement arising from a charge or complaint of discrimination).

(3) If an entire hospital is to be closed—or if only some of its facilities are to be closed and it is not possible to reassign affected employees to other positions within the hospital—the responsibility for reassignment requires that the hospital prior to closure shall provide a placement service for affected employees. The placement service may be in the form of a community-wide placement service operated on behalf of hospitals and hospital employees in the commuting area. It may also be in the form of a combination placement and retraining program designed to place employees in allied industries or within the hospital industry as attrition creates open positions.

(4) If all the affected employees cannot be placed in the hospital industry or allied industries, the reassignment effort shall include reasonable measures to assist affected employees in obtaining employment in other industries in the commuting area.

(5) The reassignment effort shall be directed primarily to placing employees in substantially equivalent positions in the commuting area, but it may encompass efforts to place employees outside the commuting area. The refusal of an affected employee to accept an offer of substantially equivalent employment within the commuting area has the consequence of terminating the employee's rights under the protection arrangements. If an employee accepts substantially equivalent employment outside the commuting area, however, the employee waives all rights under the protection arrangements. Because of the limits on the duration and amounts of dismissal allowances provided in § 225.13 of this regulation, affected employees—especially those at more highly compensated pay levels—may prefer to seek and accept employment outside the commuting area and forego their rights under the protection arrangements.

(6) A hospital training program which already exists may be utilized in the reassignment and retraining arrangements if there is a reasonable prospect that affected employees will be placed in at least substantially equivalent positions upon the completion of such training. To satisfy the minimum requirements of this regulation, arrangements for retraining need not, however, provide programs for upgrading the skills of employees.

(7) In the case of professional employees such as nurses, the retraining must provide for the enrollment of affected employees in specialized

courses in professional schools if necessary to qualify for substantially equivalent positions in another specialty area. For example, if a registered nurse has been serving in a maternity ward or a general duty area which is to be closed and needs additional specialized training to qualify for duty in the emergency room or a children's ward, the retraining shall encompass that kind of training.

(8) Whenever reasonably possible, retraining should commence before an employee is dismissed and employees should be permitted to attend retraining during duty hours.

(9) Retraining for affected employees who are not reassigned to other positions must be provided unless there is no reasonable prospect that training would lead to their employment in substantially equivalent positions.

§ 225.9 Reemployment rights.

(a) If a hospital continues operating after discontinuing some of its facilities, any affected employee who has not been reassigned as provided in § 225.8 of this regulation shall be offered employment in any other position in the hospital for which such employee is qualified or for which the employee can become qualified after retraining before any new employees are hired by the hospital to permanently fill vacancies in such position.

(b) Where the employer has some discretion in determining which affected employees shall be rehired, the selection among them should be guided by any existing affirmative action obligations.

§ 225.10 Pensions.

(a) The requirement in the Act that employee pension rights be protected applies to any pension plan covering the positions held by affected employees at the time of discontinuance of facilities or layoff in anticipation of discontinuance.

(b) The term "pension plan" includes any plan, fund, or program maintained by an employer to the extent that it either provides retirement income to employees or results in a deferral of income by employees. The term "pension plan" includes defined benefit pension plans, money purchase pension plans and profit sharing plans which provide benefits at retirement.

(c) An affected employee who has been employed for at least 12 months by a hospital in which a discontinuance of facilities occurs shall continue to receive credit under any pension plan maintained by the hospital in which the employee is or may become a participant as if the employee had continued in service during the protected period.

(d) If the employee has not been admitted to participation in the plan on the date of the employee's dismissal, the employee shall be admitted to participation if and when the employee would have been admitted if he continued in employment during the protected period.

(e) In the case of a money purchase pension plan or any other individual account plan, the employee's account shall be credited with contributions made by the employer to the plan as if the employee continued in the employment of the hospital until the end of the protected period.

(f) For purposes of this section, an employee shall be deemed to continue during the protected period at the rate of pay in effect immediately before the employee's dismissal, and at a level of hours worked per day, week, month, or year no less than the employee's average level of hours worked during the 12 months preceding his dismissal.

(g) If the plan requires employee contributions, an affected employee may be required to make any such contributions as a condition to receiving credit under this section. Such contributions, if the employee so elects, may be deducted from the employee's dismissal allowance provided in § 225.13 of this Part.

(h) If the employee is not reemployed by the hospital and covered by the same plan at the end of the protected period, the employee's benefit entitlements under the pension plan shall become nonforfeitable (i.e., "vested") in full.

(i) If an affected employee is not reemployed under the coverage of the plan before the expiration of the period of protection, the administrator of the plan may pay to the employee in a lump sum the entire amount of the employee's vested benefits to the extent permitted by the Employee Retirement Income Security Act and Treasury regulations.

§ 225.11 Health benefits.

Any affected employee who is not reassigned to a position as provided in § 225.8 of this regulation shall continue to be eligible at no greater cost to the affected employee than applicable to active employees for coverage under any hospital insurance, medical benefits including optical and dental benefits or other variety of health plan in which the employee participated before becoming unemployed upon the discontinuance of hospital facilities. If the affected employee has elected not to participate in any such program before said employee was terminated, there is no obligation to extend such eligibility after the termination. If the affected employee had exercised an option providing low benefits prior to termination, said employee shall not subsequently be eligible to change options to receive higher benefits. If an employee exercised a high option prior to termination, however, the employee may subsequently elect an option for lower benefits at whatever interval is allowed under the plan for changing options.

§ 225.12 Other fringe benefits.

An affected employee who is not reassigned to a position as provided in § 225.8 of this regulation shall continue to be eligible for other fringe benefits established by collective bargaining or by custom and practice to which the employee was entitled before becoming unemployed upon the discontinuance of hospital facilities. Examples of other fringe benefits include: life insurance, disability insurance, accidental death and dismemberment insurance, and dental insurance. However, benefits attached to the performance of a job such as free parking need not be continued for employees not actively employed.

§ 225.13 Dismissal allowance.

(a) During an affected employee's period of protection the protective arrangements shall provide for monthly or weekly dismissal allowances to be claculated as provided in paragraph (b) below with the duration of such allowances limited by paragraph (d) below.

(b) The amounts of dismissal allowances shall be calculated as follows: The total gross pay during the 12 months preceding the date the affected employee became unemployed shall be determined, including payment for any overtime. If the dismissal allowances are to be paid monthly, the total shall be divided by 12; if the dismissal allowances are to be paid weekly, the total shall be divided by 52. In the case of an employee with less than one year's service, the amounts shall be the average weekly earnings received by the employee in the position last occupied for each week in which the employee performed service. These amounts (which in effect are average monthly or weekly gross earnings) shall be reduced by 15%. The result is the dismissal allowance payable to an affected employee which shall be subject to deductions for: first, gross earnings from other employment; second, all applicable federal, state, and local taxes; third, other appropriate deductions (e.g., mandatory employee retirement plan contributions); and, finally, this net amount is subject to the

deduction of unemployment compensation.

(c) The monthly or weekly dismissal allowance shall not exceed 70% of the average monthly or weekly earnings during the preceding year of all regular full-time employees at the hospital.

(d) The duration of the dismissal allowance shall vary according to the employee's length of service with the employee receiving one week of benefit for each full month of service up to a maximum of 52 weeks.

(e) In the case of employees who held other full-time or part time employment prior to dismissal, the earnings from their other employment continuing subsequent to dismissal shall not be deducted from their dismissal allowances if such earnings do not exceed there earnings from such employment prior to dismissal. Any excess, however, may be deducted from their dimissal allowances.

(f) A hospital may require employees to report, as a condition of receiving dismissal allowances, the amounts they receive from unemployment insurance and other employment.

§ 225.14 Resolution of disputes.

"(a) In the case of employee protection arrangements for non-represented employees, any controversy over the interpretation, application, or enforcement of the employee protection arrangements between an affected employee and a hospital may be submitted for determination to the Assistant Secretary for Labor-Management Relations, whose decision shall be final.

(b) In the case of an arrangement of employee protections negotiated between a hospital and a labor organization, questions arising out of the interpretation or application of the agreement and any dispute between a hospital and any affected employee covered by the agreement shall be resolved under whatever procedures the parties to the agreement have provided, with arbitration as the final step as provided in § 225.7.

§ 225.15 Notice to employees.

(a) When a hospital receives approval of a grant from HHS, it shall post notice to employees at locations where they can reasonably be expected to be read by employees at least 60 days prior to any discontinuation of facilities. The notices shall identify the facilities to be discontinued, advise employees where they may obtain a copy of the employee protection arrangements and this regulation and identify by name and location the hospital officer who will administer the arrangements.

(b) In addition to posting the notices, notice shall be given individually to employees in postions which are known to be affected by the discontinuance either at their place of employment or at their home address.

Signed at Washington, D.C., this 19th day of January,

William P. Hobgood,

Assistant Secretary for Labor-Management Relations.

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Part IX

Department of Labor

Employment and Training Administration

Basic and Support Service of the Employment Service; Final Rule

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 601, 602, 603, 604, 653, 658

Basic and Support Services of the Employment Service

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: These regulations are published to revise and update the management and operation of the employment service system. It is the purpose of these regulations to clarify and simplify the various policies, procedures and guidelines now contained in the Employment Security Manual and field instructions governing basic and support services of the employment service system.

EFFECTIVE DATE: April 23, 1981.

ADDRESS: Joseph T. Paslawski, Director, Office of Plans, Policies and Design, U.S. Employment Service, 601 D Street, NW., Room 8004, Washington, D.C., 20213.

FOR FURTHER INFORMATION CONTACT: Edward A. Waters, Division of Policies and Program Design, U.S. Employment Service, 601 D Street, NW., Room 8018 (376-6700), Washington, D.C., 20213.

SUPPLEMENTARY INFORMATION: On October 24, 1978, the Department of Labor published proposed rules in the **Federal Register** governing the basic services of the employment service system, support services, and review and assessment of State agency compliance with the employment service regulations.

Every effort was made to encourage public participation in this rulemaking process. Prior to October 24, 1978, several opportunities were provided State agencies to comment on various drafts of these regulations. Meetings were also held in Washington, D.C., with State agency personnel to review the regulations in draft form. All State agencies were then given a draft before publication as proposed rulemaking and encouraged to comment.

The public was given until December 26, 1978, to comment on the proposal. Over 300 written comments were received from State employment service agencies, individuals and interested organizations. The comments were pertinent and well developed. A number of commenters were critical of specific proposed rulemaking provisions and provided suggestions on how particular provisions could be improved. The Department studied these comments thoroughly and established an evaluation procedure to allow consideration of each comment on its own merits, and in relationship to other comments received on the same or related subjects. The Department found the comments helpful and has adopted a significant number of their suggestions in the final rulemaking.

Even though there was a 60-day comment period on the proposed rulemaking, the Department welcomes comments on these final rules and will evaluate them for future revisions. Those wishing to do so should send comments to Joseph T. Paslawski at the address given above. The Department also intends to develop future regulations containing a series of administrative measures to foster and improve the planning and delivery of employment and training services, emphasizing a close working relationship between the State employment service agencies and CETA prime sponsors.

The Equal Employment Opportunity Commission has waived the prepublication consultation requirements of Executive Order 12067 in order to allow these regulations to be published in a timely manner. Consultation will take place following publication and any changes to the regulations will be published thereafter.

Discussion of Major Comments

The most significant issues raised by the commenters were as follows: (1) The Department's decision not to propose specific standards to be used for the employment of counselors by the State agencies, (2) the Department's authority to issue these regulations and the commenters' concerns about their effect on the employment service system, (3) the need for and utility of handbooks in conjunction with these regulations, (4) the absence of rules on test research and development, and (5) the State employment service coordination with prime sponsors under the Comprehensive Employment and Training Act (CETA).

A number of commenters expressed disagreement with the Department's decision not to include in its proposed rulemaking a set of standards for employment service counselors. Generally, the commenters were concerned about maintaining the quality of counseling services in the absence of specific standards and the contrast with other counseling programs that have recognized standards.

The Department agrees that standards for counselors are necessary. As explained in the proposed rulemaking, however, the Department decided not to include standards at this time because of the Uniform Guidelines on Employee Selection Procedures recently adopted by the Department and the emphasis in those guidelines on validating personnel standards with respect to equal employment opportunity. The Department will continue to study this issue. However, further delay in the finalization of these regulations to accommodate the development of standards is not acceptable.

A substantial proportion of the commenters questioned the Department's authority to publish these regulations. Section 12 of the Wagner-Peyser Act of 1933, as amended, (29 U.S.C. 49 *et. seq.*), authorizes the Secretary of Labor to make rules and regulations as may be necessary to carry out the provisions of the Act. The operations of the Federal-State employment service system have been subject, for over 40 years, to the rules and regulations developed under this authority. These rules and regulations are embodied in the Employment Security (ES) Manual referenced at 20 CFR 603.4 and in Federal regulations currently published as final rules. Over the years, the ES Manual, together with other directives, has been the principal vehicle for issuing policy, operating procedures, guidelines and technical assistance. The Manual system, however, had weaknesses, principally the inability to distinguish between required and advisory material.

After studying a number of alternatives, the present system of using Regulations, Handbooks and Technical Assistance Guides (TAGs) was selected because it provided some significant benefits. Among the most important are: A clear distinction between required policy and optional procedures; greater flexibility to States in managing their operations, to the extent permitted by law; elimination of unnecessary requirements; and a uniform system whereby policies and procedures can be clearly updated.

In the present system each of the three documents has a distinct purpose. Reflecting the intent of legislation, Congressional actions, executive orders and court orders that affect the Job Service, the regulations provide regions and States with national policy and requirements for the operation of the Job Service.

The Employment and Training Handbooks which accompany the regulations provide explanations of the regulations and recommended procedures to maintain consistency in the quality of services provided to the public as well as program data to ETA. The Handbooks do not establish policy

or substantive requirements beyond what is already established in the regulations.

Technical Assistance Guides (TAGs) are issued as areas of need are identified. Material in the TAGs is optional and is developed for the purpose of providing States with suggestions on how to meet policy and other requirements established by the regulations.

The Department has no intention of imposing unnecessary requirements on State ES agencies with the publication of these regulations. As regulations governing specific operations of the Federal-State employment service system are published and become effective, ES Manual sections will be revoked. It should be noted that this procedure was used when various other ES regulations were published by the Department in final form.

Many commenters noted the absence of proposed regulations dealing with test research and development and insisted that they be addressed in the final regulations. The Department agrees that there is a need for further guidance in this area. The regulations now provide that ETA shall design and, in cooperation with specified State agencies, maintain a test research and development program.

Numerous commenters reiterated the Department's objective of better coordination between CETA prime sponsors and the Employment Service. Generally it was felt that section 653.407 could be better organized and the language made more definitive. This section has been revised to reflect related provisions of the April 3, 1979 CETA regulations, implementing the CETA Amendments of 1978, which were published in final form during the comment and resolution period of these regulations (44 FR 19990).

The Department also received comments on the role of the employment service in the administration of work requirements under § 653.406. The proposed rules were interpreted to require reimbursement for labor exchange services provided individuals receiving public assistance. It is not the Department's intent to deny public assistance recipients the labor exchange services available to all other applicants. However, these regulations do require reimbursement for the provision of so-called "work test" or other information to benefit paying agencies where the work requirement and reporting provisions are imposed exclusively under authority of State or local law.

Discussion of Significant Changes

Definitions in § 651.10

Bona Fide Occupational Qualification (BFOQ)

It was clear from the comments received on § 653.7 dealing with discriminatory job orders that an operational definition to guide the day-to-day application of the BFOQ concept was needed. Therefore, the Department has added a definition of BFOQ in § 651.10.

Job Development

Commenters objected to the requirement of a job order as part of the proposed job development definition. The Department agrees that since the primary purpose of job development is to bring to the employer's attention a particular applicant that the employer may ultimately want to hire, the requirement of a job order is inappropriate. Accordingly, the definition has been revised to delete the requirement for a job order and to add the job interview as a part of the job development process.

Placement

Significant numbers of comments were received on two aspects of the placement definition. First, in the proposed definition, one of the four required steps to be completed to receive placement credit was verification that the applicant "entered on *the* job" to which he/she was referred. The point was well made that unknown numbers of placements would not be credited because the placement did not match exactly with the original job order. Commenters suggested substituting the language "entered on *a* job," which would allow credit for placement resulting from a specific referral. After careful consideration the Department decided that the standard in the final regulations will be "entered on *a* job."

Second, commenters noted the lack of any language that recognizes as valid a placement following a job development referral on behalf of a specific applicant. The definition of placement was amended to permit credit for hiring made after a job development contact on behalf of a specific applicant, without the necessity of a job order form prior to referral.

All Definitions

It should be noted that minor changes have been made in the language of many proposed definitions to make the definitions in these final regulations consistent with the *ETA Glossary of Terms and Definitions.*

Discriminatory Job Orders; Affirmative Action Job Orders (653.7)

The Department is aware of the sensitive and difficult issues that arise when it develops regulations regarding the handling of discriminatory and affirmative action job orders. Clarity and consistency were prime considerations in this final rulemaking.

Comments received on the discriminatory job orders section indicated that there was confusion about the meaning of bona fide occupational qualification (BFOQ). A definition has been added to make clear that a BFOQ is a narrow exception to the general rule against discrimination. This was needed to guide the States and the public in the handling of discriminatory job orders.

Regarding affirmative action job orders, commenters raised questions of interpretation of the language used in defining this type of order and suggested more specific wording which they thought might clarify and improve this section. A significant addition has been made to paragraph (e) which now authorizes State agencies to accept affirmative action job orders on the basis of voluntary affirmative action plans adopted pursuant to the Affirmative Action Guidelines of the Equal Employment Opportunity Commission. (29 CFR Part 1608, published January 19, 1979, at 44 FR 4422.) Employers who affirm that they are involved in such affirmative action programs will be allowed to submit affirmative action job orders.

Some thought the language of paragraph (f) permitted exclusive referral of target group individuals. The language of this paragraph has been revised to make clear that exclusive referrals are not permitted and that qualified applicants other than those in the affirmative action job order are also to be referred.

Labor Disputes (653.8)

The comments received on § 653.8 concerning State responsibilities in the case of labor disputes questioned the inclusion of procedural language that might more properly belong in a handbook, requested clarification of some terms used, and objected to the imposition of "new" responsibilities upon the States. Additional commenters strongly protested the ES policy of refusing to refer applicants to vacant positions involved in a labor dispute.

The language of the proposal has been retained and revised in the final regulations to make clear that certain procedures are required with respect to labor disputes involving work

stoppages. These are not new requirements, but rather the codification of ongoing ES policies and responsibilities. The Department has consistently taken the position that the ES, seeking to avoid involvement in a labor dispute, will not make referrals to openings which are vacant as the result of a labor dispute. The requirement to report on labor disputes is similarly an ongoing responsibility which forms a basis for the Bureau of Labor Statistics' survey of work stoppages.

Job Development (653.10)

Commenters opposed paragraphs (b) and (c) of this section as an attempt to provide special treatment for certain groups of applicants (i.e., displaced homemakers and individuals seeking nontraditional jobs). It is the intent of these requirements to accommodate the changing composition of the labor force by developing specialized techniques to cope with traditional job stereotyping and artificial barriers to employment. While acknowledging that displaced homemakers face particular difficulty in entry or reentry into the labor market, the specialized techniques required by these paragraphs are directed at obstacles which affect job opportunities for all applicants, both men and women. Accordingly, the Department is retaining these provisions.

Counseling (653.11)

The counseling section has undergone a number of changes, most of which were for sharpening and clarification purposes rather than substance. Specific changes in content were limited to those areas covered by the commenters.

The Department agrees that the term "State counseling supervisor" was not appropriate for all agencies and it has been removed. Language has been added to this section to require that State agencies provide counseling to applicants who specifically request counseling services. A new paragraph (e) has also been added which requires the safeguarding of confidential information and records.

Testing (653.12)

The proposed regulations did not contain any mention of test research and development. Commenters thought there was a definite need to add language that would recognize and guide this activity. The Department agrees, and a new § 653.405 was written for this purpose. State agencies can administer only tests approved by ETA. This requires review and updating of tests to insure their continued validity and soundness. The new section provides that ETA shall design and, in cooperation with specified States, maintain a test research and development program.

Employer Services (653.13)

Some commenters were concerned about the lack of specific authorization to provide technical services to employers. The Department has, for clarity, added specific language in reference to those services.

Review and Assessment of State Agency Compliance With Employment Service Regulations

The Department is continuing to study the issue of State agency review and assessment within the context of a related rulemaking procedure involving the employment service. See, 45 FR 2529 (January 11, 1980). Accordingly, the Department is deferring final action on the proposed standards for review and assessment of State agency compliance with employment service regulations pending the conclusion of the January 11, 1980 rulemaking.

Regulatory Analysis

Although the proposed regulations were initially developed prior to the Department's guidelines on Improving Government Regulations, they were included in the January 26, 1979 semiannual agenda and were determined to be significant. Since the financial and other impact is less than specified in the Department's criteria for identifying major regulations, the preparation of a regulatory analysis is not required. (See, 44 FR 5576, January 26, 1979). These regulations have been duly considered and approved as meeting the Department's criteria for significant regulations.

Accordingly, Title 20, Chapter V, of the Code of Federal Regulations is amended as follows:

PART 601—ADMINISTRATIVE PROCEDURE

§ 601.7 [Removed]

1. Section 601.7, *Requests for funds for servicemen's readjustment allowance program*, is removed. This program expired several years ago.

2. In order to conform the regulations with the Department's overall regulations for the administration of grant programs (published in final form on July 20, 1979, at 44 FR 42920), § 601.9 *Audits.*, is revised to read as follows:

§ 601.9 Audits.

The Department of Labor's audit regulations at 41 CFR 29-70.207-2(h) and (i), 41 CFR 29-70.207-3, and 41 CFR 29-70.207-4 shall apply with respect to employment service and unemployment insurance programs.

PART 602—FEDERAL-STATE EMPLOYMENT SERVICE SYSTEM

3. The table of contents for Part 602 is revised to read as follows:

Sec.
602.1 Definitions.
602.3 Vocational rehabilitation services.
602.5a Special service for the handicapped.
602.8 Agricultural and related industry placement services.
602.11 Services and facilities.
602.12 Organization.
602.14 Manual of instructions.
602.15 Personnel administration.
602.16 Fiscal affairs.
602.17 Advisory councils.
602.18 Confidential character of records.
602.19 Reports and studies.
602.20 State plans of operation.
602.22 Amounts and purposes of grants.

4. The following sections in Part 602 are removed:

Sec.
602.2 Placement services.
602.4 Occupational analysis.
602.4a Industrial services.
602.5 Services to veterans.
602.6 Labor market information service.
602.7 Participation in community programs.
602.13 Arrangements between United States Employment Service and related Federal agencies.

5. Section 602.3, *Employment counseling and selective placement services*, is revised to read as follows:

§ 602.3 Vocational rehabilitation services.

Local offices shall establish and maintain cooperative relationships with community and State agencies and organizations for the coordination and mutual improvement of vocational adjustment services. In those States where State boards, departments, or agencies exist which are charged with the administration of State laws for the vocational rehabilitation of handicapped persons, the State agency shall make provision for cooperation with such boards, departments, or agencies.

§ 602.11 [Amended]

6. Section 602.11, *Services and facilities*, is amended by removing the words "to 602.10, inclusive," and adding in lieu thereof "to Parts 638 (§ 638.13), 653, 654, 655 and 656 of this Chapter."

PART 603—STATE PROGRAM BUDGET PLANS UNDER THE WAGNER-PEYSER ACT

§ 603.3 [Amended]

7. Section 603.3, *Compliance with USES regulations*, is amended by adding

the citations "638 (§ 638.13)" in the numerical sequence.

PART 604—POLICIES OF THE UNITED STATES EMPLOYMENT SERVICE

8. The following sections in Part 604 are removed:

Sec.
604.1 The placement process.
604.2 Clearance.
604.3 Employment counseling.
604.4 Services for veterans.
604.6 Service to youth.
604.8 Servce to minority groups.
604.9 Preparation and use of labor market information.
604.10 Employment service testing.
604.11 Industrial services.
604.12 Community participation.
604.13 Foreign labor.
604.14 Employer relations.
604.15 Information services.
604.17 Older workers.
604.18 Occupational analysis activities.
604.20 Service to women.
604.21 Employability development services.

PART 651—GENERAL PROVISIONS GOVERNING THE EMPLOYMENT SERVICE SYSTEM

9. The table of contents for Part 651 is revised to read as follows:

Sec.
651.1 Scope and purpose of the Federal-State employment service system.
651.2 Basic structure of the employment service system.
651.3 Authority and effect of regulations for the employment service system.
651.4 Series of handbooks for the employment service system.
651.5 Federal statutes governing the employment service system.
651.6 Executive orders affecting the employment service system.
651.7 Uniform Guidelines on Employee Selection Procedures.
651.8 Format of the regulations for the employment service system.
651.9 Consolidated table of contents for Parts 651–658.
651.10 Definitions of terms used in Parts 651–658.

10. A new paragraph (c) is added to § 651.1 which reads as follows:

§ 651.1 Scope and purpose of the Federal-State employment service system.

* * * * *

(c) Neither the ETA nor the State agencies are guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers. No job order accepted or recruited upon by the ES constitutes an offer to contract to which the ETA or a State agency is in any way a party. Nevertheless, material misrepresentation of job order information supplied by the employer constitutes a violation of these regulations, and the procedures at subpart F of Part 658 of this Chapter shall be followed upon discovery by the ETA or a State agency.

§§ 651.3–651.7 [Redesignated as §§ 651.5, 651.6, 651.8–651.10]

11. Section 651.3, § 651.4, § 651.5, § 651.6, and § 651.7 are redesignated as § 651.5, § 651.6, § 651.8, § 651.9, and § 651.10 respectively.

12. A new § 651.3, § 651.4 and § 651.7 are added to read as follows:

§ 651.3 Authority and effect of regulations for the employment service system.

(a) The regulations governing the employment service system in Chapter V of this title are issued under the authority of the Wagner-Peyser Act, 29 U.S.C. 49 *et seq.*, unless otherwise noted.

(b) The regulations are binding on the Federal/State employment service system. The Assistant Secretary for Employment and Training has the authority to waive any provision(s) of these regulations, except to the extent they are required by statute, through a notice in the **Federal Register** which includes:

(1) The provisions being waived;
(2) The State agencies affected;
(3) The reason for the waiver; and
(4) The period for which the waiver will be in effect.

(c) The ES regulations require State agencies to provide certain services and observe national priorities and special emphases in return for funds appropriated each year under authority of the Wagner-Peyser Act and Title III of the Social Security Act. The level of required services provided by a State agency, though, is dependent upon the extent to which the State agency can provide the required services through the proper and efficient administration of its allocated share of the appropriation.

§ 651.4 Series of handbooks for the employment service system.

(a) Section 12 of the Wagner-Peyser Act authorizes the Secretary to issue rules and regulations to carry out the provisions of the Act. The Employment and Training Administration handbooks for the employment service system provide explanations of the regulations and recommended procedures to the State agencies for carrying out employment service programs. The handbooks do not establish policy or substantive requirements beyond those established in the regulations.

(b) Each State agency in the employment service system will be offered an opportunity to review and comment on the Handbooks and on any subsequent substantive amendment or revision prior to their becoming effective.

§ 651.7 Uniform guidelines on employee selection procedures.

Each State agency shall comply with the Uniform Guidelines on Employee Selection Procedures (41 CFR Part 60–3). Where tests or selection procedures have an adverse impact on any race, sex or national origin group in the selection of applicants or staff, such tests or selection procedures shall be validated, modified or changed in accordance with the Guidelines or otherwise demonstrated to be in accord with Federal law.

§ 651.6 [Amended]

13. Because Executive Order 11075 has been revoked, § 651.6, *Executive Orders affecting the employment service system*, is amended by removing paragraph (d) and redesignating paragraphs (e) through (k) as paragraphs (d) through (j).

§ 651.9 [Amended]

14. Section 651.9, *Consolidated table of contents for Part 651–658*, is amended by revising the table of contents for Part 651, adding a table of contents for Subpart A of Part 653, reserving a Subpart D of Part 653 and adding a table of contents for Subpart E of Part 653 as follows:

PART 651—GENERAL PROVISIONS GOVERNING THE FEDERAL-STATE EMPLOYMENT SERVICE SYSTEM

Sec.
651.1 Scope and purpose of the Federal-State employment service system.
651.2 Basic structure of the employment service system.
651.3 Authority and effect of regulations for the employment service system.
651.4 Series of handbooks for the employment service system.
651.5 Federal statutes governing the employment service system.
651.6 Executive orders affecting the employment service system.
651.7 Uniform Guidelines on Employee Selection Procedures.
651.8 Format of the regulations for the employment service system.
651.9 Consolidated table of contents for Parts 651–658.
651.10 Definitions of terms used in Parts 651–658.

* * * * *

PART 653—SERVICES OF THE EMPLOYMENT SERVICE SYSTEM

Subpart A—Basic Services of the Employment Service System

653.1 Scope and purpose of subpart.
653.2 Job information.
653.3 Information on supportive services, training and education opportunities.

Sec.
653.4 Registration.
653.5 Job order taking.
653.6 Job referral.
653.7 Discriminatory job orders; affirmative action job orders.
653.8 Labor disputes.
653.9 Clearance systems for job orders for nonagricultural workers.
653.10 Job development.
653.11 Employment counseling.
653.12 Employment service testing.
653.13 Employer services.
* * * * *

Subpart D—Services to the Handicapped [Reserved]

Subpart E—Support Services

653.400 Scope and purpose of subpart.
653.401 Labor market information (LMI) program.
653.402 Occupational analysis activities.
653.403 Multistate labor market area agreements.
653.404 Automated systems.
653.405 Test research and development activities.
653.406 Participation in administration of related Federal State and local programs.
653.407 Coordination with Comprehensive Employment and Training Act (CETA).
653.408 Participation with community programs.
653.409 Arrangements with related Federal and community programs.

§ 651.10 [Amended]

15. In § 651.10, *Definitions of terms used in Parts 651–658,* in each definition where it applies, the words "shall mean" are amended to read "means."

16. The following definitions in § 651.10 are revised:

"Applicant" shall means a person who files an application for services with a local office of a State agency, with outstationed staff or with an outreach worker.

"Employment Service (ES)" means the national system of public employment offices known as Job Service offices consisting of the U.S. Employment Service (USES), its grantee State agencies, and the various offices of the State agencies.

"ES regulations" means the Federal regulations at 20 CFR Parts 601–604, 621, 638 [§ 638.13), and 651–658 and at 29 CFR Parts 26 and 75.

"Job Bank" shall means a computer assisted system which provides listings of current job openings in the area, on a regular basis, for distribution to JS and WIN offices and to cooperating agencies.

"Local office" shall mean a full-time office of a State agency maintained for the purpose of providing placement and other services of the public service system.
* * * * *

17. The following definitions in § 651.10 are added and inserted in alphabetical order:

"Affirmative Action" means positive, result-oriented action imposed on or assumed by an employer pursuant to legislation, court order, consent decree, directive of a fair employment practice authority, government contract, grant or loan, or voluntary affirmative action plan adopted pursuant to the Affirmative Action Guidelines of the Equal Employment Opportunity Commission to provide equal employment opportunities for members of a specified group which for reasons of past custom, historical practice, or other nonoccupationally valid purposes has been discouraged from entering certain occupational fields.

A "Bona Fide Occupational Qualification (BFOQ)" means that an employment decision or request based on age, sex, national origin or religion is based on a finding that such characteristic is necessary to the individual's ability to perform the job in question. Since a BFOQ is an exception to the general prohibition against discrimination on the basis of age, sex, national origin or religion, it must be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR Parts 1604, 1605 and 1627.

"Clearance" means activities in the placement process involving joint action of local offices in different labor market areas and/or States in the location, selection and the job referral of an applicant.

"Decertification" means the rescission by the Secretary of the year end certification made under Section 7 of the Wagner-Peyser Act to the Secretary of the Treasury that the State agency may receive funds authorized by the Wagner-Peyser Act.

"Dictionary of Occupational Titles (DOT)" shall mean the Dictionary of Occupational Titles, the reference work published by the USES which contains brief, non-technical definitions of U.S. job titles, distinguishing number codes, and worker trait data.

"Employer" shall mean a person, firm, corporation or other association or organization (1) which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and (2) which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises and otherwise controls the work of such employee. An association of employers shall be considered an employer if it has all of the indicia of an employer set forth in this definition. Such an association, however, shall be considered as a joint employer with the employer member if either shares in exercising one or more of the definitional indicia.

"Establishment" means a public or private economic employing unit generally at a single physical location which produces and/or sells goods or services, for example, a mine, factory, store, farm orchard or ranch. It is usually engaged in one, or predominantly one, type of commerical or governmental activity. Each branch or subsidiary unit of a large employer in a geographical area or community should be considered an individual establishment, except that all such units in the same physical location shall be considered a single establishment. A component of an establishment which may not be located in the same physical structure (such as the warehouse of a department store) should also be considered as part of the parent establishment. For the purpose of the "Seasonal farmworker" definition, farm labor contractors and crew leaders are not considered establishments; it is the organizations to which they supply the workers that are the establishments.

"Full Application" means an application for an applicant who has participated in an application interview and which includes the applicant's personal characteristics, work history and an occupational classification and DOT code.

"Identification Card" (applicant identification card) means a card given to the applicant on which are recorded identifying information and the dates of the applicant's visits to the local employment office.

"Job Development" means the process of securing a job interview with a public or private employer for a specific applicant for whom the local office has no suitable opening on file

"Job Information" means information derived from data compiled in the normal course of employment service activities from reports, job orders, applications and the like.

"Job Opening" means a single job opportunity for which the local office has on file a request to select and refer on applicant or applicants.

"Job Referral" means (1) the act of bringing to the attention of an employer an applicant or group of applicants who are available for specific job openings and (2) the record of such referral. "Job Referral" means the same as "referral to a job."

"Labor Market Area" means a geographic area consisting of a central

city (or cities) and the surrounding territory within a reasonable commuting distance.

"Labor Market Information (LMI)" means that body of knowledge pertaining to the socio-economic forces influencing the employment process in specific labor market areas. These forces, which affect labor demand-supply relationships and define the content of the LMI program, include population and growth charcteristics, trends in industrial and occupational structure, technological developments, shifts in consumer demands, unionization, trade disputes, retirement practices, wage levels, conditions of employment, training opportunities, job vacancies, and job search information.

"Partial Application" means the application of an applicant who has not participated in an application interview and which does not include an occupational classification of DOT code. Partial applications prepared for Migrants and Seasonal Farmworkers must include a signed waiver for full services at that time in accordance with 20 CFR 653.103.

"Placement" means the hiring by a public or private employer of an individual referred by the employment office for a job or an interview, provided that the employment office completed all of the following steps:

(a) Prepared a job order form prior to referral, except in the case of a job development contact on behalf of a specific applicant;

(b) Made prior arrangements with the employer for the referral of an individual or individuals;

(c) Referred an individual who had not been specifically designated by the employer, except for referrals on agricultural job orders for a specific crew leader or worker;

(d) Verified from a reliable source, preferably the employer, that the individual had entered on a job; and

(e) Appropriately recorded the placement.

"Rural Area" means an area which is not included in the urban area of a Standard Metropolitan Statistical Area and which has a population of less than 10,000.

"Secretary" means the Secretary of the U.S. Department of Labor or the Secretary's designee.

"Standard Metropolitan Statistical Area (SMSA)" means a metropolitan area designated by the Bureau of Census which contains (1) at least one city of 50,000 inhabitants or more, or (2) twin cities with a combined population of at least 50,000.

"Supportive Services" means services other than employment or training that are needed to enable individuals to obtain or retain employment, or to participate in employment and training programs.

"Tests" means a standardized method of measuring an individual's possession of, interest in, or ability to acquire, job skills and knowledge. Use of tests by employment service staff must be in accordance with the provisions of:

(1) 41 CFR Part 60-3, *Uniform Guidelines on Employee Selection Procedures;*

(2) 29 CFR Part 1627, *Records To Be Made or Kept Relating to Age; Notices To Be Posted; Administrative Exemptions;* and

(3) The Department of Labor's regulations on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, which have been published as 29 CFR Part 32 at 45 FR 66706 (October 7, 1980).

"Training" means a planned, systematic sequence of instruction or other learning experience on an individual or group basis under competent supervision, which is designed to impart skills, knowledge, or abilities to prepare individuals for employment.

"Transaction" means a single ES activity performed on behalf of an individual seeking assistance and/or the result of such an activity, e.g., applicant registration referral to a job, referral to a supportive service, counseling interview, testing, job development, job placement, enrollment in training, and inactivation of an applicant registration.

"Vocational Plan" means a plan developed jointly by a counselor or counselor trainee and the applicant which describes: (1) The applicant's short-range and long-range occupational goals and (2) the actions to be taken to place the plan into effect.

"Work Incentive Program (WIN)" means the employment and training program under Part C of Title IV of the Social Security Act, administered by a State agency (such as the State employment service) or another public or nonprofit private agency.

PART 653—SERVICES OF THE EMPLOYMENT SERVICE SYSTEM

18. The table of contents for Part 653 is amended by adding a table of contents for Subpart A of Part 653, reserving a Subpart D of Part 653 and adding a table of contents for Subpart E of Part 653 as follows:

Subpart A—Basic Services of the Employment Service System

Sec.
653.1 Scope and purpose of subpart.
653.2 Job information.
653.3 Information on supportive services, training and education opportunities.
653.4 Registration.
653.5 Job order taking.
653.6 Job referral.
653.7 Discriminatory job orders; affirmative action job orders.
653.8 Labor disputes.
653.9 Clearance systems for job orders for nonagricultural workers.
653.10 Job development.
653.11 Employment counseling.
653.12 Employment service testing.
653.13 Employer services.

* * * * *

Subpart D—Services to the Handicapped [Reserved]

Subpart E—Support Services

653.400 Scope and purpose of subpart.
653.401 Labor market information (LMI) program.
653.402 Occupational analysis activities.
653.403 Multistate labor market area agreements.
653.404 Automated systems.
653.405 Test research and development activities.
653.406 Participation in administration of related Federal, State and local programs.
653.407 Coordination with Comprehensive Employment and Training Act (CETA).
653.408 Participation with community programs.
653.409 Public information service.

Authority: Wagner-Peyser Act of 1933, as amended, 29 U.S.C. 49 *et seq.*; 5 U.S.C. 301; unless otherwise noted.

19. Subpart A of Part 653 is added to read as follows:

Subpart A—Basic Services of the Employment Service System

§ 653.1 Scope and purpose of subpart.

(a) This subpart sets forth those basic employment services which each State agency shall provide to the public. Subparts B, C and D of this Part 653 describe the special efforts which State agencies must make in providing services to MSFWs, veterans and the handicapped, respectively.

(b) The basic services described in this subpart are the principal ES services which lead to placement of individuals into employment.

(1) Sections 653.2 and 653.3 describe services which must be available to all individuals, regardless of whether they are registered with the employment service.

(2) Sections 653.4 through 653.8 describe the registration process and those services which may only be provided to applicants.

(3) Sections 653.9 through 653.12 describe those services which are provided employers in eliciting job orders, accepting and servicing those job

orders, and assisting employers to make better use of the employment service system.

§ 653.2 Job information.

(a) State agencies shall compile job information for the purpose of providing it to the public.

(b) Each State agency shall make available job information with respect to local office areas to all individuals and, if desired by an individual, job information with respect to other areas within the State. Upon request from an individual, State agencies shall assist an individual to obtain job information about jobs in other States in which he/she may have an interest in employment.

(c) Job information available to the public about specific job openings listed with a State agency shall include:

(1) Job title and hiring specifications;

(2) Salary or wage range;

(3) Starting date of employment;

(4) Anticipated duration of employment;

(5) Any special terms and conditions of employment identified by the employer;

(6) Where applicable, notice of affirmative action specification and target group(s) encouraged to apply;

(7) total base hours to be worked each week, and any overtime indicated;

(8) Location of worksite, when appropriate.

(d) State agencies shall insure that the policies for maintaining confidentiality of records and for disclosure of information at 20 CFR 602.18 and 604.16 are adhered to in providing job information.

§ 653.3 Information on supportive services, training, and educational opportunities.

Each State agency shall provide to the public on request information on supportive services, training and educational opportunities that are available from other agencies (e.g., CETA, WIN, State Welfare, Veterans Administration).

§ 653.4 Registration.

(a) State agencies shall register as a job applicant any individual legally qualified to work in the United States without regard to place of residence, current employment status, or occupational qualifications. Registration shall consist of the taking of an application which includes the recording of an individual's availability for employment or training and/or employability development services. State agencies shall obtain from an applicant only that information which is necessary to determine the applicant's qualifications and facilitate placement on a job, and to satisfy ETA reporting requirements.

(b) Registration, including all ETA required data elements, shall have been completed prior to:

(1) Job referral;

(2) Job development;

(3) Employment counseling; or

(4) Employment testing, except when testing is being done solely as a service for another agency or organization or for research purposes.

(c) Except as otherwise required by ES regulations, State agencies may require full or partial applications in registering individuals. When establishing State agency policy on requiring full or partial applications, State agencies shall consider the extent to which a full application is necessary for offering services such as job development, employment counseling, and job referral from the active application file when the applicant is not physically present, i.e., the extent to which such services require knowledge of the applicants' skills, knowledge, and abilities. State agencies shall, however, require employment service staff to accept a full application from any individual who requests to file a full application.

(d) No inquiry is to be made regarding the union or nonunion affiliation of an applicant, nor is such information to be recorded on the applicant record.

§ 653.5 Job order taking.

(a) State agencies shall accept job orders from an employer except for:

(1) Job orders from an employer who has had services discontinued in accordance with the provisions at Subpart F of Part 658 of this chapter;

(2) Job orders which contain specifications which are in violation of Federal, State, or local laws such as laws governing wages, hours, child labor, or housing standards where housing is offered as a condition of work;

(3) Job orders which contain discriminatory provisions in accordance with § 653.7;

(4) Job orders involving labor disputes in accordance with § 653.8;

(5) Job orders on which a job referral may result in a monetary or other charge being made to either the employer or the applicant;

(6) Job orders from farm labor contractors who are not registered with the Employment Standards Administration where required by Federal law and who do not possess a valid State certificate where required by State law; and

(7) Job orders which specifically designate the individual to be referred; except that State agencies may accept an agricultural job order for specific crew leader or worker preferred by the employer, provided the order meets the nondiscrimination criteria.

(b) Job orders from agricultural and related industry establishments and from certain food processing establishments which require recruitment from outside the local office area shall be serviced according to § 653.108, *Services for Migrant and Seasonal Farmworkers*. These establishments are identified by a Standard Industrial Classification (SIC) code of 01 through 07, except 027, 074, 078, 0752, and 0761, or an SIC code of 201, 2033, 2035, or 2037.

(c) Job orders accepted by State agencies shall contain only that information which is necessary to select qualified applicants for job referral and to satisfy ETA reporting requirements.

(d) Job orders from United States and foreign employers to recruit U.S. workers for employment at locations outside the U.S. are subject to the requirements of these regulations irrespective of the laws of the Country in which the employment is located. Prior to performing any service under a job order of this type, the State agency must have a written understanding with the employer on the particulars of the referral activity and copies of the job order and written understanding must be sent to the regional office.

§ 653.6 Job referral.

(a) Every attempt shall be made to refer applicants to jobs which utilize the applicant's highest skills, knowledge, and abilities in keeping with the information provided by the applicant and the employer.

(b) Preference in referring applicants shall be given to those who are veterans pursuant to § 653.221. In the case of referrals on affirmative action job orders, the provisions of § 653.7 shall be followed.

(c) No referral shall be made which results in a charge or fee being levied on the applicant for referral to a job or on the employer for hiring applicants referred by the employment service.

(d) Applicants may be referred to job orders indicating that union membership is required after obtaining employment: *Provided*, That the applicant concurs in referral to such a job opening and that such a membership requirement is legal in the State where the job opening exists.

(e) When the State agencies are performing services under grants, subcontracts or agreements with other

Federally funded programs (e.g., CETA, WIN, Job Corps) referrals to such programs shall be made in accordance with the regulations in effect for the program.

§ 653.7 Discriminatory job orders; affirmative action job orders.

(a) State agencies shall promote the equal employment opportunity of all applicants on the basis of their skills, knowledge, and abilities as determined from the information provided by the applicant.

(b) State agencies shall not accept any discriminatory job orders. A discriminatory job order is one which indicates a preference or requirement for workers of a specific race, color, religion, sex, age, national origin, citizenship or physical or mental status unrelated to job performance, except if the requirement is a bona fide occupational qualification (BFOQ) under the Equal Employment Opportunity Commission regulations set forth at 29 CFR Parts 1604, 1605, and 1627.

(c) Whenever an employer submits a job order which is determined to be discriminatory, the State agency shall inform the employer that the job order may not be accepted and the reason why, unless the employer withdraws the discriminatory specifications.

(d) State agencies shall accept affirmative action job orders which seek qualified applicants who are members of a specified group which for reasons of past custom, historical practice, or other nonoccupationally valid purposes have been discouraged from entering certain occupational fields. To be accepted, an affirmative action job order must result from a court order, the directives of a fair employment practices authority, the affirmation action provisions of a government contract, grant, loan, or the provisions of a Federal, State, or local law or a voluntary affirmative action plan adopted pursuant to the Affirmative Action Guidelines of the Equal Employment Opportunity Commission set forth at 29 CFR Part 1608.

(e) If the employer asserts that the job order is an affirmative action job order and cites an authority for that order described at paragraph (d) of this section, the State agency shall note on the order that it is an affirmative action job order, with the authority provided and the target group(s) requested.

(f) In making job referrals on affirmative action job orders, State agencies shall make every effort to include a significant number of qualified applicants from the target group(s) to enable the employer to meet its affirmative action obligations. In referring qualified individuals to affirmative action job orders, veterans referral priorities in § 653.221(a)(7) shall be followed, i.e., qualified veteran applicants, including veterans who are members of the affirmative action target group(s), will be given preference in referral; thereafter all qualified applicants, including members of the affirmative action target group(s), shall be referred.

(g) State agencies shall attempt to service affirmative action job orders from applicants currently available and through active recruitment in the local community, especially through local public agencies such as the CETA prime sponsors.

(h)(1) An employer asserting a BFOQ has the burden of proving a BFOQ exists. A BFOQ shall be interpreted narrowly in accordance with the Equal Employment Opportunity Commission regulations set forth at 29 CFR Parts 1604, 1605, and 1627.

(2) A job order asserting a BFOQ based on religion shall be accepted if the employer can demonstrate that the job duties are such that they can only be performed by an individual who is a member of the specified religious denomination. In addition, religious corporations, associations, educational institutions or societies, but not other employers, may specify a restriction or preference for individuals of a particular religion to perform work connected with the carrying on of their activities.

(3) An otherwise discriminatory job order may be accepted if the job order is for training or employment in a Federal or Federally assisted employment or training program in which participation is limited to persons of the group(s) specified in the job order, or if the job order limitation is required by Federal law or a State law not in conflict with Federal law, such as a child labor law.

§ 653.8 Labor disputes.

(a) State agencies shall make no job referral on job orders which will aid directly or indirectly in the filling of a job opening which is vacant because the former occupant is on strike, or is being locked out in the course of a labor dispute, or the filling of which is otherwise an issue in a labor dispute involving a work stoppage.

(b) Written notification shall be provided to all applicants referred to jobs not at issue in the labor dispute that a labor dispute exists in the employing establishment and that the job to which the applicant is being referred is not at issue in the dispute.

(c) When a job order is received from an employer reportedly involved in a labor dispute involving a work stoppage, State agencies shall:

(1) Verify the existence of the labor dispute and determine its significance with respect to each vacancy involved in the job order; and

(2) Notify all potentially affected staff concerning the labor dispute.

(d) State agencies shall resume full referral services when they have been notified of, and verified with the employer and workers' representative(s), that the labor dispute has been terminated.

(e) State agencies shall notify the regional office in writing of the existence of labor disputes which:

(1) Result in a work stoppage at an establishment involving a significant number of workers; or

(2) Involve multi-establishment employers with other establishments outside the reporting State.

§ 653.9 Clearance system for job orders for nonagricultural workers.

(a) This section applies to all clearance activities on job orders seeking nonagricultural workers, except that:

(1) In areas covered by multistate agreements under § 653.403, clearance activities shall be conducted in accordance with an approved multistate agreement; and

(2) Job orders seeking migrant food processing workers shall be handled in accordance with § 653.108.

(b) Each State agency shall cooperate with the ETA in establishing and maintaining a system for facilitating the movement of nonagricultural workers between labor market areas within the State (intrastate clearance), or between the States (interstate clearance). In doing so, each State agency shall:

(1) Serve applicants by referring them to job openings suitable for them when they desire employment in a State different from where they live, or when they cannot be placed locally and will accept employment elsewhere;

(2) Service employers who request such assistance by locating, selecting, and referring qualified applicants from other States when such applicants are not available within the State; and

(3) Recruit qualified applicants from sources within the State before resorting to interstate clearance unless:

(i) The area is covered by a multistate labor market area agreement; or

(ii) The State agency anticipates a shortage of workers within the State.

§ 653.10 Job development.

(a) State agencies shall insure that local offices provide job development

for those applicants who can best benefit from such assistance.

(b) State agencies shall develop and implement specialized techniques to facilitate the placement of qualified applicants in jobs which have traditionally been limited primarily to individuals of the opposite sex.

(c) State agencies shall develop and implement specialized techniques to assist affected applicants, such as displaced homemakers, to overcome artificial barriers to entry or reentry into the labor market.

§ 653.11 Employment counseling.

(a) Each State agency shall provide employment counseling for applicants who request, or who otherwise have been identified as needing, employment counseling services and who accept referral to counseling.

(b) Each State agency's employment counseling service shall have as its objective to assist applicants with the problems of vocational choice, occupational change, or job adjustment which interfere with obtaining or holding suitable employment.

(c) Each State agency shall insure that Job Service staff recognized applicants in need of employment counseling and refer them for employment counseling service.

(d) Each State agency shall insure that employment counseling is provided by qualified and trained employment counselors or counselor trainees.

(e) Each State agency shall maintain a separate counseling record on each applicant counseled and preserve the confidentiality of information and records on counseled applicants.

(f) Each State agency's employment counseling staff shall:

(1) Administer, or arrange to have administered by appropriate Job Service staff, only those tests approved by the ETA;

(2) Assist the applicant in developing a vocational plan which shall be part of the applicant's counseling record and which shall be reflected in the assignment of occupational classifications to the applicant; and

(3) Refer applicants to other community resources for training and other services which the State agency is not equipped to provide and which will improve the applicant's employability.

(g) Each State agency shall cooperate with schools, community agencies, CETA prime sponsors, and other public organizations which also provide counseling and guidance services or which have clients who can benefit from employment counseling services of the State agency.

§ 653.12 Employment testing.

(a) Each State agency shall administer an employment testing program in accordance with the provisions of:

(1) 41 CFR Part 60–3, *Uniform Guidelines on Employee Selection Procedures;*

(2) 29 CFR Part 1627, *Records To Be Made or Kept Relating to Age; Notices To Be Posted; Administrative Exemptions;* and

(3) The Department of Labor's regulations on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, which have been published as 29 CFR Part 32 at 45 FR 66706 (October 7, 1980).

(b) In operating the testing program, the State agency shall:

(1) Administer only those tests approved by the ETA, using the specific instructions contained in the manual for each test and required test materials, equipment and facilities;

(2) Use only staff trained in the appropriate administration of each ETA approved test(s);

(3) Provide for reporting test results in an appropriate form to individuals, employers and other organizations;

(c) The State agencies may:

(1) Provide for testing apprenticeship candidates for Joint Apprenticeship Committees and/or national unions and testing employed workers for promotion or transfer and civil service candidates; and

(2) Provide for release of certain testing materials to other organizations, under procedures designed to safeguard their administration and use and assure adequate security to protect their integrity. Copies of such procedures shall be sent to the appropriate ETA Regional Office for Federal approval prior to the release of testing materials.

§ 653.13 Employer services.

(a) Each State agency shall establish and maintain an employer services program which:

(1) Solicits job orders from employers and promotes the maximum use of employment service facilities;

(2) Provides information on labor market conditions and other subjects of interest to the employers;

(3) Provides information to employers covered by the Federal contractor job listing program regarding the employers' listing and reporting responsibilities under the provisions of Section 2012 of Title 38, United States Code and the Department's veterans' affirmative action regulations at 41 CFR Part 60–250; and

(4) Elicits information from employers, including individual job requirements, anticipated hiring, composition and size of work force, and need for employment services, which will contribute to the State agencies' ability to plan and provide services to employers.

(b) States are authorized to provide technical services to employers including but not limited to job analysis services, affirmative action planning assistance, test selection, turnover and absenteeism control, job evaluation information and other support directed towards work force stabilization.

§ 653.103 [Amended]

20. § 653.103, *MSFW job applications,* is amended, by removing the citation "651.7" and inserting in lieu thereof the citation "651.10."

§ 653.108 [Amended]

21. Paragraph (c)(1) of § 653.108, *Requirements for intrastate and interstate job orders seeking agricultural workers,* is amended by adding the word "or" between the words "citizenship" and "mental" and removing the phrase ", or veteran or nonveteran status."

22. A new Subpart D—Services to the Handicapped is added and reserved as follows: Subpart D—Services to the Handicapped [Reserved]

23. Subpart E of Part 653 is added to read as follows:

Subpart E—Support Services

§ 653.400 Scope and purpose of subpart.

Subpart A of this Part 653 sets forth the basic services of the employment service system. This subpart sets forth the services which support those basic services.

§ 653.401 Labor market information (LMI) program.

States agencies, under the direction of the ETA, with appropriate assistance from the Bureau of Labor Statistics (BLS) shall:

(a) Develop and maintain an LMI program to collect, analyze, and issue information on current and anticipated labor market developments and opportunities for employment and training;

(b) Submit plans as part of the Program and Budget Plan (PBP) each fiscal year for using any funds specifically allocated for LMI activities;

(c) Supplement LMI as appropriate to meet individual State and area needs; and

(d) Disseminate and explain LMI as requested by appropriate groups (e.g., CETA prime sponsors, Vocational Education Agencies, State Employment and Training Councils).

§ 653.402 Occupational analysis activities.

(a) The ETA shall design and, in cooperation with State agencies, maintain an occupational analysis program for the purpose of developing improved occupational information which may then be used to develop job search and career guidance information and techniques. This program shall include collecting, analyzing, and organizing information about the duties and performance requirements of jobs and the relationships among jobs.

(b) State agencies shall inform the ETA of changes that occur in occupations within their State (e.g., new or emerging occupations, changes in job requirements).

§ 653.403 Multistate labor market area agreements.

When a single labor market area covers part of two or more States, the State agencies involved shall establish and maintain by a written agreement adequate arrangements and procedures to assure that applicants have full access to job opportunities and employers have full access to the available labor supply within the area, without regard to State boundaries. Copies of such agreements shall be sent to the appropriate ETA Regional Office(s).

§ 653.404 Automated systems.

(a) State agencies shall cooperate with ETA in the establishment and maintenance of automated systems designed to aid in the more effective administration and operation of employment service programs, and which assist the Secretary in carrying out the provisions of section 312(f) of CETA.

(b) ETA shall assist in appraising and selecting sites for the establishment of automated systems. The ETA shall:

(1) Provide assistance to State agencies in establishing automated systems and making them operational; and

(2) Monitor implementation of the systems and their subsequent operation.

(c) State agencies shall insure that:

(1) ES Staff, in making job referrals based on the output of automated matching systems, shall follow the requirements for preference in job referral of veteran applications established at § 653.221(a)(7) and for filling job orders from employers with affirmative action obligations at § 653.7;

(2) Information on applicants and employers in the automated system shall be used in ways consistent with the policies for maintaining confidentiality of records and for disclosure of information at 20 CFR §§ 602.18 and 604.16.

(d) Costs for the implementation and maintenance of computer-assisted systems will be shared with other ETA programs in accordance with ETA fiscal standards.

§ 653.405 Test research and development activities.

(a) The ETA shall design, and in cooperation with specified State agencies, maintain a test research and development program for the purpose of developing and validating tests used in counseling and selection of employment service applicants in accordance with ETA standards and Federal requirements.

§ 653.406 Participation in administration of related Federal, State and local programs.

(a) Each State agency shall participate in the administration of related Federal, State and local programs to the extent required by Federal law; regulation or directive of the Secretary; or agreement between the Secretary and the agency administering such a program.

(b) Each State agency shall participate in the administration of programs established exclusively under State or local law only to the extent that the costs of doing so are paid to the State agency by the agency administering such a program.

(c) A State agency shall make information from employment service files available to a public agency with any duty or responsibility under Parts A or D of Title IV of the Social Security Act upon request of the public agency: *Provided, That:*

(1) The costs for doing so are paid to the State agency by the appropriate public agency;

(2) The information concerns an individual receiving benefits or eligible to receive benefits under a program receiving funds under Parts A or D of Title IV of the Social Security Act; and

(3) The information is requested for purposes reasonably necessary for the proper administration of an activity authorized or required under Parts A or D of Title III of the Social Security Act.

§ 653.407 Coordination with Comprehensive Employment and Training Act (CETA).

(a) Each State agency shall establish linkages with State and local prime sponsors and other program sponsors under CETA.

(b) Each State agency shall provide a copy of its annual Program Budget Plan to all CETA prime sponsors within the State.

(c) Each State agency shall enter into written agreements with the State and local prime sponsors. The purpose of such agreements shall be to maximize the level of coordination and minimize duplication between the State agency and State and local prime sponsors. Such agreements shall delineate the responsibility of each and cover at a minimum:

(1) Coorination of employment service activities with employment and training services of the prime sponsors;

(2) A description of arrangements for coordination of employer contacts and other activities involving contact with employers;

(3) Arrangements to coordinate activities including certification, referral, and publicity functions under the Targeted Jobs Tax Credit Program established by the Revenue Act of 1978, 26 U.S.C. 44B, 51–52; and

(4) Arrangements to accept information on available public service employment positions, in order that such information may be provided to unemployment insurance recipients and other applicants for ES services.

(d) A copy of the agreement described in paragraph (c) of this section shall be made available to the RA upon request.

(e) Each State agency shall coordinate with prime sponsor staff in providing priority services to veterans and other eligible persons as required by Chapter 41 of Title 38, United States Code (relating to counseling and employment services to veterans) and in filling job openings covered by the mandatory listing requirements of 38 U.S.C. 2012.

(f) Each State agency shall actively seek to deliver appropriate services to State and local prime sponsors.

(g) Each State agency shall participate in the following activities:

(1) Prime sponsor planning councils;

(2) State Employment and Training Council (S.E.T.C.); and

(3) ETA negotiated agreements for employment services; e.g., recruitment, certification, selection, referral and placement for programs such as Job Corps, HIRE II and the Young Adult Conservation Corps.

§ 653.408 Arrangements with related Federal and community programs.

(a) The ETA is authorized to establish appropriate arrangements with other Federal, State or local agencies, and private and community organizations for the coordination of activities and the exchange of services which relate to the purposes and programs of the Employment Service. Each State agency shall comply with and carry out such arrangements.

(b) Each State agency shall, wherever practicable, cooperate with other public agencies and private nonprofit organizations concerned with employment problems in developing programs for increasing employment opportunities which will result in more efficient administration of ES activities or use of ES funds.

§ 653.409 Public information service.

Each State agency shall keep the public informed through the use of the public information media, e.g., radio, television, and newspapers, about ES operations and services. Disclosure of identifying information on individual applicants or employers is prohibited unless that disclosure is specifically authorized in writing by each applicant and/or employer, and is in keeping with §§ 602.18 and 604.16 of this chapter.

PART 658—ADMINISTRATIVE PROVISIONS GOVERNING THE EMPLOYMENT SERVICE

Subpart E—Employment Service Complaint System

§ 658.411 [Amended]

24. Paragraph (a)(1) of § 658.411, *State agency officials responsible for handling ES-related complaints*, is amended by removing the phrase "or non-veteran."

25. Paragraph (b)(1) of § 658.420, *Establishment of ES complaint system at the ETA regional office*, is amended by removing the phrase "or non-veteran."

(Wagner-Peyer Act of 1933, as amended, 29 U.S.C. 49 et seq.; 5 U.S.C. 301; and 38 U.S.C. Chapters 41 and 42)

Signed at Washington, D.C., this 19th day of January 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81-2471 Filed 1-22-81; 8:45 am]

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Part X

Department of Energy

Economic Regulatory Administration

Mandatory Petroleum Price Regulations; Retroactive Amendments to "V" Factor of Refiner Cost Allocation Formulae

DEPARTMENT OF ENERGY

Economic Regulatory Administration

10 CFR Part 212

[Docket No. ERA-R-80-30]

Mandatory Petroleum Price Regulations; Retroactive Amendments to "V" Factor of Refiner Cost Allocation Formulae

AGENCY: Economic Regulatory Administration, Department of Energy.

ACTION: Final rule.

SUMMARY: The Economic Regulatory Administration (ERA) of the Department of Energy (DOE) is amending as of April 30, 1974, the definition of the denominator of the "V" factor of the refiner cost allocation formula contained in 10 CFR § 212.83 to reinstate that definition in the form and wording as promulgated in 39 FR 15138 (May 1, 1974), and to repromulgate all subsequent amendments to the definition. This amendment has the effect of requiring that the denominator of the "V" factor represent virtually the total volume of refinery output, including volumes of petroleum coke, petroleum wax, asphalt, road oil and refinery gas. Including all such volumes in the denominator of the "V" factor assures that products subject to price controls bear only their volumetric share of increased costs incurred in the refining process.

DATE: Effective date: April 30, 1974.

FOR FURTHER INFORMATION CONTACT:

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William Funk (Office of General Counsel), Department of Energy Room 6A-099, 1000 Independence Avenue, SW., Washington, D.C. 20585 (202) 252-6736.

SUPPLEMENTARY INFORMATION:

I. Background
II. The Proposed Amendment
III. Comments and Responses
A. Objections on the Merits
B. Legal Objections
C. Enforcement Issues
IV. Amendments Adopted
V. Procedural Requirements

I. Background [1]

In 1979 the definition of "V_n" in the refiner price formula (10 CFR 212.83) (hereafter referred to as the "V" factor) that had been adopted on April 30, 1974, was declared invalid by the District Court for the Eastern District of Texas. In so finding, the court held that in promulgating that definition, the agency (1) had violated 5 U.S.C. 553 by failing to provide notice and comment on the rule, (2) had acted arbitrarily and capriciously by failing to consider the objectives of the Emergency Petroleum Allocation Act (EPAA), and (3) had violated section 4(b)(2)(A) of the EPAA by failing to provide for a dollar-for-dollar passthrough of crude oil costs. The Temporary Emergency Court of Appeals (TECA) upheld the district court on the first two points, but did not address the third.[2]

The "V" factor in the April 30, 1974 rule, as well as in previous Cost of Living Council regulations and subsequent Federal Energy Administration (FEA) regulations, was used to determine the maximum allowable increased crude oil costs that could be passed through in prices of petroleum products subject to price controls. The "V" factor operated through a volumetric apportionment of costs. All petroleum products subject to price controls, as a group, could not bear a greater proportion of crude oil cost increases than their sales volume bore to the total sales volume of all products derived from crude oil. Similarly, certain specified petroleum products, individually, could not bear a greater proportion of crude oil cost increases than the sales volume each such product bore to the total volume of products derived from crude oil sold by the refiner.

When the Economic Stabilization Act of 1970 (ESA), which authorized price controls on petroleum products until April 30, 1974, expired, price controls on "refined petroleum products," a defined term, continued under the EPAA. Five petroleum products previously controlled, however, were not included in the definition of "refined petroleum products" in the EPAA, and, therefore, were exempt from controls. These products were: petroleum coke, petroleum wax, asphalt, road oil, and refinery gas. In anticipation of the expiration of the ESA (and thus the authority to control these five products), the FEA promulgated a rule on April 3, 1974, to delete from the term "covered products" (which term was used to describe products subject to price controls) those five products. The agency did not realize, however, that this change in definition would result in a disproportionate allocation of costs to refined petroleum products under the "V" factor as it then read.[3] When this oversight was discovered, the agency promulgated the April 30, 1974 rule amending the definition of the "V" factor to reinstitute the allocation of increased crude oil costs to all refined petroleum products on the basis of the volumetric proportion of each product's sales to total sales of all products derived from crude oil. It was this rule that the courts have held invalid.

II. The Proposed Amendment

In our September 5, 1980 notice of proposed rulemaking we proposed to adopt, retroactively to April 30, 1974, the "V" factor rule that had been invalidated. Moreover, we also proposed to re-adopt all subsequent amendments to the April 30, 1974 rule, the status of which amendments, although not invalidated by the court's judgment, was not totally clear. As explained in the preamble to that proposal, our intent was to adopt a rule that would, for the periods in question, best further the purposes of the EPAA. We also explained why we believed it both necessary and appropriate to adopt the rule retroactively.

III. Comments and Response

As a general matter, several commenters questioned our good faith in the rulemaking proceeding, suggesting that we had already made up our minds and that the proceeding was a sham. There is no truth in those suggestions. The original proposal was drafted and proposed in the good faith belief that the proposed rule, proposed to be adopted retroactively, would better further the purposes of the EPAA than the rule that would exist in the absence of adopting the proposed rule. The reasons for this belief were reflected in the preamble to the proposed rule. Refiners' vehement opposition to the proposal [4], and the arguments raised in support of that opposition, led to a reconsideration of the proposal and the reasons behind it. Several of the alternatives raised by commenters, although not contained in the proposal, were given serious

[1] The background and the proposed rule were extensively discussed in the preamble to the proposed rule (45 FR 58871, September 5, 1980). That discussion is incorporated herein by reference.

[2] While the validity of the April 30, 1974 rule is no longer involved in litigation, the scope of the judgment with respect to the plaintiff Mobil is currently before TECA on appeal. In our view, the adoption of today's final rule does not affect the appeal, and nothing in the current litigation suggests that the adoption of this rule is inappropriate.

[3] How the change in definition of "covered products" resulted in a disproportionate allocation of costs under the "V" factor is more fully described in the preamble to the proposed rule.

[4] Of the 49 commenters, 43 opposed adoption of the proposed rule. Five resellers and one trade association representing resellers supported the proposal. Of the 43 commenters that opposed the rule, 41 were either refiners or trade associations representing refiners.

consideration as possible further proposals in a continued rulemaking. Nevertheless, after a thorough review of the original proposal, comments thereon, and possible alternatives, we have decided to adopt as a final rule the rule proposed. Our reasons for this action are described in detail below. We recognize that our decision will lead some to believe that their original skepticism in our good faith has been proved correct, but we cannot fail to take the action we believe to be correct, after a thorough consideration of the entire record, merely because some will interpret that action in a false light.

A. Objections on the Merits

A consistent theme in the objections to the proposed rule was that the effect of volumetric apportionment of increased crude oil costs to the five exempt products is inequitable, contrary to market realities, and unreasonable. Essentially, commenters alleged that certain of these products constituted the residual waste of the refinery process and could never recover their volumetric proportion of crude oil costs. Moreover, it was alleged by several refiners that their particular circumstances prohibited them from recouping their volumetric proportion of increased crude oil costs with respect to the five exempt products as a group. Thus, they said, they were forced to under-recoup their increased crude oil costs, which was inequitable, unfair, and led to market distortions by penalizing investment in facilities to produce these five exempt products.

A related comment was that the volumetric apportionment of costs to all controlled products was unreasonable. Again, because the commenters believed the exempt products were the least valuable products—and the controlled products the most valuable—they believed that controlled products *per se* were entitled to a higher than volumetric proportion of increased crude oil costs.

The commenters felt that our 1979 adoption of the gasoline "tilt," where we recognized the importance of allowing a greater than volumetric apportionment of crude oil costs to gasoline, was precedent for allowing the passthrough on several products of the increased crude oil costs volumetrically attributable to the five exempt products.

Some commenters advised that no rule should be promulgated, suggesting that all increased crude oil costs should be available for passthrough on covered products.

Other commenters suggested that DOE could propose a new alternative that would allow passthrough on covered products of only unrecouped increased crude oil costs volumetrically apportioned to the five exempt products. This, they said, would avoid the "double recovery" problem we had noted in the preamble to the proposed rule.

Moreover, in light of our concern, expressed in the preamble to the proposed rule, that failure to adopt any rule could result in substantial increases in banks that might be passed through in a tight gasoline market, other commenters suggested the proper solution was to limit the bank passthroughs, not to change retroactively the cost allocation formula.

Finally, many commenters said that our concern with the effect on enforcement actions of failure to adopt any rule was improper. These commenters claimed that we were trying "to revive otherwise barren allegations of overcharges." *See* comments of American Petrofina, Inc.

In light of these many comments, we extensively reconsidered the proposed rule and the previously articulated reasons for it. First, we have determined that our concern with the possible effects on future gasoline prices is not of overriding importance in this rulemaking. The elimination of the equal application rule (which occurred after the "V" factor proposal was issued), the current size of the banks, the current and projected gasoline market, and the limited length of time left under price controls all suggest that, if a crisis occurs that might make possible large increases in gasoline prices, the more direct and appropriate regulatory response would most likely be further limitations on bank passthroughs or the elimination of the banks.

Nevertheless, we continue to believe a rule that would allow a double recovery of certain increased crude oil costs to be inequitable under the EPAA. One of the principal purposes, if not the paramount purpose, of the EPAA was to mandate a system of price controls. The legislative history and findings and purposes section of the EPAA make clear that the regulations thereunder were to *minimize* the impacts of crude oil shortages. To allow refiners to recover *all* increased costs of crude oil on only those petroleum products subject to controls, while certain products were exempt and able to be sold at market prices, thereby recovering some, all, or more than all the increased cost of crude oil associated with those products, is directly contrary to the spirit and purpose of the EPAA. Such a price regime would also be directly contrary to several of the section 4(b)(1) objectives, *see* FR 58873 for a discussion of these objectives. None of the other objectives, moreover, would be furthered by allowing such a double recovery.

Generally, the commenters did not attack this conclusion. Those who addressed the double recovery problem, however, noted that this problem did not by itself compel the conclusion that the "V" factor proposal was the proper solution. Rather, they suggested, the double recovery problem could be solved by allowing the passthrough on covered products of only the unrecouped increased costs volumetrically attributable to the five exempt products.

We considered this suggestion very carefully because initially it appeared a reasonable and equitable manner of prescribing prices.[5] The major problem with adopting this suggestion on an industry-wide basis was how to determine the "recouped" increased curde oil costs in order to determine the unrecouped crude oil cost increases. For example, it is not necessarily true that the difference between revenues received in the sale of exempt products in a particular month and the revenues received in the sale of exempt products in May 1973 represent "recouped" increased crude oil costs, since this amount would also include increased non-product costs. Even if these separate components could be identified and quantified in the price regulations, there would then be a sequence of recovery issue. While such issues and problems might be resolvable, the result would be very complicated and would require the logical and legal paradox of DOE investigation and audit of revenues received for *exempt* products. Moreover, at least one refiner has stated that it no longer has records of its sales prices for exempt products. These administrative burdens, which would have to be imposed on all refiners, whether or not they might benefit from the rule, as well as on DOE, have to be weighed against whatever benefits might flow from adoption of such a rule.

This complexity and administrative burden was recognized by some commenters. TOSCO, in response, proposed a simplified system. Under that proposal *all* increased crude oil costs would be allocated to covered products, but all increases in revenue for the five exempt products (in any given month) over the revenues received in

[5] Although this alternative was not expressly proposed, we considered it and related alternatives as carefully as the proposed version. While adoption of one of the alternatives might have had to have been preceded by further notice and comment, we did not need to reach that question because, as discussed below, we have determined the proposed "V" factor best furthers EPAA objectives.

May 1973 would be deducted from the refiner's pool of increased product and non-product costs. TOSCO noted that this would be a simple, easily administered system. While this is true, TOSCO's proposal could have particularly detrimental effects if adopted on an industry-wide basis. The increased revenues for the five exempt products for some refiners could well exceed the increased crude oil costs volumetrically attributable to those products in a given month, depending on the type of exempt products produced, their volume, and the market.[6] In this circumstance, refiners would be penalized by profiting in the exempt markets because they would lose the ability to passthrough actual increased costs associated with controlled products on those products.[7] This would conflict with the EPAA objective of economic efficiency and minimizing economic distortion.

Thus, providing a mechanism for passing through on covered products only the unrecouped increased crude oil costs volumetrically attributable to the exempt products would benefit some refiners—to greater or lesser degrees depending on the volume and type of exempt products produced—but would impose certain costs on all refiners, and perhaps significant costs on some refiners depending on the particular regulatory approach adopted.

In assessing the relative burden that would be imposed on refiners by the proposed rule or the suggested alternative, we noted that not all refiners indicated that the proposed rule would preclude them from recouping all costs volumetrically attributable to the five exempt products. Moreover, most commenters did not indicate that problems with cost recoupment applied to all exempted products. Many commenters indicated only that increased costs could not always be recouped in sales of petroleum coke and asphalt. These commenters, however, did not always indicate whether the costs associated with petroleum coke and asphalt were in fact recouped in sales of other exempted products.[8]

In short, we have determined on the basis of the record that the problems that would arguably be caused by the proposed rule—that is, not allowing any recoupment on covered products of increased crude oil costs volumetrically attributed to the five exempted products as a class—would at most impact only some refiners, and only some of these refiners in a significant amount.[9] Given the cost, complexity, and improbability of contriving a rule that would benefit only some refiners without having caused offsetting disequalibria or distortions in the marketplace for exempt products, while imposing some burdens on all refiners, we have determined that the proposed rule should be adopted.

In making this decision, we recognize that the final rule does not result in perfect equity and does not *guarantee* full recovery of increased crude oil costs by all refiners. However, we do not believe that any cost apportionment formula in a price control regime can ever attain these objectives or that Congress expected the price controls under the EPAA to achieve such goals. It is our view that the benefits of the final rule are sufficient to overcome its costs when compared with the costs and benefits of alternatives to it.

In weighing these factors, we have balanced each of the objectives of the EPAA.[10] Specifically, we believe that the volumetric apportionment of increased crude oil costs to covered products preserves an economically sound and competitive petroleum industry. Such apportionment also tends to make covered product prices more equitable among refiners. For example, if two refiners each processed the same number of barrels of crude oil, and each had identical increased crude oil costs, their maximum lawful prices for covered products will be similar under a volumetric apportionment formula. If, however, costs volumentrically attributable to exempt products could in whole or in part be passed through on covered products, the maximum lawful prices for covered products by different refiners could then vary *due solely to volumes of exempt products* sold. These differing prices for covered products, due solely to products not subject to controls, would frustrate the purpose of achieving equitable prices for covered products.

Moreover, were refiners able to pass through on covered products some costs volumetrically attributable to exempt products, false economic incentives could be created that would frustrate the purpose of the EPAA to further economic efficiency and to minimize economic distortion and unnecessary interference with market mechanisms, to the extent practicable under a price control regime. For example, in a softening market for the exempt products and a tight market for covered products, maintaining production or shifting production to greater volumes of exempt products could actually increase a refiner's revenues on covered products, as unrecouped increased crude oil costs on the exempt products could be recouped on the covered products.

The other objectives of the EPAA are less directly pertinent to the volumetric apportionment of increased crude oil costs in our view, and the commenters did not focus on them. We recognize that, with respect to the particular circumstances of those refiners most adversely affected, a combination of volumetric apportionment of increased crude oil costs and market forces may have prevented them from recouping all of these crude oil costs in prices for the exempt products. Thus, as to them, the proposed "V" factor may not have been as economically efficient as would be ideal, may have contained elements of inflexibility, and may have interfered with market mechanisms to a certain degree. Nevertheless, we find that it simply is not practicable now to adopt a cost allocation system that would cure these problems but not cause equal or greater problems in addition. Given the fact that exception relief is available on a case-by-case basis under 10 CFR 205.50 *et seq.*, where there is serious hardship or gross inequity,[11] we believe the adoption of the proposed "V" factor, together with the availability of exception relief in appropriate cases, minimizes any negative impacts of the "V" factor with respect to the EPAA objectives and, to the maximum extent practicable, furthers the objectives of the EPAA.

Finally, we do not believe the adoption of the proposed "V" factor is in any way inconsistent with the adoption of the gasoline "tilt." In the latter case, the record at that time supported a finding that a volumetric apportionment

[6] For example, petroleum wax is a premium product.

[7] For example, Getty Oil was granted exception relief equivalent to the proposal of TOSCO, yet Getty declined that relief.

[8] Of the 37 refiners that commented on the proposal, only 20 alleged that they had been unable to recover in the sale of exempt products the increased crude oil costs volumetrically attributable to exempt products. Only one of the 20 quantified the extent of its under-recoupment.

[9] In this regard, we have considered the number of comments that specifically indicated both the impact and the magnitude of the impact on them. We have also considered the number and nature of requests for exception relief from the "V" factor as adopted on April 30, 1974. Finally, we have considered public comments by refiners on previous rulemakings that raised cost allocation issues.

[10] In considering these objectives, and in comparing volumetric apportionment to other possible schemes of cost allocation, we have analyzed the effects that would have occurred had the proposed rule or alternatives thereto been adopted in 1974 as well as the effects today of adopting this rule.

[11] For example, in a particular case it might well be feasible and appropriate to allow a refiner to pass through on covered products unrecouped crude oil cost increases volumetrically attributable to exempt products.

of both crude oil and non-product costs to gasoline (1) was economically inefficient, (2) unnecessarily interfered with market mechanisms, and (3) resulted in economic distortions. These negative features of the limitation of volumetrically attributable costs to gasoline impacted not just some, but all, refiners. Moreover, we found that this limitation on the cost passthrough for a covered product might have serious impacts on necessary investments in refineries to produce gasoline, which, we believed and time has confirmed, was a product for which additional investments were necessary to preserve an economically sound petroleum industry and to prevent gasoline shortages. Finally, we found an administratively simple manner of allowing the passthrough on gasoline of a greater than volumetrically attributable proportion of increased costs, one that would not create other distortions in the marketplace.

The record in this proceeding does not support equivalent findings to allow a greater than volumetric proportion of increased crude oil costs on covered products in a regime of full price controls.[12] First, the record does not support a simple fixed percentage add-on to the volumetric apportionment of crude oil costs to covered products, because of the wide variance in refiners' production of and recoveries on exempt products. Second, while there are claims by some commenters that the proposed "V" factor would inhibit investment in production of petroleum coke and asphalt, there is nothing in the record that suggests a critical need for such investment, or that as a result of the April 30, 1974 rule necessary investments were not, in fact, made.

In summary, we find that a rule that prohibits a recovery on covered products of costs already recovered on exempt products to be necessary to fulfill the objectives of the EPAA. Moreover, we find that the volumetric apportionment of increased crude oil costs on covered products, with the availability of exception relief in particular cases where such apportionment causes serious hardship or gross inequity, to the maximum extent practicable best furthers the objectives of the EPAA, even when compared with the alternative of allowing on an industry-wide basis only unrecouped increased crude oil costs attributable to the exempt products to be added to the costs of covered products.

B. Legal Objections

A large number of commenters raised what they felt to be legal objections to the proposal, as well as to the rulemaking proceeding itself.

1. *Dollar-for-Dollar Passthrough.* A common claim was that the proposed rule could not be adopted because it violated the dollar-for-dollar passthrough requirement of section 4(b)(2)(A) of the EPAA. It was noted in this regard that the district court in the "V" factor case had specifically held that the original rule, which we proposed to re-adopt, was, because of this provision, beyond the statutory authority of the agency.

We acknowledge that the district court so held, but as noted in the Background, this issue, although appealed, was not addressed by TECA. We must respectfully disagree with the district court's conclusion, as well as the claims of the commenters on this issue.

Section 4(b)(2)(A) in 1974 required that the price regulations under the EPAA provide for "a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers and distributors at the retail level."[13] After February 1, 1976, that section required the regulations to provide for "a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level."[14] With respect to all controlled products, a dollar-for-dollar passthrough of increased crude oil costs was provided under the April 30, 1974 rule by allowing the proportion of costs of the crude oil used in those products to be passed through on those products. With respect to the exempt products, there was never a limitation in the regulations on the increased crude oil costs that could be passed through on those products. Thus, the regulations themselves did not prohibit or restrict the recovery of increased crude oil costs. Even the district court recognized this, for in its Findings of Fact it stated, *"[b]ecause of market conditions and* the amendment of § 212.83(c)(2), Mobil has been unable to recover all of its increased crude oil costs * * *." (Emphasis added). Nothing in our regulations has ever intended or purported to guarantee dollar-for-dollar recovery where market conditions would not allow full recovery. Rather, with respect to controlled products, the regulations have allowed refiners to pass through, if the market would bear it, a volumetric proportion of increased crude oil costs, and with respect to uncontrolled products, refiners have always been free to passthrough all those increased costs that the market would bear. As TECA held in *Cities Service* v. *FEA*, 529 F. 2d 1016, 1024 (1975), "[t]he Allocation Act does not guarantee that all increased costs will be absorbed by the marketplace * * *; rather the Act merely mandates that an opportunity for the pass-through of such costs be provided." Moreover, the regulations have also provided that any refiner that suffers from gross inequity or severe hardship by reason of our regulations may obtain exception relief from the regulations causing the hardship or inequity. Thus, the regulations have fully provided for a dollar-for-dollar passthrough of increased crude oil costs.

2. *Participation by the Office of Special Counsel in the Rulemaking.* Some commenters claimed that the provision in the Department of Energy Organization Act (DOE Act) requiring the Secretary to provide by rule for the separation of regulatory and enforcement functions in the ERA prohibited any participation by the Office of Special Counsel in the rulemaking. *See* 42 U.S.C. 7136(a). That provision of the DOE Act has been implemented in 10 CFR 1001.1, which provides in pertinent part:

> the regulation preparation and enforcement functions delegated to the Administrator of ERA shall be performed by separate entities of the ERA. The Office of the Assistant Administrator for Regulations and Emergency Planning shall be responsible for the preparation of regulations. The Office of the * * * Special Counsel for Compliance shall be responsible for the bringing of individual enforcement actions. No officer or member of the office of the Assistant Administrator for Regulations and Emergency Planning shall have authority to make or concur in any decision by ERA to institute an individual enforcement investigation or adjudicate an individual enforcement proceeding.

Nothing in this regulation precludes the Office of Special Counsel from

[12] The discussion above has focussed on a regime of full price controls such as existed during 1974 and 1975. Once significant petroleum products are not subject to controls, the ability to recover increased crude oil costs volumetrically attributable to those decontrolled products and the original five exempt products is measurably enhanced. In this regard, commenters in this rulemaking generally did not assert the inability to recover costs attributable to decontrolled and exempt products as a group in the period following decontrol of heating oil and diesel oil. Moreover, comments in the decontrol rulemakings in 1976 generally supported continuation of the volumetric apportionment formula.

[13] Under this language it would not appear that refiners were entitled to dollar-for-dollar passthrough. *See Standard Oil* v. *FEA*, 453 F. Supp. 203 (N.D. Ohio 1978).

[14] This requirement lapsed on June 30, 1979, by reason of section 18 of the EPAA, but we accept for purposes of argument that the requirement would have to apply with respect to a rule adopted retroactively to a date before June 30, 1979.

participating in an advisory or consultative role with respect to proposed or final rules. Moreover, nothing in the legislative history of the DOE Act, the Administrative Procedure Act, or sound administrative practices suggests that such a role is inappropriate.[15] Indeed, the recently enacted Regulatory Flexibility Act, Pub. L. No. 96-354, specifically requires proposed and final rules to consider compliance issues. *See* 5 U.S.C. 603(b)(4). Offices and personnel involved in compliance work, such as Office of Special Counsel for Compliance, are natural, if not inevitable, sources for information and input with respect to such issues.

In this rulemaking the Office of Special Counsel has played just such a role. Other offices in DOE, including the Office of General Counsel and the Assistant Secretary for Policy and Evaluation, have also participated in the rulemaking. We believe the participation of the Office of Special Counsel was particularly appropriate in this rulemaking because of its experience with the "V" factor and its consequent ability to assess the impact of the proposal and alternatives thereto with respect to compliance issues.

3. *Adequacy of Notice and Comment.* Several commenters suggested that affording notice and comment on the proposed rule could not cure the failure to provide notice and comment on the April 30, 1974 rule. We are not by this rulemaking proceeding attempting to cure a failure to provide notice and comment in the April 30, 1974 rule. Rather this rulemaking proceeding is a distinct action and, therefore, should and does conform with the appropriate procedural requirements.

Moreover, some commenters alleged that we had already made up our minds and thus the notice and comment were a sham. With respect to this point, we have already indicated that our minds were not made up, that the proposal was in fact a proposal reflecting our tentative conclusions, and that we carefully considered modifying the original proposal on the basis of the comments.

4. *Retroactivity Issues.* A primary legal objection to the proposed rule was its retroactive effect. Refiners and their representatives were virtually unanimous in their view that the rule could not be adopted retroactively. Various reasons were cited. Some commenters believed that absent some explicit statutory authorization for retroactive rulemaking a retroactive rule either was unlawful or there was an almost conclusive presumption against the retroactivity, citing *Transcontinental & Western Air* v. *CAB*, 169 F.2d 893, 894 (D.C. Cir. 1948), *aff'd*, 336 U.S. 601 (1949). We believe that the legislative rulemaking authority contained in the EPAA embraces the authority to adopt retroactive legislative rules under the proper circumstances, notwithstanding the lack of an explicit statement to that effect in the EPAA. We have articulated this belief in the past, *see* 44 FR 21810 (April 12, 1979),[16] and court cases have upheld the general authority to issue retroactive rules absent explicit statutory authority, *see, e.g., General Telephone Co. of the Southwest* v. *United States*, 449 F.2d 846 (5th Cir. 1971); *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972). Moreover, the court in *Standard Oil Co.* v. *DOE*, 596 F.2d 1029 (TECA 1978), implicitly recognized that DOE has such authority in the proper circumstances.

Other commenters expressed the view that an agency is prohibited from adopting a retroactive rule to replace a rule invalidated by a court *except* under the authority and supervision of the court. Although specifically requested for a citation for such a proposition of law, these commenters did not provide such a citation. Rather, they cited *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944). That case, however, did not hold or suggest that an agency could retroactively promulgate a rule to replace a voided rule *only* under the authority and supervision of a court. Instead, in that case the Supreme Court itself recognized the need for a retroactive rule to replace the voided rule and directed that a retroactive rule be promulgated.[17] That a court in its equitable jurisdiction can direct an agency to promulgate a retroactive rule to replace the rule voided by the court certainly does not logically suggest that an agency acting under its statutory authority cannot independently promulgate a retroactive rule to replace a voided rule in the absence of court direction or supervision.

Finally, various commenters took issue with our balancing of the considerations that can justify a retroactive legislative rule. *See, e.g., Retail, Wholesale Department Store Union NLRM, supra.*

We believe that the applicable factors listed in that case support the adoption of the proposed "V" factor rule on a retroactive basis.

First, the retroactive adoption of this rule does not represent an abrupt departure from well-established practice; rather, it merely attempts to fill a void in an unsettled area of the law. Not a single commenter indicated that it did not contemporaneously understand the "V" factor as promulgated in the April 30, 1974 rule. To our knowledge, only one refiner in the nation did not file cost allocation reports in accordance with the terms of the April 30, 1974 rule. Thus, whether or not that rule was valid at the time, it was clearly the well-established practice. Moreover, we believe that the decision in the *Mobil* case has created an unsettled area of the law with respect to the applicable law after April 30, 1974. That is, while it is clear that the April 30, 1974 rule was held invalid, the conclusions of law of the district court only addressed that rule and the judgment only declared void that rule. Consequently, rules adopted after that date that repromulgated the "V" factor have not been declared void. The fact that TECA authorized the plaintiff *Mobil* to pass through on covered products increased crude oil costs attributable to exempt products for a period after that date, however, has led to questions as to the applicable law after that date with respect to refiners not parties to the case. By adopting this rule retroactively to April 30, 1974, we will settle these questions of law.

Second, we are aware of only one refiner that claims to have relied on any other rule than the April 30, 1974 rule in filing cost allocation reports or for any other purpose. Indeed, all other refiners have manifested compliance with the terms of the April 30, 1974 rule.[18] Thus,

[15] A few commenters claimed that separation of functions provision in 5 U.S.C. 554(d) somehow applied here. That provision does not apply to informal rulemakings pursuant to 5 U.S.C. 553, such as this rulemaking.

[16] This **Federal Register** notice was a draft report by DOE on retroactive application of rules and rule interpretations, which notice solicited public comments on the report. The report distinguished between the retroactive effect of rulings and interpretations and legislative rules, published with notice and comment, with a retroactive effective date. None of the fourteen comments received in response to the notice denied that DOE had the authority, after notice and comment, to adopt a retroactive legislative rule in appropriate circumstances.

[17] Indeed, the Court made clear that, in directing the Administrator to promulgate a retroactive rule, it "would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction." 322 U.S. at 623. The Court also made clear that the authority under which the Administrator would promulgate the new rule was the authority of the statute, not any authority derived from the court. Moreover, the statute in question there did not expressly authorize retroactive rules.

[18] Some commenters claimed that their compliance with the April 30, 1974 rule was irrelevant, and that we confused compliance with reliance. For purposes of the balancing test in the *Retail, Wholesale* case, the issue is whether persons have relied on a rule *other* than the one to be adopted retroactively. Only one commenter claimed to rely on a rule different from the "V"

adoption of the proposed rule recreates the identical regulatory scheme that existed prior to the court decision in the *Mobil* case, a regulatory scheme that the industry had broadly and consistently obeyed.

Third, we do not believe that any burden is imposed on refiners by the retroactivity of this rule. In this regard, it is important to distinguish between the "burdens" that would be imposed on refiners by a volumetric apportionment formula *per se* and the "burdens" caused by the retroactive effect of this rule. This is, under the *Retail, Wholesale* case, the issue is whether adopting a rule retoactively would cause burdens that would not have been caused had the rule been promulgated prospectively at the time to which it is now to be adopted retroactively. No commenter claimed that the retroactive adoption of the proposed rule caused burdens that would not have been equally caused by the April 30, 1974 rule, had it been validly promulgated. Indeed, as this rule merely recreates the situation obtaining prior to the invalidation of the April 30, 1974 rule, it cannot by definition create a different or greater burden.[19] Consequently, we do not believe adoption of this rule retroactively causes any *additional* burden to refiners. Rather, failure to adopt this rule would retroactively create burdens for the customers of refiners. This is so because refiners that complied with the terms of the April 30, 1974 rule might today attempt to impose on their customers retroactively the burden of a windfall resulting from judicial invalidation of that rule, even though we have now found that rule reasonable and proper.

Finally, we find a compelling statutory interest in adopting a rule retroactive to April 30, 1974, that will preclude passing through to covered products increased crude oil costs already recovered on exempt products. Previously in the preamble we have discussed the reasons why we believe the preclusion of "double recoveries" is compelled by the objectives of the EPAA. Perhaps, had the April 30, 1974 rule never been promulgated and had refiners relied on a different rule in their cost allocation reports and pricing, to adopt a wholly new rule seven years later to preclude "double recoveries" would not be justified, because of refiners' reliance on the former rule. That, however, is not the case here. As has been demonstrated above, refiners have not relied on any different rule in their cost allocation reports or pricing. Thus, we are not changing the ground rules. Consequently, we believe the compelling statutory interests are controlling and fully justify the adoption of the rule retroactively to April 30, 1974.[20]

As we mentioned in the proposal of the "V" factor, wholly apart from the considerations adumbrated in the *Retail, Wholesale* case, we believe that the case of *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944), fully supports the appropriateness of retroactive rulemaking in this case. While many commenters took issue with us on this point, after our review of the comments, we continue to believe that the similarities between the situation in *Addison* and here are striking and the alleged differences are more apparent than real.

C. Enforcement Issues

In our proposed rule we stated that one of the reasons why we believed the proposal was necessary was that it would maintain the integrity of the price control system. This was due in part, we said, to the fact that "refiners that violated price controls in the past (with respect to matters totally unrelated to the issues involved in this rulemaking) *might assert* a right to avoid any real liability by merely offsetting the amounts in violation against their costs associated with uncontrolled products * * *." (Emphasis added). 45 FR 58874. Several commenters reacted negatively to this statement and inferences which they drew from it.

Specifically they alleged that enforcement concerns were not an appropriate consideration in adopting a retroactive rule and that, even if the proposed retroactive "V" factor rule were lawful, it could not be used to support allegations of overcharges for the periods in question.

As indicated above, the *Mobil* case only held the April 30, 1974 rule invalid. What rules are in effect after that date, therefore, is unclear with respect to persons other than Mobil. Thus, refiners could assert various theories of the law for this period, as indeed they have suggested in attempted refilings. In the absence of this rule these questions might have to be resolved in piece-meal litigation. For example, while Mobile has never claimed the right to recoup on covered products unrecouped increased costs attributable to decontrolled (as opposed to exempt) products, other refiners have so claimed, relying on the *Mobil* decision. The rule adopted today hereby settles these questions of law.

Moreover, we believe that this final rule can and should be enforced retroactively, but it is important to keep in mind the nature of the enforcement that would be involved; it is not criminal prosecution for violation of today's retroactive rule but rather obtaining refunds of overcharges. Nothing in the law or constitution generally prohibits such enforcement of retroactive regulatory provisions. Indeed, the balancing test of the *Retail, Wholesale* case presumes enforcement of the retroactive rule. Moreover, the EPAA itself was on one occasion adopted with retroactive effect, and the legislative history made clear that it could be enforced with respect to that retroactive period.[21]

Above, we have demonstrated (1) why the volumetric apportionment of crude oil costs best furthers the purposes of the EPAA, thereby showing why it should have been adopted on April 30, 1974, and (2) why retroactive promulgation of the rule that should have been in existence at that time is proper today. Such demonstrations, we believe, are sufficient to justify the legality of enforcement today of these retroactively adopted provisions.

Many commenters, however, have claimed that, because the April 30, 1974 rule was declared invalid, their pool of increased costs for the period thereafter can be enlarged, such that alleged violations based on their contemporaneously reported increased costs are either diminished or obliterated.[22] Whatever might be the effect on current enforcement actions were we not to promulgate today's rule, we believe it beyond cavil that enforcement actions to obtain refunds based upon today's rule are lawful and appropriate.

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factor in the April 30, 1974 rule. Whether or not refiners relied on the *validity* of the April 30, 1974 rule, they clearly complied with its terms in their actions and did not rely on any other rule or construction.

[19] With respect to the inherent "burdens" of a volumetric apportionment of costs rule, we have addressed those earlier in this preamble and found them mitigated both by the limited number of refiners that suffer them, the limited amount of burden involved in many cases, and the availability of exception relief in serious cases.

[20] In the *Retail, Wholesale* case, the court mentioned a fifth consideration—whether the case was one of first impression. As the discussion in that case indicates, however, that consideration is more appropriate to standards of conduct adopted through adjudication rather than rulemaking. The concept behind that consideration can apply to rulemaking, but that concept is, we believe, expressed in the other considerations as well. Therefore, to the extent that consideration applies to rulemaking, we believe it is met in this rule.

[21] On August 31, 1975 the EPAA expired. On September 29, 1975, the expiration date was amended, retroactive to the earlier date to continue uninterrupted the regulatory scheme. *See* Pub. L. No. 94-99, 89 Stat. 481 (1975).

[22] It should be noted here that not all price violations are dependent on the pool of increased costs.

Some commenters, believe, however, that once a court has determined the April 30, 1974 rule invalid, they have some undefined inalienable property right to pass through on covered products the increased crude oil costs which the April 30, 1974 rule prohibited from being passed through on covered products. We do not believe that to be the case. To the contrary, we do not believe their interest in those increased costs today is any greater than it was or would have been in April 30, 1974. Refiners complied with the "V" factor rule, did not rely on any other cost apportionment formula, and filed contemporaneous reports claiming certain increased costs.

In the absence of today's rule, refiners would retroactively claim increased costs to be applied to these past periods. Generally, our regulations allow for refiling of increased costs only within one year of the original report. 10 CFR 212.126(d)(1). Exceptions are only made for "good cause." 10 CFR 212.126(d)(2). In adopting this rule today, we are in effect determining that no good cause exists to allow refiners on an industry-wide basis to retroactively include increased crude oil costs volumetrically attributable to exempt products. No good cause exists because a rule that precludes the passthrough on covered products of costs not volumetrically attributable to those products best furthers the purposes of the EPAA.

In sum, we are not adopting today's rule to "protect" or "revive" enforcement actions. If we did not believe that today's rule on the merits best furthered the purposes of the EPAA and that, after careful consideration of the court cases dealing with retroactive rulemaking, it properly could be adopted with retroactive effect, we would *not* adopt today's rule. Having determined, however, that the rule *does* best further the purposes of the EPAA and that it *is* appropriate to give it retroactive effect, we believe that enforcement of the entire regulatory scheme, including proceeding against overcharges, by seeking refunds, is both proper and equitable. Adoption of this rule will protect the integrity of a coherent regulatory structure. To fail to enforce all the terms of that structure would undermine the purposes of the EPAA that today's rule is intended to further and impose burdens on the customers of refiners and the ecomomy as a whole by not obtaining the refunds that are due to them.

III. Amendments Adopted

The amendments adopted today institute a definition of "V_n" in 10 CFR 212.83(c)(2) effective April 30, 1974. This definition changes the definition of the same term adopted on January 14, 1974 (39 FR 1924, January 15, 1974). This previous definition of "V_n" included only the volumes of "covered products," a defined term which at the time effectively encompassed all products produced from crude oil. The term "covered products," however, was amended on April 3, 1974, (39 FR 12343, April 5, 1974) to include only crude oil, residual fuel oil and "refined petroleum products," which itself was a defined term. The effect of the April 3, 1974 amendment, therefore, was to change the meaning of the definition of "V_n" even though the definition of "V_n" itself had not changed. This effect was not perceived by the agency at the time of the promulgation of the April 3, 1974 rule.

The amendment adopted today, retroactive to April 30, 1974, defines "V_n" to include not only "covered products" but also "all products refined from crude petroleum other than covered products." This has the effect, therefore, of re-creating for the period after April 30, 1974, the regulatory scheme that existed prior to April 3, 1974, as well as the regulatory scheme adopted on April 30, 1974, but which was later invalidated by the courts.

In addition, we are repromulgating the subsequent amendments to the definition of "V_n", its deletion and the substitution of the definition of "V_o", its subsequent amendments, the definition of "R_t", and subsequent amendment to that definition. Each of these is repromulgated as of the date on which each was originally effective.

IV. Procedural Requirements

A. Section 404 of the DOE Act

Pursuant to the requirements of Section 404(a) of the Department of Energy Organization Act, we have referred these amendments to the Federal Energy Regulatory Commission (FERC) for a determination whether they would significantly affect any matter within the Commission's jurisdiction. The Commission has advised us that it "has decided not to exercise its discretion to determine that the proposed rule significantly affects any function within the jurisdiction of the Commission."

B. National Environmental Policy Act

It has been determined that these amendments would not significantly affect the quality of the human environment within the meaning of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321 *et seq.*), and therefore, neither an environmental assessment nor an environmental impact statement is required by NEPA and the applicable DOE regulations for compliance with NEPA.

C. Regulatory Analysis

The draft regulatory analysis prepared in conjunction with the proposed rule focused largely upon the possible impacts on future gasoline prices of a failure to adopt any rule in this proceeding. As noted above, our further analysis, especially in light of the public comments, has convinced us that possible impacts on future gasoline prices, with or without this rule, are better addressed through regulatory action more specifically addressed to that issue in light of the circumstances that make substantial and rapid price increases possible. Such action might include further limitations on the passthrough of banks or partial or total elimination of banks. In any case, because the magnitude of price impacts on future gasoline sales is not the basis for our final rule, the draft regulatory analysis was not finalized. Rather the analysis prescribed by Executive Order 12044 and DOE Order 2030 is contained in the preamble to this rule, which encompasses and constitutes our final regulatory analysis.

(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, and Pub. L. 95-70; Department of Energy Organization Act, 42 U.S.C. § 7101 *et seq.*, Pub. L. 95-91; E.O. 11790, 39 FR 23185; E.O. 12009, 42 FR 46267)

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

Issued in Washington, D.C., January 16, 1981.

Lynn R. Coleman,

Deputy Secretary, Department of Energy.

§ 212.83 [Amended]

1. Effective April 30, 1974, 10 CFR 212.83(c)(2), as published in 39 FR 1924 (January 15, 1974), is amended by revising the definition of "V_n" to read as follows:

V_n = The total volume of all covered products and all products refined from crude petroleum other than covered products sold in the period "n" (the consecutive three-month period of the preceding year such that the middle

month of the period corresponds to the current month "u").

2. The subsequent amendments to the definition of "V_n", its deletion and the substitution of the definition of "V_u", the subsequent amendments to the definition of "V_u", the definition of "R_t", and subsequent amendment to that definition are hereby repromulgated as published in the following **Federal Register** notices, effective on the dates indicated therein:

39 FR 30828 (August 26, 1974)
39 FR 42368 (December 5, 1974)
40 FR 10444 (March 6, 1975)
41 FR 5111 (February 4, 1976)
41 FR 15330 (April 12, 1976)
42 FR 5023 (January 27, 1977)
42 FR 39195 (August 3, 1977)

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Friday
January 23, 1981

Part XI

Department of Labor

Employment and Training Administration

Unemployment Compensation for Civilian Employees

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 609

Unemployment Compensation for Federal Civilian Employees; Revision of Regulations

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule.

SUMMARY: The Department of Labor proposes to revise the regulations for the Program of Unemployment Compensation for Federal Civilian Employees (UCFE Program). Changes to the regulations incorporate statutory amendments, which principally concern the finality of Federal findings as to the reasons for termination of Federal employment; the treatment of the Virgin Islands as a participating State in the Federal-State Unemployment Compensation Program; and the Federal share of the costs of benefits on joint claims under the UCFE Program and State unemployment compensation laws. The regulations are also reorganized and revised to state the rights and obligations of claimants for the benefits and to clarify the respective duties and responsibilities of the Federal Government and the State agencies. The setting forth of this information in each Part dealing with a separate unemployment compensation program conforms to the more recent practice in writing regulations in this area.

DATE: Written comments must be received by the Department on or before March 24, 1981.

ADDRESS: Send comments on this proposal to the U.S. Department of Labor, Employment and Training Administration, Room 7000, Patrick Henry Building, 601 "D" Street NW., Washington, D.C. 20213. All comments received will be available for public inspection during normal business hours, in Room 7000 at the above address.

FOR FURTHER INFORMATION CONTACT: Charles W. Reynolds, Unemployment Insurance Service, at (202) 376-6222. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The unemployment compensation program for Federal civilian employees is a program financed by Federal funds to furnish unemployment benefits to eligible indiciduals who are separted from Federal employment and are unable to obtain work. The UCFE Program was created by Pub. L. 83-767, approved on September 1, 1954. It has been codified in 5 U.S.C. 8501-8508.

On October 20, 1976, the Unemployment Compensation Amendments of 1976 (Pub. L. 94-566, 90 Stat. 2267) were enacted. Section 116 of the 1976 Amendments authorized the inclusion of the Virgin Islands in the Federal-State Unemployment Compensation Program, and this became effective on January 1, 1978, with the approval of the Virgin Islands unemployment compensation law. This has an effect on the manner in which the UCFE Program is administered in the Virgin Islands, and requires conforming changes in the regulations.

Section 214 of the 1976 Amendments amended 5 U.S.C. 8501 to add a definition of the term "base period," and amended 5 U.S.C. 8505(a) in regard to the proration of costs of claims filed jointly under State law and the UCFE Program. These amendments also require changes in the regulations.

Section 313 of the 1976 Amendments repealed the finality provisions as to Federal findings formerly in 5 U.S.C. 8506(a). This amendment necessitates major changes in the regulations.

Revisions to Part 609 are proposed in this document to implement the statutory amendments. Included in this document are a reorganization and upgrading of the regulations to conform to the more recent practice in writing regulations for unemployment compensation programs, including new sections, new titles for sections, replacing words of gender, and deleting references to specific form numbers to be used in the program.

The significant changes proposed in Part 609 are:

1. All sections in this proposal have been renumbered, their order of appearance rearranged, and the titles changed in most instances. Some of the sections in the present regulations have been incorporated into one section, while other sections have been amplified for clarity. However, there are no legal or substantive changes in this new arrangement with the exception of those changes mentioned below. This rearrangement is only a reorganization and upgrading of the present regulations to conform with the more recent practice in writing regulations for unemployment compensation programs.

2. Section 609.1 is a new section explaining the purposes of the UCFE Program, the rules of construction to be applied, and including provisions for monitoring the uniform application of the law. In this regard the regulation is revised to incorporate into §§ 609.1(d)(3) and (4) specific rules for assigning responsibility to the States for the payment of benefits only in accordance with the law and this regulation. These rules (sometimes referred to as the "Lopez Rule") were developed following *In re Lopez* and other cases, where a State had paid claims in flagrant disregard of the law and the regulations.

3. Section 609.2, *Definitions of terms,* has been revised to amplify certain terms for the purpose of clarification and to delete exceptions in the definitions pertaining to the Virgin Islands. The term "base period" has been defined in accordance with the Unemployment Compensation Amendments of 1976.

4. Sections 609. to 609.11 are new sections which set forth specific rules concerning eligibility requirements, benefit amounts, claims, determinations of entitlement, notices of determinations, appeal and review, and other provisions on benefit administration including more specific provisions on overpayments and penalties for fraud. There are no legal or substantive program changes in these sections, but they reflect more recent practice in writing regulations for unemplomeni compensation programs.

5. Proposed §§ 609.7, 609.9 and 609.21 to 609.24 are revisions of present sections to implement section 313 of the Unemployment Compensation Amendments of 1976 which rescinded the provisions pertaining to the finality of Federal findings. Individuals filing UCFE claims shall have the same appeal rights regarding their separation from Federal employment as those individuals filing claims under the State unemployment compensation law. These changes include deletmg present § 609.18 on the finality of Federal findings, and changes previously made in present §§ 609.9 and 609.23 relating to hearings in connection with requests for reconsideration of Federal findings.

6. Section 609.8 contains a subsection that relates to the assignment of Federal civilian service and wages to the appropriate State for benefit purposes. Hereafter, all Federal wages and service for an individual shall be assinged tothe appropriate State and not just the wages and services used in the appropriate State's base period. This will simplify administration of the program, provide more effective control over assignments, and conform to the procedure for the UCX Program (20 CFR Part 614).

7. A new § 609.14, *Payments to States,* is added to provide for the proration of costs of claims filed jointly under State law and the UCFE Program, in accordance with section 214(a) of the Unemployment Compensation Amendments of 1976. Under this

amendment to 5 U.S.C. 8505(a), the Federal share of joint claims is in the proportion that the Federal wages in the base period bear to the total base period wages of the claimant.

8. Subpart D, *Provisions Applying Only to Virgin Islands*, has been deleted. In addition, all special provisions formerly applicable to the Virgin Islands have been deleted from the sections in which they appeared. This change is due to section 116 of the Unemployment Compensation Amendments of 1976, under which the Virgin Islands became a participating State in the Federal-State Unemployment Compensation Program.

9. Sections 609.12, 609.13, 609.15, 609.16 and 609.17 are new sections pertaining to inviolate rights, recordkeeping and disclosure of information, public access to Agreements, administration in the absence of an Agreement with a State, and information, reports and studies. Except as to disclosure of information, these sections provide no new legal or substantive change, but have been added to conform with the new practice in writing regulations for unemployment compensation programs.

Note.—The Department of Labor has determined that the proposal in this document is not a major regulation that requires the preparation of a regulatory analysis, within the meaning of Executive Order 12044 and the Department's guidelines published at 44 FR 5570. This note also reflects that I have certified, in accordance with 5 U.S.C. 605(b), that the regulation in this document will not have a significant economic impact on a substantial number of small business entities.

This document was prepared under the direction and control of the Administrator of the Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, N.W., Washington, D.C. 20213; telephone: (202) 376-7032.

Accordingly, it is proposed to revise 20 CFR Part 609 as set out below.

Signed at Washington, D.C., on January 19, 1981.

Ernest G. Green,

Assistant Secretary for Employment and Training.

PART 609—UNEMPLOYMENT COMPENSATION FOR FEDERAL CIVILIAN EMPLOYEES

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Authority: 5 U.S.C. 8506; Secretary's order No. 4-75, 40 FR 18515; (5 U.S.C. 301). Interpret and apply secs. 8501-8508 of title 5, United States Code.

Subpart A—General Provisions

§ 609.1 Purpose and application.

(a) *Purpose.* Subchapter I of chapter 85, title 5 of the United States Code, as amended by Public Law 94-566, 90 Stat. 2667, 5 U.S.C. §§ 8501-8508, provides for a permanent program of unemployment compensation for unemployed Federal civilian employees. The unemployment compensation provided for in Subchapter I is hereinafter referred to as Unemployment Compensation for Federal Employees, or UCFE. The regulations in this Part are issued to implement the UCFE Program.

(b) *First rule of construction.* The Act and the implementing regulations in this Part shall be construed liberally so as to carry out the purposes of the Act.

(c) *Second rule of construction.* The Act and the implementing regulations in this Part shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States.

(d) *Effectuating purpose and rules of construction.*

(1) In order to effectuate the provisions of this section, each State agency shall forward to the United States Department of Labor (hereafter Department), not later than 10 days after issuance, a copy of each judicial or administrative decision ruling on an individual's entitlement to payment of UCFE or to credit for a waiting period. On request of the Department, a State agency shall forward to the Department a copy of any determination or redetermination ruling on an individual's entitlement to UCFE or waiting period credit.

(2) If the Department believes that a determination, redetermination, or decision is inconsistent with the Department's interpretation of the Act or this Part, the Department may at any time notify the State agency of the Department's view. Thereafter the State agency shall issue a redetermination or appeal if possible, and shall not follow such determination, redetermination, or decision as a precedent; and, in any subsequent proceedings which involve such determination, redetermination, or decision, or wherein such determination, redetermination, or decision is cited as precedent or otherwise relied upon, the State agency shall inform the claims deputy or hearing officer or court of the Department's view and shall make all reasonable efforts, including appeal or other proceedings in an appropriate forum, to obtain modification, limitation, or overruling of the determination, redetermination, or decision.

(3) If the Department believes that a determination, redetermination, or decision is patently and flagrantly violative of the Act or this Part, the Department may at any time notify the State agency of the Department's view. If the determination, redetermination, or decision in question denies UCFE to a claimant, the steps outlined in paragraph (2) above shall be followed by the State agency. If the determination, redetermination, or decision in question awards UCFE to a claimant, the benefits are "due" within the meaning of section 303(a)(1) of the Social Security Act, 42 U.S.C. § 503(a)(1), and therefore must be paid promptly to the claimant. However, the State agency shall take the steps outlined in paragraph (2) above, and payments to the claimant may be temporarily delayed if redetermination or appeal action is taken not more than one business day following the day on which the first payment otherwise would be issued to the claimant; and the redetermination action is taken or appeal is filed to obtain a reversal of the award of UCFR and a ruling consistent with the Department's view; and the redetermination action or appeal seeks an expedited redetermination or appeal within not more than two weeks after the redetermination action is taken or the appeal is filed. If redetermination action is not taken or appeal is not filed within the above time limit, or a redetermination or decision is not obtained within the two-week limit, or any redetermination or decision or order

is issued which affirms the determination, redetermination, or decision awarding UCFE or allows it to stand in whole or in part, the benefits awarded must be paid promptly to the claimant.

(4)(i) If any determination, redetermination, or decision, referred to in paragraph (2) or paragraph (3) above, is treated as a precedent for any future UCFE claim or claim under the UCX Program (Part 614 of this chapter), the Secretary will decide whether the Agreement with the State entered into under the Act shall be terminated.

(ii) In the case of any determination, redetermination, or decision that is not legally warranted under the Act or this Part, including any determination, redetermination, or decision referred to in paragraph (3) above, the Secretary will decide whether the State shall be required to restore the funds of the United States for any sums paid under such a determination, redetermination, or decision, and whether, in the absence of such restoration, the Agreement with the State shall be terminated and whether other action shall be taken to recover such sums for the United States.

(5) A State agency may request reconsideration of a notice issued pursuant to paragraph (2) or paragraph (3) above, and shall be given an opportunity to present views and arguments if desired.

(6) Concurrence of the Department in a determination, redetermination, or decision shall not be presumed from the absence of a notice issued pursuant to this section.

§ 609.2 Definitions of terms.

For the purposes of the Act and this Part:

(a) "Act" means subchapter I of chapter 85, title 5, United States Code, 5 U.S.C. §§ 8501–8508.

(b) "Agreement" means the Agreement entered into pursuant to the Act between a State and the Secretary under which the State agency of the State agrees to make payments of unemployment compensation in accordance with the Act and the regulations and procedures thereunder prescribed by the Department.

(c) "Base period" means the base period as defined by the applicable State law for the benefit year.

(d) "Benefit year" means the benefit year as defined by the applicable State law, and if not so defined the term means the period prescribed in the Agreement with the State or, in the absence of an Agreement, the period prescribed by the Department.

(e) "Federal agency" means any department, agency, or governmental body of the United States, including any instrumentality wholly or partially owned by the United States, in any branch of the Government of the United States, which employs any individual in Federal civilian service.

(f) "Federal civilian service" means service performed in the employ of any Federal agency, except service performed—

(1) By an elective official in the executive or legislative branches of the Government of the United States;

(2) As a member of the Armed Forces of the United States;

(3) By Foreign Service personnel for whom special separation allowances are provided under chapter 14 of title 22 of the United States Code;

(4) Outside the 50 States, the Commonwealth of Puerto Rico, the Virgin Islands, and the District of Columbia, by an individual who is not a citizen of the United States;

(5) By an individual excluded by regulations of the Office of Personnel Management from civil service retirement coverage provided by Subchapter III of chapter 83 of title 5 of the United States Code because the individual is paid on a contract or fee basis;

(6) By an individual receiving nominal pay and allowances of $12 or less a year;

(7) In a hospital, home, or other institution of the United States by a patient or inmate thereof;

(8) By a student-employee as defined by 5 U.S.C. § 5351; that is (i) a student nurse, medical or dental intern, resident-in-training, student dietitian, student physical therapist, or student occupational therapist, assigned or attached to a hospital, clinic, or medical or dental laboratory operated by an agency as defined in section 5351; or (ii) any other student-employee, assigned or attached primarily for training purposes to such a hospital, clinic, or medical or dental laboratory operated by such an agency, who is designated by the head of the agency with the approval of the Office of Personnel Management;

(9) By an individual serving on a temporary basis in case of fire, storm, earthquake, flood, or other similar emergency;

(10) By an individual employed under a Federal relief program to relieve the individual from unemployment;

(11) As a member of a State, county, or community committee under the Agricultural Stabilization and Conservation Service or of any other board, council, committee, or other similar body, unless such body is composed exclusively of individuals otherwise in the full-time employ of the United States;

(12) By an officer or member of the crew on or in connection with an American vessel which is (i) owned by or bareboat chartered to the United States, and (ii) the business of which is conducted by a general agent of the Secretary of Commerce, and (iii) if contributions on account of such service are required under section 3305(g) of the Internal Revenue Code of 1954 (26 U.S.C. § 3305(g)) to be made to an unemployment fund under a State law;

(13) By an individual excluded by any other Federal law from coverage under the UCFE Program; or

(14) By an individual whose service is covered by the UCX Program to which Part 614 of this chapter applies.

(g) "Federal employee" means an individual who has performed Federal civilian service.

(h) "Federal findings" means the facts reported by a Federal agency pertaining to an individual as to (1) whether or not the individual has performed Federal civilian service for such an agency; (2) the period or periods of such Federal civilian service; (3) the individual's Federal wages; and (4) the reasons for termination of the individual's Federal civilian service.

(i) "Federal wages" means all pay and allowances, in cash and in kind, for Federal civilian service.

(j) "First claim" means an initial claim for unemployment compensation under the UCFE Program, the UCX Program (Part 614 of this chapter), a State law, or some combination thereof, whereby a benefit year is established under an applicable State law.

(k) "Official station" means the State (or country, if outside the United States) designated on a Federal employee's notification of personnel action terminating the individual's Federal civilian service (Standard Form 50 or its equivalent) as the individual's "duty station." If the form of notification does not specify the Federal employee's "duty station", the individual's official station shall be the State or country designated under "name and location of employing office" on such form or designated as the individual's place of employment on an equivalent form.

(l) "Secretary" means the Secretary of Labor of the United States.

(m) "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(n) "State agency" means the agency of the State which administers the applicable State law and is administering the UCFE Program in the

State pursuant to an Agreement with the Secretary.

(o)(1) "State law" means the unemployment compensation law of a State approved by the Secretary under section 3304 of the Internal Revenue Code of 1954, 26 U.S.C. § 3304, if the State is certified under section 3304(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 3304(c).

(2) "Applicable State law" means the State law made applicable to a UCFE claimant by § 609.8.

(p)(1) "Unemployment compensation" means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment, and includes regular, additional, emergency, and extended compensation.

(2) "Regular compensation" means unemployment compensation payable to an individual under any State law, but not including additional compensation or extended compensation.

(3) "Additional compensation" means unemployment compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors.

(4) "Emergency compensation" means supplementary unemployment compensation payable under a temporary Federal law after exhaustion of regular and extended compensation.

(5) "Extended compensation" means unemployment compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. § 3304 note, and Part 615 of this chapter, with respect to the payment of extended compensation.

(q) "Week" means, for purposes of eligibility for and payment of UCFE, a week as defined in the applicable State law.

(r) "Week of unemployment" means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to all employment and earnings, and in the same manner and to the same extent for for the purposes of the UCFE Program, as if the individual filing for UCFE were filing a claim for State unemployment compensation.

Subpart B—Administration of UCFE Program

§ 609.3 Eligibility requirements for UCFE.

An individual shall be eligible to receive a payment of UCFE or to waiting period credit with respect to a week of unemployment if:

(a) The individual has Federal civilian service and Federal wages in the base period under the applicable State law;

(b) The individual meets the qualifying employment and wage requirements of the applicable State law, either on the basis of Federal civilian service and Federal wages alone or in combination with service and wages covered under a State law or under the UCX Program (Part 614 of this chapter);

(c) The individual has filed an initial claim for UCFE and, as appropriate, has filed a timely claim for waiting period credit or a payment of UCFE with respect to that week of unemployment; and

(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this Part or the applicable State law, with respect to that week of unemployment.

§ 609.4 Weekly and maximum benefit amounts.

(a) *Total unemployment.* The weekly amount of UCFE payable to an eligible individual for a week of total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of total unemployment as determined under the applicable State law.

(b) *Partial and part-total unemployment.* The weekly amount of UCFE payable for a week of partial or part-total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of parital or part-total unemployment as determined under the applicable State law.

(c) *Maximum amount.* The maximum amount of UCFE which shall be payable to an eligible individual during and subsequent to the individual's benefit year shall be the maximum amount of all unemployment compenstation that would be payable to the individual as determined under the applicable State law.

(d) *Computation rules.* (1) The weekly and maximum amounts of UCFE payable to an individial under the UCFE Program shall be determined under the applicable State law to be in the same amount, on the same terms, and subject to the same conditions as the State unemployment compenstaion which would be payable to the individual under the applicable state law if the individual's Federal civilian service and Federal wages assigned or transferred under this part to the State has been included as employment and wages covered by that State law.

(2) All Federal civilian service and Federal wages for all Federal agencies shall be considered employment with a single employer for purposes of the UCFE Program.

§ 609.5 Claims for UCFE.

(a) *First claims.* A first claim for UCFE shall be filed by an individual in any State agency of any State (or Canada) according to the applicable State law, and on a form prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(b) *Weekly claims.* Claims for waiting week credit and payments of UCFE for weeks of unemployment shall be filed in any State agency (or Canada) at the times and in the manner as claims for State unemployment compensation are filed under the applicable State law, and on forms prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(c) *Secretary's standard.* The procedure for reporting and filing claims for UCFE and waiting period credit shall be consistent with this Part 609 and the Secretary's "Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services" (*Employment Security Manual*, Part V, sections 5000 *et seq.*)

§ 609.6 Determinations of entitlement; notices to individual.

(a) *Determination of first claim.* The State agency whose State law applies to an individual under § 609.8 shall promptly, upon the filing of a first claim for UCFE, determine whether the individual is eligible and whether a disqualification applies, and, if the individual is found to be eligible, the individual's benefit year and the weekly and maximum amounts of UCFE payable to the individual.

(b) *Determinations of weekly claims.* The State agency promptly shall, upon the filing of a claim for a payment of UCFE or waiting period credit with respect to a week, determine whether the individual is entitled to a payment of UCFE or waiting period credit with respect to such week, and, if entitled, the amount of UCFE or waiting period credit to which the individual is entitled.

(c) *Redetermination.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to State unemployment compensation under the applicable State law shall apply to determinations pertaining to UCFE.

(d) *Notices to individual.* The State agency promptly shall give notice in writing to the individual of any determination or redetermination of a first claim, and, except as may be authorized under paragraph (g) of this section, of any determination or redetermination of any weekly claim which denies UCFE or waiting period credit or reduces the weekly amount or maximum amount initially determined to be payable. Each notice of determination or redetermination shall include such information regarding the determination or redetermintion and notice of right to reconsideration or appeal, or both, as is furnished with written notices of determinations and redeterminations with respect to claims for State unemployment compensation; and where information furnished by a Federal agency was considered in making the determination, or redetermination, the notice thereof shall include an explanation of the right of the individual to seek additional information pursuant to § 609.23 and/or a reconsideration of Federal findings pursuant to § 609.24.

(e) *Obtaining information for claim determinations.*

(1) Information required for the determination of claims for UCFE shall be obtained by the State agency from claimants, employers, and others, in the same manner as information is obtained for claim purposes under the applicable State law, but information (including additional and reconsidered Federal findings) shall be obtained from the Federal agency that employed the UCFE claimant as precribed in §§ 609.21–609.25. On request by a UCFE claimant, the State agency shall seek additional information pursuant to § 609.23 and reconsideration of Federal findings pursuant to § 609.24.

(2) If Federal findings have not been received from a Federal agency within 12 days after the request for information was submitted to the Federal agency, the State agency shall determine the individual's entitlement to UCFE on the basis of an affidavit completed by the individual on a form prescribed by the Department. In addition, the individual shall submit for examination by the State agency any documents issued by the Federal agency (for example, Standard Form 50 or W–2) verifying that the individual performed services for and received wages from such Federal agency.

(3) If Federal findings recieved by a State agency after a determination has been made under this section contain information which would result in a change in the individual's eligibility for or entitlement to USFE, the State agency promptly shall make a redetermination and notify the individual, as provided in this section. All payments of UCFE made prior to or after such redetermination shall be adjusted in accordance therewith.

(f) *Promptness.* Full payment of UCFE when due shall be consistent with this Part 609 and shall be made with the greatest promptness that is administratively feasible, but the provisions of Part 640 of this chapter (relating to promptness of benefit payments) shall not be applicable to the UCFE Program.

(g) *Secretary's standard.* The procedures for making determinations and redeterminations, and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals applying for UCFE, shall be consistent with this Part 609 and with the Secretary's "Standard for Claim Determinations—Separation Information" (*Employment Security Manual,* Part V, sections 6010 *et seq.*).

§ 609.7 Appeal and review.

(a) *Applicable State law.* The provisions of the applicable State law concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to State unemployment compensation shall apply to determinations and redeterminations of eligibility for or entitlement to UCFE and waiting period credit. Any such determination or redetermination shall be subject to appeal and review only in the manner and to the extent provided in the applicable State law with respect to determinations and redeterminations of entitlement to State unemployment compensation.

(b) *Rights of appeal and fair hearing.* The provisions on right of appeal and opportunity for a fair hearing with respect to claims for UCFE shall be consistent with this Part and with sections 303(a)(1) and 303(a)(3) of the Social Security Act, 42 U.S.C. §§ 503(a)(1) and 503(a)(3).

(c) *Promptness on appeals.* (1) Decision on appeals under the UCFE Program shall accord with the Secretary's "Standard for Appeals Promptness—Unemployment Compensation" in Part 650 of this chapter, and with § 609.1(d).

(2) Any provision of an applicable State law for advancement or priority of unemployment compensation cases on judicial calendars, or otherwise intended to provide for the prompt payment of unemployment compensation when due, shall apply to proceedings involving claims for UCFE.

(d) *Appeal and review by Federal agency.* If a Federal agency believes that a State agency's determination or redetermination of an individual's eligibility for or entitlement to UCFE is incorret, the Federal agency may seek appeal and review of such determination or redetermination in the same manner as an interested employer may seek appeal and review under the applicable State law.

§ 609.8 The applicable State for an individual.

(a) *The applicable State.* The applicable State for an individual shall be the State to which the individual's Federal civilian service and Federal wages are assigned or transferred under this section. The applicable State law for the individual shall be the State law of such State.

(b) *Assignment of service and wages.* (1) An individual's Federal civilian service and Federal wages shall be assigned to the State in which the individual had his or her last official station prior to filing a first claim unless:

(i) At the time a first claim is filed the individual resides in another State in which, after separation from Federal civilian service, the individual performed services covered under the State law, in which case all of the individual's Federal civilian service and wages shall be assigned to the latter State; or

(ii) Prior to filing a first claim an individual's last official station was outside the States, in which case all of the individual's Federal civilian service and Federal wages shall be assigned to the State in which the individual resides at the time the individual files a first claim, provided the individual is personally present in such State when the individual files the first claim.

(2) Federal civilian service and wages assigned to a State in error shall be reassigned for use by the proper State agency. An appropriate record of a reassignment shall be made by the State agency which makes the reassignment.

(3) Federal civilian service and Federal wages assigned to a State shall be transferred to another State where such transfer is necessary for the purposes of a combined-wage claim filed by an individual.

(c) *Assignment deemed complete.* All of an individual's Federal service and

Federal wages shall be deemed to have been assigned to a State upon the filing of a first claim. Federal civilian service and Federal wages shall be assigned to a State only in accordance with Paragraph (b) of this section.

(d) *Use of assigned service and wages.* All assigned Federal civilian service and Federal wages shall be used only by the State to which assigned or transferred in accordance with paragraph (b) of this section.

§ 609.9 Provisions of State law applicable to UCFE claims.

(a) *Particular provisions applicable.* Except where the result would be inconsistent with the provisions of the Act or this Part or the procedures thereunder prescribed by the Department, the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCFE and claims for waiting period credit. The provisions of the applicable State law which shall apply include, but are not limited to:

(1) Claim filing and reporting;

(2) Information to individuals, as appropriate;

(3) Notices to individuals, and Federal agencies, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to UCFE;

(4) Determinations and redeterminations;

(5) Ability to work, availability for work, and search for work, and

(6) Disqualifications.

(b) *IBPP.* The *Interstate Benefit Payment Plan* shall apply, where appropriate, to individuals filing claims for UCFE.

(c) *Wage combining.* The State's provisions complying with the *Interstate Arrangement for Combining Employment and Wages* (Part 616 of this chapter) shall apply, where appropriate, to individuals filing claims for UCFE.

(d) *Procedural requirements.* The provisions of the applicable State law which apply hereunder to claims for and the payment of UCFE shall be applied consistently with the requirements of Title III of the Social Security Act and the Federal Unemployment Tax Act which are pertinent in the case of State unemployment compensation, including but not limited to those standards and requirements specifically referred to in the provisions of this Part, except as provided in paragraph (f) of § 609.6.

§ 609.10 Restrictions on entitlement.

(a) *Disqualification.* If the week of unemployment for which an individual claims UCFE is a week to which a disqualification for State unemployment compensation applies under the applicable State law, or would apply but for the fact that the individual has no right to such compensation, the individual shall not be entitled to a payment of UCFE for that week.

(b) *Allocation on terminal annual leave payments.* Lump-sum terminal annual leave payments shall not be allocated by a Federal agency and shall be allocated by a State agency in the same manner as similar payments to individuals employed by private employers are allocated under the applicable State law. In a State in which a private employer has an option as to the period to which such payments shall be allocated, such payments shall be allocated to the date of separation from employment.

§ 609.11 Overpayments; penalties for fraud.

(a) *False statements and representations.* Section 8507(a) of the Act provides that if a State agency, the Department, or a court of competent jurisdiction finds that an individual—

(1) knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact; and

(2) as a result of that action has received an amount as UCFE to which the individual was not entitled; the individual shall repay the amount to the State agency or the Department. Instead of requiring repayment, the State agency or the Department may recover the amount by deductions from UCFE payable to the individual during the 2-year period after the date of the finding. A finding by a State agency or the Department may be made only after an opportunity for a fair hearing, subject to such further review as may be appropriate under § 609.7.

(b) *Prosecution for fraud.* Section 1919 of title 18, United States Code, provides that whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5, United States Code, or under an agreement thereunder, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) *Absence of fraud.* If a State agency or court of competent jurisdiction finds that an individual has received a payment of UCFE to which the individual was not entitled under the Act and this Part, which was not due to a false statement or representation as provided in paragraph (a) or (b) of this section, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(d) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible, the amount of any overpayment which is not repaid by the individual, by deductions from any UCFE payable to the individual under the Act and this Part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) A State agency shall also recover, insofar as is possible, the amount of any overpayment of UCFE made to the individual by another State, by deductions from any UCFE payable by the State agency to the individual under the Act and this Part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemploymnent under any other Federal law administered by the State agency.

(3) Recoupment of fraudulent overpayments referred to in paragraph (a) of this section shall be limited to the 2-year period stated in that paragraph. Recoupment of fraudulent overpayments referred to in paragraph (b) of this section, and nonfraudulent overpayments referred to in paragraph (c) of this section shall be subject to any time limitation on recoupment provided for in the State law that applies to the case.

(e) *Debts due the United States.* UCFE payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person except pursuant to a court order for child support or alimony in accordance with the law of the State and section 459 of the Social Security Act, 42 U.S.C. § 659.

(f) *Application of State law.* (1) Any provision of State law that may be applied for the recovery of overpayments or prosecution for fraud, and any provisin of State law authorizing waiver of recovery of overpayment of unemployment compensation, shall be applicable to UCFE.

(2) In the case of any finding of false statement or representation under the Act and paragraph (a) of this section, or prosecution for fraud under 18 U.S.C. § 1919 or pursuant to paragraph (f)(1) of this section, the individual shall be disqualified or penalized in accordance with the provisions of the applicable State law relating to fraud in connection with a claim for State unemployment compensation.

(g) *Final decision.* Recovery of any overpayment of UCFE shall not be enforced by the State agency until the determination or redetermination establishing the overpayment has become final, or if appeal is taken from the determination, or redetermination, unitl the decision after opportunity for a fair hearing has become final.

(h) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (g) of § 609.6 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 609.7 shall apply to determinations and redeterminations made pursuant to this section.

(i) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayment of UCFE shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's "Standard for Fraud and Overpayment Detection" (*Employment Security Manual,* Part V, sections 7510 *et seq.*).

(j) *Recovered overpayment.* An amount repaid or recouped under this section shall be—

(1) deposited in the fund from which payment was made, if the repayment was to a State agency; or

(2) returned to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payment was made, if the repayment was to the Department.

§ 609.12 Inviolate rights to UCFE.

Except as specifically provided in this Part, the rights of individuals to UCFE shall be protected in the same manner and to the same extent as the rights of persons to State unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for UCFE from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to UCFE, except as provided in § 609.11. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to UCFE.

§ 609.13 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency all make and maintain records pertaining to the administration of the UCFE program as the Department requires, and will make will such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required be law.

(b) *Disclosure of Information.* Information in records maintained by a State agency in administering the UCFE Program shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to State unemployment compensation and the entitlement of individuals thereto may be disclosed under the applicable State law. This provision on the confidentiality of information maintained in the administration of the UCFE Program shall not apply, however, to the Department or for the purposes of §§ 609.11 or 609.13, or in the case of information, reports and studies required pursuant to §§ 609.17 or 609.25, or where the result would be inconsistent with the Freedom of Information Act (5 U.S.C. § 552), the Privacy Act of 1974 (5 U.S.C. § 552a), or regulations of the Department promulgated thereunder.

§ 609.14 Payments to States.

(a) *State entitlement.* Each State is entitled to be paid by the United States with respect to each individual whose base period wages included Federal wages, an amount bearing the same ratio to the total amount of compensation paid to such individual as the amount of the individual's Federal wages in the individual's base period bears to the total amount of the individual's base period wages.

(b) *Payment.* Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Department, the sum that the Department estimates the State is entitled to receive under the Act and this Part for each calendar month. The sum shall be reduced or increased by the amount which the Department finds that its estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Department and the State agency.

(c) *Certification by the Department.* The Department, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of the Act and this Part.

(d) *Use of money.* Money paid a State under the Act and this Part may be used solely for the purposes for which it is paid. Money so paid which is not used solely for these purposes shall be returned, at the time specified by the Agreement, to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payments to States under the Act and this Part may be made.

§ 609.15 Public access to agreements.

The State agency of a State will make available to any individual or organization a true copy of the Agreement with the State for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

§ 609.16 Administration in absence of an agreement.

(a) *Administering Program.* The Department shall administer the UCFE Program through personnel of the Department or through other arrangements under procedures prescribed by the Department, in the case of any State which does not have an Agreement with the Secretary as provided for in 5 U.S.C. § 8502. The procedures prescribed by the Department under this section shall be consistent with the Act and this Part.

(b) *Applicable State law.* On the filing by an individual of a claim for UCFE in accordance with arrangements under this section, UCFE shall be paid to the individual, if eligible, in the same amount, on the same terms, and subject to the same conditions as would be paid to the individual under the applicable State law if the individual's Federal

civilian service and Federal wages had been included as employment and wages under the State law. Any such claim shall include the individual's Federal civilian service and Federal wages, combined with any service and wages covered by State law. However, if the individual, without regard to his or her Federal civilian service and Federal wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of UCFE under this section may be made only on the basis of the individual's Federal civilian service and Federal wages.

(c) *Fair hearing.* An individual whose claim for UCFE is denied under this section is entitled to a fair hearing under rules of procedure prescribed by the Department. A final determination by the Department with respect to entitlement to UCFE under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

§ 609.17 Information, reports, and studies.

State agencies shall furnish to the Department such information and reports and conduct such studies as the Department determines are necessary or appropriate for carrying out the purposes of the UCFE Program.

Subpart C—Responsibilities of Federal Agencies

§ 609.20 Information to Federal civilian employees.

Each Federal agency shall:

(a) Furnish information to its employees as to their rights and responsibilities under the UCFE Program and 18 U.S.C. § 1919; and

(b) Furnish a completed copy of a form approved by the Department, "Notice to Federal Employee About Unemployment Compensation," in accordance with instructions thereon, to each employee at the time of separation from Federal civilian service, when transferred from one payroll office to another, or when the office responsible for distribution of the form is advised that an individual is in nonpay status for seven consecutive days or more.

§ 609.21 Findings of Federal agency.

(a) *Answering request.* Within four workdays after receipt from a State agency of a request for Federal findings on a form furnished by the State agency, and prescribed by the Department, a Federal agency shall make such Federal findings, complete all copies of the form, and transmit the completed copies to the State agency. If documents necessary for completion of the form have been assigned to an agency records center or the Federal Records Center in St. Louis, the Federal agency shall obtain the necessary information from the records center. Any records center shall give priority to such a request.

(b) *Failure to meet time limit.* If a completed form containing the Federal agency's findings cannot be returned within four workdays of receipt, the Federal agency immediately shall inform the State agency, and shall include an estimated date by which the completed form will be returned.

(c) *Administrative control.* Each Federal agency shall maintain a control of all requests for Federal findings received by it, and the Federal agency's response to each request. The records shall be maintained so as to enable the Federal agency to ascertain at any time the number of such forms that have not been returned to State agencies, and the dates of the Federal agency's receipt of such unreturned forms.

§ 609.22 Correcting Federal findings.

If a Federal agency ascertains at any time within one year after it has returned a completed form reporting its findings, that any of its findings were erroneous, it shall promptly correct its error and forward its corrected findings to the State agency.

§ 609.23 Furnishing additional information.

On receipt of a request for additional information from a State agency, a Federal agency shall consider the information it supplied initially in connection with such request and shall review its findings. The Federal agency promptly shall forward to the State agency such additional findings as will respond to the request. The Federal agency shall, if possible, respond within four workdays after the receipt of a request under this section.

§ 609.24 Reconsideration of Federal findings.

On receipt of a request for reconsideration of Federal findings from a State agency, the Federal agency shall consider the initial information supplied in connection with such request and shall review its findings. The Federal agency shall correct any errors or omissions in its findings and shall affirm, modify, or reverse any or all of its findings in writing. The Federal agency promptly shall forward its reconsidered findings to the requesting authority. The Federal agency shall, if possible, respond within four work days after the receipt of a request under this section.

§ 609.25 Furnishing other information.

(a) *Additional Information.* In addition to the information required by §§ 609.21, 609.22, 609.23, and 609.24, a Federal agency shall furnish to a State agency or the Department, within the time requested, any information which it is not otherwise prohibited from releasing by law, which the Department determines is necessary for the administration of the UCFE Program.

(b) *Reports.* Federal agencies shall furnish to the Department or State agencies such reports containing such information as the Department determines are necessary or appropriate for carrying out the purposes of the UCFE Program.

§ 609.26 Liaison with Department.

To facilitate the Department's administration of the UCFE Program, each Federal agency shall designate one or more of its officials to be the liaison with the Department. Each Federal agency will inform the Department of its designation(s) and of any change in a designation.

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Part XII

Department of Labor

Employment and Training Administration

Unemployment Compensation for Ex-Service Members

DEPARTMENT OF LABOR

20 CFR Part 614

Unemployment Compensation for Ex-Service Members; Revision of Regulations

AGENCY: Employment and Training Administration, Labor.

ACTION: Proposed rule.

SUMMARY: The Department of Labor proposes to revise the regulations for the Program of Unemployment Compensation for Ex-Servicemembers (UCX Program). Changes to the regulations incorporate statutory amendments, which require treatment of the Virgin Islands as a participating State in the Federal-State Unemployment Compensation Program, which prescribe a new rule for determining the Federal share of the cost of benefits in connection with joint claims under the UCX Program and State unemployment compensation laws, and which revise the eligibility requirements for entitlement to the program benefits. The regulations are also reorganized and revised to state the rights and obligations of claimants for the benefits and to clarify the respective duties and responsibilities of the Federal Government and the State agencies. The setting forth of this information in each Part dealing with a separate unemployment compensation program conforms to the more recent practice in writing regulations in this area.

DATE: Written comments must be received by the Department on or before March 24, 1981.

ADDRESS: Send comments on this proposal to the U.S. Department of Labor, Employment and Training Administration, Room 7000, Patrick Henry Building, 601 "D" Street, N.W., Washington, D.C. 20213. All comments received will be available for public inspection during normal busiess hours in Room 7000 at the above address.

FOR FURTHER INFORMATION CONTACT: Charles W. Reynolds, Unemployment Insurance Service, at (202) 376-6222. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: The UCX Program is financed by Federal funds to furnish unemployment benefits to individuals who are separated from military service and are unable to obtain work. The program was created by Public Law 85-848, approved on August 28, 1958. It has been codified in 5 U.S.C. 8521-8525.

Section 116 of the Unemployment Compensation Amendments of 1976 (Pub. L. 94-566, 90 Stat 2667, 2672) authorized treatment of the Virgin Islands as a State for unemployment compensation purposes. This change became effective on January 1, 1978, following approval of the Virgin Islands unemployment compensation law, as amended to meet Federal statutory requirements, by the Secretary of Labor. The change in the status of the Virgin Islands requires conforming changes in the UCX regulations.

Section 214 of the Unemployment Compensation Amendments of 1976 amended 5 U.S.C. 8505(a) to provide for prorating of costs as to claims filed jointly under the UCX Program and State unemployment compensation laws, and also amended 5 U.S.C. 8501 to add a definition of "base period." These changes also require conforming changes in the UCX regulations.

Section 415 of the Multiemployer Pension Plan Amendments Act of 1980 (Pub. L. 96-364, 94 Stat. 1208, 1310) amended 5 U.S.C. 8521 to require 365 days instead of 90 days as the minimum period of military service required to qualify for benefits under the UCX Program. This amendment applies to all individuals filing new UCX claims on or after October 1, 1980.

Revisions to Part 614 are proposed in this document to implement the statutory amendments. This revision of the UCX regulations also includes a reorganization and upgrading to conform to the more recent practice in writing regulations for unemployment compensation programs, including new sections, new titles for sections, replacing words of gender, and deleting references to specific form numbers to be used in the program.

The significant changes proposed in Part 614 are:

1. All sections in this proposal have been renumbered, titles changed, and their order of appearance rearranged. Some of the sections in the present regulations have been incorporated into one section, while other sections have been amplified for clarity. However, there are no legal or substantive changes in this new arrangement with the exception of those changes mentioned below. This rearrangement is only a reorganization and upgrading of the present regulations to conform to the more recent practice in writing regulations for unemployment compensation programs.

2. Section 614.1 is a new section explaining the purpose of the UCX Program, the rules of construction to be applied, and including provisions for monitoring the uniform application of the law. In this regard the regulation is revised to incorporate into §§ 614.1(d) (3) and (4) specific rules for assigning responsibility to the States for the payment of benefits only in accordance with the law and this regulation. These rules (sometimes referred to as the "Lopez Rule") were developed following *In re Lopez* and other cases, where a State had paid claims in flagrant disregard of the law and the regulations.

3. Section 614.2, *Definitions of terms*, has been revised to expand certain definitions for the purpose of clarification. All provisions for special handling of claims pertaining to the Virgin Islands have been deleted. The term "base period" has been defined in accordance with the Unemployment Compensation Amendments of 1976.

4. Sections 614.3 to 614.11 are new sections which set forth specific rules concerning eligibility requirements, benefit amounts, claims, determinations of entitlement, notices of determinations, appeal and review, and other provisions on benefit administration, including more specific provisions on overpayments and penalties for fraud. There are no legal or substantive program changes in these sections, but they reflect more recent practice in writing regulations for unemployment compensation programs.

5. Section 614.12, *Schedules of Remuneration*, is revised in that the current schedule shall no longer be a part of the section. The schedule prescribes a scale of wages by military grade which is used in computing benefit amounts for UCX claims. The frequency of military pay raises, and the amount of time required to adopt new schedules by regulation, has caused administrative problems in making new schedules effective at a given date so as to regularize the effective dates of new schedules. The Secretary of Labor, after consultation with the Secretary of Defense, will issue the schedules as required by 5 U.S.C. 8521 (a) (2), and in accordance with revised § 614.12. The State agencies and Federal military agencies will be notified of each new Schedule, and it will be published in the **Federal Register** as a notice. New Schedules will not, however, require a change in Part 614, and will not be published as a part of the regulations.

6. Sections 614.13, 614.14, 614.16, 614.17 and 614.18 are new sections pertaining to inviolate rights, recordkeeping and disclosure of information, public access to Agreements, administration in the absence of an Agreement with a State, and information, reports and studies. Except as to disclosure of information, these sections provide no new legal or substantive change, but have been added to conform to the new practice in

writing regulations for unemployment compensation programs.

7. Section 614.15, *Payments to States*, is a new section to provide for proration of costs of claims filed jointly under State law and the UCX Program, in accordance with section 214(a) of the Unemployment Compensation Amendments of 1976. Under this amendment to 5 U.S.C. 8505(a), the Federal share of joint claims is in the proportion that the Federal military wages in the base period bear to the total base period wages of the claimant.

8. Sections 614.2(g) and 614.23(a) are revised to reflect the new minimum service requirement of 365 days instead of the 90 days previously required.

Note.—The Department of Labor has determined that the proposal in this document is not a major regulation that requires the preparation of a regulatory analysis, within the meaning of Executive Order 12044 and the Deparment's guidelines published at 44 FR 5570. This note also reflects that I have certified, in accordance with 5 U.S.C. 605(b), that the regulation in this document will not have a significant economic impact on a substantial number of small business entities.

This document was prepared under the direction and control of the Administrator of the Unemployment Insurance Service, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, N.W., Washington, D.C. 20213; telephone: (202) 376-7032.

Accordingly, it is proposed to revise 20 CFR Part 614 as set out below.

Signed at Washington, D.C., on January 19, 1981.

Ernest G. Green,

Assistant Secretary for Employment and Training.

PART 614—UNEMPLOYMENT COMPENSATION FOR EX-SERVICEMEMBERS

Subpart A—General Provisions

Sec.
614.1 Purpose and application.
614.2 Definitions of terms.

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614.3 Eligibility requirements for UCX.
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614.12 Schedules of Remuneration.
614.13 Inviolate rights to UCX.
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Subpart C—Responsibilities of Federal Military Agencies and State Agencies

614.20 Information to ex-servicemembers.
614.21 Findings of Federal military agency.
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614.23 Findings of Veterans Administration.
614.24 Correcting Veterans Administration findings.
614.25 Finality of findings.
614.26 Furnishing other information.
614.27 Liaison with Department.

Authority: 5 U.S.C. 8508; Secretary's Order No. 4-75, 40 FR 18515 (5 U.S.C. 301). Interpret and apply secs. 8521-8525 of title 5, United States Code.

Subpart A—General Provisions

§ 614.1 Purpose and application.

(a) *Purpose.* Subchapter II of chapter 85, title 5 of the United States Code, as amended by Pub. L. 94-566, 90 Stat. 2667 (5 U.S.C. §§ 8521-8525), provides for a permanent program of unemployment compensation for unemployed individuals separated from the Armed Forces. The unemployment compensation provided for in subchapter II is hereinafter referred to as Unemployment Compensation for Ex-Servicemembers, or UCX. The regulations in this Part are issued to implement the UCX Program.

(b) *First rule of construction.* The Act and the implementing regulations in this Part shall be construed liberally so as to carry out the purposes of the Act.

(c) *Second rule of construction.* The Act and the implementing regulations in this Part shall be construed so as to assure insofar as possible the uniform interpretation and application of the Act throughout the United States.

(d) *Effectuating purpose and rules of construction.*

(1) In order to effectuate the provisions of this section, each State agency shall forward to the United States Department of Labor (hereafter Department), not later than 10 days after issuance, a copy of each judicial or administrative decision ruling on and individual's entitlement to payment of UCX or to credit for a waiting period. On request of the Department, a State agency shall forward to the Department a copy of any determination or redetermination ruling on an individual's entitlement to UCX or waiting period credit.

(2) If the Department believes that a determination, redetermination, or decision is inconsistent with the Department's interpretation of the Act or this Part, the Department may at any time notify the State agency of the Department's view. Thereafter the State agency shall issue a redetermination or appeal if possible, and shall not follow such determination, redetermination, or decision as a precedent; and, in any subsequent proceeding which involve such determination, redetermination, or decision, or wherein such determination, redetermination, or decision is cited as precedent or otherwise relied upon, the State agency shall inform the claims deputy or hearing officer or court of the Department's view and shall all reasonable efforts, including appeal or other proceedings in an appropriate forum, to obtain modification, limitation, or overruling of the determination, redetermination, or decision.

(3) If the Department believes that a determination, redetermination, or decision is patently and flagrantly violative of the Act or this Part, the Department may at any time notify the State agency of the Department's view. If the determination, redetermination, or decision in question denies UCX to a claimant, the steps outlined in paragraph (2) above shall be followed by the State agency. If the determination, redetermination, or decision in question awards UCX to a claimant, the benefits are "due" within the meaning of section 303(a)(1) of the Social Security Act, 42 U.S.C. 503(a)(1), and therefore must be paid promptly to the claimant. However, the State agency shall take the steps outlined in paragraph (2) above, and payments to the claimant may be temporarily delayed if redetermination or appeal action is taken not more than one business day following the day on which the first payment otherwise would be issued to the claimant; and the redetermination action is taken or appeal is filed to obtain a reversal of the award of UCX and a ruling consistent with the Department's view, and the redetermination action or appeal seeks an expedited redetermination or appeal within not more than two weeks after the redetermination action is taken or the appeal is filed. If redetermination action is not taken or appeal is not filed within the above time limit or a redetermination or decision is not obtained within the two-week limit, or any redetermination or decision or order is issued which affirms the determination, redetermination, or decision awarding UCX or allows it to stand in whole or in part, the benefits awarded must be paid promptly to the claimant.

(4)(1) If any determination, redetermination, or decision, referred to in paragraph (2) or paragraph (3) above, is treated as a precedent for any future UCX claim or claim under the UCFE Program (Part 609 of this chapter), the Secretary will decide whether the Agreement with the State entered into under the Act shall be terminated.

(ii) In the case of any determination, redetermination, or decision that is not legally warranted under the Act or this part, including any determination, redetermination, or decision referred to in paragraph (3) above, the Secretary will decide whether the State shall be required to restore the funds of the United States for any sums paid under such a determination, redetermination, or decision, and whether, in the absence of such restoration, the Agreement with the State shall be terminated and whether other action shall be taken to recover such sums for the United States.

(5) A State agency may request reconsideration of a notice issued pursuant to paragraph (2) or paragraph (3) above, and shall be given an opportunity to present views and arguments if desired.

(6) Concurrence of the Department in a determination, redetermination, or decision shall not be presumed from the absence of a notice issued pursuant to this section.

§ 614.2 Definitions of terms.

For purposes of the Act and this Part:

(a) "Act" means subchapter II of chapter 85 of title 5 of the United States Code, 5 U.S.C. 8521–8525.

(b) "Agreement" means the Agreement entered into pursuant to 5 U.S.C. 8502 between a State and the Secretary under which the State agency of the State agrees to make payments of unemployment compensation in accordance with the Act and the regulations and procedures thereunder prescribed by the Department.

(c) "Base period" means the base period as defined by the applicable State law for the benefit year.

(d) "Benefit year" means the benefit year as defined by the applicable State law, and if not so defined the term means the period prescribed in the Agreement with the State or, in the absence of an Agreement, the period prescribed by the Department.

(e) "Ex-servicemember" means an individual who has performed Federal military service.

(f) "Federal military agency" means any of the Armed Forces of the United States, including the Army, Air Force, Navy, Marine Corps, and Coast Guard.

(g) "Federal military service" means a period of active service, including active duty for training purposes, in the Armed Forces if—

(1) Such service was continuous for 365 days or more or was terminated in less than 365 days because of an actual service-incurred injury or disability; and

(2) With respect to such service the individual (i) was discharged or released under conditions other than dishonorable, (ii) was not given a bad conduct discharge, or (iii) if an officer, did not resign for the good of the service.

(h) "Federal military wages" means all pay and allowances in cash and in kind for Federal military service, including any payment for unused military leave which is allocated under § 614.10, as determined in accordance with the applicable Schedule of Remuneration.

(i) "First claim" means an initial claim for unemployment compensation under the UCX Program, the UCFE Program (Part 609 of this chapter), or a State law, or some combination thereof, first filed by an individual after the individual's latest discharge or release from Federal military service, whereby a benefit year is established under an applicable State law.

(j) "Military document" means an official document or documents issued to an individual by a Federal military agency relating to the individual's Federal military service and discharge or release from such service.

(k) "Period of active service" means a period of continuous active duty (including active duty for training purposes) in a Federal military agency or agencies, beginning with the date of entry upon active duty and ending on the effective date of the first discharge or release thereafter which is not qualified or conditional.

(l) "Schedule of Remuneration" means the schedule issued by the Department from time to time under 5 U.S.C. 8521(a)(2) and this Part, which specifies for purposes of the UCX Program the pay and allowances for each pay grade of servicemembers.

(m) "Secretary" means the Secretary of Labor of the United States.

(n) "State" means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands.

(o) "State agency" means the agency of the State which administers the applicable State unemployment compensation law and is administering the UCX Program in the State pursuant to an Agreement with the Secretary.

(p)(1) "State law" means the unemployment compensation law of a State approved by the Secretary under section 3304 of the Internal Revenue Code of 1954, 26 U.S.C. § 3304, if the State is certified under section 3304(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 3304(c).

(2) "Applicable State law" means the State law made applicable to a UCX claimant by § 614.8.

(q)(1) "Unemployment compensation" means cash benefits (including dependents' allowances) payable to individuals with respect to their unemployment, and includes regular, additional, emergency, and extended compensation.

(2) "Regular compensation" means unemployment compensation payable to an individual under any State law, but not including additional compensation or extended compensation.

(3) "Additional compensation" means unemployment compensation totally financed by a State and payable under a State law by reason of conditions of high unemployment or by reason of other special factors.

(4) "Emergency compensation" means supplementary unemployment compensation payable under a temporary Federal law after exhaustion of regular and extended compensation.

(5) "Extended compensation" means unemployment compensation payable to an individual for weeks of unemployment in an extended benefit period, under those provisions of a State law which satisfy the requirements of the Federal-State Extended Unemployment Compensation Act of 1970, as amended, 26 U.S.C. § 3304 note, and Part 615 of this chapter, with respect to the payment of extended compensation.

(r) "Unemployment compensation for Ex-service-members" means the unemployment compensation payable under the Act to claimants eligible for the payments, and is referred to as UCX.

(s) "Week" means, for purposes of eligibility for and payment of UCX, a week as defined in the applicable State law.

(t) "Week of unemployment" means a week of total, part-total, or partial unemployment as defined in the applicable State law, which shall be applied in the same manner and to the same extent to all employment and earnings, and in the same manner and to the same extent for the purposes of the UCX Program, as if the individual filing for UCX were filing a claim for State unemployment compensation.

Subpart B—Administration of UCX Program

§ 614.3 Eligibility requirements for UCX.

An individual shall be eligible to receive a payment of UCX or waiting

period credit with respect to a week of unemployment if:

(a) The individual has Federal military service and Federal military wages in the base period under the applicable State law;

(b) The individual meets the qualifying employment and wage requirements of the applicable State law, either on the basis of Federal military service and Federal military wages alone or in combination with service and wages covered under a State law or under the UCFE Program (Part 609 of this chapter);

(c) The individual has filed an initial claim for UCX and, as appropriate, has filed a timely claim for waiting period credit or payment of UCX with respect to that week of unemployment; and

(d) The individual is totally, part-totally, or partially unemployed, and is able to work, available for work, and seeking work within the meaning of or as required by the applicable State law, and is not subject to disqualification under this Part or the applicable State law, with respect to that week of unemployment.

§ 614.4 Weekly and maximum benefit amounts.

(a) *Total unemployment.* The weekly amount of UCX payable to an eligible individual for a week of total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of total unemployment as determined under the applicable State law.

(b) *Partial and part-total unemployment.* The weekly amount of UCX payable for a week of partial or part-total unemployment shall be the amount that would be payable to the individual as unemployment compensation for a week of partial or part-total unemployment as determined under the applicable State law.

(c) *Maximum amount.* The maximum amount of UCX which shall be payable to an eligible individual during and subsequent to the individual's benefit year shall be the maximum amount of all unemployment compensation that would be payable to the individual as determined under the applicable State law.

(d) *Computation rule.* The weekly and maximum amounts of UCX payable to an individual under the UCX Program shall be determined under the applicable State law to be in the same amount, on the same terms, and subject to the same conditions as the State unemployment compensation which would be payable to the individual under the applicable State law if the individual's Federal military service and Federal military wages assigned or transferred under this Part to the State had been included as employment and wages covered by that State law, subject to the use of the applicable Schedule of Remuneration.

§ 614.5 Claims for UCX.

(a) *First claims.* A first claim for UCX shall be filed by an individual in any State agency of any State according to the applicable State law, and on a form prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(b) *Weekly claims.* Claims for waiting week credit and payments of UCX for weeks of unemployment shall be filed in any State agency (or Canada) at the times and in the manner as claims for State unemployment compensation are filed under the applicable State law, and on forms prescribed by the Department which shall be furnished to the individual by the State agency where the claim is filed.

(c) *Secretary's standard.* The procedures for reporting and filing claims for UCX and waiting period credit shall be consistent with this Part 614 and the Secretary's "Standard for Claim Filing, Claimant Reporting, Job Finding and Employment Services" *(Employment Security Manual,* Part V, sections 5000 *et seq.*).

§ 614.6 Determinations of entitlement; notices to individual.

(a) *Determination of first claim.* Except for findings of a Federal military agency or the Veterans Administration and the applicable Schedule of Remuneration which are final and conclusive under § 614.25, the State agency whose State law applies to an individual under § 614.8 shall, promptly upon the filing of first claim for UCX, determine whether the individual is otherwise eligible and, if the individual is found to be eligible, the individual's benefit year and the weekly and maximum amounts of UCX payable to the individual.

(b) *Determinations of weekly claims.* The State agency promptly shall, upon the filing of a claim for a payment of UCX or waiting period credit with respect to a week, determine whether the individual is entitled to a payment of UCX or waiting period credit with respect to such week, and, if entitled, the amount of UCX or waiting period credit to which the individual is entitled.

(c) *Redetermination.* The provisions of the applicable State law concerning the right to request, or authority to undertake, reconsideration of a determination pertaining to State unemployment compensation under the applicable State law shall apply to determinations pertaining the UCX.

(d) *Notices to individual.* The State agency promptly shall give notice in writing to the individual of any determination or redetermination of a first claim, and, except as may be authorized under paragraph (g) of this section, of any determination or redetermination of any weekly claim which denies UCX or waiting period credit or reduces the weekly amount or maximum amount initially determined to be payable. Each notice of determination or redetermination shall include such information regarding the determination or redetermination and notice of right to reconsideration or appeal, or both, as is furnished with written notices of determinations and redeterminations with respect to claims for State unemployment compensation. Such notice shall include the findings of any Federal military agency or the Veterans Administration, and shall inform the individual of the finality of such findings and of the individual's right to request correction of such findings as is provided in §§ 614.22 and 614.24.

(e) *Obtaining information for claim determinations.*

(1) Information required for the determination of claims for UCX shall be obtained by the State agency from claimants, employers, and others, in the same manner as information is obtained for claim purposes under the applicable State law, but Federal military findings shall be obtained from military documents, the applicable Schedule of Remuneration, and from Federal military agencies and the Veterans' Administration as prescribed in §§ 614.21–614.26.

(2) Procedures for requesting correction of Federal findings and Veterans Administration findings, and State agency procedures when requests are made and responses are received, are prescribed in §§ 614.22–614.24.

(f) *Promptness.* Full payment of UCX when due shall be consistent with this Part 614 and shall be made with the greatest promptness that is administratively feasible, but the provisions of Part 640 of this chapter (relating to promptness of benefit payments) shall not be applicable to the UCX Program.

(g) *Secretary's standard.* The procedures for making determinations and redeterminations, and furnishing written notices of determinations, redeterminations, and rights of appeal to individuals applying for UCX, shall be consistent with this Part 614 and with the Secretary's "Standard for Claim

Determinations—Separation Information" (*Employment Security Manual,* Part V, sections 6010 *et seq.*).

§ 614.7 Appeal and review.

(a) *Applicable State law.* The provisions of the applicable State law concerning the right of appeal and fair hearing from a determination or redetermination of entitlement to State unemployment compensation (exclusive of findings which are final and conclusive under § 614.25) shall apply to determinations and redeterminations of eligibility for or entitlement to UCX and waiting period credit. Any such determination or redetermination shall be subject to appeal and review only in the manner and to the extent provided in the applicable State law with respect to determinations and redeterminations of entitlement to State unemployment compensation. (Section 614.24 governs appeals of findings of the Veterans Administration.)

(b) *Rights of appeal and fair hearing.* The provisions on right of appeal and opportunity for a fair hearing with respect to claims for UCX shall be consistent with this Part and with sections 303(a)(1) and 303(a)(3) of the Social Security Act, 42 U.S.C. §§ 503(a)(1) and 503(a)(3).

(c) *Promptness on appeals.* (1) Decisions on appeals under the UCX Program shall accord with the Secretary's "Standard for Appeals Promptness—Unemployment Compensation" in Part 650 of this chapter, and with § 614.1(d).

(2) Any provision of an applicable State law for advancement or priority of unemployment compensation cases on judicial calendars, or otherwise intended to provide for the prompt payment of unemployment compensation when due, shall apply to proceedings involving claims for UCX.

(d) *Appeal and review by Federal military agency.* If a Federal military agency believes that a State agency's determination or redetermination of an individual's eligibility for or entitlement to UCX is incorrect, the Federal military agency may seek appeal and review of such determination or redetermination in the same manner as an interested employer may seek appeal and review under the applicable State law.

§ 614.8 The applicable State for an individual.

(a) *The applicable State.* The applicable State for an individual shall be the State to which the individual's Federal military service and Federal military wages are assigned or transferred under this section. The applicable State law for the individual shall be the State law of such State.

(b) *Assignment of service and wages.* (1) When an individual files a first claim all of the individual's Federal military service and Federal military wages shall be deemed to be assigned to the State in which such claim is filed, which shall be the "Paying State" in the case of a combined-wage claim. (Section 616.6(e) of this chapter.)

(2) Federal military service and Federal military wages assigned to a State in error shall be reassigned for use by the proper State agency. An appropriate record of the reassignment shall be made by the State agency which makes the reassignment.

(c) *Assignment deemed complete.* All of an individual's Federal military service and Federal military wages shall be deemed to have been assigned to a State upon the filing of a first claim. Federal military service and Federal military wages shall be assigned to a State only in accordance with paragraph (b) of this section.

(d) *Use of assigned service and wages.* All assigned Federal military service and Federal military wages shall be used only by the State to which assigned in accordance with paragraph (b) of this section, except that any Federal military service and Federal military wages which are not within the base period of the State to which they were assigned shall be subject to transfer in accordance with Part 616 of this chapter for the purposes of any subsequent Combined-Wage Claim filed by the individual.

§ 614.9 Provisions of State law applicable to UCX claims.

(a) *Particular provisions applicable.* Except where the result would be inconsistent with the provisions of the Act or this Part or the procedures thereunder prescribed by the Department, the terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCX and claims for waiting period credit. The provisions of the applicable State law which shall apply include, but are not limited to:

(1) Claim filing and reporting;

(2) Information to individuals, as appropriate;

(3) Notices to individuals, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to UCX;

(4) Determinations and redeterminations;

(5) Ability to work, availability for work, and search for work; and

(6) Disqualifications, except in regard to separation from any Federal military agency.

(b) *IBPP.* The *Interstate Benefit Payment Plan* shall apply, where appropriate, to individuals filing claims for UCX.

(c) *Wage combining.* The State provisions complying with the *Interstate Arrangement for Combining Employment and Wages* (Part 616 of this chapter) shall apply, where appropriate, to individuals filing claims for UCX.

(d) *Procedural requirements.* The provisions of the applicable State law which apply hereunder to claims for and the payment of UCX shall be applied consistently with the requirements of Title III of the Social Security Act and the Federal Unemployment Tax Act which are pertinent in the case of State unemployment compensation, including but not limited to those standards and requirements specifically referred to in the provisions of this Part, except as provided in paragraph (f) of § 614.6.

§ 614.10 Restrictions on entitlement.

(a) *Disqualification.* If the week of unemployment for which an individual claims UCX is a week to which a disqualification for State unemployment compensation applies under the applicable State law, the individual shall not be entitled to a payment of UCX for that week. As provided in § 614.9(a), no disqualification shall apply in regard to separation from any Federal military agency.

(b) *Effect of "days lost".* The continuity of a period of an individual's Federal military service shall not be deemed to be interrupted by reason of any "days lost" in such period, but "days lost" shall not be counted for purposes of determining:

(1) Whether an individual has performed Federal military service;

(2) Whether an individual meets the wage and employment requirements of a State law; or

(3) The amount of an individual's Federal military wages.

(c) *Allocation of military accrued leave.* A State agency shall allocate the number of days of unused military leave specified in an ex-servicemember's military document, for which a lump-sum payment has been made, in the same manner as similar payments by private employers to their employees are allocated under the applicable State law, except that the applicable Schedule of Remuneration instead of the lump-sum payment shall be used to determine the amount of the claimant's Federal military wages. In a State in which a

private employer has an option as to the period to which such payments shall be allocated, such payments shall be allocated to the date of the individual's latest discharge or release from Federal military service. An allocation under this paragraph shall be disregarded in determining whether an individual has had a period of active service constituting Federal military service.

(d) *Education and training allowances.* An individual is not entitled to UCX under the Act or this Part for a period with respect to which the individual receives:

(1) A subsistence allowance for vocational rehabilitation training under chapter 31 of title 38 of the United States Code, 38 U.S.C. §§ 1501 *et seq.*, or under Part VIII of Veterans Regulation Number 1(a); or

(2) An educational assistance allowance or special training allowance under chapter 35 of title 38 of the United States Code, 38 U.S.C. §§ 1700 *et seq.*

§ 614.11 Overpayments; penalties for fraud.

(a) *False statements and representations.* Section 8507(a) of the Act provides that if a State agency, the Department, or a court of competent jurisdiction finds that an individual—

(1) knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact; and

(2) as a result of that action has received an amount as UCX to which the individual was not entitled; the individual shall repay the amount to the State agency or the Department. Instead of requiring repayment, the State agency or the Department may recover the amount by deductions from UCX payable to the individual during the 2-year period after the date of the finding. A finding by a State agency or the Department may be made only after an opportunity for a fair hearing, subject to such further review as may be appropriate under § 614.7.

(b) *Prosecution for fraud.* Section 1919 of title 18, United States Code, provides that whoever makes a false statement or representation of a material fact knowing it to be false, or knowingly fails to disclose a material fact, to obtain or increase for himself or for any other individual any payment authorized to be paid under chapter 85 of title 5, United States Code, or under an agreement thereunder, shall be fined not more than $1,000 or imprisioned not more than one year, or both.

(c) *Absence of fraud.* If a State agency or court of competent jurisdiction finds that an individual has received a payment of UCX to which the individual was not entitled under the Act and this Part, which was not due to a false statement or representation as provided in paragraph (a) or (b) of this section, the individual shall be liable to repay to the applicable State the total sum of the payment to which the individual was not entitled, and the State agency shall take all reasonable measures authorized under any State law or Federal law to recover for the account of the United States the total sum of the payment to which the individual was not entitled.

(d) *Recovery by offset.* (1) The State agency shall recover, insofar as is possible, the amount of any overpayment which is not repaid by the individual, by deductions from any UCX payable to the individual under the Act and this Part, or from any unemployment compensation payable to the individual under any Federal unemployement compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(2) A State agency shall also recover, insofar as is possible, the amount of any overpayment of UCX made to the individual by another State by deductions from any UCX payable by the State agency to the individual under the Act and this Part, or from any unemployment compensation payable to the individual under any Federal unemployment compensation law administered by the State agency, or from any assistance or allowance payable to the individual with respect to unemployment under any other Federal law administered by the State agency.

(3) Recoupment of fraudulent overpayments referred to in paragraph (a) of this section shall be limited to the 2-year period stated in that paragraph. Recoupment of fraudulent overpayments referred to in paragraph (b) of this section, and nonfraudulent overpayments referred to in paragraph (c) of this section shall be subject to any time limitation on recoupment provided for in the State law that applies to the case.

(e) *Debts due the United States.* UCX payable to an individual shall be applied by the State agency for the recovery by offset of any debt due to the United States from the individual, but shall not be applied or used by the State agency in any manner for the payment of any debt of the individual to any State or any other entity or person except pursuant to a court order for child support or alimony in accordance with the law of the State and section 459 of the Social Security Act, 42 U.S.C. § 659.

(f) *Application of State law.* (1) Any provision of State law that may be applied for the recovery of overpayments or prosecution for fraud, and any provision of State law authorizing waiver of recovery of overpayments of unemployment compensation, shall be applicable to UCX.

(2) In the case of any finding of false statement or representation under the Act and paragraph (a) of this section, or prosecution for fraud under 18 U.S.C. § 1919 or pursuant to paragraph (f)(1) of this section, the individual shall be disqualified or penalized in accordance with the provisions of the applicable State law relating to fraud in connection with a claim for State unemployment compensation.

(g) *Final decision.* Recovery of any overpayment of UCX shall not be enforced by the State agency until the determination or redetermination establishing the overpayment has become final, or if appeal is taken from the determination or redetermination, until the decision after opportunity for a fair hearing has become final.

(h) *Procedural requirements.* (1) The provisions of paragraphs (c), (d), and (g) of § 614.6 shall apply to determinations and redeterminations made pursuant to this section.

(2) The provisions of § 614.7 shall apply to determinations and redeterminations made pursuant to this section.

(i) *Fraud detection and prevention.* Provisions in the procedures of each State with respect to detection and prevention of fraudulent overpayments of UCX shall be, as a minimum, commensurate with the procedures adopted by the State with respect to State unemployment compensation and consistent with the Secretary's "Standard for Fraud and Overpayment Detection" (*Employment Security Manual*, Part V, sections 7510 *et seq.*).

(j) *Recovered overpayments* An amount repaid or recouped under this section shall be—

(1) deposited in the fund from which payment was made, if the repayment was to a State agency; or

(2) returned to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payment was made, if the repayment was to the Department.

§ 614.12 Schedules of Remuneration.

(a) *Authority.* Section 8521(a)(2) of chapter 85, title 5 of the United States Code, 5 U.S.C. 8521(a)(2), requires the Secretary of Labor to issue from time to

time, after consultation with the Secretary of Defense, a Schedule of Remuneration specifying the pay and allowances for each pay grade of members of the Armed Forces.

(b) *Elements of schedule.* A schedule reflects representative amounts for appropriate elements of the pay and allowances, whether in cash or kind, for each pay grade of members of the Armed Forces, with a statement of the effective date of the schedule. Benefit amounts for the UCX Program are computed on the basis of the Federal military wages for the pay grade of the individual at the time of the individual's latest discharge or release from Federal military service, as specified in the schedule applicable at the time the individual files his or her first claim for compensation for the benefit year.

(c) *Effective date.* Any new Schedule of Remuneration shall take effect beginning with the first week of the calendar quarter following the calendar quarter in which such schedule is issued, and shall remain applicable until a subsequent schedule becomes effective. Prior schedules shall continue to remain applicable for the periods they were in effect.

(d) *Publication.* Any new Schedule of Remuneration shall be issued by the Secretary of Labor to the State agencies and the Federal military agencies. Promptly after the issuance of a new Schedule of Remuneration it shall be published as a notice in the **Federal Register.**

§ 614.13 Inviolate rights to UCX.

Except as specifically provided in this Part, the rights of individuals to UCX shall be protected in the same manner and to the same extent as the rights of persons to State unemployment compensation are protected under the applicable State law. Such measures shall include protection of applicants for UCX from waiver, release, assignment, pledge, encumbrance, levy, execution, attachment, and garnishment of their rights to UCX, except as provided in § 614.11. In the same manner and to the same extent, individuals shall be protected from discrimination and obstruction in regard to seeking, applying for, and receiving any right to UCX.

§ 614.14 Recordkeeping; disclosure of information.

(a) *Recordkeeping.* Each State agency will make and maintain records pertaining to the administration of the UCX Program as the Department requires, and will make all such records available for inspection, examination, and audit by such Federal officials or employees as the Department may designate or as may be required by law.

(b) *Disclosure of information.* Information in records maintained by a State agency in administering the UCX Program shall be kept confidential, and information in such records may be disclosed only in the same manner and to the same extent as information with respect to State unemployment compensation and the entitlement of individuals thereto may be disclosed under the applicable State law. This provision on the confidentiality of information maintained in the administration of the UCX Program shall not apply, however, to the Department or for the purposes of §§ 614.11 or 614.14, or in the case of information, reports and studies required pursuant to §§ 614.18 or 614.26, or where the result would be inconsistent with the Freedom of Information Act, 5 U.S.C. § 552, the Privacy Act of 1974, 5 U.S.C. § 552a, or regulations of the Department promulgated thereunder.

§ 614.15 Payments to States.

(a) *State entitlement.* Each State is entitled to be paid by the United States with respect to each individual whose base period wages included Federal military wages, an amount bearing the same ratio to the total amount of compensation paid to such individual as the amount of the individual's Federal military wages in the individual's base period bears to the total amount of the individual's base period wages.

(b) *Payment.* Each State shall be paid, either in advance or by way of reimbursement, as may be determined by the Department, the sum that the Department estimates the State is entitled to receive under the Act and this Part for each calendar month. The sum shall be reduced or increased by the amount which the Department finds that its estimate for an earlier calendar month was greater or less than the sum which should have been paid to the State. An estimate may be made on the basis of a statistical, sampling, or other method agreed on by the Department and the State agency.

(c) *Certification by the Department.* The Department, from time to time, shall certify to the Secretary of the Treasury the sum payable to each State under this section. The Secretary of the Treasury, before audit or settlement by the General Accounting Office, shall pay the State in accordance with the certification from the funds for carrying out the purposes of the Act and this Part.

(d) *Use of money.* Money paid a State under the Act and this Part may be used solely for the purposes for which it is paid. Money so paid which is not used solely for these purposes shall be returned, at the time specified by the Agreement, to the Treasury of the United States and credited to the current applicable appropriation, fund, or account from which payments to States under the Act and this Part may be made.

§ 614.16 Public access to agreements.

The State agency of a State will make available to any individual or organization a true copy of the Agreement with the State for inspection and copying. Copies of an Agreement may be furnished on request to any individual or organization upon payment of the same charges, if any, as apply to the furnishing of copies of other records of the State agency.

§ 614.17 Administration in absence of an agreement.

(a) *Administering program.* The Department shall administer the UCX Program through personnel of the Department or through other arrangements under procedures prescribed by the Department, in the case of any State which does not have an Agreement with the Secretary as provided for in 5 U.S.C. § 8502. The procedures prescribed by the Department under this section shall be consistent with the Act and this Part.

(b) *Applicable State law.* On the filing by an individual of a claim for UCX in accordance with arrangements under this section, UCX shall be paid to the individual, if eligible, in the same amount, on the same terms, and subject to the same conditions as would be paid to the individual under the applicable State law if the individual's Federal military service and Federal military wages had been included as employment and wages under the State law. Any such claims shall include the individual's Federal military service and Federal military wages, combined with any service and wages covered by State law. However, if the individual, without regard to his or her Federal military service and Federal military wages, has employment or wages sufficient to qualify for compensation during the benefit year under that State law, then payments of UCX under this section may be made only on the basis of the individual's Federal military service and Federal military wages.

(c) *Fair hearing.* An individual whose claim for UCX is denied under this section is entitled to a fair hearing under rules of procedure prescribed by the Department. A final determination by the Department with respect to entitlement to UCX under this section is

subject to review by the courts in the same manner and to the same extent as is provided by section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

§ 614.18 Information, reports, and studies.

State agencies shall furnish to the Department such information and reports and conduct such studies as the Department determines are necessary or appropriate for carrying out the purposes of the UCX Program.

Subpart C—Responsibilities of Federal Military Agencies and State Agencies

§ 614.20 Information to ex-servicemembers.

At the time of discharge or release from Federal military service each Federal military agency shall furnish to each ex-servicemember information explaining rights and responsibilities under the UCX Program and 18 U.S.C. § 1919, and military documents necessary for filing claims for UCX.

§ 614.21 Findings of Federal military agency.

(a) *Findings in military documents.* Information contained in a military document furnished to an ex-servicemember shall constitute findings to which § 614.25 applies as to:

(1) Whether an individual has performed Federal military service, or whether paragraph (b) of this section or §§ 614.23 and 614.24 are applicable;

(2) The beginning and ending dates of the period of military service and "days lost" during such period;

(3) The type of discharge or release terminating the period of military service; and

(4) The individual's pay grade at the time of discharge or release from military service.

(b) Bad Conduct and Dishonorable discharges. A military document which shows that an individual received a bad conduct or dishonorable discharge shall be a finding to which § 614.25 applies, that the individual did not perform Federal military service.

§ 614.22 Correcting Federal findings.

(a) *Request for correction.* (1) If an individual believes that a finding specified in § 614.21 is incorrect or that information as to any finding has been omitted from a military document, the individual may request the issuing Federal military agency to correct the military document. A request for correction may be made through the State agency, which shall forward such request and any supporting information submitted by the individual to the Federal military agency.

(2) The Federal military agency shall promptly forward to the individual or State agency making the request the corrected military document. Information contained in a corrected military document issued pursuant to such a request shall constitute the findings of the Federal military agency under § 614.21.

(3) If a determination or redetermination based on a finding as to which correction is sought has been issued by a State agency before a request for correction under this paragraph is made, the individual who requested such correction shall file a request for redetermination or appeal from such determination or redetermination with the State agency, and shall inform the State agency of the request for correction.

(4) An individual who files a request for correction of findings under this paragraph shall promptly notify the State agency of the action of the Federal military agency on such request.

(b) *State agency procedure when request made.*

(1) If a determination of entitlement has not been made when an individual notifies a State agency of a request for correction under paragraph (a) of this section, the State agency may postpone such determination until the individual has notified the State agency of the action of the Federal military agency on the request.

(2) If a determination of entitlement has been made when an individual notifies a State agency that a request for correction of Federal findings has been made, or if an individual notifies a State agency prior to a determination of entitlement that a request has been made but such determination is not postponed by the State agency, the individual may file a request for redetermination or appeal in accordance with the applicable State law.

(3) Except as provided in paragraph (c) of this section, no redetermination shall be made or hearing scheduled on an appeal until the individual has notified the State agency of the action of the Federal military agency on a request for correction under paragraph (a) of this section.

(c) *State agency procedure when request answered.* On receipt of notice of the action of a Federal military agency on a request for correction of its findings, a State agency shall:

(1) Make a timely determination or redetermination of the individual's entitlement, or

(2) Promptly schedule a hearing on the individual's appeal.

If such notice is not received by a State agency within one year of the date on which an individual first filed a claim, or such notice is not given promptly by an individual, a State agency without further postponement may make such determination or redetermination or schedule such hearing.

(d) *Findings corrected without request.* Information as to any finding specified in § 614.21 contained in a corrected military document issued by a Federal military agency on its own motion shall constitute the findings of such agency under § 614.21, if notice thereof is received by a State agency before the period for redetermination or appeal has expired under the State law. On timely receipt of such notice a State agency shall take appropriate action under the applicable State law to give effect to the corrected findings.

§ 614.23 Findings of Veterans Administration

(a) *Request for findings.* If a military document shows that an individual's discharge or release from Federal military service was under conditions other than honorable, or that the period of such service was less than 90 days, the Veterans Administration on request of a State agency shall decide whether the individual was discharged or released—

(1) Under conditions other than dishonorable, or

(2) In the case of an officer, by reason of resignation for the good of the service, or

(3) By reason of an actual service-incurred disability.

(b) *Qualified or conditional separations.* On request of a State agency the Veterans Administration also shall decide whether an individual's discharge or release from Federal military service was qualified or conditional.

(c) *Finality of Findings.* Any decision by the Veterans Administration under this section shall constitute a finding to which § 614.25 applies.

(d) *Promptness of decision.* The Veterans Administration shall promptly act on and reply to any request received under this section.

§ 614.24 Correcting Veterans Administration findings.

(a) *Request for correction.* (1) If an individual believes that a finding under § 614.23 is incorrect, the individual may request reconsideration of or appeal such finding under the procedures of the Veterans Administration. The decision of the Veterans Administration on any such request shall constitute the findings of the Veterans Administration under § 614.23.

(2) Any request for correction must be filed before the period for redetermination or appeal of the UCX claim has expired under the applicable State law.

(3) A request for correction may be made through the State agency, which shall forward such request and any supporting information submitted by the individual to the Veterans Administration. If a request for correction is not made through the State agency, the individual shall notify the State agency promptly that a request for correction has been filed with the Veterans Administration.

(4) The individual making a request for correction under this section shall notify the State agency promptly of the action of the Veterans Administration on the request, unless the State agency is notified directly by the Veterans administration.

(b) *State agency procedure when request made. (1) If a State agency has not made a determination of entitlement when an individual requests correction of a Veterans Administration finding under paragraph (a) of this section, the State agency shall postpone such determination until it is notified of the action of the Veterans administration on the request.*

(2) If a determination of entitlement has been made when an individual requests correction of a Veterans Administration finding under paragraph (a) of this section, the individual may file with the State agency a request for redetermination or an appeal in accordance with the applicable State law. No redetermination shall be made, or hearing scheduled on an appeal, until the State agency receives notice of the action of the Veterans Administration on such request.

(c) *State agency procedure when request answered.* On receipt of the action of the Veterans Administration a State agency shall:

(1) Make a timely determination or redetermination of the individual's entitlement; or

(2) Promptly schedule a hearing on the individual's appeal.

(d) *Promptness of correction.* The Veterans Administration shll promptly act on and reply to any request received under this section.

§ 614.25 Finality of findings.

The findings of a Federal military agency referred to in §§ 614.21 and 614.22, the findings of the Veterans Administration referred to in §§ 614.23 and 614.24, and the Schedules of Remuneration issued by the Department pursuant to the Act and § 614.12, shall be final and conclusive for all purposes of the UCX Program, including appeal and review pursuant to § 614.7 or § 614.17.

§ 614.26 Furnishing other information.

(a) *Additional information.* In addition to the information required by §§ 614.21, 614.22, 614.23, and 614.24, a Federal military agency or the Veterans Administration shall furnish to a State agency or the Department, within the time requested, any information which it is not otherwise prohibited from releasing by law, which the Department determines is necessary for the administration of the UCX Program.

(b) *Reports.* Federal military agencies shall furnish to the Department or State agencies such reports containing such information as the Department determines are necessary or appropriate for carrying out the purposes of the UCX Program.

§ 614.27 Liaison with Department.

To facilitate the Department's administration of the UCX Program, each Federal military agency and the Veterans Administration shall designate one or more of its officials to be the liaison with the Department. Each Federal military agency will inform the Department of its designation(s) and of any change in a designation.

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Friday
January 23, 1981

Part XIII

Office of the Special Assistant to the President for Consumer Affairs

Export of Banned or Significantly Restricted Substances; Background Report on Executive Order 12264

OFFICE OF THE SPECIAL ASSISTANT TO THE PRESIDENT FOR CONSUMER AFFAIRS, THE WHITE HOUSE

Background Report on Executive Order 12264 on Federal Policy Regarding the Export of Banned or Significantly Restricted Substances

AGENCY: Office of the Special Assistant to the President for Consumer Affairs, The White House.

ACTION: Background Report.

SUMMARY: For the past two and a half years, a 22-agency working group worked on the development of a Federal policy regarding the export of hazardous substances banned or significantly restricted for use in the United States. On August 12, 1980, the working group published in the **Federal Register**, for public comment, its draft report. (45 FR 53754) On the basis of comments received from the public and from affected agencies as well, the policy described in the draft report was refined and submitted to the President in the form of a proposed Executive Order.

On January 15, 1981, the President signed Executive Order 12264, embodying the policy recommendations developed by the working group. The Executive Order was published in the **Federal Register** of January 19, 1981. (46 FR 4659)

The background report being published today is based on the draft report published on August 12 of last year. It is intended to inform the public about the policy considerations that went into the development of the Executive Order, to describe the statutory context against which the Order was prepared, and to discuss the procedures, standards, and activities that are provided for in the Order.

FOR FURTHER INFORMATION CONTACT: Requests for additional copies of this report, or questions about its contents, should be directed to Kitty Gillman, Council on Environmental Quality, 722 Jackson Place, N.W., Washington, D.C. 20006, (202) 395-5780.

Background Report on the Executive Order on Federal Policy Regarding the Export of Banned or Significantly Restricted Substances

I. Introduction

The Executive Order issued by the President today follows a two and a half year effort by a Carter Administration Working Group to examine and improve Federal policy on the export of hazardous substances which are banned or whose use is significantly restricted in the United States.* The catalyst for this effort was the national and international controversy over U.S. exports of TRIS-treated children's sleepwear, after it had been banned for sale in the United States.

The export of TRIS-treated sleepwear was not an isolated incident. Congressional hearings in July 1978** pointed out numerous instances in which American firms exported, without restriction on the part of the U.S. government, substances that had been banned or strictly limited for use in this country. In some of these cases, the risks and benefits of using the exported products in the importing countries may have been different from those in the United States due to differing economic, social, and cultural conditions. However, in most instances, there was little evidence of a special U.S. government effort to share with importing countries the information which had led the United States to ban or strictly limit the use of the products, so that the importing countries could make their own informed judgments. The unrestrained export of hazardous substances by U.S. firms raised questions about this country's ethical responsibility for the hazards arising from hazardous exports, questions that have important implications for U.S. trade and foreign relations. One result of this concern was that in 1978 Congress amended several regulatory acts to provide notification to importers and/or to the government of the importing nation when certain banned products are exported from the United States.

U.S. manufacturers have a strong stake in fostering a positive attitude among foreign governments and consumers toward products bearing the label "Made in USA." Sale abroad of banned products tends to undermine foreign confidence in American-made products. Among the potential consequences are losses in export trade and thus negative effects on our balance of payments, and possible adverse long-term effects on foreign markets.

Uncontrolled export of hazardous substances also tends to damage our relations with foreign countries. Importing countries—generally the poorer, less developed nations of the world—have urged that exporting countries exercise restraint in sending abroad products that are banned for use at home and provide full information on the products' effects. UN Environment Programme resolutions (formally called decisions) in 1977, 1978, and 1980 asked nations not to permit export of hazardous substances without the knowledge and consent of the importing countries. To these countries, a U.S. government policy that tolerates unrestrained export of banned products could appear callous or hostile and thus be detrimental to U.S. foreign policy interests.

In the summer of 1978, the Interagency Working Group was established to explore the nature and scope of problems related to the export of banned or significantly restricted substances, and, if appropriate, to propose a government policy to which all Federal agencies would subscribe. The Executive Order is based upon recommendations of the Working Group.

Definition of Banned and Significantly Restricted Substances

Careful definition of terms is necessary, to make clear what substances should be considered for purposes of a policy to control export of banned and significantly restricted substances. The Executive Order generically defines these substances to mean a pesticide, chemical, food (including meat, meat product, or poultry), food additive, drug, cosmetic, medical device, electronic product, biological product, color additive, or consumer product for which a Federal agency has taken any of the following types of regulatory actions in order to protect against an actual or potential threat to the health or safety of the United States public or to the environment:

(1) Final rulemaking or adjudicatory action (including emergency or interim binding action) which denies or revokes approval for, or prohibits, the manufacture, production, use, or sale in the United States.

(2) Final rulemaking or adjudicatory action (including emergency or interim binding action) which prohibits or revokes approval of most significant uses in the United States.

(3) Withholding, or absence of registration or approval for any substance for which Federal law

*The Working Group, convened by Esther Peterson, Special Assistant to the President for Consumer Affairs, included the Departments of State, Agriculture, Commerce, Energy, Health and Human Services (Food and Drug Administration), Justice, Defense, Labor, Transportation, and Treasury, and the Environmental Protection Agency, Consumer Product Safety Commission, Export-Import Bank, Overseas Private Investment Corporation, ACTION, Agency for International Development, Regulatory Council, Office of Management and Budget, Council on Environmental Quality, Nuclear Regulatory Commission, Office of the U.S. Trade Representative, and several other Executive offices. Mrs. Peterson served as Chair of the Working Group; Robert Harris, Member of the Council on Environment Quality was Co-Chair.

**Hearings before the Subcommittee on Commerce, Consumer and Monetary Affairs of the House Committee on Government Operations.

requires Federal agency registration or approval before manufacture, production, use, or sale in the United States.

A more detailed definition of "banned and significantly restricted substances," in which the substances and products covered by the policy are defined in terms of regulatory action under certain sections of certain statutes, is provided in Section VII.

Certain categories of products were excluded from the policy because of their special legislative history or because of the special problems they raise: alcohol, tobacco, and firearms; military weapons and equipment; narcotic and psychotropic substances; and nuclear fuels. Hazardous non-nuclear wastes are not included since another effort led by the State Department is developing a policy to deal with exports of these wastes. Also generally excluded from consideration are the export of hazardous production facilities, and U.S. financial assistance for such facilities. Substances which may cause hazardous workplace conditions are included in parts of the policy.

III. Nature and Scope of the Problem

Since there are only limited controls at present on export of banned and significantly restricted substances, the government has no mechanisms for monitoring or valuing such exports. Further, many firms resist disclosure of the extent or destination of export products. Some of them consider their marketing plans trade secrets. Thus, no estimates are available of the dollar value of such substances exported from the United States.

Virtually unrestrained export is currently allowed for many substances banned for sale in the United States: certain food dyes; cyclamate sweeteners; and drugs, cosmetics, and antibiotics that are adulterated or misbranded. Other banned substances may be exported provided notice is sent to the importing nation. These include most CPSC and EPA-regulated products. Finally, a few classes of banned substances, including unapproved drugs and banned medical devices, are categorically prohibited from export.

Several examples, drawn from Congressional hearings and information provided by federal agencies, suggest suggest the nature and scope of the problem. Some of the examples also suggest the complexity of controlling the export of substances which the United States may consider too hazardous to use but which other countries, with differing needs and conditions, may judge differently.

• Complying with federal requirements, U.S. manufacturers treated children's sleepwear with the chemical flame-retardant TRIS. In April 1977, after the carcinogenic hazard of the substance was discovered the Consumer Product Safety Commission (CSPC) banned domestic sales of TRIS-treated sleepwear. According to Congressional testimony, however, exports of the garments continued for more than a year. Approximately 2.4 million pieces valued at $1.2 million were reported to have been shipped abroad. Most banned consumer products may still be exported, provided the government of the importing country is notified of the shipment.

• In March 1978, the Food and Drug Administration (FDA) issued a final rule prohibiting the nonessential uses of certain chlorofluorocarbons (CFCs) as propellants in self-pressurized containers of foods, drugs and cosmetics. EPA at the same time prohibited domestic production, processing, and use of CFCs (other than those covered by FDA) for nonessential aerosol propellant use. These actions were taken because chlorofluorocarbons may deplete stratospheric ozone, leading to an increase in skin cancer, climatic changes, and other adverse biological and ecological effects. EPA also banned the processing of CFCs into aerosols for export, though it did not ban the export of unprocessed CFCs. Subsequently, some manufacturers requested information from FDA as to whether or not is was legal to export cosmetics (e.g., hair sprays) containing chlorofluorocarbons as propellants. FDA advised these firms that shipping cosmetic products to other countries was lawful as long as they were not prohibited by the country to which they are shipped.

• The very powerful and very hazardous pesticide, Leptophos, never registered by EPA for domestic use, was manufactured in the United States principally for export. According to Congressional testimony, nearly 14 million pounds was exported to 50 countries between 1971 and 1976. In 1971 and 1972 a number of Egyptain farmers were found to be suffering from hallucinations and impairment of vision and speech after using Leptophos, and 1,200 water buffalos were reported to have died from exposure to the pesticide.

• According to the General Accounting Office, over 550 million pounds of pesticides were exported from the United States in 1976. Of these exports, approximately 30 percent (more than 160 million pounds) were pesticides whose use is prohibited in the United States. This includes unregistered pesticides which contain an "active ingredient" that is contained in registered products, but which is being exported in a different formulation; pesticides for which registration has never been sought; and pesticides whose registration has been cancelled, suspended, or denied. Unregistered pesticides may lawfully be exported provided that the product is labeled as unregistered (and meets other labeling requirements) and that importers are notified and acknowledge that the pesticide is unregistered. A copy of the acknowledgement is sent to EPA for transmittal to the foreign government.

• The World Health Organization has estimated that approximately 500,000 human poisonings, including about 5,000 deaths, are attributable to pesticides each year. Many of these are due to use of certain classes of pesticides which degrade quickly but are extremely toxic when applied. EPA has established stringent standards for the training and certification of individuals wishing to use these registered pesticides in the United States. However, the U.S. exports tens of millions of pounds of these pesticides each year to countries where such training may not be required and warning labels may not be followed.

• Chloramphenicol is an extremely potent antibiotic used in the United States only against typhoid fever and a few other life-threatening infections because of its serious potential side effects, such as aplastic amenia. The FDA indicated in Congressional testimony that an American firm had labelled and exported it to Spanish-speaking countries as suitable for treatment of much more routine diseases for which there had been no substantiation of its effectiveness, including measles, mumps, and chicken pox, with no warnings as to its dangerous side effects.

• Depo-Provera, a drug that can be used legally in 69 countries (though not in the United States) as an injectable contraceptive, is supplied for contraception by an American drug firm from overseas manufacturing sites. According to FDA, it is approved for use in the United States only for palliative treatment of endometrial and renal cancer, because animal tests have suggested that it may itself be carcinogenic. Currently, it may not be exported for contraceptive use. Some people have asked for U.S. approval of the drug as a contraceptive so its can be used in AID programs for population control.

Besides the concerns about health and safety effects of hazardous substances exports on foreign citizens, effects on our own citizens are also a cause of concern. Export of hazardous substances can have a direct effect on U.S. citizens by more than one route: through adverse effects on workers in the plant where the product is manufactured; through the reimportation of the original substances or their traces or derivatives; through the illegal diversion into domestic commerce of restricted products originally produced for export; or through transport of hazardous substances back to this country via the air or oceans. The world environment itself could suffer through release of hazardous substances to the global commons.

A General Accounting Office report concluded that many kinds of imported foods may be contaminated with pesticides not allowed in the United States. FDA spot checks (examining about 1 percent of shipments) of imported raw agricultural commodities found that about 5 percent of the shipments tested in 1977 through 1979 contained residues of pesticides for which no U.S. tolerance levels exist. According to the GAO report, test results showing unacceptable residue levels are sometimes received after the item tested has already entered the marketplace. Moreover, the vast majority of imported foods enter the United States with no testing for toxic residues. Pesticides banned in the United States but used in other countries, especially nearby countries like Canada and Mexico, can also travel by water or air to enter the environment of the United States.

Several factors suggest that the problem of hazardous substances exports is likely to increase over the next several years. Growth in world population, especially in developing countries, will put a strain on global resources. Significant health and food supply problems may follow, leading to increased foreign demand for imported drugs, pesticides, and other potentially hazardous products. Moreover, continued new discoveries of carcinogenic and other damaging effects of many substances are probable over the next few years. In some cases, certain firms may be left with stocks of materials which can no longer be sold in the United States, and the incentive to recover some of their investment by selling the products abroad may be considerable.

If current economic trends continue, exports are likely to increase. In 1970, total U.S. exports of goods and services were $62.5 billion or 6.4 percent of gross national product. By 1978, the percentage had risen to 9.7 percent and the dollar value was $205 billion. Yet the U.S. balance of trade has generally deteriorated, and pressure for U.S. firms to increase exports has mounted. The National Export Policy recommended by the President's National Export Policy Task Force provides new economic incentives for export. Importing countries may improve their ability to assess the effects of imports and exclude those they consider damaging. Nevertheless, it appears that the problem of hazardous substances exports will remain serious.

IV. Existing Statutory Authority and Procedures

A. Summary of Existing Authority

The following agencies have been directed by Congress to regulate the domestic manufacture, use, and introduction in interstate commerce of certain products or substances that may involve hazards to human health and the environment.

Agency [1]	Product class	Statute
Consumer Product Safety Commission.	Consumer products	Consumer Product Safety Act.
	Fabric-type products	Flammable Fabrics Act.
	Household chemical substances, e.g., if toxic, corrosive, flammable.	Federal Hazardous Substances Act.
	Children's articles	
Drug Enforcement Administration	Drug (narcotics and dangerous drugs)	Controlled Substances Act.
Environmental Protection Agency	Pesticides	Federal Insecticides, Fungicide, and Federal Food, Drug, and Cosmetic Act.
	Chemical substances	Toxic Substances Act.
Food and Drug Administration	Foods, drugs, cosmetics, and medical devices.	Federal Food, Drug, and Cosmetic Act.
	Biological and electronic products	Public Health Service Act.
U.S. Department of Agriculture	Meat and meat products	Federal Meat Inspection Act.
	Poultry	Poultry Products Inspection Act.
Occupational Safety and Health Administration.	Workplace hazards and workplace equipment.	Occupational Safety and Health Act.

[1] The Customs Service of the Treasury Department assists some of these agencies in enforcement.

While many of the statutes listed above address the export issue in some measure, there are no consistent principles underlying their various mandates. If any generalization is warranted, it is that Congress seems recently to have moved away from extremes—complete permissiveness on the one hand and rigid controls on the other—toward a middle course that calls for notification, disclosure, and, in limited circumstances, bans on exports of hazardous substances (see Appendix A for more information on the provisions of these statutes).

Since the mid-1970s, Congress has put increasing emphasis on notification to the receiving country of the export of banned and significantly restricted substances. Such notification was required by the Toxic Substances Control Act of 1976 and amendments to four existing statutes passed in 1978 by the 95th Congress. These amendment strengthened existing notification procedures of the Federal Insecticide, Fungicide, and Rodenticide Act and established notification requirements for consumer products under the Consumer Product Safety Act, the Flammable Fabrics Act, and the Federal Hazardous Substances Act. Also, Congress authorized limited discretionary export banning authority, to protect U.S. consumers, under the same three acts. These recent actions suggest that there is a growing concern in Congress about the effects of exports of hazardous sustances on foreign citizens, combined with the view that it is generally appropriate for countries to make their own judgments about their needs for hazardous substances, so long as they are adequately informed.

The provisions of existing statutes pertaining to export of substances which are banned or significantly restricted in the United States are of five general types, although some statutes fit more than one category. In addition there are a good many qualifications and exceptions in the laws. As the following outline shows, the regulatory scheme is complex.

(1) Substances for which there are no export limitations or for which exports must be in accord with the laws of the importing nation

Federal Food, Drug, and Cosmetic Act—adulterated or misbranded foods (except meat and poultry subject to controls), cosmetics, drugs, and antibiotics.

Public Health Service Act—noncomplying electronic products.

Federal Insecticide, Fungicide and Rodenticide Act—registered pesticides composed of active ingredients for which major uses have been cancelled or suspended.

(2) Substances for which notification of the importing country of any export is required

Federal Insecticides, Fungicide, and Rodenticide Act—pesticides not registered for use in the United States.

Toxic Substances Control Act—certain regulated chemical substances.

Consumer Product Safety Act—consumer products which are banned or do not meet federal safety standards.

Flammable Fabrics Act—fabric-type products which do not conform to federal safety standards.

Federal Hazardous Substances Act—toxic, flammable, corrosive and otherwide hazardous products, including children's articles which fail to meet federal requirements.

(3) Substances for which prior approval by the importing country must be sought

Federal Food, Drug, and Cosmetic Act—unapproved medical devices[1] and investigational drugs.[2]

(4) Substances for which an agency can ban exports if there is a risk to health or the environment of the United States

Toxic Substances Control Act—chemical substances [3]

Consumer Product Safety Act—consumer products [4]

Flammable Fabrics Act—fabric-type products[4]

Federal Hazardous Substances Act—household chemicals[4]

(5) Substances for which there is a total ban on export

Federal Food, Drug, and Costmetic Act—unapproved new drugs,[5] unapproved new animal drugs

Public Health Service Act—unapproved biological products (serums, vaccines, etc.)

Meat Inspection Act—meat failing to meet U.S. quality standards (except for preservation)

Poultry Products Inspection Act—poultry failing to meet U.S. standards.

A more detailed summary of the authority contained in the various regulatory statutes for each product appears in Appendix A.

It is not surprising that the export provisions of the various regulatory statutes are not consistent in their treatment of the export hazardous substances. First, these laws were enacted over a period of 40 years. In addition, considering the different hazards involved in the various product categories, the various circumstances in which the products are shipped, and the different conditions of use of the products, some variation in the treatment of different products is perhaps warranted.

This is not to say that more consistency in the treatment of hazardous substance exports is not desirable or achievable. For example, where federal agencies provide notification of export to a foreign government, it is desirable to systematize the procedures to assure more regularity in the process. Additional steps, included in the Executive Order and described later in this report, will make product hazard information and data more readily available and accessible. Finally, there are some circumstances, also discussed afterward, under which any export of a banned or significantly restricted substances may be undesirable and not in the national interest.

In addition to the laws regulating specific products or practices, two additional authorities are relavant to export policy.

First, the Export Administration Act of 1979 (Pub. L. 96-72) authorizes the President to use export controls to restrict the export of goods and technology where such export might prove detrimental to the national security of the United States; restrict export where necessary to prevent the excessive drain of scarce materials from the United States or to reduce the serious inflationary impact of foreign demand; and restrict export where necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations. This recently enacted statute extends and revises the Export Administration Act of 1969.

Second, Executive Order No. 12114, issued by President Carter on January 4, 1979, requires that agencies analyze the environmental effects aboard of certain types of major Federal actions that may significantly affect the environment. This analysis helps guide decisions by the responsible agency officials. However, the grant or denial of an export license under the Export Administration Act is not considered a major Federal action for the purposes of Executive Order No. 12114.

B. Present Export Procedures

Present agency procedures dealing with the export of hazardous substances may be described in two categories: (1) procedures to implement specific control authorities and (2) mechanisms to promote international cooperation in the analysis and exchange of hazard data and to develop common approaches to regulation.

1. Procedures to Implement Existing Control Authority

Most agencies have in place administrative procedures which could be adapted to carrying out a more consistent export policy for banned and severely restricted hazardous substances. This is particularly true of agencies with long established responsibilities in the export area. The Commerce Department has well established procedures for imposing export controls for the various purposes specified in the Export Administration Act. The State Department has formal procedures for the cases where it is required by statute to transmit notifications regarding hazardous exports from U.S. regulatory agencies to foreign governments. Customs has long-established procedures for controlling the entry of goods into international commerce, such as checking for required export licenses and documents, which could be adopted to the needs of an export policy for banned and severely restricted hazardous products. FDA has in place under its various statutory authorities procedures for approving exports, as well as for notifying foreign governments of significant regulatory decisions and changes in statutes or regulatory approaches. In the case of agencies with new statutory authorities—EPA for the Toxic Substances Control Act and Federal Insecticide, Fungicide, and Rodenticide Act and CPSC for the various laws it administers—new formal procedures are largely in place. Final regulations for carrying out notification for CPSC-regulated products appeared in the **Federal Register** on August 8, 1980. A policy statement regarding notification under FIFRA appeared in the **Federal Register** on July 28, 1980. EPA published final rules covering export notices for PCBs, CFCs, asbestos and dioxins (the four substances regulated under TSCA

[1] Non-complying banned products cannot be exported unless the HHS Secretary determines that export is not contrary to public health and safety and the foreign government approves of the export.

[2] Export is permitted if requested by the foreign government.

[3] Banning is authorized if the exported product presents an unreasonable risk of injury to health within the U.S. or to the environment of the U.S.

[4] Banning is authorized if exported product presents an unreasonable risk of injury to consumers within the U.S.

[5] A bill (S. 1075) has passed the Senate which would allow export if the approval of the importing country were obtained and the HHS Secretary determined that the export would not be contrary to public health.

so far), and for all substances regulated under TSCA so far), and for all substances regulated under TSCA in the future, on December 16, 1980.

2. Existing Programs to Foster International Exchange of Hazard Data and Consistent Approaches to Regulation and Export of Hazardous Substances

The U.S. government is participating in several programs to promote international cooperation on control of hazardous substances and their export. The programs seek to improve exchange of information, to broaden understanding of common regulatory issues, and to develop consistent approaches where feasible.

The locus and subjects of such international intitiatives include:

- Organization for Economic Cooperation and Development (OECD): exchange of information on regulation of pesticides and other toxic chemicals; development of consistent testing methods and control practices for chemicals; possible controls over the export of unsafe consumer goods; study of export policy needs for chemicals.
- United Nations General Assembly (UNGA): Resolution requesting the Secretary General in cooperation with the United Nations agencies and bodies concerned, especially the World Health Organization, to assist governments to exchange information on banned hazardous chemicals and unsafe pharmaceutical products. A report is to be submitted to the General Assembly at its 36th (1981) session, through the Economic and Social Council about the experience of Members States and United Nations agencies and bodies concerned.
- United Nations Environment Programme (UNEP): resolutions calling for strong and consistent policies governing hazardous substances exports; development of an International Registry of Potentially Toxic Chemicals (IRPTC) to serve as a data clearinghouse for all information generated on potentially toxic substances.
- World Health Organization (WHO, a UN body): dissemination of methodologies to study the human health effects of chemicals and evaluate risks; development of environmental health criteria for various toxic substances; intergovernmental cooperation on international health matters.
- Food and Agricultural Organization (FAO, a UN body): consultation on assessing environmental hazards of pesticides and on developing consistent requirements for pesticide registration.
- Codex Alimentarius Commission (independent UN body established by WHO and FAO): establishment of international maximum residue limits for pesticides in foods, to be adopted by member countries.
- International Labor Organization (ILO): a global occupational safety and health hazard alert system.
- The UN Committee of Exports on the Transport of Dangerous Goods: development of recommendations regarding classification, labeling, and packaging of hazardous materials during transport.
- Multinational agreements: an example, is the Tri-Partite Pesticide Agreement among the U.S., U.K., and Canada.

U.S. participation in international programs takes on still more importance as the United States implements a strong hazardous substances export policy. The "International Efforts" Section VI, below, describes the provisions included in the Executive Order and recommendations by the Working Group for strengthened international efforts.

V. Policy

This section identifies the considerations that were weighed in arriving at a hazardous substances export policy and discusses how the policy balances those considerations.

A. Policy Considerations

The Executive Order establishes a consistent, practical Federal policy to govern the export of banned and significantly restricted substances. It takes the following considerations into account:

(1) As a nation exporting banned and significantly restricted substances, the United States has a moral obligation to recognize and assist in controlling the potential effects of these substances on the health and safety of citizens abroad and on the world environment.

(2) Nations differ substantially in their economic and cultural conditions and in their use of, and need for, hazardous substances. It is difficult for one nation to make decisions on the acceptability of risks for another nation. Such assessments require extensive information regarding economic, political, and social conditions which U.S. regulatory agencies do not have and cannot readily obtain.

(3) U.S. relations with other countries could be harmed by unrestrained export of substances which are banned or significantly restricted in the United States.

(4) The unrestrained export of hazardous products could undermine confidence of foreign buyers in U.S.-made goods, and could jeopardize their sale abroad.

(5) Excessively restrictive limitations on the export of products which a foreign country may decide it needs could place U.S. firms at a competitive disadvantage and harm U.S. relations with the government of that country.

(6) Excessively restrictive limitations could also place significant economic burdens on the U.S. economy, including adverse effects on the balance of trade and payments, on output and jobs, and perhaps on domestic competition (if smaller firms suffer disproportionately from reduced ability to compete in foreign markets).

(7) An export policy should be administratively simple and inexpensive to implement, and should recognize the complexities of international commerce.

(8) The United States should encourage and participate actively in international initiatives to develop consistent policies for hazardous substance exports, and for the sharing of data, analysis, and information. The effectiveness of unilateral United States action could be substantially diminished if foreign facilities or firms were to become alternative suppliers of substances which U.S. policies seek to control.

(9) The United States should attempt to protect American citizens against the dangers to their health and safety of importing hazardous substances and their derivatives or residues, and of damage to the world environment.

B. Elements of the Policy

The policy upon which the Executive Order is based includes the considerations listed above and also recognizes and uses the expertise of individual regulatory agencies. The policy relies on existing statutory authority and is further implemented through the Order. The Order sets forth the *minimum* requirements that all agencies are obligated to meet. Agencies are expected to adopt more stringent requirements where required by statute or where authorized and appropriate for the types of hazards within their jurisdiction.

(1) Hazard Notification

In most circumstances the international responsibilities of the United States can be met by an effective hazard notification system. Existing law requires notification tied to actual shipment (either first shipment of the year or shipment-by-shipment) or intent to export for most categories of products included in this policy. Exceptions include foods and cosmetics which are

adulterated or misbranded; radiation-emitting electronic products which do not meet FDA health and safety standards; approved drugs and antibiotics which do not meet FDA quality control standards; and registered pesticides made from active ingredients for which major uses have been suspended or cancelled in the United States.

Most of the laws requiring notification, including those contained in the Consumer Product Safety Act, the Federal Hazardous Substances Act, the Flammable Fabrics Act, and the Federal Insecticide, Fungicide, and Rodenticide Act, are just 2 years old; some of the regulations implementing them are very recent. The notification schemes in the various laws differ in terms of timing, frequency, and content of the notice, and experience with them is minimal. Accordingly, the Working Group was not able at this point to recommend the best scheme for notification.

The Working Group did not recommend any changes in existing law at this time. It is suggested that, as we gain experience with the requirements of present laws, an assessment be made of the laws' effectiveness, any important omissions they may have left, and any burdens they may impose. The Executive Branch may want to work with Congress to determine whether notification requirements should be imposed where they are not now required and whether existing notification requirements should be modified.

Notification systems are intended to allow a foreign government to decide for itself whether the potential benefits of a substance are worth the anticipated risks and detriments. With this knowledge, a foreign government is in a position to limit the importation of a particular hazardous substance or take other measures to protect its citizens, if it decides any of these limitations or measures are in its national interest.

There is a need for greater procedural uniformity in the notification process as used by Federal agencies. It will be more effective and more efficient, for the United States and for other countries, to establish an official government-to-government contact for transmission of information concerning hazardous substances.

The Executive Order designates the State Department as the official conduit of notifications concerning exports of banned and significantly restricted hazardous substances for all Federal agencies. This designation is consistent with the Department's role as official U.S. representative to foreign governments. Each agency will list for the State Department its own offices and people to be contacted if a foreign government wants further information about regulatory actions or hazardous substances risks. Agencies will also work with the Department to identify their opposite numbers in foreign governments, to receive notifications and to serve as points of contact. The State Department will transmit notifications to the U.S. embassy in the country in question and may also transmit them to the country's embassy in the United States. U.S. embassies in foreign countries will keep on file copies of notifications transmitted to host governments for a period of one year. If a foreign government is asked under any existing notification system to respond to a notice, that response will be transmitted through the State Department to the relevant U.S. regulatory agency.

Individual agencies will still be free to communicate directly with their counterparts in a foreign government if they wish, and will of course do so where required to by law.

In addition to greater uniformity in procedure, it is also desirable to achieve greater uniformity in the content of the notices sent to foreign governments. Under the Executive Order, the information to be provided by the State Department to the foreign government will include, at a minimum:

(a) The name of the hazardous substance to be exported;

(b) A concise summary of the agency's regulatory actions regarding that substance, including the statutory authority for such actions and the timetable for any further actions that are

(c) A concise summary of the potential risks to human health or safety or to the environment that are the grounds for the agency's actions.

In addition, to the exent deemed appropriate by the agency with jurisdiction, copies of additional documents may be forwarded to a foreign country to assist that country in its assessment of the risks associated with the substance. Trade secrets or other confidential commercial or financial information will not be sent to a foreign government unless authorized or required by existing law (including statutes and regulations). Agencies will keep on file any supplemental materials forwarded to importing countries and, to the extent permitted by law, disclose them to the public upon request.

(2) Annual Summary

As a complement to the notification scheme that is already in effect, the Executive Order requires the preparation and distribution of a report which:

(a) Summarizes all final regulatory actions of the types described in Section VII [5] that were taken by federal agencies by the end of the previous calendar year (including those antedating that calendar year but continuing in force) and that are of significant international interest;

(b) Summarizes all proposed regulatory actions of the types described in Section VII [5] that were pending before agencies at the end of the previous calendar year and that are of significant international interest (proceedings preliminary to issuance of a proposed rule, such as issuance by EPA of a Rebuttable Presumption Against Registrations, would not be included); and

(c) indicates generally what kind of additional information is available with respect to each of these final or proposed regulatory actions and how the information may be obtained.

The report will also include information on some substances that are generally permitted for use in the United States, subject to conditions or restrictions based on potential risks to human health or safety or the environment. For example, the Occupationsl Satety and Health Administration, under the Occupational Safety and Health Act, issues health standards that set maximum workplace exposure levels for certain chemicals and other substances, and establishes other requirements for worker protection. Similarly, the Environmental Protection Agency issues regulations governing the use of some pesticides. Such regulations should be included in the Annual Summary when they are likely to be of interest to other countries in protecting against similar hazards.

The report will be compiled by the Regulatory Council and distributed by the State Dapartment to appropriate foreign officials and to public and private international organizations. (The latter includes such organizations as the UN Environment Programme, OECD, FAO, World Health Organization and the ILO.) Each agency will provide the Regulatiory Council with the information requested in a standard format and on a timetable determined by the Regulatory Council. The report will also be published in the United States in the **Federal Register.**

The annual summary will serve several important purposes. It will compile in one up-to-date document a summary of U.S. regulatory actions banning or significantly restricting the

[5] Information on unregistered pesticides would be included in the Annual Report only if EPA cancels or denies registration or if a tolerance is denied or repealed.

manufacture, production, use, or sale of hazardous substances. It will inform foreign governments of regulatory actions the previous year that were not included in the last annual report, and for which some governments will not have received a shipment notification. It will also give foreign governments notice of prospective regulatory actions so they can monitor the progress of a proceeding if they so desire (the nature and function of proposed rules will, of course, be explicitly described). Furnished with this information, a foreign government will able to take regulatory action it deems appropriate at the same time that U.S. regulatory action takes place. The report will also list people and offices in the United States to approach for discussions of hazards of particular substances. The summary will also serve as a "hazard alert" for foreign governments on products that it may be importing from other countries.

(3) Export Control

In general, the responsibilities of the United States concerning the export of hazardous substances will be fulfilled in most cases through notification. There are a few limited circumstances, however, where additional safeguards are needed to assure good and stable relations with other nations in the world community. If the United States does not exercise special viligance over the export of certain extremely hazardous banned or significantly restricted products which represent a substantial threat to human health or safety or the environment, our economic and diplomatic ties with other countries could be jeopardized. Citizens and governments of foreign countries receiving these products directly, or being adversely affected indirectly as innocent bystanders, may develop increasingly hostile attitudes towards this country and its products.

As indicated in Section IV, existing law already prohibits the export of some substances in particular circumstances. Another mechanism that can be used to prohibit hazardous exports where such exports would prove detrimental to the foreign policy interests of the United States is the Export Administration Act of 1979 (Pub. L. No. 96–72, 93 Stat 503, 50 U.S.C. App. 2401 *et seq.* (the Act)). The Act authorizes the President to "* * * prohibit or curtail the exportation of any goods, technology, or other information subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." (Sec.6 (a) (1)). The authority contained in this subsection is to be exercised by the Secretary of Commerce, in consultation with the Secretary of State and such other departments and agencies as the Secretary considers appropriate, and is to be implemented by means of export licenses issued by the Secretary.

The Export Administration Act of 1979 is the successor statute to the Export Administration Act of 1969. By memorandum dated January 30, 1979, Deputy Assistant Attorney General, Office of Legal Counsel, Leon Ulman advised the Department of Commerce that the 1969 statute gave the President authority to control exports of hazardous substances for foreign policy purposes. On January 9, 1980, the Working Group inquired as to whether this authority was modified in the 1979 statute. Deputy Assistant Attorney General Ulman advised the Working Group, by memorandum dated April 11, 1980, that the President may control the export of hazardous substances to further significantly the foreign policy of the United States under the 1979 statute.[7]

The Executive Order provides that, in very few instances for certain extremely hazardous prohibited and significantly restricted products and substances, the Secretary of Commerce may require a validated export license. Export controls will be limited to extremely hazardous substances [8] which represent a substantial threat to human health or safety or to the environment; the export of which would cause clear and significant harm to the foreign policy interests of the United States; and for which export licenses would be granted only in exceptional cases.

The products on which such export controls may be imposed will be chosen in the following manner. First, the appropriate regulatory agencies will prepare lists of substances, products, and class of substances or products which have been banned or significantly restricted in the United States under the specific statutory authorities listed in Section VII. These prohibited and restricted substances, with the exception of certain unapproved products [9] and "medicines and medical supplies" as that phrase is used in Section 6(f) of the Act [10] will constitute the universe from which those substances to be subjected to export controls may be chosen. No substance which is not already prohibited or significantly restricted for use in the United States will be considered for export controls under this policy.

Next, these lists of substances and products will be brought before an interagency task force chaired by the State Department and composed of the Department of Commerce, the Environmental Protection Agency, the Consumer Product Safety Commission, the Food and Drug Administration, and the Office of the U.S. Special Trade Representative. The State Department, as chair of the task force may invite representatives of other Federal agencies as well to participate from time to time in the work of the task force. This task force will advise the State Department as to which of the listed substances should be considered candidates for inclusion on the Commodity Control List. The task force will be mindful of, and give the strictest interpretation to, the provisions of the

[7] By memorandum dated November 13, 1980, Deputy Assistant Attorney General Ulman, advised Joseph Onek, Deputy Counsel to the President, that the seven statutes providing for regulation of products and substances covered by this policy do not limit the President's authority under the Export Administration Act to control export of hazardous substances for foreign policy purposes.

[8] The determination as to whether a praticular substance is an extremely hazardous substance will be made by the agency primarily responsible for regulating the substance on the basis of the record compiled in connection with a regulatory action taken by that agency concerning that substance. This determination would not require an additional regulatory proceeding.

[9] Pesticides for which registration has never been sought will not generally be included in the universe of products since U.S. regulatory agencies will not necessarily possess any test data on their health or safety ramifications. However, pesticides for which a tolerance has been denied or repealed will be included in the universe for the purpose of consideration for export controls. In this way, an unregistered pesticide may be placed on the list for consideration. For example, the unregistered pesticide Leptophos would appear on the list (were it still being manufactured), because EPA denied a tolerance for residues on foods (under authority of Sec. 408 of the Federal Food, Drug, and Cosmetics Act). Existing law already prohibits the export of new drugs and new animal drugs. Present law also prohibits the export of certain medical devices unless the Secretary of Health and Human Services has determined that the export is not contrary to public health and safety and has the approval of the country to which the device is intended for export.

[10] Export controls will not be applied to medicines and medical supplies which are excluded from such controls by the Export Administration Act. Deputy Assistant Attorney General Ulman advised the Working Group by memorandum dated November 13, 1980, that the President is given great discretion and flexibility under the EAA in defining the scope of this exclusion: "In the absence of a definition specially confining this general authority, the President may utilize his authority to the utmost extent and identify the contours of the (medicine or medical supplies) exclusion subject only to the limitations imposed by humanitarianism suggested by the concept of basic human needs." Given this discretion of the President to define the scope of the exclusion, the phrase "medicine and medical supplies" shall be construed so as to permit consideration for inclusion on the Commodity Control List of drugs and devices within the categories specified in Subsection 1–101(b–e) of the order and representing a substantial threat to human health or safety or to the environment.

Executive Order that export controls will be imposed in only a very few instances for extremely hazardous products. The task force will endeavor to reach consensus on its advice, consistent with the policy and standards defined in the order.

In advising the State Department on possible condidates for the Commodity Control List, the task force will consider, to the extent possible within the limits of available information, the type, extent, and severity of the potential detrimental effects of each substance proposed for inclusion on the commodity Control List by a member of the task force; the likelihood of the effects; the duration of the effects; the ability of foreign countries to avoid or mitigate the effects; the availability of the substance from sources other than the United States; the availability of other substances or methods that would serve the same purpose as the substance to be exported; and the importance of the beneficial uses of the substance (this is not intended to require a rigorous, quantitative analysis of costs and benefits, however, as is usually performed in domestic regulatory procedures).

The interagency task force will be receptive to members of the public, foreign governments, and nongovernmental organizations submitting their views or contributing information which will be helpful in considering whether to place a banned or significantly restricted substance on the Commodity Control List.

The function of the regulatory agencies on the task force is to provide technical advice to the State Department, on the basis of available information compiled in the course of previous regulatory proceedings pertaining to the substance or product; and to assure that those products for which a recommendation of restricted export is made all pose a common, especially severe, level of hazard. The task force will be a continuing one which will review additional substances and suggest new candidates for the Commodity Control List as new actions of the type defined in Section VII are taken; should a domestic regulation of this type be altered or rescinded, the task force will also consider removal of the substance form the List.

With the benefit of advice obtained from the interagency task force, the State Department will identify, subject to the concurrence of the Secretary of Commerce, those few extremely hazardous banned or significantly restricted substances which should be included on the Commodity Control List because their export would cause clear and significant harm to the foreign policy interests of the United States. The task force will attempt to stay abreast of pending regulatory action, so that if export controls are deemed necessary, they may be recommended as soon as possible after promulgation of a new regulation banning or significantly restricting a product.

In the event that the State and Commerce Departments disagree over the imposition of export controls, the disagreement will be referred to the President as provided in the Act.

The Act mandates a number of procedural and substantive requirements which must be met when invoking foreign policy controls. The President may impose export controls "only after full consideration of the impact (of such controls) on the economy of the United States" (Sec. 3(2)) and only if the foreign policy standard is satisfied (Sec. 3(2)(B)). Where the controlled goods or technology are comparably available from foreign sources, he may impose controls only after he "determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States". Sec. 4(c). Furthermore, the President is obligated to initiate negotiations with foreign governments to eliminate foreign availability of goods or technology comparable to those subject to U.S. controls (Sec. 6(g)). Export controls maintained for foreign policy reasons expire one year after their imposition, unless extended by the President.

In addition, the Act specifies several preconditions to the imposition of foreign policy controls. The President must determine that reasonable efforts have been made to achieve the purposes of the controls through negotiations or other alternative means" Sec. 6(d). The President must "in every possible instance * * * consult with the Congress before imposing any export control * * *" Sec. 6(e). The Secretary of Commerce must "consult with such affected United States industries as the Secretary considers appropriate, with respect to * * * [criteria 1 and 4 listed below]" Sec. 6(c).

Section 6(b) of the Act also requires that the President consider the following criteria [11] when imposing, expanding, or extending foreign policy controls:

(1) The probability that such controls will achieve the intended foreign policy purpose, in light of other factors, including the availability from other countries of the goods or technology proposed for such controls;

(2) The compatibility of the proposed controls with the foreign policy objectives of the United States, including the effort of counter international terrorism, and with overall United States policy toward the country which is the proposed target of the controls;

(3) The reaction of other countries to the imposition or expansion of such export controls by the United States;

(4) The likely effects of the proposed controls on the export performance of the United States, on the competitive position of the United States in the international economy, on the international reputation of the United States as a supplier of goods and technology, and on individual United States companies and their employees and communities, including the effects of the controls on existing contracts;

(5) The ability of the United States to enforce the proposed controls effectively; and

(6) The foreign policy consequences of not imposing controls.

In addition to consulting with Congress, the Act requires that when controls are imposed, expanded or extended, the President "shall immediately notify the Congress of such action and shall submit with such notification a report * * * ." The report must (1) specify "the conclusions of the President" with respect to each of the six criteria discussed above; (2) specify "the nature and results of any alternative means attempted * * * or the reasons for imposing, extending, or expanding the control without attempting any such alternative means"; and (3) indicate "how such controls will further significantly the foreign policy of the United States * * * ." (Sec. 6(e).)

The Secretary of Commerce has statutory authority, or the Presisent has delegated to the Secretary, the responsibility for meeting many of the above requirements.

Once all of the above requirements for imposing export controls have been met and a hazardous substance has been placed on the Commodity Control List, an exporter must apply to the Commerce Department for a validated license before it can export that substance. The Act sets forth specific statutory deadlines for processing applications. The Department of Commerce will make the decision on whether to grant the license in consultation with the Federal agency with domestic regulatory authority, the State Department, and any other relevant agency.

Historically, the Commerce Department has rarely, if ever, granted licenses over State Department objections. In this context, Commerce will continue to give great weight to State Department recommendations. The State Department will not

[11] The legislative history of the Act indicates that these criteria are to be taken into consideration, but they are not conditions which must be met.

recommend issuing a license unless it has determined that the export would cause clear and significant harm to U.S. foreing policy interestes, and that the State Department, after appropriate consultations, has received no objections to the export from the government of the foreign country to which the banned or significantly restricted product is to be exported. The State Department's determination and findings will be conveyed in writing to the Commerce Department. The State Department should instruct its personnel at missions and embassies in foreign nations to be prepared to carry out such consultations. Embassy personnel should be instructed to identify an official of the foreign government with whom to consult on proposed hazardous export shipments. When a validated export license is sought for a substance added to the CCL under this policy, a U.S. embassy official in the country of destination will apprise the foreign government official of the nature of the product, quantity to be shipped, the regulatory action which prohibited or significantly restricted its sale in the United States, the potential risks to human health or the environment which were the basis for the action, and such other information as is deemed appropriate (provided that trade secrets or other confidential commercial or financial information will not be sent to a foreign government unless authorized or required by exisiting law).

Other factors to be considered by the Commerce Department in acting on an application for a validated export license might include: the type of hazardous substance; the destination of the export; the proposed use to which the product would be put; labeling or marketing plans; whether the foreign government is the importer; the nature and type of hazards involved; the number of people potentially affected by the hazard; the benefits to be gained by the export (again, this would not be a rigorous, quantitative analysis of costs and benefits); the availability of alternative sources of the substance; the availability of non-hazardous alternatives; precautions the importer will take with the substance; the dangers inherent in alternative substances presently being used; the effect the substance might have on neighboring countries; the potential reaction of other countries; results of consultations with industry representatives and other concerned parties; and the results of international efforts to curb the export of the substance. Actual experience evaluating applications may reveal other factors that should be considered. The Commerce Department will propose and receive comment on regulations governing its consideration of applications for export licenses for hazardous substances.

The economic consequences of invoking export controls are unlikely to be great. The categories of products which are candidates for the Commodity Control List are well defined (see Section VII) and readily identifiable. The circumstances in which substances may be chosen for the CCL are very limited, and the number of substances selected will be few. In addition, it is quite possible that a U.S. firm may have or could develop a substitute product offering the same benefits without posing severely hazardous risks.

(4) Evaluation

Considering the importance of an effective policy for export of hazardous substances, and recognizing that experience with such a policy is lacking, it is essential to evaluate from time to time how well the policy is working in practice. The Executive Order calls for a progress report to the President 18 months after the effective date of the policy, and annually thereafter. The report will be prepared jointly by the Council on Environmental Quality, the Department of State, and the Department of Commerce in consultation with other affected agencies.

The report will summarize agency activities under the policy, evaluate the effectiveness of the hazardous substances export policy, and make any recommendations that are deemed appropriate.

(5) Government-Sponsored Exports

All the policies discussed so far apply to exports by private commercial firms. Somewhat different considerations apply to products which the U.S. government itself buys and distributes abroad, mainly for the purpose of assisting economic development in other countries. The Working Group recommended that the U.S. government, in its own dealings with export of hazardous substances, maintain the highest standards of good judgment and scrupulous care for the health and welfare of foreign citizens and their environment.

Environmental review, by which government agencies look at the consequences of a proposed action before undertaking it, and analyze reasonable alternatives, is a good model for government dealings with hazardous exports. In fact, such an approach has been tried and worked well. In the early 1970's, the Agency for International Development (AID) distributed abroad some pesticides which were not approved for use in the United States (Leptophos, DDT for other than public health uses). Following a lawsuit, AID reexamined its entire pesticide program, writing a comprehensive environmental impact statement that looked at consequences and weighed alternatives. AID no longer purchases or distributes abroad pesticides that are banned for use in the United States, except for compelling reasons and after very careful examination. The AID pest control program now emphasizes alternatives such as integrated pest management.

The Working Group recommended the same approach of program assessment and analysis of alternatives for other programs that may involve the distribution abroad of hazardous substances. For example, population programs that are a part of U.S.-assisted development efforts should be carefully scrutinized, to ensure that the birth control drugs and devices bought with U.S. government funds are as safe and effective as possible. The program assessment should be concerned with more than the simple avoidance of products that have already been banned, through lengthy legal proceedings, for use in the United States. It should also be sensitive to the likely circumstances of use in the country of destination. For example, if a birth control drug is known to interfere with vitamin metabolism, or if safe application of a birth control device requires special medical skills, these facts should be carefully considered before the U.S. government provides the funds to export such products to countries where women are likely to be malnourished, or medical skills are scarce.

Similar considerations apply to mother-child nutrition programs. Infant formula that is safe and convenient to use in the United States may be fatal if used in places with impure water supplies. Program assessments and the decisions based on them should take such factors into account.

Responsible, well-informed decisions by U.S. Government agencies related to shipments of hazardous substances abroad might serve as a model for other countries and for private traders.

(b) Labeling of Hazardous Exports

The Working Group recommended that regulatory agencies give continuing attention to improvements in labeling, as a technique for dealing with hazardous exports. In some cases, it may be possible to develop simplified,

more readily understandable labels. Agencies may also want to consider new requirements that pesticide, drug and toxic substance labels on exported products include more information on the nature of possible hazards associated with their use. The Executive Branch, working with the Congress, may wish to propose legislation, if appropriate, to impose such requirements.

VI. International Efforts

Unilateral actions should be just one part of a broader U.S. program to promote international cooperation on trade of hazardous substances throughout the world. In the Executive Order, the President directs the State Department and other federal agencies in consultation with the State Department to seek international agreement in these areas:

- Notification of the export of hazardous substances;
- Comprehensive adoption of uniform, readily understandable hazard labeling for substances in international commerce;
- Improved worldwide hazard alert systems and clearinghouses for information on health and safety risks in the workplace;
- Other common standards and practices related to the export of hazardous substances.

These steps could lead to the formulation of an international convention governing hazardous substances exports.

A common international effort is important for several reasons. Common policies governing hazardous exports, subscribed to by all countries, would help to assure that U.S. multinational firms located abroad or firms in other nations would not become alternate suppliers for hazardous substances. Consistency among nations in hazard notification and labeling would be more effective than widely varying national programs, because more hazards would be covered and the procedures would be more universally understood; more accurate, because it would be based on broad international experience; and less burdensome to industry, because firms would not have to respond to multiple varying requirements. Moreover countries like the United States that take responsibility for hazardous exports would not be penalized economically.

Through international cooperation, ongoing technical assistance programs should focus on helping developing countries to establish adequate standards for health and safety, competent regulation, and effective use of available hazard information. The United States committed itself to such bilateral efforts when it signed the Multilateral Trade Negotiations Agreement on Technical Barriers to Trade (Standards Code) in December, 1979. Differences among countries in needs and desires for assistance should be recognized in shaping these programs. International cooperation will more likely flourish if it is built on existing structures, and is mindful of resources constraints that affect the ability of developing countries to contribute to the effort.

Targeted technical assistance to countries which are increasing their importation, manufacture and use of chemicals would greatly enhance the policy's chances of success. The Working Group recommended that appropriate agencies consider possibilities for technical assistance under present legal authorities, and adopt changes to make present programs more effective. In this connection, the Department of Commerce should investigate opportunities for the Bureau of the Census to monitor exports to hazardous substances, to serve as the basis for better notification and targeting technical assistance.

The Working Group recommended continued participation by the United States in the international efforts listed in Section IV. The Group encouraged increased activity by the UNEP Committee on Toxic Chemicals, the WHO International Program on Chemical Safety, and the OECD. The OECD has begun considering approaches to the control of toxic substances and export of hazardous products. OECD membership includes the major non-Communist industrialized nations; these nations are responsible for the bulk of hazardous substances trade. OECD is an excellent forum for exchange of information and technology among member countries, and for consideration of export notification and control policies. However, OECD is not so useful as a clearinghouse for communication with less developed countries, which are often importing countries and are thus greatly interested in and affected by policies concerning trade in hazardous substances. OECD should be encouraged to cooperate with UNEP, or to include by other means a broader array of nations in conducting deliberations on these matters.

U.S. resources to be devoted to international health and safety cooperation merit careful consideration and budget review. The success of the effort will depend to a significant extent on U.S. leadership, plus financial support and cooperation from other major industrial countries.

The steps described above, together with provisions of the Executive Order, are important first steps toward the control of hazardous substances in international trade. The adoption of a U.S. policy that includes notification, export controls in very limited circumstances, careful assessment of exports by U.S. government agencies, and efforts to reach international agreements on controls over hazardous exports will put the United States in a position of world leadership in the field. Through such domestic and international policies, the United States will be in a strong position to persuade over industrialized nations to control the distribution of hazardous products throughout the world. This leadership role is consistent with the President's human rights themes and will enhance the U.S. trading position.

VII. Substances Covered by the Policy

As discussed in Section II, The Executive Order covers substances which are banned or significantly restricted in the United States because of the threat they pose to public health and safety or the environment. It thus applies to substances and products regulated under certain sections of FIFRA, TSCA, FDCA, PHSA, CPSA, FHSA and the Flammable Fabrics Act. The Order specifically defines the policy as covering the following substances and products, all of which are banned or significantly restricted in the United States:

(a) A food or class of food which

(1) Is adulterated, as defined by rules or orders issued under Sec. 402(a) or (c) (21 U.S.C. 342(a) or (c)), or

(2) Is in violation or emergency permit controls issued under Sec. 404 (21 U.S.C. 344)

of the Federal Food, Drug, and Cosmetic Act;

(b) A drug which is

(1) Adulterated, as defined by rules or orders issued under Sec. 501(a), (b), (c) or (d) (21 U.S.C. 351(a), (b), (c), or (d)),

(2) Misbranded, as defined by rules or orders issued under Sec. 502(j) (21 U.S.C. 352(j)) or

(3) A new drug or new animal drug for which an approval is not in effect under Sec. 505 (21 U.S.C. 355) or Sec. 512 (21 U.S.C. 360), respectively,

of the Federal Food, Drug, and Cosmetic Act;

(c) An antibiotic drug which has not been certified under Sec. 507 (21 U.S.C. 357)

of the Federal Food, Drug, and Cosmetic Act;

(d) A drug containing insulin which has not been certified under Sec. 506 (21 U.S.C. 356)

of the Federal Food, Drug, and Cosmetic Act;

(e) A device which

(1) Is adulterated, as defined by rules or orders issued under Sec. 501(a) (21 U.S.C. 351(a)),

(2) Is misbranded, as defined by rules or orders issued under Sec. 502(j) (21 U.S.C. 352(j)),

(3) Does not conform with a performance standard issued under Sec. 514 (21 U.S.C. 360d),

(4) Has not received premarket approval under Sec. 515 (21 U.S.C. 360e), or

(5) Is banned under Sec. 516 (21 U.S.C. 360f)

of the Federal Food, Drug, and Cosmetic Act;

(f) A cosmetic which is adulterated, as defined by rules or orders issued under Sec. 601 (21 U.S.C. 361) of the Federal Food, Drug, and Cosmetic Act;

(g) A food additive or color additive which is deemed unsafe within the meaning of Sec. 409 (21 U.S.C. 348) or Sec. 706 (21 U.S.C. 376), respectively, of the Federal Food, Drug, and Cosmetic Act;

(h) A biological product which has been propagated or manufactured and prepared at an establishment which does not hold a license as required by Sec. 351 (42 U.S.C. 262) of the Public Health Service Act;

(i) An electronic product which does not comply with a performance standard issued under Sec. 358 (42 U.S.C. 263f) of the Public Health Service Act;

(j) A consumer product which

(1) Does not comply with a consumer product safety standard adopted under Secs. 7 and 9 (15 U.S.C. 2056 and 2058) other than one relating solely to labeling,

(2) Has been declared to be a banned hazardous product under Secs. 8 and 9 (15 U.S.C. 2057 and 2058),

(3) Presents a substantial product hazard under Sec. 15 (15 U.S.C. 2064), or

(4) Is an imminently hazardous consumer product under Sec. 12 (15 U.S.C. 2061),

of the Consumer Product Safety Act;

(k) A fabric, related material, or product which does not comply with a flammability standard (other than one relating to labeling) adopted under Sec. 4 (15 U.S.C. 1193) of the Flammable Fabrics Act;

(l) A product which is a banned hazardous substance (including a children's article) under Secs. 2 and 3 (15 U.S.C. 1261 and 1262) of the Federal Hazardous Substances Act;

(m)(1) A pesticide which, on the basis of potential risks to human health or safety or to the environment,

(A) has been denied registration for all or most significant uses under Sec. 3(c)(6) (7 U.S.C. 136a(c)(6)),

(B) has been classified for restricted use under Sec. 3(d)(1)(C) (7 U.S.C. 136a(d)(1)(C)),

(C) has had its registration cancelled or suspended for all or most significant uses under Sec. 6 (7 U.S.C. 136d),

(D) has been proceeded against and seized under Sec. 13(b)(3) (7 U.S.C. 136k), or

(E) has not had its registration cancelled, but requires an acknowledgement statement under Sec. 17(a)(2) (7 U.S.C. 136o(a)(2))

of the Federal Insecticide, Fungicide, and Rodenticide Act, or

(2) A pesticide chemical for which a tolerance has been denied or repealed under Sec. 408 (21 U.S.C. 346(a)) of the Federal Food, Drug, and Cosmetic Act; and

(n) A chemical substance or mixture

(1) Which is subject to an order or injunction issued under Sec. 5(f)(3) (15 U.S.C. 2604(f)(3)),

(2) Which is subject to a requirement issued under Sec. 6(a)(1), 6(a)(2), 6(a)(5), or 6(a)(7) (15 U.S.C. 2605(a)(1), 2605(a)(2), 2605(a)(5), or 2605(a)(7)) or

(3) For which a civil action has been brought and relief granted under Sec. 7 (15 U.S.C. 2606)

of the Toxic Substances Control Act.

The number of substances and products covered by the Executive Order and the policy is limited. (The extremely hazardous substances to be placed on the Commodity Control List will be selected from among those products and substances and will be very much smaller in number.) Under FIFRA, EPA estimates that there are 32 pesticide chemicals the use of which is entirely prohibited in the United States or for which major uses are prohibited, and 50 which are classified for restricted use under FIFRA Sec. 3(d)(1)(C)). (EPA also estimated on the basis of early experience with the notification process that there are perhaps 25 pesticides which are wholly unregistered in the United States being manufactured for export only.[12]) Under TSCA, four classes of chemicals, (PCBs, chlorofluorocarbons, asbestos, and dioxins) have been regulated so far, though more actions are expected in the future. Under FDCA and PHSA there have been some several hundred regulatory actions prohibiting sale of certain kinds of foods, drugs, cosmetics, and medical products; it is not known how many products are manufactured and sold for export only which do not comply with these regulations. However, it is anticipated that few of these products would be recommended for inclusion on the Commodity Control List. Under the three statutes which CPSC administers, some 30 classes of products have been subject to standard-setting or other actions which prohibit sale in the United States. Again, it is not certain how many products which do not comply with these requirements are exported, but early experience with notification requirements suggests that the number is quite small.

Excluded from the purview of the policy are alcohol, tobacco, firearms, military weapons and equipment, narcotic and psychotropic substances, and nuclear fuel. Also excluded are the exportation of hazardous production facilities, and U.S. financial assistance for such facilities. As indicated, certain substances which may create hazardous workplace conditions are included only in the annual summary called for in the Executive Order. Finally, Export-Import Bank financing of exports is not convered by the policy or the Order.

Alcohol, tobacco, and firearms were excluded because they are extensively controlled through the tax code and their health and safety implications are well known. The Working Group believed there is sufficient attention to and control over these products and that their exclusion does not detract from the policy. Military weapons and equipment and narcotic and psychotropic substances were excluded because they are subject to an extensive system of national controls and agreements under international treaty obligations. Likewise, nuclear fuels were excluded because they are extensively controlled nationally and internationally.

As indicated by the criteria, substances for which most significant uses in the United States have been prohibited are covered by the policy and the Order. In this category are products such as DDT, banned for most uses by EPA because of its serious adverse environmental effects but allowed for certain very narrowly defined uses (i.e., public health measures).

Products that are not restricted for use in the United States, but subject to unsafe circumstances of consumption abroad are not covered by the Executive Order and were not included in the

[12] While unregistered pesticides are covered by certain aspects of the Executive Order and policy (e.g., notification as required by statute), they will generally not be candidates for inclusion on the Commodity Control List or the Annual Report on regulatory actions.

Working Group's policy recommendations affecting private, commercial trade. The Working Group excluded these products with some reluctance, since there are indications that they are posing problems in certain countries. One such product is infant formula, discussed above in connection with U.S. government actions. It appears that commercial trade involving such products might be more appropriately dealt with through such means as technical assistance or codes for industry rather than export controls.

The Working Group also excluded from consideration the export of hazardous production facilities and direct or indirect financial assistance for those facilities (for example, through the Export-Import Bank and the Overseas Private Investment Corporation). As occupational health and safety and environmental protection requirements are placed on U.S. production facilities, some firms have established new facilities in other countries with less rigorous regulatory requirements. In some cases these "runaway" facilities have been established in Mexico near the U.S. border so that they remain close to U.S. markets, with advanced freight transport systems, but they can be and are located elsewhere in the world.

Hazardous production facilities were excluded because the issues they raise and the nature of possible remedial action are quite different from those related to exports of hazardous substances. In the case of banned or severely restricted hazardous substances, there are amply precedents for export controls on products. This is not true for exports of production facilities. Only certain exported production facilities involving major federal actions abroad (as defined under Executive Order 12114) are subject even to environmental review. Often the only connection between the facility and this country is that it is owned or built by a U.S.-based firm. Any system of controls for export of hazardous facilities would require a statutory basis; this is an issue that the Congress may want to examine.

Substances causing hazardous workplace conditions as regulated by OSHA are included in one part of the Order. The Annual Summary will include OSHA health standards where appropriate, so that foreign governments will have the benefit of our studies and regulations to protect their own workers.

The question of how to control the export of hazardous wastes (as defined by EPA under RCRA) has not yet been resolved. However, it is currently being addressed by an interagency group led by the State Department which is nearing completion of a proposed policy. EPA has promulgated new regulations governing the management and disposal of hazardous wastes in the United States. At present, it such wastes are to be exported, EPA must be notified 30 days in advance of export. EPA will then in turn notify foreign governments in cooperation with the State Department.

Implementation and Enforcement

To implement the Executive Order, each regulatory agency with jurisdiction over substances subject to the policy will undertake the following:

(1) Define with particularity either the specific products or the classes of products which are banned or significantly restricted substances as defined in Section VIII, for publication in the **Federal Register**. This list will be revised as necessary to reflect new regulatory actions.

(2) Prepare, on an annual basis, consistent with the format developed by the Regulatory Council, summaries of all final and proposed regulatory actions taken each year concerning banned and severely restricted hazardous substances, and indications of what additional information is available with respect to each of these final or proposed regulatory actions. In addition, in the first year, each agency will provide a listing or summary of all of its final regulatory actions with respect to such hazardous substances.

(3) Establish procedures, where notification is required under existing law, for expeditiously notifying the State Department of exports of relevant hazardous substances to foreign countries. The procedures will include timing and content of notices, recordkeeping responsibilities, provisions relating to trade secrets and confidential information, any special agency requirements in addition to those required by the order, and provisions for enforcement.

It is not anticipated that the regulatory agencies will require additional personnel or resources to carry out these tasks. In implementing the Order's requirements, the State Department will need to enhance its ability to expeditiously provide export notifications, through its embassies, to the appropriate foreign officials, and to consult with these officials prior to the granting of a validated export license for hazardous substances on the Commodity Control List. This will require each embassy to develop accurate up-to-date directories of the foreign officials responsible for hazardous substances so that there is no delay in identifying the appropriate official when a notification is transmitted or an export license is applied for.

The Department of Commerce will have enhanced responsibilities in implementing the Export Administration Act. In order to implement certain provisions of the Order, a limited number of extremely hazardous substances may be added to the Commodity Control List (see Section V). The small number of substances so listed should not unduly burden the Department. However, limited additional resources (approximately 5–15 staff members) may need to be added to the offices responsible for implementing this part of the Order.

The Customs Service also has authority, resources, field structure, and enforcement experience which will be needed to implement certain provisions of the Order. Customs, through the use of Shipper's Export Declarations, enforces Commerce's present export licensing requirements. Customs can inspect, seize, and detain articles in violation of the Export Administration Act. Enforcement responsibility for shipment notification would be added as another element in the Customs export check.

Attachment A

Consumer Product Safety Commission

Consumer Product Safety Act (15 U.S.C. 2051)

Products or Financing Arrangement

Consumer products—articles used in and around the residence, school, or in recreation for the personal use, consumption, or enjoyment of a consumer, except tobacco, motor vehicles, pesticides, boats, annunition, aircraft, foods, drugs, cosmetics, or medical devices.

(15 U.S.C. 2052(a)(1))

Regulatory Authority for Domestic Use

CPSC can (1) sat mandatory Federal standards for products which pose an unreasonable risk of injury; (2) ban products which pose such risk if no standard can adequately protect the public; (3) seek a court order to seize products which contain an imminent hazard; (4) order pre-market notice of new products; (5) mandate labeling and data disclosure requirements; and (6) order public notice and recall of products presenting substantial product hazards.

(15 U.S.C. 2056, 2057; 2058; 2061; 2062; 2063; 2064; 2076(e))

Regulatory Authority for Exports

The CPSC can prohibit export if it determines that exportation of a product

presents an unreasonable risk of injury to consumers within the U.S.

Any other product can be exported (except to U.S. installation outside the U.S.) if it

(1) Is manufactured or sold for export purposes and has never been distributed in the U.S., and

(2) Is labeled for export.

Thirty days prior to exporting a product which does not comply with a product safety standard or banned by rule, the exporter must notify the CPSC. CPSC notifies country of destination of the exportation and the basis of the standard or rule. CPSC may, by petition, require only 10 days notice.

(15 U.S.C. 2067)

Pending Amendments

None.

Federal Hazardous Substances Act (14 USC 1261)

Products or Financing Arrangement

A substance which is (1) toxic, corrosive, an irritant, a strong sensitizer, flammable, combustible, or which generates pressure and which may cause substantial personal injury or illness, and (2) toys.

(15 U.S.C. 1261)

Regulatory Authority for Domestic Use

CPSC may ban hazardous substances, require labeling, and seek a court order to seize noncomplying products, or enjoin their distribution.

(15 U.S.C. 1262; 1265; 1267)

Regulatory Authority for Exports

CPSC may prohibit export if it determines that exportation of a hazardous substance represents an unreasonable risk of injury to persons residing within the United States. All other products can be exported if they are

(1) in a package branded in accordance with the specifications of the foreign purchaser;

(2) labeled in accordance with the laws of the foreign country;

(3) labeled on the shipping package as intended for export;

(4) so exported

and have not previously been introduced into domestic commerce.

Thirty days prior to exporting a misbranded or banned hazardous substance, the exporter must notify CPSC. CPSC notifies country of destination of the exportation and the basis upon which the substance has been misbranded or banned. CPSC may, by petition, require only 10 days notice.

(15 U.S.C. 1264(b); 1265(a); 1273(d))

Pending Amendments

None.

Flammable Fabrics Act (15 USC 1191)

Products or Financing Arrangement

Wearing apparel, fabrics, interior furnishings, or related materials.

(15 U.S.C. 1191)

Regulatory Authority for Domestic Use

CPSC can set standards, issue cease and desist order, and seek court order to seize noncomplying products.

(15 U.S.C. 1193; 1195)

Regulatory Authority for Exports

The CPSC can prohibit export if it determines that exportation of a product presents an unreasonable risk of injury to persons residing within the U.S.

Any other product can be exported (except to U.S. installations outside the U.S.) if it is labeled for export.

(15 U.S.C. 1202)

CPSC interprets this provision so as to require the manufacturers of noncomplying goods to have the intention to export goods at the time of original manufacture.

(16 CFR 1602.2)

Thirty days prior to exporting a fabric which fails to conform with a standard, the exporter must notify CPSC. CPSC notifies country of destination of the exportation and the basis of the standard. CPSC may, by petition, require only 10 days notice.

(15 U.S.C. 1202)

Pending Amendments

None.

Food and Drug Administration

Federal Food, Drug & Cosmetic Act (21 U.S.C. 301 et seq.)

Products or Financing Arrangement

Foods.

(21 U.S.C. 321(f))

Regulatory Authority for Domestic Use

Secretary may establish standards of identity, levels of adulteration, and standards of misbranding.

(21 U.S.C. 341–343)

Regulatory Authority for Exports

May be exported (no permit required) if:

(1) Accords to specifications of foreign purchaser.

(2) Is not in conflict with laws of foreign country.

(3) Is labeled for export.

(4) Is not offered for domestic sale.

(21 U.S.C. 381(d))

Foods which are subject to Emergency Permit Controls and for which a permit has not been issued cannot be exported.

(21 U.S.C. 344)

Pending Amendments

None.

Products or Financing arrangement

New drugs.

New animal drugs.

(21 U.S.C. 321(p) and (w))

Regulatory Authority for Domestic Use

No introduction of new drugs or animal drugs in interstate commerce without approval by FDA. "Interstate commerce" between any state or territory and any place outside thereof.

(21 U.S.C. 335(a) and 360b(a))

Regulatory Authority for Exports

No exportation permitted unless the new drug is in complete compliance with an approved new drug application.

Exportation authorized for *investigational* use only if FDA receives, through the State Department, a formal request from the foreign government. The request must specify that such government has adequate information about the drug and the proposed investigational use.

(21 CFR 312.1 and 21 CFR 511.1)

Pending Amendments

New drugs not yet approved in U.S., or approved drugs not in compliance with domestic requirements, may be exported if exporting firm applies to the HHS Secretary for an export permit. The Secretary shall issue the permit unless he finds:

(1) Drug does not accord to specifications of foreign purchaser.

(2) Drug is not labeled for export.

(3) The foreign government has not been informed of the legal status of the drug in the U.S. and it does not disapprove of importation of the drug.

(4) Export of the drug is contrary to the public health (presumably of the U.S. or the foreign country).

(H.R. 4258 and S. 1045, Sec. 134–135)

Products or Financing Arrangement

Medical devices for human uses.

(21 U.S.C. 321(h))

Regulatory Authority for Domestic Use

Depending upon the type of device, the Secretary may (1) establish performance standards, (2) require premarket approval, (3) ban devices which present unreasonable deception or an unreasonable and substantive risk of illness or injury, and (4) require recall.

(21 U.S.C. 360d, 360e, 360f, 360h)

Regulatory Authority for Exports

Generally, may be exported (no permit required) if:
(1) Accords to specifications of foreign purchaser;
(2) Is not in conflict with the laws of foreign country;
(3) Is labeled for export; and
(4) Is not offered for sale in domestic commerce.
In addition to the above, devices which do not comply with performance standards, have not received premarket clearance, or have been banned cannot be exported unless the Secretary has determined:
(1) That exportation is not contrary to the public health and safety; and
(2) That the foreign country approves.

(21 U.S.C. 381 (d)(1) and (d)(2))

Similar requirements for investigational devices.

(21 CFR 812.18(b))

Pending Amendments

None.

Products or Financing Arrangement

Drugs approved for U.S. use.

Regulatory Authority for Domestic Use

Drug must previously have been approved by FDA.

Regulatory Authority for Exports

A drug which may be sold in interstate commerce may be exported without special requirements. A drug which is misbranded or adulterated may be exported (no permit required) if—
(1) Accords to specifications of foreign purchaser
(2) Is not in conflict with laws of foreign country
(3) Is labeled for export
(4) Is not offered for domestic sale
This provision also applies to antibiotics, insulin, and pre-1938 drugs.

(21 U.S.C. 381(d))

Pending Amendments

May be exported (permit required) so long as drug meets manufacture and quality standards required for domestic products (outlined in subparts 3 and 4 of H.R. 4258 and S. 1045).

(H.R. 4258 and S. 1045, Sec. 134)

Products or Financing Arrangement

Cosmetics.

(21 U.S.C. 321(i))

Regulatory Authority for Domestic Use

Secretary may establish standards of adulteration and misbranding.

(21 U.S.C. 361–362)

Regulatory Authority for Exports

May be exported (no permit required) if:
(1) Accords to specifications of foreign purchaser
(2) Is not in conflict with laws of foreign country
(3) Is labeled for export
(4) Is not offered for domestic sale

(21 U.S.C. 381(d))

Pending Amendments

None.

Environmental Protection Agency

Federal Insecticide, Fungicide and Rodenticide Act

(7 U.S.C. 136)

Products or Financing Arrangement

Substance or mixture of substances intended for preventing destroying, repelling, or mitigating any pest, or for use as a plant regulator, defoliant or desiccant.

(7 U.S.C. 136)

Regulatory Authority for Domestic Use

Registration of pesticides for specified use upon a finding by EPA of no "unreasonable adverse effect on the environment"; EPA registration of pesticide producers; EPA can issue "stop sale, use, or removal" orders and seek court orders for seizure of non-complying pesticides.

(7 U.S.C. 136a; 136e, 176k)

Regulatory Authority for Exports

Pesticides are subject only to certain labeling regulations when intended solely for export and are prepared or packed according to specifications or directions of the foreign purchaser. Pesticides not registered in the U.S. may be exported if, prior to export, the foreign purchaser signs a statement acknowledging that it understands the product cannot be sold in the U.S. A copy of the statement must be forwarded to EPA for transmittal to the appropriate government official of the importing country.
EPA notifies State Department whenever there is a cancellation or suspension of registration which is of international significance. State Department notifies foreign governments and appropriate international agencies.
EPA, in cooperation with State and other appropriate federal agencies are to participate and cooperate in international efforts to develop improved pesticide research and regulation.

(7 U.S.C. 136(0))

Pending Amendments

None.

Food and Drug Administration

Public Health Service Act (42 U.S.C. 201 et seq.)

Products or Fianancing Arrangment

Biological Products.

(42 U.S.C. 262)

Regulatory Authority for Domestic Use

HHS Secretary licenses establishments which propagate or manufacture and prepare biological products (*e.g.*, viruses, serums, vaccines, blood, toxins)

(42 U.S.C. 262(a))

Regulatory Authority for Exports

No exportation of products which cannot be sold in U.S.

(42 U.S.C. 262(a))

Pending Amendments

None.

Food and Drug Administration

Public Health Service Act

(42 U.S.C. 201 et. seq.)

Products or Financing Arrangement

Electronic products.

(42 U.S.C. 263c(2))

Regulatory Authority for Domestic Use

Secretary of HHS may establish performance standards to control emission of electronic product radiation and require notification for defects or non-compliance.

(42 U.S.C. 263f(a); 263g)

Regulatory Authority for Exports

Products for export need not conform to standards if:
(1) Labeled for export; and
(2) Product meets all applicable requirements for the foreign country.

(42 U.S.C. 263f(a)(3))

Pending Amendments

None.

Drug Enforcement Administration

Controlled Substances Import and Export

(21 U.S.C. 881)

Products or Financing Arrangement

Narcotics and Dangerous Drugs.

Regulatory Authority for Domestic Use

Broad controls are provided for the transhipment of controlled substances through the United States to other

countries and for their in transit shipment within the U.S. for immediate export, and for the possession of controlled substances on board any vessel, aircraft or other vehicle arriving or departing from the United States.

Regulatory Authority for Exports

Regulates the importation and exportation of all controlled substances—narcotics, marijuana, depressants, stimulants and other dangerous drugs. No controlled substance can be exported except in compliance with specified procedures which vary accordingly to the schedule of the substance. Registration of importers and exporters of substances classified in schedule I or II would be based on the Attorney General's determination that this would be consistent with the public interest and certain treaty obligations.

Pending Amendments

None.

Environmental Protection Agency

Resource Conservation and Recovery Act of 1976

(42 U.S.C. 6901–6987)

Products or Financing Arrangement

Hazardous wastes, which are defined to include solids, liquids, and sludges which may cause or significantly contribute to an increase in serious irreversible or incapacitating reversible, illness; or pose a substantial present or potential hazard to human health on the environment when improperly treated, stored, transported or disposed of, or otherwise managed.

(42 U.S.C. 6903(5))

Regulatory Authority for Domestic Use

EPA to identify hazardous wastes, establish standards applicable to generators and transporters of such waste and owners and operators of hazardous waste treatment, storage and disposal facilities. Each person owning or operating a hazardous waste treatment, storage or disposal facility is required to obtain a permit from EPA within prescribed time periods. EPA is to assist states in the development of hazardous waste programs.

(42 U.S.C. 6921–25, 6930)

Regulatory Authority for Exports

None.

Pending Amendments

None.

Toxic Substances Control Act

(15 U.S.C. 2601)

Products or Financing Arrangement

Chemical substances or mixtures except pesticides, tobacco, nuclear materials, firearms, etc.

(15 U.S.C. 2602)

Regulatory Authority for Domestic Use

EPA may require testing, impose pre-market notice requirements, require labeling, limit or prohibit sale if tests show a reasonable basis to conclude an unreasonable risk of injury to health or the environment, or obtain a court order to seize a substance or mixture posing an imminent hazard.

(15 U.S.C. 2603–2606)

Regulatory Authority for Exports

Statute does not apply if substance, mixture or article is manufactured for export and is labeled as such *except* as follows:

1. If EPA finds the substance, mixture or article will present "an unreasonable risk of injury to health within the United States or to the environment of the United States," it may control export. Administrator may order testing to make such a determination.

2. If a person intends to export a substance which has been subject to certain regulatory actions, such person shall notify EPA and EPA shall furnish foreign government notice of the rule, order, action, or relief.

(15 U.S.C. 2611)

Pending Amendments

None.

U.S. Department of Agriculture Food Safety and Quality Service

Federal Meat Inspection Act

(21 U.S.C. 601 et seq.)

Products or Financing Arrangement

Meat or meat food products of cattle, sheep, swine, goats, horses, mules or other equines.

Regulatory Authority for Domestic Use

Secretary has regulatory authority with respect to standards of identity, adulteration and misbranding.

Regulatory Authority for Exports

Meat or meat food products which are not allowed to enter interstate or foreign commerce may not be exported. Provisions in regard to preservatives used in meat food products shall not apply to such products when exported if:

(1) they are prepared or packed according to specifications or directions of the foreign purchasers; and

(2) no substance used therein is in conflict with the laws of the country to which the products are to be exported.

(21 U.S.C. 606)

In addition, livestock and meat or meat food products derived therefrom that are offered for export must undergo an export inspection and certification procedure.

(21 U.S.C. 612–618)

Pending Amendments

None.

U.S. Department of Agriculture Food Safety and Quality Service

Poultry Products Inspection Act

(21 U.S.C. 451 et seq.)

Products or Financing Arrangement

Poultry and poultry products.

Regulatory Authority for Domestic Use

Secretary has regulatory authority with respect to standards of identity, adulteration and misbranding.

Regulatory Authority for Exports

Poultry or poultry products which are not allowed to enter interstate or foreign commerce may not be exported.

Pending Amendments

None.

Esther Peterson,

Special Assistant to the President for Consumer Affairs, Chair, Interagency Working Group on Hazardous Substances Export Policy.

The White House

January 15, 1981.

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Part XIV

Department of Labor

Employment and Training Administration

Comprehensive Employment and Training Act Regulations; Amendments

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Parts 676, 677, 678, and 679

Comprehensive Employment and Training Act Regulations; Amendments to Administrative Provisions

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains several amendments to the reporting, recordkeeping and various other administrative provisions in the final regulations for programs under Titles I, II, VI, and VII, and Youth Programs under Title IV of the Comprehensive Employment and Training Act (CETA) published on May 20, 1980, 45 FR 33846. The document implements proposed changes which were published on May 20, 1980, at 45 FR 33922.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Anderson, Administrator, Office of Comprehensive Employment Development, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, NW., Washington, D.C. 20213, Telephone: (202) 376-6254.

SUPPLEMENTARY INFORMATION:

Background:

On Tuesday, May 20, 1980, regulations for the implementation of programs under Titles I, II, VI, VII and Youth Programs under Title IV of the Comprehensive Employment and Training Act (CETA) were published in the **Federal Register**, 45 FR 33846. On the same date, proposed changes to several sections of these regulations, which had inadvertently been omitted from the proposed rules published on April 4, 1980, 45 FR 23296, were also published for comment, at 45 FR 33922.

The changes proposed at 45 FR 33922 were designed primarily to reduce unnecessary paperwork burdens on prime sponsors, by deleting certain reporting and recordkeeping requirements and shifting other information from the Annual Plan subparts to the Annual Plan General Narrative or from the Annual Plan to the Master Plan.

Comments:

The proposed revisions were published for a 60-day review and comment period. The Department received approximately 40 written comments on the proposed changes. Following is a description of each affected section as it appears in these amendments, a summary of the comments received and the Department's response.

Deletions from Master Plan Requirements; Maintenance of Descriptions On-Site

In the proposed amendments, various items required by § 676.10 to be included in the Master Plan were deleted, including: (A) the description of procedures to ensure that planning council meetings are open (§ 676.10-4(f)(2)); (B) the description of staff support to the council (§ 676.10-4(f)(3)); (C) the description of the Personnel Merit System (§ 676.10-4(g)(1)(iii)); (D) the description of the allowance payment system (§ 676.10-4(g)(2)(vi)); and (E) the description of methods to insure compliance with retirement provisions (§ 676.10-4(g)(2)(vii)). The requirement that various aspects of the allowance payment system be described in the Comprehensive Employment and Training Plan (CETP) was also deleted from § 676.26-2 (e)(2), (f)(2), (f)(3), (g), (h)(2), (h)(3) and (j).

As an alternative it was proposed to require, at § 676.22(f) (1), (2) and (3), that prime sponsors maintain descriptions on-site of the personnel merit system, retirement system and allowance payment system. Revisions were also proposed to § 676.26-2 (h)(2) and (h)(3) to reference the revised § 676.22.

One commenter opposed the deletions at §§676.10-4(f)(2) and 676.10-4(f)(3) and expressed concern that these deletions would be viewed by prime sponsors as a DOL retreat from commitment to the concept of open local planning in which interested persons, including aspiring service deliverers and representatives of significant groups in the prime sponsor's jurisdiction, can participate.

The Department believes that the requirement at Section 676.7 that each prime sponsor appoint to its planning council members who are representative of the significant segments of the eligible population, CBO's, public interest groups, etc., and the provision at § 676.6 for involvement in the planning process of groups not directly represented on the council, satisfy the requirement for open planning. Accordingly, the provision is adopted as proposed.

Several commenters recommended that the provision in § 676.10-4(g)(2)(vi) which requires a description of the allowance payment system in the Comprehensive Employment and Training Plan (CETP) be maintained.

These commenters reasoned that this description provides the opportunity to review the proposed system and procedures before they are implemented. One commenter objected to deletion of the requirement at § 676.10-4(g)(2)(vii) of a description of methods to insure compliance with retirement provisions. The majority of commenters welcomed the proposed deletions from the Master Plan. The Department observes that the proposed revisions simply eliminate these descriptions from the already cumbersome Master Plan, while requiring, at Section 676.22(f), that the descriptions be available for on-site review. Accordingly, the provision is adopted as proposed.

Transfers from Annual Plan Subparts to Master Plan; from Annual Plan Subparts to Annual Plan General Narrative

The proposed amendments transferred from the Annual Plan Subparts to the Master Plan the requirements that prime sponsors describe methods for insuring compliance with the annual average wage provisions, for determining PSE wage rates if rates for comparable jobs have not been established and for integrating PSE programs with other programs under the Act. The changes would be effected by deleting §§ 677.56(b)(3) (iv), (v) and (vi) and 678.6(b)(3) (v), (vi), and (vii) and by adding § 676.10-4 (i), (ii) and (iii).

Several commenters stated that consolidation and transfer of the several PSE requirements in the Master Plan would facilitate the stated goal of reducing unnecessary paperwork and noted that these items, which are administrative and standard in nature, are more appropriate for inclusion in the Master Plan. The Department agrees with the commenters. Accordingly, the provision is adopted as proposed.

The proposed amendments also transferred the requirement that prime sponsors provide significant segment charts and related information from the Annual Plan Subparts for Title II-B, C and D, Title VI and VII to the Annual Plan General Narrative, by deleting §§ 677.15(b)(1), 677.56(b)(1), 678.6(b)(1) and 679.5(d)(1)(ii) and adding Section 676.11(c)(5)(i) (A), (B), (C), and (D).

There were no comments on this proposal, which is designed to centralize target group information in the General Narrative. Accordingly, the changes are adopted as proposed.

PSE Occupational Summary

The proposal eliminated the required PSE Occupational Summary by deleting all reference to the Summary in §§ 676.12(f), 676.16(c)(3)(v), 677.56 (a) and (f) and 678.6 (a) and (f).

Two commenters opposed elimination of the PSE Occupational Summary on the ground the document is useful in reviewing prime sponsors' plans for compliance with the regulations. The vast majority of commenters welcomed elimination of the document. Some commenters noted that because of changes in the number of slots and in positions and wages throughout the fiscal year, the information in the Summaries was never complete or accurate. They also noted that in light of targeting of services and individualization of activities through the employability development plans (EDPs), public service employment (PSE) positions are likely to change as participants change. The Department agrees with these comments. Accordingly, references to the PSE Occupational Summary are deleted as proposed.

Annual Report of Training and Completions

The proposed regulations revised § 676.44 to require, at subparagraph (a)(6), a new Annual Report of Training and Completions. The Department received only two comments on this proposed change. Both commenters opposed the additional requirement because of the increase in workload. While the Department understands that the additional report increases prime sponsors' workload, the amendment is adopted as proposed to implement the requirements of Section 313(g)(1)(B) of the Act.

Administrative Costs

The May 20, 1980 proposal amended § 677.39(f) to clarify that the 20 percent of vocational education assistance funds which may be used for administrative costs under § 677.39(e) comes out of the 85 percent to be used to provide services to participants, rather than the 15 percent allocated for coordination, linkage and other activities under § 677.39(f). All comments received on this proposal were favorable. Accordingly, the provision is adopted as proposed.

Regulatory Analysis; Catalog Number

The regulations herein do not fall within the criteria for significant regulations requiring the preparation of a regulatory analysis under the Department of Labor guidelines implementing Executive Order 12044 (43 FR 12661, March 23, 1978). The program for which this rule is promulgated is listed in the Catalog of Domestic Federal Assistance as No. 17.232 "Comprehensive Employment and Training Programs."

Accordingly, the regulations at Part 676, 677, 678 and 679 of Title 20 of the Code of Federal Regulations are amended as set forth below:

PART 676—GENERAL PROVISIONS GOVERNING PROGRAMS UNDER THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT

1. Section 676.10–4 is amended by deleting subparagraphs 676.10–4(f)(2) and 676.10–4(f)(3) and renumbering the existing 676.10–4(f)(4), (5), (6), (7) and (8) as 676.10–4(f) (2), (3), (4), (5) and (6). Also, subparagraphs 676.10–4(g)(1)(iii), 676.10–4(g)(2)(vi) and 676.10–4(g)(2)(vii) are deleted and the existing subparagraph 676.10–4(g)(2)(viii) is renumbered as 676.10–4(g)(2)(vi).

§ 676.10–4 Narrative description.

The narrative description shall include:

(a) *Statement of purpose.*—(b) *Geographic Area, Population and Labor Market.* (1) A detailed description of the geographic area to be served and demographic characteristics of the population (with data, if available, indicating the number of potential eligible participants from each significant segment and their income and employment status) (sec. 103(a)(1)(A)).

(2) A comprehensive analysis of the local labor market and economic conditions, using existing sources such as the Employment Service, which includes identification of the availability of employment and training in the public and private sectors and the potential for job growth in those sectors (sec. 103(a)(1)(B)).

(3) A statement of long-term program goals related to the improvement of the labor market and economic conditions (sec. 103(a)(2)).

(c) *Approach.* (1)(i) A description of arrangements to ensure that employment and training services are provided to those individuals most in need, including low-income persons, handicapped individuals, older workers facing artificial barriers to employment and persons of limited English-language proficiency (sec. 103(a)(5)(A)).

(ii) The method used to determine priorities for service based on objective locally established criteria using such factors as employment status, household status, level of employability development, handicap, veteran status, age, race, sex or other criteria established by the prime sponsor (sec. 103(b)(12)).

(2) A description of the recruitment, intake, and selection methods to be used to identify, and place participants in programs (secs. 103(a)(4)(B) and 103(a)(5)(A)).

(3) A description of the system for developing participant employability plans, including the methods for determining the appropriate training and services to provide to each participant (sec. 205).

(4) A description of job development and placement services, and how these services will relate to, and be coordinated with, other area employment and training opportunities not provided under the Act, including any special activities designed to orient participants for their job responsibilities (sec. 103(b)(6)).

(5) A description of arrangements to provide participants with job search assistance, counseling and other services (sec. 103(a)(4)(B)).

(6) A description of methods to insure compliance with personnel procedures and collective bargaining agreements where participants are engaged in employment and training activities (sec. 103(a)(18)).

(d) *Service Deliverers.* (1) A description of procedures and criteria used to select service deliverers in accordance with § 676.23 (sec. 103(a)(3)(B)).

(2) A description of the criteria used to designate programs of demonstrated effectiveness (sec. 103(a)(4)(A)).

(3) A description of procedures for giving special consideration to employment and training programs of demonstrated effectiveness which are operated by community-based organizations (sec. 123(1)).

(e) *Coordination.* (1) A description of the methods for coordination between the prime sponsor and local State Employment Security Agencies, as provided in the agreement under § 676.23(g) (sec. 103(a)(15)).

(2) A summary of the agreement made with State or local educational agencies or post-secondary institutions for the conduct of employment and training programs (sec. 103(b)(16)).

(3) A description of procedures used to ensure the participation of, and consultation with, local education agencies, vocational education agencies, community-based organizations, Federal and State agencies, organized labor, apprenticeship programs, business and other institutions and organizations, including women's organizations, in the conduct of programs (sec. 103(a)(8)(A) and (9)).

(4) A description of methods to coordinate programs with employment and training programs administered by the Secretary and other federally-funded programs in the area (sec. 103(a)(8)(B)).

(5) A description of arrangements for the use of skill centers established under section 231 of the Manpower Development and Training Act of 1962 and efforts to promote maximum feasible use of apprenticeship or other on-the-job training opportunities available for veterans under Section 1787 of Title 38 United States Code, and coordination with the appropriate apprenticeship agency (sec. 103(a)(8)(A) and (c)).

(6) A description of procedures concerning academic credit developed in conjunction with the appropriate local educational agency or institution of higher education and approved by the appropriate State educational agency (sec. 103(a)(16)).

(7) A description of plans and activities to coordinate, strengthen, and expand employment and training activities with economic development activities in the private sector (sec. 103(a)(20)).

(8) A description of arrangements for implementing responsibilities under the Targeted Jobs Tax Credit program established by the Revenue Act of 1978.

(f) *Prime Sponsor Planning.* (1) A description of the functions and responsibilities of the prime sponsor Planning Council (secs. 109(e)and 103(a)(10)).

(2) A list of the groups within the community represented on the council (sec. 109(b))

(3) A description of procedures used to select members of the council (sec. 103(a)(4)(C)).

(4) A description of the methods and arrangements for the participation of groups not directly represented on the council as required by § 676.6, Planning Process, (secs. 103(a)(6) and 103(a)(14)).

(5) A description of efforts to involve the private sector in the design and implementation of programs (sec. 103(b)(8)).

(6) A description of coordination and consultation linkages between the Prime Sponsor Planning Council, Youth Council, and Private Industry Council (secs. 109(f) and 103(a)(4)(C).

(g) *Management and Administration.* (1) Organizational Structure and Staffing.

(i) A description of the prime sponsor's organizational structure (sec. 103(a)(4)(A)).

(ii) A description of procedures to recruit and select administrative staff (sec. 103(a)(4)(A)).

(2) Administrative Controls. A description of arrangements and procedures for:

(i) Management Information System (including accounting, participant tracking system, client record and reporting systems) (sec. 103(a)(11));

(ii) Evaluation and monitoring system, including the independent unit responsible for monitoring programs and subrecipients (secs. 103(a)(12) and 121(o)(3));

(iii) Fiscal and program auditing, including procedures for auditing subrecipients and bonding (secs. 103(a)(12) and 134);

(iv) Supervising deliverers of services (sec. 103(a)(4)(A));

(v) Determining and verifying eligibility of applicants, including the quarterly sampling procedures as required in § 676.75 (sec. 103(a)(11));

(vi) A description of procedures to ensure that funds received under the Act will be used in compliance with the maintenance of effort provisions set forth in § 676.73 (secs. 121 (e) and (g), 122 (c) and (e)).

(3) Grievance procedures. A description of the procedures for resolving any complaints or grievances alleging violation of the Act, regulations, and CETP from CETA participants, contractors, subrecipients and other parties (secs. 106 and 103(a)(4)(A)).

(h) *Nondiscrimination and equal opportunity.* (1) A description of the mechanisms which will be used to ensure nondiscrimination and the provision of equal opportunities (sec. 103(a)(5)(B)).

(2) A description of plans and procedures concerning affirmative action, as described in § 676.54.

(3) A description of efforts and procedures to eliminate artificial barriers to employment and occupational advancement for CETA participants, including the hiring, licensing and contracting activities of subrecipients and contractors of the prime sponsor (secs. 103(a)(19) and 103(b)(11));

(4) A description of efforts to remove architectural barriers to employment of the handicapped (sec. 121(a)(5)).

(i) *Public Service Employment.* (1) An explanation of the basis for distributing funds and the basis upon which job allocation to each employing agency will be made (secs. 123(i) and 606(b)).

(2) A description of the process for selecting project applicants including (sec. 605 (a) and (b)):

(i) The methods and criteria to be used for soliciting and approving project applicants;

(ii) The role of the planning council in the approval process (sec. 109(e)(1));

(3) A description of the items required on the project applications including at least the following information (sec. 605(b)):

(i) Description of project;

(ii) Goals and objectives;

(iii) Number of persons to be served; and

(iv) Length of project.

(4)(i) A description of the methods to be used to ensure that, at the end of the fiscal year, the annual average wage rate does not exceed the area's required annual average wage rate, as described in § 676.26–1(c)(3);

(ii) A description of the methods determine wage rates if the wage rates for comparable jobs have not been established; and

(iii) A description of how the public service employment program is integrated with other programs under the Act.

2. Section 676.11(c)(5)(i) is amended by adding new subparagraphs (A) through (D). Accordingly, § 676.11 is revised to read as follows:

§ 676.11 Annual plan.

(a) *General.* (1) The Annual Plan including its subparts shall be prepared pursuant to provisions in this section and §§ 676.41, 677.15, 677.33, 677.56, 678.6, 679.4, 680.5, 680.104, 680.207, and 680.304 as appropriate.

(2) In submitting the Annual Plan for RA approval, prime sponsors shall comply with the comment and publication procedures in § 676.12 and the planning process in § 676.6. The Annual Plan shall consist of an Application for Federal Assistance (SF–424), Narrative Description and Program Planning Summaries, Budget Information Summaries and other forms as appropriate.

(b) *Application for Federal Assistance.* The Application for Federal Assistance (SF–424) shall identify the total amount of funds requested for programs under Parts 677, 678, 679, and 680.

(c) *Narrative Description.* The narrative description shall include:

(1) A summary of any evaluation conducted of the program(s) in the previous year and current year to date and a description of the use made of such evaluation (sec. 103(b)(14)).

(2) A detailed summary of the expenditures made during the preceding year, and of results achieved and changes made in the Annual Plan for the program year (sec. 103(b)(5)).

(3) A summary of the extent to which special needs of the handicapped have been met during the previous year, including the number served, type of training provided and the number placed in unsubsidized employment (sec. 103(b)(15)).

(4) A list of the specific training subgrants and agreements from the current year, including the rate of

positive termination for program completers (sec. 103(b)(13)).

(5) Approach.

(i) A description of specific programs or services, including apprenticeship programs, if any, designed specifically for those segments of the population who are experiencing severe handicaps in obtaining employment, including individuals who lack credentials, require basic and remedial skills development, have limited English-language proficiency, are handicapped, are disabled or Vietnam-era veterans, are offenders, are displaced homemakers, are public assistance recipients, are persons 55 years of age or older, are youth, are single parents, are women or other individuals having particular disadvantages in the labor market (sec. 103(b)(3); sec. 214; sec. 215; and sec. 216).

(A) For Title II Part B and C. (*1*) Identification of those groups that have been determined for priority of service and most in need.

(*2*) A breakout of the eligible population by race, sex, national origin, and age, and the planned level of services to be provided for these significant segments in terms of the percent each group will constitute of those to be served (sec. 103(b)(2)). Where the planned level of service to any significant segment varies above or below the group's incidence in the eligible population, a justification must be provided.

(B) For Title II Part D. A breakout of the eligible population by race, sex, national origin and age, and the planned level of services to be provided these groups in terms of the percentage each group will constitute of those to be served (sec. 103(b)(2)). Where the planned level of service to any significant segment varies above or below the group's incidence in the eligible population, a justification must be provided.

(C) For Title VI. A breakout of the eligible population by race, sex, national origin and age, and the planned level of services to be provided these groups in terms of the percentage each group will constitute of those to be served (sec. 103(b)(2)). Where the planned level of service to any significant segment varies above or below the group's incidence in the eligible population, a justification must be provided.

(D) For Title VII. An analysis of the eligible population by race, sex, national origin and age, and a presentation of the planned levels of service to be provided these significant segments in terms of the percent each group will constitute of those to be served (sec. 103(b)(2)). Where the planned level of service to any significant segment varies above or below the group's incidence in the eligible population a justification must be provided.

(ii) A statement of any intention to apply for and utilize funds provided under the Act which are not allocated by formula (sec. 103(b)(9)).

(iii) A description of the efforts to be undertaken to increase the participation of qualified disabled and Vietnam-era veterans in accordance with § 676.30a(a) (sec. 121(b)(2)(A)).

(iv) A description of the plans and methods to be used to provide opportunities for minority-owned businesses and small businesses (including those owned by women), to compete for procurement contracts such as the use of set-asides where appropriate (sec. 121(k)).

(v) A description of how program activities will contribute to occupational development, upward mobility, development of new careers and overcoming of sex stereotyping, including procedures which will lead to skill development and job opportunities for participants in occupations traditionally limited to individuals of the opposite sex (secs. 103(a)(5)(C) and 121(f)(1)).

(vi) A description of any outstationing of PSE participants in accordance with § 675.25 concerning employment and training activities and the reasons why such outstationing is necessary.

(vii) A description of provisions to safeguard programs from political activities.

(viii) A description of the plans and methods to be used in providing special consideration in filling public service jobs to qualified public assistance recipients (or persons who would be eligible to receive public assistance according to established criteria if they would apply for such assistance) and special disabled and Vietnam-era veterans with special emphasis on those who served in the Indo-China theater on or after August 15, 1964 and on or before May 7, 1975 (sec. 122(b)).

(6) Annual Plan Subparts for each program to be operated under the Act as required by §§ 677.15, 677.33, 677.56, 678.6, 679.4, 680.5, 680.104, 680.207, and 680.304.

3. Section 676.12 is amended to delete paragraph (f), and existing paragraphs (g) and (h) have been relettered as 676.12 (f) and (g). Accordingly, § 676.12 is revised to read as follows:

§ 676.12 Comment and publication procedures relating to submission of the CETP.

(a) Prime sponsors shall make public the provisions of the Plan prior to submission to the RA through such means as public hearings, public notice in newspapers, bulletins, or other media, including publications that primarily serve significant segments of the eligible population (sec. 104(a)(3)).

(b)(1) Each prime sponsor shall publish at a minimum in one issue of a newspaper or newspapers of general circulation in the prime sponsor's area (including minority newspapers, where applicable) a statement indicating the following information:

(i) The source of funds;

(ii) The amount requested;

(iii) A brief summary of the purpose of the proposed program and activities; and

(iv) The location and hours when the CETP and a comparison of performance against the prior year's plan through the most recent quarter, can be reviewed and the address and phone number where questions and comments may be directed.

(2) The prime sponsor shall publish the statement at least 45 days prior to the submission of the CETP to the RA in order to allow at least 30 days of review and comment. In addition, a copy of the newspaper article shall be transmitted to the RA (sec. 104(a)(3)).

(3)(i) The prime sponsor may include a statement indicating that subsequent modifications to the CETP will not be subject to these publication requirements: *Provided,* That the notice states that interested groups, organizations, or individuals may notify the prime sponsor of their desire to review any subsequent modification during the grant year.

(ii) The prime sponsor shall maintain a list of such notifications and provide these parties with copies of modifications 30 days prior to submission to the RA.

(c)(1) Each prime sponsor shall, at least 45 days before submitting its CETP to the RA, allow at least 30 days for review and comment by providing the complete Plan, to the Governor, the State employment and training council, the prime sponsor planning council, appropriate labor organizations, and the private industry council, with notice of the opportunity to review the plan going to appropriate units of general local government in its area, and appropriate native American recipients (sec. 104(a)(1)).

(2)(i) Copies of the comments and recommendations of the Governor, the State employment and training council, and the prime sponsor planning council shall be transmitted to the RA with submission of the Plan, or if the comments are received after the submission of the Plan, they may be sent separately to the RA (sec. 104(b)).

(ii) The prime sponsor shall provide an explanation for the rejection of recommendations made by the planning council, including minority reports, which were not included in the Plan (sec. 103(a)(18)).

(d) At the same time, each prime sponsor shall provide written notification of the availability of the Plan to each House of the State Legislature for appropriate referral, to appropriate community-based organizations of demonstrated effectiveness including appropriate women's organizations, veterans organizations, and appropriate educational and apprenticeship agencies and institutions (sec. 104(a)). Prime sponsors shall allow at least 30 days for review and comment.

(e) If a State or areawide clearinghouse notifies a prime sponsor that it wishes to review the complete Plan, the applicant shall also provide a copy of such to the clearinghouse(s) 45 days prior to its submission to the RA.

(f) A prime sponsor shall acknowledge all written comments and shall inform in writing any party submitting a substantive written comment of whether any Plan revision will be made in response to the comment, and the reasons for the prime sponsor's determination. The prime sponsor shall provide, upon request, copies of all written comments to the planning council and the Governor (sec. 104(b)).

(g) If no comments are received from an A–95 Clearinghouse, or if the Clearinghouse has not requested to review the CETP, the prime sponsor applicant shall so note this on Standard Form 424.

4. Section 676.16 is amended by deleting subparagraph (c)(3)(v). Accordingly, § 676.16 is revised to read as follows:

§ 676.16 Modifications.

(a) The RA may require modification of the CETP only once each fiscal quarter, with the exception of changes in the funding allocation level or to ensure compliance with the Act and regulations total amount of funds requested for program under Parts 677, 678, 679, and (108)).

(b) Modifications of the Master Plan.

(1) The Assurances and Certifications may only be modified by the RA.

(2) Prime sponsors shall obtain prior RA approval of a modification initiated by a prime sponsor which proposes to make a significant change in the Narrative Description.

(3) Modification requests from prime sponsors shall consist of the following:

(i) Approval Request Letter;

(ii) Revised Narrative Description or revised Assurances and Certifications, if appropriate; and

(iii) A copy of the newspaper announcement required in paragraph (d) of this section, for significant changes to the narrative description.

(c) Modifications to the Annual Plan.

(1) Prior RA approval is required to modify:

(i) The duration of the Annual Plan or Subparts of the Annual Plan;

(ii) The Annual Plan allocation;

(iii) An increase or decrease of 15% or more in the cumulative number of individuals to be served, planned enrollment levels for program activities, planned placements, terminations or individuals to be served within significant segments;

(iv) For Annual Plan Subparts of $100,000 or less, a cumulative transfer of $15,000 among program activities or cost categories;

(v) For Annual Plan Subparts of over $100,000, the cumulative transfer among program activities or cost categories of $50,000 or more or 15 percent of the total plan budget, whichever is greater; or

(vi) Significant changes in program design.

(2) Prime sponsors may not modify their Annual Plan solely to adjust planned performance to meet actual performance.

(3) Modifications to the Annual Plan requested by prime sponsors shall consist of:

(i) Approval Request Letter;

(ii) Revised Form SF 424 (if required);

(iii) Revised Program Planning Summary and Budget Information Summary for current and future quarters only;

(iv) Description of any conforming changes made in the Narrative Descriptions.

(4)(i) Modification of the Annual Plan pursuant to paragraph (c)(1) of this section must be made within 30 days from the beginning of the quarter in which changes are effective.

(ii) A prime sponsor may make any change, consistent with the regulations, in its Program Planning Summary, Budget Information Summary, or Narrative Description which is not set out in paragraph (c)(1) of this section without prior RA approval, but must notify the RA of any such change within 30 days from the beginning of the quarter in which the changes are effective.

(d) Publication and comment procedures specified in § 676.12 shall apply to modifications for which prior RA approval is necessary except that:

(1) Each prime sponsor shall comply with the comment and publication requirements at least 30 days prior to submission of its modification to the RA.

(2)(i) The required newspaper announcement shall include a notice of the prime sponsor's intent to modify, a brief summary of the nature and purpose of the proposed modification, the location where and hours when the complete modification can be reviewed, and the telephone number to which questions may be directed.

(ii) This publication requirement may be waived by the prime sponsor if the notification process under § 676.12(b)(3)(i) and (ii) has been met.

(3)(i) The prime sponsor shall clear modifications through the A–95 clearinghouse only if:

(A) There is a cumulative increase or decrease in funds equal to or more than 15 percent of the allocation for any Annual Plan Subpart for the current program year; or

(B) The Annual Plan, or any Subpart, is extended for a period of more than 3 calendar months.

(ii) When A–95 clearance is required, the notice from the prime sponsor to the clearinghouse shall consist of a revised SF 424 and a brief description of the anticipated modification. If within 15 days of the notice, the prime sponsor receives no notice from the A–95 clearinghouses that it wishes to review the modification, the prime sponsor may submit the modification to the RA without A–95 clearance.

(e) The RA shall approve or disapprove proposed modifications fully or partially within 30 days of receipt, and, within 7 days of such action, notify the prime sponsor and the Governor in writing of the decisions. The procedures in § 676.14(b) and (c)(1) concerning review, approval and disapproval shall apply to modifications.

(5) Section 676.22 is amended by adding paragraph (f). Accordingly § 676.22 is revised to read as follows:

§ 676.22 Program management systems.

(a) All recipients shall establish management systems to assess all programs. Recipients shall take necessary corrective action to remedy deficient performance under their grant and to plan for more effective programs.

(b) Prime sponsors shall institute and maintain effective systems for the overall management of their programs, including but not limited to:

(1) Program monitoring systems as described in § 676.75–2;

(2) Eligibility verification systems as described in § 676.75–3;

(3) Complaint and Hearing Procedures as described in § 676.83;

(4) Mechanisms for taking immediate corrective action where problems have been identified.

(c) All recipients shall establish and maintain financial management and participant tracking systems in accordance with § 676.34. Such systems shall be designed to enable the recipient to effectively manage its program and to provide information necessary to design program activities and delivery mechanisms best suited to resolve employment and training problems (Sec. 104(c)(3)).

(d) Each recipient shall establish and use procedures for the systematic assessment on a quarterly basis of program performance in relation to the goals contained in its grant. Recipients shall:

(1) Establish written quantified goals for each activity and service and for each subrecipient based on the specific program purposes of the service, activity or subgrant;

(2) Establish and use procedures for collecting performance information (including information on the status of individuals subsequent to entering unsubsidized employment) and for assessing such information in terms of the goals contained in its grant;

(3) Establish and use procedures for identifying performance problems and for developing and implementing appropriate remedial actions (sec. 103(a)(4)(A)).

(e) Recipients shall establish and use procedures whereby the information collected and assessments conducted shall be considered in subsequent program planning and in the selection of deliverers. Prime sponsors shall provide program assessments to their Planning Council and, as appropriate, to their Youth and Private Industry Councils.

(f) Each prime sponsor shall maintain on-site a description of its:

(1) Personnel merit system,

(2) Allowance payment system, and

(3) Retirement system.

These descriptions must be available for review by authorized DOL staff.

6. Section 676.26–2 is amended at paragraphs (e)(2), (f)(2), (f)(3), (g), (h)(2), (h)(3) and (j) to delete all references to the CETP. Further, paragraphs (h)(2) and (h)(3) are amended by adding the phrase "with the conditions for such increases to be maintained on site as required in § 676.22". Accordingly, § 676.26–2 is revised to read as follows:

§ 676.26–2 Payment of allowances.

(a) *General.* (1) Except for persons receiving incentive allowances, a basic hourly allowance shall be paid to participants for time spent in classroom training. In addition, allowances may be paid to a participant enrolled in *Services* and *Other Activities* when such services or activities are combined with another activity or are provided on a regularly scheduled basis.

(2) No participant shall receive compensation for classroom training for more than 104 weeks in a 5-year period, beginning October 1, 1978, or the subsequent date of the participant's initial enrollment in CETA. Participants who have exhausted the 104-week limitation on receipt of compensation may continue to be enrolled in classroom training without payments: *Provided,* That they have not exhausted the 30-month limitation on total CETA participation described in § 676.30. (sec. 121(c)(1)).

(b) *The allowance payment system.* A standard system for payment of allowances shall be maintained by every recipient to ensure prompt and efficient payment to all participants (sec. 124(a)). The standard payment system shall consist of a uniform set of procedures, but may be operated by one or more service deliverers. It shall include:

(1) Determination of entitlement and computation of amount to be paid;

(2) Maintenance of a system for requesting payment of training allowances, including the certification, issuance and distribution of payments;

(3) Maintenance of payment records and preparation of required statistical and fiscal reports;

(4) Maintenance of a system to detect and collect overpayment;

(5) Issuance of written notification to participants when allowances are reduced, denied or overpaid; and

(6) Arrangements with other agencies to obtain information to minimize unauthorized payments, including arrangements with:

(i) The State Employment Security Agency for the initial and periodic verification of a participant's receipt of unemployment compensation (sec. 124(a));

(ii) Appropriate agencies for verification of public assistance payments (e.g., local welfare agencies); and

(iii) Training facilities for submittal of payment requests and certifications of attendance.

(c) *Selection of service deliverer.* The recipient shall provide a standard allowance payment system either directly or through an organization or organizations it considers appropriate for its particular circumstances. The recipient, in selecting the service deliverer for the payment of allowances, shall give first consideration to the use of the unemployment insurance component in the SESA before using other agencies that may have experience in operating an allowance payment system (sec. 103(a)(7)).

(d) *Basic allowances.* (1) A basic hourly allowance shall, except as provided in paragraphs (h) and (j) of this section, equal the higher of:

(i) The minimum hourly wage prescribed by State or local law for most employment in the recipient's area, multiplied by the number of hours during which the participant attends or is absent for good cause; or

(ii) The minimum hourly wage specified in Section 6(a)(1) of the Fair Labor Standards Act, multiplied by the number of hours during which the participant attends or is absent for good cause.

(2) For participants who are institutionalized, including prisoners, all or part of the allowances, as determined by the recipient and the head of the institution, may be held in reserve by the institution and delivered upon the participant's release from the institution. The institution shall not retain any portion of these funds, or interest earned on these funds, while held in reserve. In addition, dependent allowances may not be held in reserve.

(e) *Dependent allowances.* (1) Participants receiving basic allowances or who would be receiving full basic allowances were it not for adjustments under paragraph (h) of this section shall receive dependent allowances of $5 per week for each dependent in excess of two dependents, up to a maximum of $20 for six or more dependents (sec. 1249(a)(1)).

(2) Dependent allowances shall be reduced prorata for absence without good cause (sec. 124(a)).

(f) *Incentive allowances for persons receiving public assistance.* (1) Incentive allowances in the amount of $30 per week, in lieu of basic allowances, shall be paid to participants, including youths participating in summer youth programs under Subpart C of Part 680, who are receiving public assistance, or whose needs or income are taken into account in determining public assistance payments to others. Youths participating in programs under Subparts A, B, and D of Part 680 shall be paid basic allowances, if applicable, regardless of their public assistance status (sec. 124(a)(3)).

(2) Incentive allowances shall be reduced prorata for absences without good cause. The methodology (e.g., daily or hourly proration) for making the reduction shall be described in the recipient's CETP.

(3) Incentive allowances may be adjusted downward, provided that the adjustment shall not result in an incentive allowance payment at a rate less than the higher of the Federal, State, or local minimum wage multiplied by the number of hours of participation or absences with good cause.

(4) Incentive allowances shall be disregarded in determining the amount of public assistance payments individuals are entitled to receive under Federal or federally assisted public assistance programs (sec. 124(a)(3)).

(g) *Additional allowances.* Additional reasonable allowances, such as allowances for transportation or subsistence, may be paid to participants to cover extraordinary costs associated with participation in an activity.

(h) *Adjustments in basic allowances.* (1) The basic allowance shall be reduced on a weekly basis by the amount of any unemployment compensation received by the participant for the same week. The basic allowance shall not be reduced because of any unemployment compensation that is payable for a week(s) prior to the participant's enrollment in an activity where allowances are paid. If unemployment compensation is paid on a biweekly basis, it shall be prorated over the two weeks before the allowance is reduced. Where eligible, participants should be encouraged to apply for and claim unemployment compensation if they are not already receiving such benefits (sec. 124(a)).

(2) The basic allowance may be adjusted upward if conditions for such increases are described in documentation maintained on site as required in § 676.22.

(3) Periodic increases to the basic allowances may be provided as an incentive to participation if the conditions for such increases are described in documentation maintained on site as required in § 676.22.

(4)(i) The basic hourly allowance for a participant may be reduced, at the option of the recipient, on a weekly basis, by the total amount of any Basic Education Opportunity Grant (BEOG) during the period in which the participant is enrolled in the classroom training; or

(ii) The recipient may make arrangements with training institution to apply BEOG payment to tuition, books and related training costs normally funded by the recipient. The recipient should then pay the training institution the difference, if any, between the actual training costs and the BEOG.

(5) The basic allowance may be reduced by the amount of wages received by classroom training participants who are also enrolled full-time during the same payment period in work experience, PSE or OJT. The determination of whether the activity is full-time shall be based on the number of hours that constitute full-time employment for employees similarly employed.

(i) *Rounding of amount of allowance payable.* Allowance payments under this section, if rounded, may only be rounded to the next higher multiple of a dollar.

(j) *Waivers of allowances.* (1) The payment of all or part of the basic allowance may be waived only in accordance with paragraphs (j) (2) or (3) of this section. When all or part of the basic allowance is waived, the recipient shall maintain documentation that the waiver accomplishes the goals established by the recipient when requesting the waiver. However, when participants, who had received either basic or incentive allowances continue to participate in classroom training without compensation after their 104 weeks of receipt of allowances, these waiver provisions do not apply, since these participants have exhausted their eligibility for allowances and are not waiving them (sec. 1239(a)).

(2) Waivers of basic allowances shall be allowable ony when the following conditions have been met and documented:

(i) That the waiver will be applied to the total enrollment in a course and will not be imposed on an individual basis, except as provided in paragraph (j)(3) of this section; and

(ii) That the waiver will not have the effect of denying participation to individuals who could not participate without receipt of allowances; and

(iii) That the waiver will increase the number of participants served or the level of services provided; and

(iv) That the waiver will otherwise promote the purposes of the Act; and

(v) That all participants for whom allowances are waived will be so notified in writing; and

(vi) That documentation of the participant's notification of the waiver will be made a part of the participant's record.

(3) In exceptional circumstances, individual waivers, when described in the CETP or grant may be granted under the following conditions:

(i) The waiver is at the written agreement of the participant; and

(ii) All of the funds allocated in the Budget Information Summary for allowances have been obligated and training opportunities are still unfilled and available.

(4) The dependent allowances may not be waived, except in cases where the entire basic allowance is waived.

(5) Allowance payments shall not be waived solely because a participant receives benefits through the Vietnam Era Veteran's Readjustment Assistance Act, as amended.

(6) Incentive allowances shall not be waived.

(k) *Repayments.* Recipients shall require participants to repay the amount of any overpayment of allowances under this Part, except if the overpayment was made in the absence of fault on the part of the participant. Where the recipient does not require repayment, the recipient shall maintain written documentation of the overpayment specifying the absence of fault on the part of the participant. Where the recipient requires repayment, any overpayment not repaid may be set off against any future allowance or other payments under the Act to which the participant may become entitled, but in no case shall the wage be reduced below the applicable minimum wage.

7. Section 676.44 is amended by adding subparagraph (a)(6). Accordingly, § 676.44 is revised to read as follows:

§ 676.44 Reporting requirements for prime sponsors.

(a) Each prime sponsor shall submit five periodic reports which will be used by the Secretary to assess its performance in carrying out the objectives of the Act. Reports 1, 2, and 3 of this section shall be prepared to coincide with the ending dates of Federal fiscal year quarters. These five reports are:

(1) The Program Status Summary (sec. 127(d)(1));

(2) The Financial Status Report (sec. 127(d)(3));

(3) The Quarterly Summary of Participant Characteristics (sec. 127(d)(2));

(4) Annual CETA Program Activity Summary (sec. 127(d)); and

(5) Annual Report of Detailed Characteristics (sec. 127(d)). Prime sponsors may from time to time be required to prepare and submit additional reports requested by DOL and other Federal agencies for the performance of the legal responsibilities of these agencies. Detailed descriptions of the five reports are in the *Forms Preparation Handbook.*

(6) The Annual Report of Training Enrollments and Completions (sec. 313(g)).

(b) The Periodic reports shall be sent by the prime sponsor to be received by the RA no later than 30 days after the

end of the reporting period. The annual reports shall be sent to arrive no later than 60 days after the end of the fiscal year.

(c) Separate reports will be required for each Annual Plan Subpart.

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8. Section 677.15 is amended by deleting paragraph (b)(1), and existing paragraphs (b)(e) and (3) have been renumbered as 677.15(b)(1) and (2). Accordingly, § 677.15 is revised to read as follows:

§ 677.15 Annual plan subpart.

(a) *General.* To receive financial assistance under Parts B and C of Title II, a prime sponsor shall submit the following information, which will become part of the Annual Plan described in § 676.11. This Subpart shall consist of a Narrative Description, Program Planning Summary, and Budget Information Summary specific to Parts B and C of Title II.

(b) The Narrative Description shall include:

(1) *Results and Benefits.* Provide a statement on:

(i) Specific quantified performance and placement goals, by program activity;

(ii) Any performance and placement goals, with respect to groups designated to be served (sec. 103(b)(4));

(iii) Explain any variation between the prime sponsor's performance and placement goals and the Secretary's performance standards (sec. 103(b)(4)); and

(iv) Any non-quantifiable goals or outcomes.

(2) *Approach.* (i) Program Activities and Services.

(A) A description of the program activities and services to be provided including a description of how the proposed work experience activities conform to the program requirements for work experience as distinct from PSE.

(B) A description of the circumstances that warrant a waiver of the work experience limitations set forth in § 676.30(g)(2), if appropriate.

(C) A description of upgrading or retraining activities including the prime sponsor's system for determining eligibility for participation, the criteria used for selection of occupations and employers, and the length of the training period (sec. 221(a) and (b)).

(ii) A description of arrangement to ensure that funds under Subparts 2 and 3 of Part A Title IV of the Act will not be used to replace opportunities available for eligible youth under Title II (secs. 421 and 431).

(iii) A list of the selected service deliverers (summary of recipients and contractors) and the services or facilities to be provided by each. (sec. 103(b)(7)).

(c) The prime sponsor shall attach a Program Planning Summary (PPS) which reflects the goals, objectives and activities for the program year.

(d)(1) The prime sponsor shall attach a Budget Information Summary (BIS) containing the proposed budget for programs under Parts A, B, and C of Title II.

(2) If any item of capital equipment which individually costs more than $1,000 is to be purchased, a list, including quantity and prices of items, must be provided.

(3) If administrative costs are planned to exceed 20% of the funds allocated, adequate justification must be provided.

9. Section 677.39 is amended at paragraph (f). Accordingly, § 677.39 is revised to read as follows:

§ 677.39 Vocational education activities.

(a) The Governor shall provide vocational education funds received by special grant to the State Vocational Education Board as described in § 677.34 of this Subpart D and approve the plans for expenditure of those funds.

(b)(1) The State Vocational Education Board representatives will provide the training and services detailed in a nonfinancial agreement with the prime sponsor as described in § 677.35 of this Subpart D.

(2) If no Vocational Education Board exists within a State, the Governor may provide financial assistance to an alternate agency which serves the same purpose as a State Vocational Education Board. If the Vocational Education Board refuses to participate in this program the Governor shall make alternative arrangements to provide these services.

(c) Vocational education services which may be provided by a State Vocational Education Board include, but are not limited to, basic or general education, educational programs conducted for offenders, institutional training, and supportive services. Vocational education funds may be used for the payment of allowances to participants in vocational education training and for administrative costs incurred for the vocational education programs funded under the Act.

(d) When funds for vocational education services are used for the payment of allowances to participants, the method of payment utilized must be that of the prime sponsor whose participants are receiving such allowances.

(1) Where the prime sponsor has an established delivery system for the payment of allowances pursuant to § 676.26 (Compensation for participants), the State Vocational Education Board shall utilize the agency or agencies administering that system.

(2) Where the prime sponsor has no allowances payment delivery system, the method of payments shall be developed between the prime sponsor and the State Vocational Education Board subject to the requirements of § 676.26.

(e) For funds for vocational eduction assistance, not less than 85 percent shall be used for providing vocational education services to prime sponsor's participants in programs under the Act.

(1) Of this amount, not more than 20 percent of the funds used for such education and services may be used for administration.

(2) At least fifty percent of the vocational education funds allocated to administration shall be made available to local prime sponsor areas unless adequate justification for not doing so is provided to the RA by the Governor.

(f) Subject to the limitations specified in § 676.40 (allowable costs under CETA), remaining funds may also be used by the Vocational Educational Board for the following activities:

(1) To coordinate programs under this Act with existing vocational education programs;

(2) To coordinate the utilization of funds under this Act with the Vocational Education Act, as amended, to enhance economic growth and development in the State;

(3) To develop linkages between vocational education and training programs under this Act with private sector employers;

(4) To provide technical assistance to vocational education agencies to aid them in making cooperative arrangements with appropriate prime sponsors;

(5) To provide information, curriculum materials and technical assistance in curriculum development and staff development to prime sponsors.

(g) Of the total amount provided for vocational education assistance, the Governor may retain only the nominal amount of administrative funds necessary to carry out his or her responsibilities to provide for passing the funds through to the Vocational Education Board.

10. Section 677.56 is amended by deleting at paragraph (a) the words "PSE Occupational Summary" and by deleting paragraphs (b)(1), and

subparagraphs (b)(3) (iv), (v), and (vi) and paragraph (f) and renumbering the existing 677.56(b) (2), (3), and (4) as 677.56(b) (1), (2), and (3). Accordingly, § 677.56 is revised to read as follows:

§ 677.56 Annual plan subpart.

(a) *General.* To receive financial assistance under Part D of Title II of the Act, a prime sponsor shall submit the following information as the Annual Plan Subpart which will become part of its Annual Plan:

Narrative Description.
Program Planning Summary.
Budget Information Summary.
Monthly Schedule.

(b) *Narrative Description.* The narrative description shall include:

(1) *Results and Benefits.* The results and benefits expected including:

(i) Specific quantifiable performance and placement goals by program activity;

(ii) Performance and placement goals with respect to groups designated to be served (sec. 103(b)(4));

(iii) The relationship between the prime sponsor's performance and placement goals and the Secretary's performance standards (sec. 103(b)(4)); and

(iv) Non-quantifiable goals which the prime sponsor intends to achieve.

(2) *Approach.* The approach to be used in producing the expected results and benefits, including:

(i) Program activities and services to be provided, including a description of the arrangements for the provision of training and services that will assist participants in obtaining unsubsidized employment;

(ii) How the prime sponsor will provide for an orderly transition from the number of jobs funded in the current fiscal year to the number of jobs that will be funded with the allocation for the next fiscal year (sec. 602(c));

(iii) The wages or salaries and fringe benefits for public service employment participants and a comparison of these with the wages or salaries and fringe benefits paid to person in similar public occupations by the same employer; levels of employment not supported under the Act; layoffs, and hiring and promotional freezes in each employing agency (sec. 103(b)(10)).

(3) *Service Deliverers.* A list of the selected service deliverers and the services or facilities to be provided by each (summary of subrecipients and contractors).

(c) *Program Planning Summary (PPS).* A PPS reflecting the goals and activities for the program year.

(d) *Budget Information Summary (BIS).* A BIS containing the proposed budget and a list specifying the quantity and price of each piece of capital equipment exceeding $1,000 to be purchased during the fiscal year.

(e) *Monthly Schedule.* A monthly schedule which contains an estimate of the total number of participants who will be enrolled in Title II, Part D programs at the end of each month and the total cumulative expenditures expected to have been incurred by the end of each month by the PSE and non-PSE programs.

PART 678—PUBLIC SERVICE EMPLOYMENT PROGRAMS UNDER TITLE VI OF THE COMPREHENSIVE EMPLOYMENT AND TRAINING ACT

11. Section 678.6 is amended by deleting at paragraph (a) the words "and PSE Occupational Summary" and by deleting paragraphs (b)(3)(v), (vi), (vii); (b)(1) and (f), and renumbering the existing 678.6(b)(2), (3) and (4) as 678.6(b)(1), (2) and (3). Accordingly § 678.6 is revised to read as follows:

§ 678.6 Annual plan subpart.

(a) *General.* To receive financial assistance under Title VI of the Act, a prime sponsor shall submit the following information as the Annual Plan Subpart which will become part of its Annual Plan: Narrative Description, Program Planning Summary, Budget Information Summary and Monthly Schedule.

(b) (1) *Results and Benefits.* The results and benefits expected including:

(i) Specific quantifiable performance and placement goals by program activity;

(ii) Performance and placement goals, with respect to groups designated to be served (sec. 103(b)(4));

(iii) The relationship between the prime sponsor's performance and placement goals and the Secretary's performance standards (sec. 103(b)(4)); and

(iv) Non-quantifiable goals which the prime sponsor intends to achieve.

(2) *Approach.* The approach to be used in producing and expected results and benefits including:

(i) Program activites and services to be provided, including a description of the arrangements for the provision of training and services that will assist participants in obtaining unsubsidized employment;

(ii) How the prime sponsor will provide for an orderly transition from the number of jobs funded in the current fiscal year to the number of jobs which will be funded with the allocation for the next fiscal year (sec. 602(c));

(iii) The extent to which the prime sponsor will supplement wages of persons other than those who were in the program on September 30, 1978, including:

(A) The maximum amount of funds used to supplement any one particular job funded under this Part; and

(B) The total amount of funds used to supplement all jobs funded under this Part;

(iv) The wage rates or salaries and fringe benefits for public service employment participants and a comparison of these with the wages or salaries and fringe benefits paid to persons in similar public occupations by the same employer; levels of employment not supported under the Act; layoffs, and hiring and promotional freezes in each employing agency (sec.103(b)(10));

(3) *Service Deliverers.* A list of the selected deliverers and the services or facilities to be provided by each (summary of subrecipient and contractors).

(c) *Program Planning Summary (PPS).* A PPS reflecting the goals and activities for the program year.

(d) *Budget Information Summary (BIS).* A BIS containing the proposed budget and a list specifying the quantity and price of each piece of capital equipment exceeding $1,000 to be purchased during the fiscal year.

(e) *Monthly Schedule.* A monthly schedule which contains an estimate of the total number of participants who will be enrolled in Title VI programs at the end of each month, and the total cumulative expenditures expected to have been incurred by the end of each month by the PSE and non-PSE programs.

PART 679—PRIVATE SECTOR INITIATIVE

Program for the Economically Disadvantaged Under the Comprehensive Employment and Training Act

12. Section 679.5(d)(1) is amended by deleting paragraph (d)(1)(ii) and deleting "(i)" before the sentence beginning "State the objectives . . . ." Accordingly, § 679.5 is revised to read as follows:

§ 679.5 Annual plan subpart.

(a) *General.* To receive financial assistance under this Part, a prime sponsor shall submit the following information, which will become part of the Annual Plan as described in § 676.11. This subpart shall consist of a Narrative Description, Statement of Concurrence, Program Planning Summary, and Budget Information

Summary, specific to Title VII (sec. 103(b)).

(b) The prime sponsor shall transmit a copy of the Title VII Annual Plan subpart to the prime sponsor's planning council, to appropriate labor organizations, commuity-based organizations, educational agencies and institutions, Overall Economic Development Program committees and to such other parties as are required by § 676.12(d). The comment and publication procedures of § 676.12 apply to this Part (secs. 703(b)(4) and (5)).

(c) The Annual Plan subpart shall have the concurrence of both the PIC and the prime sponsor in order to be approved. Therefore, a Statement of Concurrence shall be submitted, signifying the concurrence of the PIC and the prime sponsor with the contents of the Annual Plan subpart or any modifications thereto.

(d) *Narrative Description.* The narrative description shall include:

(1) *Objectives and need for assistance.* State the objectives and need for funding under this Part, including an identification of private sector occupations where there are labor shortages.

(2) *Results and benefits.* Provide a statement on:

(i) Specific quantified performance and placement goals, by program activity.

(ii) Any performance and placement goals with respect to groups designated to be served (sec. 103(b)(4)).

(iii) Explain any variation between such performance and placement goals and the Secretary's performance standards (sec. 103(b)(4)).

(iv) Any nonquantifiable goals or outcomes.

(3) *Approach.* Provide a description of:

(i) The specific activities to be conducted, and how these activities will be integrated with other training and placement activities under the Act (sec. 703(a)).

(ii) The procedures and standards to be used for the selection of occupations in which training is to be provided.

(iii) The system that will be used to review and assess the success of activities, including a description of the role of the PIC.

(4) *Private Industry Council (PIC).* Provide the following:

(i) The responsibilities assumed and the functions to be performed by the Private Industry Council in the planning, operation and review of programs.

(ii) A list of the PIC Membership indicating representation from among those membership categories identified in § 679.3–2.

(iii) Staffing arrangements for support of the PIC agreed upon the PIC and the prime sponsor.

(iv) A description of procedures established to ensure periodic consultation and coordination of activity between the PIC and the prime sponsor's planning council and other appropriate agencies in the labor market area.

(v) For multijurisdictional PIC's (except for existing consortia) identify the geographic area to be served, the prime sponsors participating, administrative and programmatic relationships between the PIC and the participating prime sponsors and the functions to be performed by each. A copy of the written agreement cited in § 679.3–6 must be included as an attachment to the Annual Plan Subpart.

(e) *Statement of Concurrence.* This statement documents the concurrence of the PIC and the prime sponsor with the contents of the Annual Plan Subpart.

(f) *Program Planning Summary (PPS).* The PPS reflects the goals, objectives and activities planned under Title VII for the program year.

(g) *Budget Information Summary (BIS).* The BIS contains the planned budget under Title VII for the program year.

(Sec. 128 of the Comprehensive Employment and Training Act (Pub. L. 95–524, 92 Stat. 1909, 29 U.S.C. 801 *et seq.*))

Signed at Washington, D.C., this 16th day of January 1981.

Ray Marshall,

Secretary of Labor.

[FR Doc. 81–2811 Filed 1–23–81; 2:02 pm]

BILLING CODE 4310–30–M

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 676

Comprehensive Employment and Training Act

AGENCY: Employment and Training Administration, Labor.

ACTION: Final rule.

SUMMARY: This document contains several amendments to Part 676, Subpart D of the Comprehensive Employment and Training Act (CETA) regulations dealing with nondiscrimination, equal opportunity, equitable service and affirmative action published on May 20, 1980, 45 FR 33846. The document implements modifications proposed by the Equal Employment Opportunity Commission (EEOC) pursuant to its review and coordination responsibilities with respect to equal employment opportunity regulations under Executive Order 12067 (43 FR 28967, June 30, 1978).

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Anderson, Administrator, Office of Comprehensive Employment Development, Employment and Training Administration, U.S. Department of Labor, 601 "D" Street, N.W., Washington, D.C. 20213, Telephone: (202) 376-6254.

SUPPLEMENTARY INFORMATION:

Background

On April 4, 1980, the Department of Labor published proposed revisions to the CETA regulations at 20 CFR Parts 675-679 45 FR 23296 *et seq.* Inadvertently, the nondiscrimination/equal opportunity provisions in Part 676, Subpart D of that proposal were not submitted to the Equal Employment Opportunity Commission in advance of publication for review pursuant to Executive Order 12067 (1-304, 43 FR 28967, June 30, 1978). As a result, EEOC's comments were not considered in the final regulations published on May 20, 1980, 45 FR 33846. The purpose of these amendments is to incorporate the EEOC comments on Subpart D into the final regulations.

EEOC Comments

Following is a description of each affected section as it appears in these amendments, a summary of the EEOC comments and the Department's response.

Uniform Guidelines on Employee Selection Procedures

Section 676.52(d)(3) of the current regulations requires that tests or selection procedures which have an adverse impact on any race, sex or national origin group in the selection of participants or staff be validated in accordance with the Uniform Guidelines on Employee Selection Procedures (41 CFR Part 60-3). The EEOC notes that validation is only one alternative under the Uniform Guidelines; that employers may eliminate or modify the tests or procedures in question to remove or minimize the adverse impact (see 41 CFR 60-3.3 and 60-3.6). The Department agrees that the regulation should reflect the existence of this option and is amending § 676.52(d)(3) to indicate that tests and selection procedures shall be used only in conformity with the Uniform Guidelines. The last sentence of § 676.52(d)(3) is also clarified to reflect that tests or procedures which have been validated in accordance with the Uniform Guidelines shall not be considered artificial barriers to employment.

EEOC also notes that under the Uniform Guidelines, selection procedures which have an adverse impact on individuals of certain religions are treated in the same manner as procedures which have an adverse impact on persons of a certain race, sex, or national origin. EEOC suggests that § 676.52(d)(3) be amended accordingly. The Department agrees with this comment and considers that § 676.52(d)(3), as amended, addresses EEOC's concern.

Equitable Provision of Services and Affirmative Action

EEOC observes that although § 676.54(a) and (c) require affirmative action in certain instances, neither section indicates explicitly that written affirmative action plans are contemplated. EEOC recommends that the regulation be amended to specify that written plans are required. The Department notes that affirmative action under CETA may not always require a written plan, as is the case under the EEOC Affirmative Action Guidelines (29 CFR Part 1608, §§ 1608.4(d) and 1608.10; see 44 FR 4422, 4424 (January 19, 1979)). Also CETA Plan and reporting requirements, in many instances, will provide adequate written documentation of prime sponsors' affirmative action commitments, without the imposition of additional paperwork burdens. The Department, accordingly, is amending the regulation to clarify that the minimum requirements in § 676.54(d) apply wherever an affirmative action *plan* is required or voluntarily undertaken under the preceding paragraphs (§ 676.54(a), (b) and (c)).

EEOC suggests that the affirmative action provision for administrative staff in § 676.54(a) be amended to require that prime sponsors make special efforts to recruit and hire persons who reflect the demographic characteristics of the *CETA-eligible* population in the area. DOL notes that Section 121(b)(1)(B) of the statute provides separately for (1) increasing staff employment opportunities for "members of the eligible population" and (2) making special efforts to recruit and hire staff who reflect the "significant demographic segments of the population residing in the area." The Department does not believe that Congress intended the demographic requirement to be expanded to include the income and other eligibility criteria required for enrollment as a CETA participant. Accordingly, the existing provision is retained unchanged.

EEOC also suggests that § 676.54(b) dealing with affirmative action for handicapped persons be amended to apply specifically to administrative staff. The Department notes that this change would exceed the statute (Section 103(b)(15)), which is clearly limited to participation in programs under the Act. The existing language, accordingly, is retained. DOL notes, however, that other statutory nondiscrimination provisions with respect to handicap (*e.g.*, Section 132 of CETA Section 504 of the Rehabilitation Act of 1973, as amended) apply to administrative staff. Also, to conform with the requirements of Section 504 and

the Department's implementing regulations (45 FR 66707 *et seq.*, October 7, 1980), the reference in § 676.54(b) to the standards of the American National Standards Institute (ANSI) is deleted. The provision is amended to indicate that in identifying and removing architectural barriers, recipients shall be guided by the standards of the General Services Administration (GSA) under the Architectural Barriers Act, at 41 CFR 101–19.6.

With respect to affirmative action to increase levels of service to previously underrepresented groups (§ 676.54(c)), EEOC proposes that the "groups" in question be identified specifically, in terms of age, race, sex, and national origin. DOL considers this change unnecessary since the phrase "previously underrepresented groups" is well understood among recipients to include age, race, sex, and national origin and may also include other groups, such as handicapped persons.

Finally, EEOC reads § 676.53(c) as permitting prime sponsors to underserve significant segments of their eligible populations by as much as 15 percent without justifying the variance. Based on this reading, EEOC recommends elimination of the provision. EEOC also proposes that recipients be permitted to provide service to target groups *beyond* their representation in the eligible population where such special consideration is necessary because of employment disadvantages faced by such groups, as in the case of past exclusion or discouragement from seeking certain types of employment. The Department notes that the 15 percent variance is designed to permit prime sponsors to provide service to target groups beyond their representation in the eligible population, but that this or any planned variance from the target group's representation in the eligible population must be justified in the prime sponsor's Plan (§ 676.11(c)(5)(i) (A), (B), (C), and (D); formerly §§ 677.15(b)(1)(ii), 677.56(b)(1), 678.6(b)(1) and 679.5(d)(1)(ii)). To clarify the intent of the 15 percent provision, the Department is amending Section 676.53(c) to indicate that it is to be read in conjunction with the above-cited Plan provisions, which require justification of any variations in planned service levels. The amendment also clarifies that corrective action is mandatory if there is more than a 15 percent variance in service levels, but is also permissible if a prime sponsor cannot adequately justify a variance in service of less than 15 percent.

Miscellaneous

EEOC questions the references in § 676.52(a) to procedures for handling discrimination complaints set forth in Subpart F (§ 676.86(f)) of the CETA regulations, on the ground that Subpart F was not included in the proposed rules published on April 4, 1980 (45 FR 23296 *et seq.*). The Department notes that the Subpart F reference is to the requirements of 20 CFR Part 676, Subpart F as published on April 3, 1979 (44 FR 19990 *et seq.*), which are still in effect. See 45 FR 33846, 33851, May 20, 1980. EEOC's comments on substantive provisions in Subpart F will be addressed when proposed revisions to that Subpart are published in the **Federal Register.**

EEOC notes, correctly, that the reference to section 121(a)(4) of the statute in § 676.52(c) is inaccurate. The provision, accordingly, is amended to delete the incorrect reference. The reference to Section 121(a)(5), which deals with removal of architectural barriers to employment of the handicapped, however, is retained. EEOC also notes that the regulatory references in § 676.54(c) are inaccurate. The Department agrees and the provision is amended to delete the inaccurate references and to substitute the correct references, to § 676.10–4 (c) and (h).

The Department has determined that these amendments are not a significant regulation which requires preparation of a regulatory analysis under DOL's guidelines implementing Executive Order 12044 (43 FR 12661, March 23, 1978). Also, in accordance with 5 U.S.C. 605(b), the Secretary has certified that the regulation herein will not have a significant economic impact on a substantial number of small business entities. The program for which this rule is promulgated is listed in the Catalog of Domestic Federal Assistance as No. 17.232 "Comprehensive Employment and Training Programs."

Accordingly, 20 CFR Part 676, Subpart D, is revised to read as follows:

Signed at Washington, D.C., this 16th day of January 1981.

(Section 126 of the Comprehensive Employment and Training Act (Pub. L. 95–524, 92 Stat. 1909, 29 U.S.C. 801 et seq.))

Ray Marshall,

Secretary of Labor.

Subpart D—Nondiscrimination; Equal Opportunity; Equitable Service and Affirmative Action

§ 676.51 General.

This subpart sets out the Department of Labor's regulations for insuring that discrimination prohibited by section 132 of the Act does not occur in any CETA programs. The subpart also implements various equal opportunity and equitable provision of service requirements in the Act and sets forth affirmative action provisions which implement these requirements.

§ 676.52 Nondiscrimination and equal opportunity.

(a) No person shall, on the ground of race, color, religion, sex, national origin, age, handicap, or political affiliation or belief, be discriminated against, or denied employment as a participant, administrator, or staff person, in connection with any program under the Act. No participant under the Act shall be discriminated against by reason of citizenship. Participation shall be open to citizens and nationals of the United States, lawfully admitted resident aliens, and lawfully admitted refugees and parolees. Such discrimination is covered by this Subpart and the procedures for handling discrimination complaints in § 676.86(f)(9) (sec. 132(e)). Recipients shall also comply with the Department of Labor's nondiscrimination requirements at 29 CFR Part 31 and subsequent amendments thereto. The 29 CFR Part 31 regulations are currently being revised to implement section 132 of the Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, as amended, the Age Discrimination Act of 1975, as amended and Title IX of the Education Amendments of 1972, as amended. The Department's regulations under Section 504 of the Rehabilitation Act, published on October 7, 1980 (45 FR 66706) will be incorporated into the revised 29 CFR Part 31.

(b) All programs, to the maximum extent feasible, shall contribute to the elimination of sex stereotyping. Prime sponsors, in planning their program activities, shall:

(1) Recruit for, and encourage, female entry, through such means as training, into occupations with skill shortages where women represent less than 25 percent of the labor force; and

(2) Recruit for, and encourage, male entry, through such means as training, into occupations with skill shortages where men represent less than 25 percent of the labor force.

(c) All programs shall contribute to the maximum extent feasible to the elimination of architectural barriers (sec. 121(a)(5)).

(d)(1) No person shall be denied training or employment in any program because of artificial barriers to employment.

(2) Prime sponsors shall analyze and reevaluate job descriptions and qualification requirements at all levels of employment, including civil service requirements and practices relating thereto, with a view toward removing artificial barriers to public service employment, as defined in § 675.4 (sec. 122(f)).

(3) Tests or selection procedures used in the selection of participants or staff shall be used only in conformity with the Uniform Guidelines on Employee Selection Procedures (41 CFR Part 60–3). Tests or selection procedures which have been validated in accordance with the Uniform Guidelines shall not be considered to be artificial barriers to employment.

(e) Prime sponsors shall establish procedures to ensure against discrimination and foster equal opportunity.

(f) Each prime sponsor shall assign equal opportunity (EO) responsibilities on a full-time basis to an individual or staff, or if this is not practicable, explain why in the Master Plan.

(g) Members of the eligible population shall be provided maximum feasible opportunities for employment in the administration of programs, including staff positions in which they will have opportunities for occupational training and career advancement.

§ 676.53 Equitable provision of services to significant segments of the eligible population.

(a) CETA recipients shall provide employment and training opportunities on an equitable basis to significant segments of the eligible population (age, race, sex, or national origin group) (sec. 121(b)(1)).

(b) When planning and developing employment and training opportunities, prime sponsors shall first set planned service levels, taking into consideration the age, race, sex, and national origin composition of the eligible population. Whenever giving affirmative action to handicapped individuals, or members of other groups, or giving special consideration to Vietnam-Era and special disabled veterans and public assistance recipients, giving special emphasis to groups such as the target groups set forth in the Act, or otherwise serving those most in need will result in service to a significant segment at a level more or less than the incidence of persons in that significant segment in the total eligible population, the prime sponsor's Annual Plan shall provide adequate justification, including an explanation of how the make-up of the target groups by age, race, sex, and national origin will impact on the overall service levels by age, race, sex, and national origin. Prime sponsors may design program and services to assist specific target groups.

(c) The recipient shall take positive steps, such as active recruitment and other affirmative action efforts as described in § 674.54, to ensure that the planned levels of participation are realized. If service levels by prime sponsors to a significant segment (age, race, sex, or national origin group) differ by more than 15 percent from the levels set forth in the approved CETP (see § 676.11(c)(5)(1)(A), (B) and (C)), the RA shall require corrective action of any prime sponsor which is not able to adequately justify the variance. Corrective action requirements may also be imposed where a prime sponsor cannot adequately justify a variance in service of less than 15 percent.

§ 676.54 Affirmative action.

(a) Each recipient shall take affirmative action to recruit and hire qualified staff who will reflect the significant segments of the population residing in the area by age, race, sex and national origin (sec. 121(b)(1)(B)). See generally the EEOC's Affirmative Action Guidelines 44 FR 4426, January 19, 1979.

(b) Each recipient shall establish an affirmative action plan for outreach to, and training, placement, and advancement of, handicapped individuals in employment and training programs under the Act. Such an affirmative action plan shall be described in the Annual Plan or grant application (sec. 103(b)(15)). In identifying and removing architectural barriers, recipients shall be guided by the standards of the General Services Administration (GSA) under the Architectural Barriers Act, at 41 CFR § 101–19.6.

(c) Any recipient, which has been determined by DOL or another Federal, State or local government agency to have discriminated in its CETA program, shall take affirmative action to overcome the effects of that discrimination. Other recipients are also encouraged to undertake affirmative action in order to increase the participation of previously underrepresented groups, to ensure that planned levels of participation are realized or as one of the mechanisms described in the Master Plan to ensure nondiscrimination and foster equal opportunity and equitable provision of services (676.10–4 (c) and (h)). As one recommended means of ensuring nondiscrimination and equal opportunity, prime sponsors may require subrecipients and contractors to prepare affirmative action plans for CETA participants and CETA administrative staff.

(d) Where affirmative action plans are required or voluntarily undertaken under the preceding paragraphs (a), (b) and (c) of this section, they shall include as a minimum:

(1) The development and implementation of specific steps, including the assignment of management responsibility, to achieve objectives within specific timeframes, e.g., special recruitment efforts, test validation, job analysis, display of EEO posters, identification of artificial barriers to employment and development of upward mobility programs;

(2) The establishment of monitoring and evaluation procedures to measure progress in meeting the goals of the affirmative action plan within the projected timeframes;

(3) Internal dissemination of an affirmative action policy statement to all CETA management officials, staff, and participants, and external dissemination of the statement to community groups, community-based organizations, minority and women's organizations, and the general public;

(4) Written documentation that subgrantees and contractors are aware of the affirmative action plan including the specific staffing and service goals; and

(5) Placement of advertisements regarding programs in minority owned or operated newspapers and magazines.

[FR Doc. 81-2422 Filed 1-19-81; 3:40 pm]

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federal register

Friday
January 23, 1981

Part XV

Environmental Protection Agency

Federal Radiation Protection Guidance for Occupational Exposures

[RH-FRL 1722-5]

Federal Radiation Protection Guidance for Occupational Exposures; Proposed Recommendations, Request for Written Comments, and Public Hearings

AGENCY: U.S. Environmental Protection Agency.

ACTION: Proposed recommendations for radiation protection of workers.

SUMMARY: We are proposing to make recommendations to the President for new guidance to Federal agencies for the protection of workers exposed to ionizing radiation. These proposals are based on a review of existing guidance in the light of scientific knowledge of radiation risks and of experience in the control of occupational exposure. The proposed recommendations include both qualitative guidance on radiation protection and numerical guides for maximum allowed dose equivalents (RPG's[1]). The most significant changes proposed are (a) that a graded set of minimum radiation protection requirements be introduced in three levels; (b) that the RPG for maximum whole-body dose equivalent be reduced from three rem [2] per quarter to five rem per year, and that regulatory agencies establish lower limits for specific types of work situations; (c) that limitation of internal doses [3] take into account the sum of the risks to all organs, rather than continue to be based only on the most significantly exposed organ; (d) that the RPGs for the whole body apply to the appropriately weighted sum of the doses from both internal and external exposures; and (e) that the dose to the embryo and the fetus be limited through one of several alternative recommendations.

We welcome written comments on these proposals and will hold public hearings as discussed below. We will carefully consider all oral and written comments in preparing our final recommendations to the President.

DATES: 1. All written comments in response to this notice must be received by us by April 24, 1981, in order to be used.

2. Public hearings will be held at the following locations, beginning no earlier than 60 days following publication of this notice: Washington, D.C., Chicago, Illinois, San Francisco, California, Houston, Texas. We will publish the times and addresses for these hearings shortly.

3. Instructions of interest to those who wish to appear at the public hearings are given below under the heading "Public Hearings."

ADDITIONAL INFORMATION: We will be happy to send a copy of a background report which provides additional information on these proposed recommendations to anyone requesting it. Please send requests to Mr. Luis F. Garcia at the address below. This report is also available for inspection and copying at EPA's Central Docket Section and ten Regional Offices (addresses below).

ADDRESSES: Written comments should be addressed to the Director, Criteria and Standards Division (ANR-460), U.S. Environmental Protection Agency, Washington, D.C. 20460, Attention: Docket No. A-79-46. These comments and the public hearing record will be filed under the above docket number and will be available for inspection and copying at the U.S. Environmental Protection Agency's Central Docket Section, Room 2903B, Mall 401 M Street, S.W., Washington, D.C. 20460, and at the Agency's library in each of its ten regional offices: *Region I:* JFK Building, Room 2100-B; Boston, Massachusetts 02203 (Tel. 617-223-5791); *Region II:* 26 Federal Plaza, Room 1002, New York, New York 10278 (Tel. 212-264-2881); *Region III:* Curtis Building, 6th & Walnut Streets, Philadelphia, Pennsylvania 19106 (Tel. 215-597-0580); *Region IV:* 345 Courtland Street, N.E., Atlanta, Georgia 30365 (Tel. 404-881-4216); *Region V:* 230 South Dearborn Street, Room 1417, Chicago, Illinois 60604 (Tel. 312-353-2022); *Region VI:* First International Building, 1201 Elm Street, 28th Floor, Dallas, Texas 75270 (Tel. 214-767-7341); *Region VII:* 324 East 11th Street, Kansas City, Missouri 64106 (Tel. 816-374-3497); *Region VIII:* Radiation Program Office (in lieu of library), 1860 Lincoln Street, Second Floor, Denver, Colorado 80203 (Tel. 303-837-2221); *Region IX:* 215 Fremont Street, 6th Floor, San Francisco, California 94105 (Tel. 415-556-1841: *Region X:* 1200 Sixth Avenue, 12th Floor, Seattle, Washington 98101 (Tel. 206-442-1289).

FOR FURTHER INFORMATION CONTACT: Contact Mr. Luis F. Garcia, U.S. Environmental Protection Agency (ANR-460), Washington, D.C. 20460 (Telephone 703-557-8224), about these proposed recommendations or the public hearings.

SUPPLEMENTARY INFORMATION:

Statutory Authority

The Administrator of the Environmental Protection Agency (EPA) is charged under Executive Order 10831, Reorganization Plan No. 3 of 1970, and Public Law 86-373 to "* * * advise the President with respect to radiation matters, directly or indirectly affecting health, including guidance for all Federal agencies in the formulation of radiation standards and in the establishment and execution of programs of cooperation with States." This guidance has historically taken the form of qualitative and quantitative "Radiation Protection Guidance." The recommendations we propose here would replace those portions of existing Federal guidance that apply to radiation protection of workers, which were adopted in 1960 (25 FR 4402).

Previous Actions by EPA

We began this review of the 1960 radiation protection guidance for workers in 1974. The most recent notice of this activity listed the principal issues being addressed and announced our intent to hold public hearings on proposed recommendations (44 FR 53785, Sept. 17, 1979).

We have sponsored two major studies in support of this program. First, the Committee on the Biological Effects of Ionizing Radiations, National Academy of Sciences—National Research Council, has reviewed the scientific data on the health risks of low level ionizing radiation developed since its 1972 report. Second, we have carried out a study of occupational radiation exposures and published our findings in a report entitled: "Occupational Exposure to Ionizing Radiation in the United States: A Comprehensive Summary for the Year 1975." We have also considered recent recommendations of the National Council on Radiation Proctection and Measurements.

In developing these proposals, we have also consulted with the technical staffs of the Federal agencies that regulate or influence the regulation of occupational exposure, and will continue this consultation in developing final recommendations. These agencies are the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, the Mine Safety and Health Administration, the Department of Defense, the Department of Energy, the Department of Transportation, the Food and Drug Administration, the National Aeronautics and Space Administration, the National Institute for Occupational Safety and Health, and

[1] Radiation Protection Guides.

[2] A *rad* is a unit of measure for dose, i.e., the amount of ionizing radiation energy absorbed per unit weight of tissue. Thus, the same energy absorbed by twice as much tissue gives only one-half the number of rads. The *rem*, a unit for dose equivalent, is a rad multiplied by factors which describe how damaging the type of radiation is.

[3] In this notice we henceforth use "dose" to mean "dose equivalent."

the National Bureau of Standards. These agencies, which have not formally endorsed these recommendations, will formally review final proposals when they are developed following public review.

Issues Addressed

The principal issues we addressed in formulating these recommendations were identified in the advance notice cited above. They were:

1. Are the doses currently received by workers and the maximum doses permitted under existing guidance adequately low? In this regard, a) how adequate is the basis used for estimating risks to health from radiation exposure, and b) what are the appropriate bases for judging maximum individual and collective radiation doses in the work force and the tradeoffs between these two indices of the health impact of occupational exposure?
2. Should the same guides apply to all categories of workers (e.g., dental workers, nuclear medicine technicians, nuclear maintenance personnel, industrial radiographers)? Should specific guides be developed for pregnant women, female workers who could bear children, and/or men?
3. On what time basis should the guides be expressed? Quarterly? Annual? Should the lifetime occupational dose be limited? Should the age of the worker be a factor?
4. Should the guidance reflect or cover medical, accidental, and/or emergency exposures?
5. Is existing guidance for situations that involve exposure of less than the whole body adequate? In this respect, a) what organs and parts of the body should have designated limits, and b) on what basis should guidance be expressed for exposure of more than one organ or portion of the body?
6. How should the radiation protection principles requiring a) justification of any exposure, and b) reduction of the dose from justified exposures to the lowest practicable or as low as is reasonably achievable level be applied to exposure of workers? Should the concept of lowest feasible level be applied to exposure of workers?
7. What, if any, relationship should be maintained between permissible levels of risk to health from radiation exposure and other regulated hazards of disease or accidents?

Additional issues suggested since publication of the advance notice include:

8. Should the guidance include numerical values for the factors (called "quality" and "modifying" factors) used to convert dose (measured in rads) to dose equivalent (measured in rem)? If so, should this be developed now or issued later as supplementary guidance?
9. What guidance should apply to workers who do not use radiation sources, but who are exposed to radiation due to the activities of workers under the control of other employers?
10. Are there situations that may require doses higher than normally permitted? Should we provide special guidance for them?

Many of these issues are addressed below. However, for a more complete and extensive discussion please refer to the background report cited above under the heading "Additional Information."

Risks From Occupational Exposure

There are three kinds of risks from the low levels of ionizing radiation characteristic of occupational exposures. The most important of these is cancer, which is fatal at least half the time. Another risk is the induction of hereditary effects in descendants of exposed persons. The severity of these effects ranges from fatal to inconsequential. We assume that at low levels of exposure the risk of cancer and hereditary effects is in proportion to the dose received, and that the severity of any induced effect is independent of the dose level. That is, while the probability of a given type of cancer occurring increases with dose, such a cancer induced at one dose is equally as debilitating as that same type of cancer induced at another dose. Thus, for these effects we assume that there is no completely risk-free level of radiation exposure.

The third type of risk includes a variety of other effects on workers and on the children of women exposed during pregnancy. These effects range from serious effects on children, such as mental retardation, to less serious effects on workers, such as opacification of the lens of the eye and temporary impairment of fertility. For these effects we believe the degree of damage (i.e., the severity) depends to some extent on the dose level. At the dose levels allowed by current radiation protection guides, we believe that none of the effects on workers themselves occurs to a degree sufficient to be clinically detectable. At these levels, however, effects on children exposed in utero may be serious.

The risks of effects on health from low level ionizing radiation were reviewed for EPA by the National Academy of Sciences (NAS) in reports published in 1972 and in 1980. We have used these studies and others to estimate the risks associated with the current and proposed Federal guides for limiting radiation dose. Details of these and other risk estimates we use are provided in the accompanying background report.[4]

A worker who received the largest lifetime dose allowed under present guides (5 rem per year from age 18 to assumed retirement at age 65, or 235 rem) would have a lifetime risk of about 3 to 6 in 100 of dying from radiation-induced cancer, and numerically comparable chances both of nonfatal cancer and, for male workers, of mutational effects in his descendants.[5] Risks of mutational effects from exposure of female workers are assumed to be three to four times smaller. However, in our recent national survey of exposures for the year 1975, 99% of all workers received less than half of, and only 0.15% exceeded, an annual dose of 5 rem. Based on these and other data, we believe that only a few workers involved in accidents have received close to the current maximum allowed lifetime dose.

The average worker exposed to radiation sustains only a small risk of death from radiation. The estimated average risk of death due to radiation-induced cancer is smaller, for example, than the risk of job-related accidental death in the safest of all major occupational categories, retail trades, for which the annual death rate was 60 per million workers in 1975. We estimate that the collective dose to the more than one million workers potentially exposed to radiation in their workplace for that same year will not lead to more than 15–36 premature cancer deaths. Other ways of expressing this risk are that the exposure of an average worker to radiation in 1975 represented an average lifeshortening of about two to three and a half hours, or an average increase in his chance of cancer death of about one to three in 100,000. In 1975 about one sixth of United States deaths were from cancer.

The comparative time-loss associated with nonfatal cancer is also estimated to be very small. The average time lost by

[4] Our estimated ranges of risk for cancer death are based on absolute and relative linear risk models used by the 1972 BEIR Committee and the assumption that the risk of incurring most radiogenic cancers continues throughout the lifetime of exposed persons. The 1980 BEIR report, which was just published, gives estimates based on a variety of risk models, some of which yield lower and some higher values. Based on our preliminary review, we do not believe that the differences between these values and those we have adopted here would lead to any changes in these proposals.

[5] Mutational effects here mean those hereditary effects included by the BEIR Committee in their 1972 report as serious disabilities. Examples are congenital malformations leading to premature death, hemophilia, sickle cell anemia, cystic fibrosis, diabetes, schizophrenia, and epilepsy.

U.S. workers due to all occupationally-related injuries and illnesses over a working lifetime is one month. For radiation-induced nonfatal cancers it is estimated to be about four days for a hypothetical individual receiving the largest lifetime dose allowed (235 rem), and for the average worker it is about two hours.

Limitation of Whole Body (External) Exposure

Based on these observations, risks due to occupational exposure to radiation do not appear to be unreasonably high for the average worker. They are comparable to risks of accidental death in the least hazardous occupations. However, a worker exposed to the current maximum allowed dose year after year would sustain substantial risks. The proposed radiation protection guidance contains provisions to avoid the accumulation of large lifetime doses through reduction of the maximum allowed annual dose and through specific minimum radiation protection requirements for workers in high-dose work situations. These include on-the-job radiation protection supervision for high-dose jobs, maintenance of lifetime dose records, and an admonition that exposure of workers should be managed so that their lifetime doses do not exceed 100 rem.

Existing Federal guidance permits doses up to 3 rem per quarter (or 12 rem per year), within an overall cumulative limit of 5(N–18) rem, where N is the age of the worker. This flexibility, which allows annual doses greater than 5 rem, does not permit specific tasks that require doses to individuals of more than 5 rem (since the 3 rem per quarter limit prohibits this), but it does permit the same worker to accomplish several tasks requiring doses at or near this quarterly limit in a given year. In view of the risks, it is our judgement that repeated exposures in a year at such levels should not occur, and these recommendations would eliminate this flexibility. One appropriate solution in cases where workers with specific skills are in short supply is to train additional workers, rather than to impose higher risks on a few individuals.

Because we assume that any exposure carries some risk, we believe that it is important to avoid unnecessary exposures at any exposure level. Although more than 97% of all workers in our survey received annual doses less than one rem, these same workers accumulated about half of the collective dose received by the entire work force. Many of these workers, because their doses are low compared to the limits, may receive only minimal training, supervision, and monitoring for radiation protection. Many also work in situations where there is no need for exposures to ever approach the existing or the proposed new RPGs. On the other hand, some exposures at higher doses are justified. The proposed recommendations, therefore, provide a graded system of radiation protection which would establish minimum radiation protection requirements for each of three different ranges of exposure within the basic guides for maximum allowed dose to all workers. We anticipate that maximum exposure of the vast majority of workers would be effectively limited to the lowest of these ranges (less than approximately 0.5 rem to the whole body per year) through the deterrent of requirements for increased justification, on-the-job radiation protection supervision, and monitoring in the two higher ranges. In addition, the recommendations encourage regulatory agencies to establish more restrictive regulatory limits for work situations not requiring the maximum doses allowed under the basic guides.

The proposed guidance leaves agencies considerable discretion in implementing the minimum radiation protection requirements for justification of exposure of workers in each of the various ranges. We are considering additional guidance which would recommend the establishment of more explicit requirements for the highest range (Range C). These requirements could include establishment of criteria for use of Range C, or prior application to and approval by the regulatory agency of Range C exposure (either for specific or more general job situations). We request specific comments on these and similar approaches to further restrictions on the exposure of workers at these higher levels.

We have considered both higher and lower alternatives to the proposed 5 rem/year RPG for whole-body exposure. This value is proposed because (a) it is the current internationally-accepted value, (b) there appear to be essential jobs requiring near 5 rem per year, and (c) the risks to the few workers in these jobs are not high compared to other industrial hazards. In addition, the costs for levels significantly lower (one rem/year or less) appear to be unwarranted, both in terms of increased collective dose to the entire workforce (in return for a few lower individual doses), and in terms of increased economic costs.

In 1975 the National Council on Radiation Protection and Measurements took the position that no change was required in the recommendation given by it in 1971. That recommendation is that "The maximum permissible prospective dose equivalent for whole body irradiation from all occupational sources shall be 5 rems in any one year" (NCRP Report No. 39, Jan. 15, 1971). Likewise the International Commission on Radiological Protection in 1977 recommended a basic dose-equivalent annual limit of 5 rem for whole body exposures to ionizing radiation (ICRP Publication 26, Jan. 17, 1977). In support of its recommendation the ICRP states that "The Commission believes that for the foreseeable future a valid method for judging the acceptability of the level of risk in radiation work is by comparing this risk with that for other occupations recognized as having high standards of safety, * * *." The radiation risk factors given in ICRP Publication 26 in arriving at its recommendation were reviewed by ICRP in May 1978 and no changes were made (ICRP Publication 28, 1978).

Nevertheless, these recommendations are all value judgments; there is not now compelling evidence for any particular value and it is hard to get such evidence. In judging the acceptability of the risks involved, it is necessary to identify (a) activities that cannot be performed at particular maximum dose levels, (b) skilled professionals and workers in limited supply whose numbers would be difficult to quickly increase in order to reduce average annual doses, and (c) the costs for additional workers and equipment that would be needed to meet different limits. For example, we are aware of a small number of maintenance tasks at nuclear power stations that could not be done under some limits less than 5 rem/year. There may be many more examples of professions, principally in medical areas, with limited labor pools. These include cardiologists performing catheterizations using fluoroscopy; and radiologists, neuro-radiologists, and nuclear medicine technologists with large patient loads for special procedures. Finally, studies by the Department of Energy and the nuclear power industry report that large costs and many more workers would be needed to greatly reduce the dose limits for many operations. Their projections of costs and personnel requirements increase expotentially with decreasing limits. We therefore request, in addition to comment on reduction of the current RPG of 3 rem/quarter to our proposed recommendation of 5 rem/year, comment on the above factors for reduction of the current RPG to 0.5 rem/year, 1 rem/year, and 3 rem/year.

Limitation of Partial Body Exposures

Exposure of portions of the body can occur through localized irradiation of

extremities (such as hands in glove boxes), or by breathing or swallowing radioactive materials, which then migrate to different organs of the body.

Current guidance limits such exposures through separate numerical guides for organs and for individual parts of the body that are easily exposed, such as hands and feet or lens of the eye. Some organs recognized as easily subjected to high doses or as particularly sensitive to radiation have specific guides.

These current guides are applied separately. For example, even though a worker has received the maximum allowed dose to his thyroid, he may also receive doses to his lungs, skin, or any other organ, as long as no single organ receives more than the dose specified by its guide. We assume that the risks associated with such multiple doses are additive.

An alternative approach is to limit the total risk of fatal cancer in all exposed organs. This method has been adopted by the International Commission on Radiological Protection (ICRP). It is also adopted in these recommendations, but only when it leads to a greater degree of protection than limiting the dose to critical organs. Specifically, the recommended guidance provides that (a) either the combined risk of fatal cancer from all doses to individual organs not exceed the risk permitted under the whole body guide or (b) the dose to the most significantly exposed organ not exceed its guide, whichever is more restrictive. The recommendations also provide, when workers receive both external doses from whole-body exposure and internal doses from radionuclides, that the sum of the risks of fatal cancer from external whole-body doses and those due to breathing or swallowing radioactive materials not exceed the risk of fatal cancer allowed by the whole-body guide.

The numerical weighting factors chosen to relate risks to individual organs to whole-body risk are discussed in the background report cited above. In general, they are consistent with recent determinations of risk of fatal cancer by national and international scientific bodies, such as the NAS and the ICRP.

We have chosen the limiting annual dose to most single organs to be 30 rem, rather than the internationally-adopted value of 50 rem, because we do not see a need for a value higher than any now used in this country. The risk associated with 30 rem to any of these organs is equal to or less than that of 5 rem to the whole body. Additional differences from internationally-used values for gonads, lens of eye, and hands are discussed below.

It is usually impractical to directly monitor the dose received by a worker who breathes or swallows radioactive materials, but it is useful to be able to predict doses that may be received from breathing contaminated atmospheres or swallowing contaminated materials. To make decisions about radiation protection of such workers possible, it is necessary to calculate the amounts of different kinds of radioactive materials which, when breathed in or swallowed, give the maximum dose allowed by the RPGs. Those calculations require complex models of metabolism and dosimetry. We propose that these limiting amounts of radioactivity be designated the "Radioactivity Intake Factors" (RIFs), and that they replace the currently used "Radioactivity Concentration Guides."

Recent advances in modeling metabolism and dosimetry have produced significant changes in the doses calculated for radioactive materials in the body. For many radioactive materials the changes in the RIFs due to changes in the models are considerably larger than the changes due to the proposed new RPGs. These new models more often reduce allowable intakes than raise them. However, for those cases where the RIF for any specific radionuclide would be increased, the question arises whether regulations adopted by implementing agencies should retain existing values, in accordance with proposed Recommendations 2 and 6. We believe that, for existing applications, experience gained over the past two decades shows that current values can be reasonably achieved. Accordingly, in cases where the RIF for any specific radionuclide would be increased under the proposed guidance, we recommend that the value adopted in regulations governing existing applications be no higher than that now in use. A summary of the changes due to the new models and to the proposed new guides is provided for the more significant radionuclides in the background report.

Limitation of Risk From Mutations

The current guides for limiting dose to the gonads are identical to those for the whole body. For a given annual dose, the risk of mutational effects in all of a male worker's descendants combined is believed to be numerically comparable to his lifetime risk of fatal cancer. The risk to a female worker's descendants is smaller. The medical severity of these hereditary effects is usually less than, and, at worst, comparable to, death from cancer. For these reasons we do not believe that a more restrictive guide is required for the gonads than for the whole body. The proposed new guide for gonadal dose is therefore identical to that proposed for the whole body. This guide is specified separately and not included in the scheme proposed above for weighting partial-body doses because the risks involved are of a fundamentally different nature: the affected individual is not the one exposed to radiation and the effects include different types of harm.

Limitation of Risk to the Unborn (Fertilized Oocyte, Embryo, and Fetus

Protection of the unborn from radiation is an already well-established principle; the purpose of the guide for gonadal exposure is to limit mutational effects in children conceived after the exposure. However, those conceived but not yet born, the "unborn," are also at risk. Their risks are greater, for a given dose, than the risks to those not yet conceived. Current guidance does not contain a dose limitation to protect the unborn from these risks.

The risk of serious harm following in utero exposure requires careful attention because of the magnitude and diversity of the effects, because they occur so early in life, and because those who suffer the harm are involuntarily exposed. These risks are not as well quantified as those to adults. Nevertheless, available evidence indicates that at critical periods in the development of the unborn, for the same dose, risks may be many times greater than those to adults.

There are several factors which mitigate this situation. First, the exposure of most workers under annual limits is relatively evenly distributed over the year, so that only a quarter of a worker's annual dose is delivered to the unborn during any trimester. Second, the mother's body provides considerable shielding of the unborn for most types of exposure. Finally, the total period of potential exposure is small for the unborn compared to that for a worker—a period of months compared to a working lifetime.

It is difficult to provide for protection of the unborn without affecting the rights of women to equal job opportunities. This difficulty is compounded because the critical period for most harm to the unborn occurs soon after conception—during the second and third month after conception, when a woman may not know that she is pregnant. Based on our assessments of the risks and the other factors noted above, we believe that the maximum dose to the unborn should be a factor of ten below the maximum permitted adult workers in any year. This is also the current recommendation of the National

Council on Radiation Protection and Measurements. In Recommendation 8 we propose four alternatives which would, with varying degrees of certainty, achieve this objective.

The first two alternatives rely upon voluntary compliance and, therefore, should have less impact on equal job opportunities for women. The first assumes a woman knows she is pregnant within six weeks of conception, and will then, along with her employer, take appropriate protective action. It therefore does not guarantee that doses to the unborn during the critical early stages of pregnancy will be less than 0.5 rem.

The second alternative adds a voluntary limit on dose rate to women who can bear children in order to protect the unborn whose existence is not yet known. It permits women to hold any job, but encourages women able to bear children not to take those few jobs which potentially involve high dose rates.

The third alternative insures protection of all unborn throughout gestation by making the voluntary requirements of the second mandatory. It would bar women of child-bearing capacity from those few jobs which involve high dose rates.

The final alternative would restrict the exposure of all workers, male and female, to a level which would protect the unborn at the level of the first alternative. This alternative preserves equal job opportuntity for women at the cost of causing more total harm. Studies of several high exposure activities show that decreasing the dose limits to this extent would significantly increase the collective dose to workers, and that some current activities would not be possible.

None of these alternatives is completely satisfactory; they each involve either varying degrees of adequacy of protection of the unborn, some sacrifice of equal job opportunity for women, or causing more total harm, or foregoing some of the benefits to society from activities using radiation. We invite public comment on the relative importance to be attached to each of these factors in formulating guidance, and on whether or not the guidance should address this matter now. We would also be happy to receive suggestions for other alternatives.

Limitation of Other Risks

The risk of nonfatal cancer is not only intrinsically less important than that of fatal cancer, but is very much smaller than other nonfatal occupational risks. Thus, we believe the protection provided against fatal cancers includes adequate protection against nonfatal cancers.

While adequate protection against cataracts of the lens of the eye might be provided by a higher maximum average annual dose than the 5 rem now allowed, no operational difficulty is reported with use of 5 rem as an annual limit. That value is therefore retained in these proposals.

The maximum annual dose for skin of the whole body is maintained at 30 rem, since a need for allowing higher doses has not been demonstrated. However, the current guide permits 75 rem to hands and forearms, or feet and ankles, because of the assumed lower risk when only these portions of the skin and underlying tissue of these extremities are involved. We agree that at low dose rates the risk depends in some degree on the amount of skin and tissue exposed, and that exposure of the extremities is therefore less dangerous than of the whole body. However, for forearms, feet, and ankles such a high value is not needed and we propose that the guides for skin and the whole body apply to these extremites. For the hands a higher value appears to be justified for work in glove boxes. It is proposed to be 50 rem, the limit recommended by the ICRP.

Other Considerations

These recommendations apply to workers exposed to other than normal background radiation on the job. It is sometimes hard to identify such workers, because everyone is exposed to natural sources of radiation and many occupational exposures are small. Regulatory agencies will have to use care in selecting classes of workers whose exposure does not need to be regulated. In selecting such classes we recommend that the agency consider both the collective dose which is likely to be avoided through regulation and the maximum individual doses possible.

The question often arises whether or not exposure for medical purposes and other nonoccupational exposures should be considered in calculating the doses that workers receive within the guides. If there were a threshold for risk of health effects from radiation, this could be an important consideration. However, since we assume that the risk at low doses is proportional to the dose, each exposure must be justified on its individual merits. For this reason, in Note 1 to the recommendations we exclude medical and other nonoccupational exposure from the total calculated occupational radiation exposure of workers.

In many jobs diagnostic x-ray examinations are a routine part of periodic or pre-employment physical examinations. Some of these examinations are a condition of employment and some are not. Federal radiation protection guidance on use of diagnostic x-rays was issued by the President on February 1, 1978 (43 FR 4377). These recommendations provide that, in general, use of such x-ray examinations should be avoided unless a medical benefit will result to a worker, considering the importance of the x-ray examination in preventing and diagnosing diseases, the risk from radiation, and the cost. Although all of the recommendations in that guidance may be usefully applied to x-ray examinations of workers, Recommendations 1 through 4 are particularly pertinent. Because this matter has been addressed by separate Federal guidance, exposure from such diagnostic x-ray examinations is not included in this guidance for occupational exposure.

Current Federal guidance provides that occupational doses to minors (those below the age of eighteen) be limited to one tenth the RPGs for older workers. We propose no change.

No other general types of exposed workers are singled out for special protection by these recommendations. However, one special class of workers—underground uranium miners—is already subject to a separate Federal guide (36 FR 12921). That guide limits exposure of their lungs to radioactive decay products of radon gas. The Mine Safety and Health Administration regulates exposure of all underground miners in accordance with this guide. We expect to review the guide on the exposure of miners to decay products of radon in the future. Exposure of miners to other radiation is governed by the Federal radiation protection guidance in these proposed recommendations.

We have not addressed the issues of emergency exposures or of whether overdoses in one year should lead to additional restrictions on doses in future years. Such situations must be dealt with on the merits in each case and under the regulatory mandate of the controlling Federal agency. We do not consider it either practical or reasonable to prejudge or prescribe general conditions for such situations beyond the general principles which apply to all radiation exposure that are set forth below in Recommendations 1 and 2.

We recognize, in addition, that some situations may exist which justify planned exposures exceeding the guides. Recommendation 9 provides for this. It requires that the controlling Federal agency fully consider and disclose the reasons for any such exposures.

Estimated Impact of These Proposals

We estimated above that the exposure of 1.1 million workers in 1975 (the latest year for which we have complete statistics) will lead to 15–36 additional premature cancer deaths and comparable numbers of serious mutational effects and nonlethal cancers. If this new guidance is adopted, workers should be harmed less in the future. We are not able to quantify the improvement because we cannot predict how efficiently the guidance will be implemented and we do not know how much of existing exposure is unjustified. However, the proposed recommendations provide a framework of graded minimum requirements to cut down the amount of unjustified exposure, and a recommendation that implementing agencies establish lower regulatory limits for workers who can operate significantly below the new maximum limits. We believe that most workers can. The proposals also reduce the maximum annual and lifetime dose that any workers can get by about 60%.

We have made only a limited assessment of the costs of implementing this proposed guidance. We do not believe it would be prudent to attempt a detailed analysis, because agencies developing regulations to carry out this guidance may use different means, and their specific proposals will be subjected to public review and economic analysis when they are developed.

The principal cost will be that associated with reduced RPGs. in order to comply with a reduced RPG an enterprise can hire more workers, reassign (and, if necessary, retrain) present employees, improve its procedures or technology, or curtail the activity. In general, a mix of these will be used, depending on the value of the reduced RPG, on the cost of each alternative, and on other factors. Since we do not know what mix will be used, for the purpose of developing rough numberical estimates of the upper bounds of costs we have used a simple model based on the costs for hiring new workers only.

From the distribution of doses found in our national survey of exposures for the year 1975, we computed the total excess collective dose between the old RPG of 3 rem per quarter and the proposed RPG of 5 rem per year. Dividing this excess by the value of the proposed new RPG gives the minimum number of workers that must be hired to absorb this dose. The average labor cost, including overhead, for each additional worker was assumed to be $40,000 per year. This method yields a cost of about $35 million per year. We believe the actual cost of meeting the new RPG will be much less.

We have also attempted to evaluate costs if existing workers now receiving lower doses are retrained to do high-dose jobs instead of hiring new workers. Some workers are very difficult to replace (e.g., medical professionals, such as cardiologists and radiologists; and workers in small enterprises with very limited labor pools). However, we believe that most workers can be relatively easily retrained (e.g., medical technicians and skilled laborers, such as welders and pipe fitters) to handle tasks which cause higher exposures. We estimate that workers that can be reassigned to these jobs would require training varying from a few days to a few months. For these workers, the costs are expected to range from a few percent to a few tens of percent of the annual cost of new hires. In addition, these costs are incurred only once instead of annually, as in the case of new hires. We therefore estimate that the costs based on the above new hires model may be as much as ten times too high, for the first year, and an even greater over-estimate in succeeding years. We welcome comments on the costs of implementing these proposals, on whether or not the costs are reasonable, and why.

Proposed Recommendations

We propose nine recommendations as guidance to Federal agencies in the formulation of Federal radiation protection standards for workers, and in their establishment of programs of cooperation with States. In all cases but one we have made single recommendations for public comment. The exception, Recommendation 8, addresses protection of the unborn during gestation. Because this recommendation involves issues that go beyond simple radiation protection of workers, including equality of employment rights and the rights of the unborn, we have proposed four alternatives for public consideration. The recommendations follow:

1. All occupational exposure should be justified by the net benefit of the activity causing the exposure. The justification should include comparable consideration of alternatives not requiring radiation exposure.

2. For any justified activity a sustained effort should be made to assure that the collective dose is as low as is reasonably achievable.

3. The radiation dose to individuals should conform to the numerical Radiation Protection Guides (RPGs) specified below. Individual doses should be maintained as far below these RPGs as is reasonably achievable and consistent with Recommendation 2.

Radiation Protection Guides

a. The sum of the annual dose equivalent [6] from external exposure and the annual committed dose equivalent [7] from internal exposure should not exceed the following values:

Whole body—5 rem
Gonads—5 rem
Lens of eye—5 rem
Hands—50 rem
Any other organ—30 rem

b. Non-uniform exposure of the body should also satisfy the condition on the weighted sum of annual dose equivalents and committed dose equivalents, H_w, that

$$H_w = \Sigma_i w_i H_i < 5\text{rm},$$

where w_i is a weighting factor, H_i is the annual dose equivalent and committed dose equivalent to organ i, and the sum excludes the gonads, lens of eye, and hands. Recommended values of w_i are:

Breast—0.20
Lung—0.16
Red bone marrow—0.16
Thyroid—0.04
Bone surfaces—0.03
Skin—0.01
Other organs [8]—0.08

c. When both uniform whole-body exposure and nonuniform exposure of the body occur, in addition to the requirements of 3a, the annual uniform whole-body dose equivalent added to the sum of weighted annual dose equivalents from additional nonuniform exposure, H_w, should not exceed 5 rem.

4. The following Minimum Radiation Protection Requirements should be established by appropriate authorities and carried out in the workplace, on the basis of the range of doses anticipated in individual work situations. The numerical values specifying the dose ranges may be adjusted to fit the needs of specific situations by implementing agencies.[9]

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[6] "Dose equivalent" means the quantity expressed by the unit "rem," as defined by the International Commission on Radiation Units (IU73).

[7] "Annual committed dose equivalent" applies only to dose equivalents from radionuclides inside the body. It means the sum of all dose equivalents that may accumulate over an individual's remaining lifetime (usually taken as 50 years) from radioactivity that is taken into the body in a given year.

[8] Applies only to each of the five other organs with highest doses.

[9] Suggested numerical ranges are: Range A, less than 0.1 RPG; Range B, 0.1–0.3 RPG; Range C, 0.3–1.0 RPG.

Minimum Radiation Protection Requirements

Range A

a. Determine that exposures result only from justified activities and are as low as is reasonably achievable. These determinations may often be made on a generic basis, that is, by considering groups of similar work situations and protective measures.

b. Monitor or otherwise determine individual or area exposure rates to the extent necessary to give reasonable assurance that doses are within the range and are as low as is reasonably achievable.

c. Instruct workers on basic hazards of radiation and radiation protection principles, and on the levels of risk from radiation and appropriate radiation protection practices for their specific work situations. The degree of instruction appropriate will depend on the potential exposure involved.

Range B

The above requirements, plus:

d. Provide professional radiation protection supervision in the work place sufficient to assure that both individual and collective exposures are justified and are as low as is reasonably achievable.

e. Provide individual monitoring and recordkeeping.

Range C

The above requirements, plus:

f. Justify the need for work situations which are expected to make a significant contribution to exposure in Range C and provide professional radiation protection supervision before and while such jobs are undertaken to assure that collective and individual exposures are as low as is reasonably achievable.

g. Carry out sufficient additional monitoring of workers to achieve Recommendation 4f.

h. Once a worker has been exposed in Range C, maintain a lifetime dose record, including at least all subsequent annual doses (as specified in Recommendation 3c) in Ranges B and C.

i. Maintain lifetime doses as low as is reasonably achievable. The accumulation of doses (as recorded under Recommendation 4h) by individual workers should be managed so that their lifetime accumulated dose is less than 100 rem.

5. a. "Radioactivity Intake Factors" (RIFs) should be used to regulate occupational radiation hazards from breathing, swallowing, or immersion in media containing radionuclides. The RIF for a radionuclide is defined as the maximum annual intake (in curies) for which the committed dose equivalent to a reference person satisfies the Radiation Protection Guides in Recommendation 3. RIFs may be derived for different chemical or physical forms, and for intake by breathing, swallowing, or for external exposure from air containing a radioactive gas. Exposure regulated through use of the RIFs should meet the same Minimum Radiation Protection Requirements as equivalent exposure under the Radiation Protection Guides.

b. When a RIF for a specific radionuclide in a specific chemical or physical form determined on the basis of part (a) is larger than that currently in use, a value no greater than that in current use should be adopted in regulations governing work situations identical or similar to those currently in existence.

6. Federal agencies should establish limits and administrative levels that are below the RPGs and the RIFs, when this is appropriate. Such limits or levels may apply to specific categories of workers or work situations.

7. In addition to any other Federal restrictions, the occupational exposure of individuals younger than eighteen should be limited to one tenth of the Radiation Protection Guides for adult workers.

8. Exposure of the unborn [10] should be restricted more than that of workers. This should include special consideration of ALARA practices for women. Women able to bear children should be fully informed of current knowledge of risks to the unborn from radiation. In addition, employers should assure that protection of the unborn is achieved without loss of job security or economic penalty to women workers. Due to the complexity of the issues involved, we propose four alternative recommendations on numerical limitation of dose to the unborn for public comment. We would be glad to receive other recommendations for dealing with exposure of the unborn.

a. Women are encouraged to voluntarily keep total dose to any unborn less than 0.5 rem during any known or suspected pregnancy; or

b. Women able to bear children are encouraged to voluntarily avoid job situations involving whole-body dose rates greater than 0.2 rem per month, and to keep total dose to the unborn less than 0.5 rem during any known pregnancy; or

c. Women able to bear children should be limited to job situations involving whole-body dose rates less than 0.2 rem per month. Total dose to the unborn during any known period of pregnancy should be limited to 0.5 rem; or

d. The whole-body dose to both male and female workers should not exceed 0.5 rem during any six month period.

9. In exceptional circumstances the RPGs may be exceeded, for cause, but only if the Federal agency having jurisdiction carefully considers the specific reasons for doing so, and publicly discloses them unless this would compromise national security.

The following notes clarify application of the above recommendations:

1. Occupational exposure of workers does not include that due to (a) normal background radiation and (b) exposure as a patient of practitioners of the healing arts.

2. When the uniform external whole-body exposure occurs in addition to exposure from radioactive materials taken into the body, the requirement of Recommendation 3c may be satisfied by the condition that

$$\frac{H_{ext}}{RPG_{wb}} + \sum_j \frac{I_j}{RIF_j} \leq 1,$$

where H_{ext} is the annual external whole-body dose equivalent, RPG_{wb} is 5 rem, I_j is the intake of radionuclide j, and RIF_j is defined as in Recommendation 5.

3. The values currently specified by the ICRP for quality factors and dosimetric conventions for measurement of the various types of radiation may be used for determining conformance with the RPGs. The model for a reference person and the metabolic models currently specified by the ICRP may be used to calculate the RIFs. We will recommend other factors, conventions, and models when and if they are more appropriate.

4. Numerical guides for emergency exposures are not provided by this guidance. Agencies should follow the general principles established by Recommendations 1, 2, 7, 8, and 9 in dealing with such situations.

5. Procedures for handling overexposures are not addressed by this guidance. The equitable handling of such cases is the responsibility of the employer and the Federal agency having regulatory jurisdiction.

6. Limits for periods other than one year may be derived by Federal agencies from the annual RPGs and RIFs when necessary for administrative

[10] "Unborn" here means the fertilized oocyte, the embryo, and the fetus.

purposes. Such limits should be consistent with Recommendation 2 and the three ranges in Recommendation 4.

7. The existing guide for limiting exposure of underground uranium miners to radon decay products is not changed by these recommendations.

These proposed recommendations would provide general guidance for the radiation protection of workers. They would replace that part of existing guidance (see 25 FR 4402 of May 18, 1960) which applies to workers. Individual Federal agencies, with their knowledge of specific worker exposure situations, would use this guidance as the basis upon which to develop detailed standards and regulations to meet their particular statutory obligations. We propose to follow the activities of the Federal agencies as they implement the final Guidance, to issue any necessary clarifications and interpretations, and to promote the coordination necessary for an effective Federal program of worker protection.

Public Hearings

Public hearings on these proposed recommendations will be held as indicated above under the heading "Dates." Because of their major responsibilities to regulate radiation exposures in work places, the Nuclear Regulatory Commission (NRC) and the Occupational Safety and Health Administration (OSHA) will participate in sponsoring these hearings. The following conditions and procedures will govern the conduct of the hearings:

1. Purpose, Type, and Scope

These hearings are to provide additional opportunity for people to express opinions and provide factual information to aid EPA, OSHA, and NRC in carrying out their respective responsibilities for guidance on and regulation of occupational exposure to ionizing radiation. The hearings will be informal and legislative in nature rather than adjudicatory or formal rulemaking hearings. Technical rules of evidence, discovery, subpoena powers, testimony under oath, and similar formalities will not apply.

The issues to be covered by these hearings are those listed above under the heading "*Issues Addressed.*" They include those listed in our advance notice of September 17, 1979 (44 FR 53785) and additional issues suggested since then. As indicated in that notice, both EPA and NRC have been petitioned by the Natural Resources Defense Council, Inc., to revise occupational guidance and standards. The subject matter of these hearings encompasses the issues raised in those petitions (See 40 FR 50327 of October 29, 1975).

2. Presiding Officer and Panel

The hearings will be conducted by a presiding officer. A six member panel consisting of representatives of EPA, OSHA, and NRC will assist the presiding officer. A principal responsibility of the panel will be to clarify the testimony by eliciting views, comments, and factual information from participants. Members of the panel will not present views or respond to questions on behalf of their agencies. The membership of the panel may vary from time to time.

The presiding officer and panel shall have the joint responsibility to assure a fair and impartial hearing and to encourage the development of testimony that will contribute to informed decision-making. It will not be the function of the presiding officer or the panel to issue an opinion or to make decisions at the conclusion of the hearings. The presiding officer shall conduct the hearings in an orderly, fair, and expeditious manner and make procedural decisions. His functions shall include, but not be limited to, the following:

a. Regulating the course of the hearings and the conduct of participants, including establishing reasonable time limits for the hearings, establishing the sequence and length of presentations and questioning, and opening and closing each hearing session;

b. Making determinations concerning procedure and similar matters;

c. Assuring that questioning of speakers by panel members and others is consistent with the nature and purpose of these hearings;

d. Making determinations on the relevance of oral testimony and questions to the issues identified as within the scope of the hearings, or, in consulation with the panel, to additional issues pertinent to the proceedings; and, as necessary, terminating irrelevant presentations;

e. Ruling on late requests to participate;

f. Deciding how long the hearing record will remain open for written comments and additional data after the end of the oral proceedings.

3. Participation in the Hearings

Persons or organizations who wish to give presentations longer than ten minutes or present extensive data and evidence must give written notice to the Director, Criteria and Standards Division (ANR–460), U.S. Environmental Protection Agency, Washington, D.C. 20460, no later than 28 days prior to the scheduled date of a hearing. The notice should include: (1) the name, address, and telephone number of the participant; (2) the hearing at which they wish to testify; (3) the organization (if any) that they will represent; (4) the amount of time requested; and (5) which of the issues they want to address. Oral presentations will generally be restricted to 30 minutes. Detailed or lengthy material should be summarized orally and presented in full in written submissions. Requests for longer times for oral presentations will be condsidered only on the basis of a detailed summary of the material to be presented. The Agency will notify participants in advance if their allocated time is less than that requested.

An opportunity will be provided each day of the hearings for persons who have not submitted a notice as specified above to make brief oral statements. A register will be provided at the beginning of each hearing for this purpose. A minimum period will be set aside for such statements in the agenda for each hearing, and the presiding officer may allocate additional time, as necessary. The maximum time allowed for such statements will depend on the number of registrants and the availability of time, but will generally be limited to periods of no more than 5 to 10 minutes each. In order to assist the management of the hearings, persons wishing to make such statements are encouraged to register promptly at the beginning of the hearing.

Attendance at the hearings will be open to all members of the public, and seating will be made available on a first-come first-served basis.

4. Testimony and Written Submission

a. The oral proceedings will be recorded verbatim and a transcript made availabe promply for inspection and copying, as specified below under the heading "The Public Hearing Record." It will help the panel if speakers supply copies of their oral testimony before they give it. However, this in not required.

b. Fourteen copies of any written statements and documents on which speakers intend to base their oral statements must be submitted to the Director (see "Addresses" above) no later than 14 days before the beginning of the hearing in which they will testify. We would appreciate if speakers would also provide eight additional copies for the use of the panel.

c. Questions may be directed to speakers by the hearing panel, by other speakers, and by other members of the public. Speakers may respond or not, as

they wish. Questions should be designed to elicit relevant information and should not be repetitious of questions asked by others. The views of questioners should be expressed in their statements and not as prefaces to questions. Such informal questioning will be at the discretion and under the control of the presiding officer.

d. Members of the public who are not able to attend the hearings or prefer not to ask questions themselves may suggest questions to the hearing panel to ask of speakers. These must be submitted no later than 14 days before any hearing to the Director (see "Addresses" above). The panel will decide whether or not to ask these questions.

e. Members of the public may also submit comments during the post-hearing comment period set by the presiding officer. These post-hearing comments should be confined to responses to data and opinions submitted at the hearings or to written comments received by the Agency.

f. In addition to these public hearings, we would appreciate any written comments on these proposals. These will be given equal consideration in formulating final recommendations. The procedure for submitting such written comment is given above under the headings "Dates" and "Addresses." Participants in the hearings may refer to and comment on such written comments, which will be available for public inspection and copying as specified below under "The Public Hearing Record."

5. Opening Statement

At the opening of each hearing, EPA will provide a summary statement of the proposed recommendations and of the major issues involved. At that time speakers and other members of the public can ask questions of the EPA representatives in order to clarify the proposed recommendations and the reasons why EPA is proposing them.

6. The Public Hearing Record

The procedures for filing documents in these hearings will be specified by the presiding officer, except as already provided herein.

The hearing record will include the transcript of oral statements by speakers, the questions and answers, and all written materials filed in connection with these hearings. Items in this public hearing record will be filed under EPA Docket No. A–79–46 and will be available for public inspection and copying as soon as possible following their receipt, at the U.S. Environmental Protection Agency's Central Docket Section, Room 2903B, Mall, 401 M Street, S.W., Washington, D.C. 20460, and at each of the Agency's ten regional offices (see "Addresses" above).

Dated: January 16, 1981.

Douglas M. Costle,

Administrator.

[FR Doc. 81-2385 Filed 1-23-81; 8:45 am]

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Friday
January 23, 1981

Part XVI

Department of Agriculture

Food and Nutrition Service

Special Supplemental Food Program for Women, Infants and Children; Eligibility Criteria

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

[Amdt. 2]

Special Supplemental Food Program for Women, Infants and Children; Eligibility Criteria

AGENCY: Food and Nutrition Service, USDA.

ACTION: Final rule.

SUMMARY: These final regulations set forth the income eligibility criteria for participation in the Special Supplemental Food Program for Women, Infants and Children (WIC) and revise the definition for health services. The regulations implement provisions of Public Law 95–627 and Public Law 96–499 regarding the income criteria standards to be used in conjunction with the nutritional risk criteria in determining eligibility of persons for participation in the WIC Program.

EFFECTIVE DATE: State and local agencies must begin implementation of these regulations no later than July 1, 1981. Implementation of new income eligibility standards must be phased in at regular certification periods.

FOR FURTHER INFORMATION CONTACT: Barbara Sandoval, Director, Supplemental Food Programs Division, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447–8206. 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: The 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."

Public Law 95–627, enacted on November 10, 1978, requires the Secretary to establish income eligibility standards, along with nutritional risk criteria, for determining a person's eligibility for participation in the Program. The law also provides that persons will be eligible only if they are members of families that satisfy the income standards prescribed for reduced-price school meals under section 9 of the National School Lunch Act. Until December 1980, the eligibility limit for reduced-price school meals was 195 percent of the poverty guidelines established by the Department, plus an allowance for itemized hardship deductions. The poverty guidelines were computed by taking the most recent OMB poverty guidelines and increasing them to reflect increases in the Consumer Price Index (CPI). However, Public Law 96–499, enacted December 5, 1980, eliminates the update of the OMB poverty guidelines, and replaces the itemized deductions with a standard deduction.

On January 9, 1979, a notice was published in 44 FR 2114 proposing to revise the WIC Program regulations and to establish the required income criteria. The proposal was based on section 3 of Public Law 95–627 which amended section 17 of the Child Nutrition Act of 1966.

The proposed regulations required all State agencies to use 195 percent of the poverty guidelines as the WIC income limit. Lower or higher income limits would not have been authorized. Since WIC regulations direct that State agencies make health care available to all participants, this proposal would also have required States to make health care available to persons with incomes up to 195 percent of the poverty guidelines. The proposal received considerable criticism. Although approximately 50 commenters supported the income eligibility standard as proposed, over 100 commenters opposed it.

Most of the commenters opposed to setting a uniform national income standard felt that each State should be allowed to set its own guidelines at some other level, for example at a level which would coincide with the reduced cost medical care standards already in use in the State. Commenters observed that for some local agencies, setting a uniform national income standard for WIC Program eligibility at a level higher than the current income standards for health care services would create a gap in the availability of health care for some WIC participants served by those local agencies. Some persons would be eligible for the Program according to the uniform national income standard, but would have income too high to be eligible for health care at the local agency. To assure the availability of health care to all participants, these local agencies would either have to raise their health income standards to coincide with the uniform national income standard for WIC or make contractual agreements with other health providers. Commenters stated that this would cause great difficulties for many local agencies, and could cause some to drop out of the Program.

Because the income eligibility requirement has been a highly controversial issue, the Department reproposed this section of the regulations on February 8, 1980, at 45 FR 8876 with a sixty-day comment period. The new proposal contained three alternative options for establishing WIC income limits, and sought comments on all three approaches.

In response to the February 8 proposed rulemaking, the Department received 440 comment letters from interested groups, State agencies, local agencies, Government offices and the general public. The Department carefully analyzed these letters, which contained comments supporting, opposing or suggesting new alternatives for the income criteria. The substantive comments received and the actions taken by the Department are discussed below.

The following paragraphs explain the three income alternatives and the reaction to each one:

Alternative A

Under Alternative A a uniform national income standard would be established at 195 percent of the poverty level. This alternative was identical to the approach originally proposed in the January 9, 1979, proposed rulemaking.

This alternative would require States to consider all applicants with incomes equal to or below 195 percent of the poverty level as having met the WIC income requirement. Since WIC regulations require that health services be made available to all WIC participants, local agencies would have to assure that health care is available to all WIC participants either directly from the local agency or through other health care providers.

The purpose of this alternative was to provide a uniform national income standard. This would assure that all persons from families with incomes at or below 195 percent of poverty are considered income eligible, and, if also certified as being at nutritional risk, are offered the full benefits of WIC supplemental foods, nutrition education and access to health care, to the extent that funds for such participants are available.

Seventy-four commenters supported this alternative. Many of these commenters stated they did not want to eliminate from participation anyone below 195 percent of the poverty level. Seventeen commenters stated that this alternative conforms with existing State or local standards for health care and provides administrative benefits to local agencies and health care to participants. A number of commenters believed this alternative is the only one that carries out WIC's objective of providing health services, nutrition education, and

supplemental food to as many people as possible. Commenters also said this was the fairest alternative since it would provide equal treatment of all women, infants and children regardless of the State or local area in which they reside.

There were 171 opponents of Alternative A. Thirty-three of these opponents stated that this alternative would eliminate WIC benefits for large numbers of people. Commenters expressed concern that the combination of the uniform national income criteria in Alternative A and the strict health services definition in the regulations, as hereinafter discussed would cause the closing of some WIC clinics, thus eliminating benefits to current and potential WIC participants. They went on to explain that because many people have incomes at or below 195 percent of the poverty level, some local jurisdictions cannot provide health services to all people who fall within this income limit. Further, some agencies with health income standards below 195 percent would have to withdraw from the Program. Many commenters reinforced this idea by stating that the lack of flexibility in this alternative precludes allowing States to incorporate the WIC Program into existing health care delivery systems. Seven State and local agencies said this alternative would be too expensive for them to implement and six agencies stated that this alternative did not allow for variations in the cost of living and income level differences between States.

After careful consideration, the Department has not selected this alternative. The Department is concerned that selection of this alternative might cause some local agencies to drop the Program, and wants State and local agencies to have the flexibility to match WIC and health care income limits. In addition, contrary to what some commenters believed, this alternative does not increase the number of persons the Program can serve. The caseload is determined more directly by available funding levels, not by the income limit.

Alternative B

This alternative would establish 195 percent of the poverty guidelines as the uniform national income ceiling, but differs from Alternative A in that it would permit State agencies the discretion to provide health care to only those WIC participants with incomes within State or local income limits for free or reduced cost health care.

Many State agencies base eligibility for free or reduced cost health care on income limits which are lower than 195 percent of the poverty guidelines. Under this alternative, those State agencies would not be required to make health services available to WIC participants if their incomes exceed the State's income standard for health care. In other words, State agencies would be required to provide WIC foods and nutrition education, but not health care, to participants whose income exceeds State or local limits for free or reduced cost health care. Participants whose income is equal to or below State or local limits for free or reduced price health care would be provided health care as well as WIC foods and nutrition education.

This alternative would result in some applicants receiving supplemental food, as well as nutrition education, without health services. The total benefit package including health care would be concentrated on those applicants most in need, based on the local income standards for health care.

Fifty-three commenters supported Alternative B. Many commenters stated this alternative would provide local agencies with the flexibility to tailor the Program to meet the individual circumstances of each area.

Twelve supporters stated that this alternative would allow conformance to their State or local standards for providing health care to participants. Seven supporters liked this alternative because it would continue to provide supplemental food to those participants whose incomes did not allow them to receive health services.

There were 192 opponents to Alternative B. Fifty-four of the commenters opposed this alternative because they believed implementation would be administratively difficult. Many stated that the multi-tiered eligibility system would result in complicated paperwork. In addition, because this alternative would create two categories of participants—those who have health services made available to them and those who do not—42 commenters said this was contrary to the philosophy and legislative intent of WIC which is to provide WIC benefits to all participants as an adjunct to health care. Some commenters felt implementation of this alternative would be the first step toward making WIC a welfare program where some people would be eligible by income alone.

After consideration of the comments, the Department has decided not to select this alternative. The Department believes this alternative is not desirable because of its interest in maintaining WIC as an adjunct to health care for all participants and avoiding increases in the administrative burden of local agencies by creating the multi-tiered eligibility system.

Alternative C

This alternative establishes 195 percent of the poverty guidelines as a maximum income ceiling rather than a uniform, national income limit. Under this alternative, States would have the discretion to determine income eligibility standards for all WIC benefits (including health care) so long as these standards did not exceed 195 percent of the poverty guidelines or fall below 125 percent of the poverty guidelines (125 percent of the poverty guidelines is the income limit for free school lunches prescribed by the National School Lunch Act).

Under this alternative, individuals with incomes above the State or local income standard would not be considered eligible for WIC benefits. A State agency could not set an income standard for the WIC Program below 125 percent or above 195 percent of the poverty guidelines. States would be required to provide supplemental foods, nutrition education and access to health care services to WIC participants with incomes at or below the State or local income standard.

The purpose of this alternative is to maintain the tie between the WIC Program and health services. From its inception, the WIC Program has operated in conjunction with health services. Coordination of WIC with health care benefits was a primary concern of the majority of commenters addressing the income requirement. In some areas, utilization of existing health services by pregnant women and infants has increased substantially with the introduction of WIC. The desire on the part of some communities to participate in the Program has encouraged the development of health resources. Also, the connection between the provision of food, nutrition education and health services has been a major reason for the strong support of the Program at the local level. Furthermore, health care is especially crucial for the WIC target population. There is no question that the early detection of problems and continuous health supervision are particularly important for pregnant women and young children.

There were 165 supporters of Alternative C. Forty-nine of these supporters stated that this alternative conforms with existing State or local standards for health care and, therefore, provides administrative benefits to State or local agencies. Thirty-two commenters supported this alternative bacause of the flexibility it provides to administering agencies. Establishing a

range for WIC income eligibility standards would allow States to set income eligibility standards consistent with their income standards for health services, while still providing for a minimum income limit. This consistency should allow agencies to simplify the income screening process for participants and help maintain linkage of WIC services with other health services.

There were 168 opponents of Alternative C. Of the 168 commenters opposed to this alternative, however, 89 stated they would support Alternative C if it did not have the 125 percent floor. They felt the 125 percent limit would curtail State discretion and flexibility. The rationale given by most of these 89 commenters was that removal of the 125 percent limit would allow greater flexibility for States since the 125 percent limit was not necessarily useful in States where the cost of living was lower than the average for the United States. Further, some of these commenters felt their recommendation corresponded to the USDA position in the Department's FY 1981 budget proposal which recommended lowering the income eligibility requirement for free meals in the School Lunch Program from 125 percent to 100 percent of the poverty guidelines. They also felt that their proposal would continue the linkage of WIC and other health benefits.

Thirteen commenters felt Alternative C would result in a loss of benefits to WIC participants since some local agencies would have to limit their caseload to participants with incomes equal to or lower than the 195 percent level. However, since neither administrative nor food funding to States would be affected by this change, the total caseload possible in the States would remain essentially the same.

Eleven commenters expressed concern about the effect that having different standards in different areas would have on migrants and other participants who move to a new area. However, participants who move during their certification period have verification of certification cards that allow them to continue participating in the Program without a new certification of income until their certification card expires. Special provisions for migrants whose certification expires while they are instream are discussed later in this preamble.

Consideration of all comments has led the Department to select this alternative with some modification. The Department believes that this alternative best promotes coordination of WIC benefits with health services, and, therefore, promotes linkage of WIC and other health benefits for participants. Further, the use of a single income criterion in any given locality for both WIC and health care eligibility determinations provides for administrative efficiency.

The Department has carefully considered the position of the 89 commenters who did not want a minimum income standard. Some of those commenters did not necessarily oppose the establishment of a minimum income standard but felt that the proposed standard was too high. The Department wishes to balance the concerns of those commenters who requested more State flexibility in this area with the need to set some minimum income standard. The proposed rules would have set the minimum standard at 125 percent of poverty guidelines which were revised to reflect recent increases in the Consumer Price Index. Under the proposal, during the July 1, 1980–June 30, 1981 period, the minimum income for a family of four would be $10,250 per year. The final rules set the minimum income standard at 100 percent of the OMB income poverty guidelines. This reflects a minimum income for a family of four of $7,450. The Department believes that States should not establish a minimum standard below the poverty level.

The maximum income limit, established in accordance with P.L. 96–499, will be 195 percent of the OMB poverty guidelines (without any update for increases in the Consumer Price Index), plus a standard deduction. The Department will provide State agencies each year with a set of maximum income limitations by household size that include the standard deduction, so that local agencies do not have to perform any additional computations to reflect the deduction. The Department will also provide State agencies each year with the minimum income limits by household size.

The final rules provide that WIC participants must be provided the full range of WIC benefits—supplemental foods, nutrition education, and access to health care.

Indian Provision—The steering committee of the Indian and Native American WIC Coalition, supported by a number of Indian State agencies, commented that the income eligibility alternatives proposed by USDA would be administratively inefficient for Indian areas in which most residents have low incomes. Such alternatives are confusing to Indian participants because they view WIC as part of the health care benefits provided to all Indian people. As relationships between Indian tribes and the Federal Government developed over the years, the Government has (since 1955 through the Indian Health Service) made health services available to Indian people without regard to income status.

Indian WIC agencies usually have agreements with the Indian Health Service whereby they provide pediatric and obstetric care and in many cases WIC certification and nutrition education. According to the Coalition, from the viewpoint of the Indian WIC participant, WIC services are part of the total health care package provided by the Indian Health Service to Indian people. The Coalition also stated that it is widely recognized that Indian people experience a high rate of poverty. The Bureau of Indian Affairs as well as most tribes have income data that supports this.

The Coalition felt the Department's alternatives would be administratively inefficient for Indians since the vast majority of Indian participants have family incomes below the 195 percent poverty ceiling. The Coalition said that small tribal agencies would need to institute expensive new administrative procedures to make income determinations that would screen out few, if any, applicants, and that the cost of this effort would likely be greater than the savings in food dollars. This is of particular concern, because many Indian State agencies already experience very high administrative costs in operating the WIC Program. The Coalition proposed two alternatives for Indian agencies: (1) Consider all Indian people categorically as having incomes below the poverty ceiling, or (2) Obtain a declaration from the tribe or Bureau of Indian Affairs that the majority of Indian people within the Indian Tribal Organization's service area have incomes at or below the poverty ceiling. The Coalition received support from ten tribal State agencies, one tribal local agency and one tribal interest group.

A finding of categorical income eligibility for Indians is not authorized by the WIC authorizing legislation. Therefore, like other WIC participants, Indians are required to satisfy the income eligibility standards as a precedent to receipt of WIC benefits. However, the Department is reluctant to impose an administrative burden on Indian local WIC agencies that would require an expenditure of time and administrative funds grossly disproportionate to the benefits received.

Because Indian health service areas are usually clearly definable by geographic boundaries or tribal membership requirements, and in recognition of the known high rate of

poverty and health problems among Indians, the Department has decided to modify the income determination requirements for Indians. The Department has determined that if an Indian State agency, or a local agency operated by an Indian organization or the Indian Health Service, can document that the vast majority of the Indian households in its service area have incomes below the maximum income limit, a somewhat abbreviated income certification system may be instituted. If an Indian State agency, or a non-Indian State agency acting on behalf of a local agency operated by an Indian organization or the Indian Health Service submits documentation to FNS indicating that the vast majority of the Indian members located in the agency's service area have incomes below the maximum income level, then an Indian household member applying to that local agency for WIC benefits may be certified as income eligible if the member is informed of the maximum income level and confirms in writing that his or her family income is at or below that level. The WIC local agency is required to verify individually any applicant's income if the certifying officials have reason to believe the applicant receives an income in excess of the maximum income level.

Migrant Provisions—Another issue which has been brought to the Department's attention concerns the computation of income for migrant farmworkers. The Department recognizes that it can be particularly difficult to determine the income of migrants while they are instream, i.e., away from their home base.

While instream, migrant income fluctuates due to factors such as episodic employment and changing weather conditions. Anticipating income that migrants have not yet received can be difficult. Inequities may result if the income does not materialize, and can result in hardships to persons at nutritional risk during the period prior to the income's receipt. Relying on income received in a previous month is also risky, and may also result in hardships if the income is no longer available due to such factors as the need of migrants to settle credit advances in their last location or to pay for the costs of traveling to a new work location.

These difficulties can be compounded, as commenters noted, when different areas through which migrants travel have different WIC income limits and different definitions of income. Frequent income redeterminations would be administratively costly to local agencies while proving burdensome and occasionally inequitable to migrant recipients.

Migrants are among those most in need of the benefits of participation in the WIC Program. For persons in the WIC Program target population—pregnant, breastfeeding, or postpartum women, infants and young children—the mobility of an instream migrant family increases the potential for nutritional risk conditions. The Department is especially concerned that inconsistent income limits and definitions not disqualify instream migrants with a legitimate need for the Program.

Accordingly, this final rule provides that if a migrant farmworker is instream and needs to be certified again because the migrant's verification of certification (VOC) card has expired, the migrant shall automatically be deemed to satisfy the income standards until such time as the migrant is no longer instream. In other words, either in the home-base State or an instream state, shall remain valid for as long as the migrant remains instream that year. An instream migrant being certified again because her VOC has expired must again be determined to be at nutritional risk.

The procedure would not apply to migrants who appear at a WIC local agency instream but have not previously been certified and have no VOC card. This procedure essentially requires migrants to have one income determination for each year's agricultural season (including the period in the home-base area prior to the beginning of the agricultural season), but removes requirements for any additional income determinations.

This procedure does not apply to participants with expiring VOC cards who are not migrants. There is no special need to use this procedure for non-migrant participants.

To make the distinction between migrant participants and other persons, local agencies must be able to identify migrants. Some migrant and public interest organizations as well as the WIC Migrant Task Force, have requested that the Department formulate a definition of migrant farmworkers so that uniform criteria for identifying migrants apply across all States. There is no single definition that is universally accepted and various Federal programs serving migrants define them in different ways. The Department plans, in a proposed rulemaking to be published shortly, to explore possible regulatory definitions of migrant farmworkers. In the meantime, however, each State agency must have a definition of migrants which shall be included in the State Plan.

Definition of Income

The final rules provide that the State agency can either use the WIC Program definition of income as outlined in Section 246.7(c)(3) or a State or local agency definition of income used for health care services. If a State agency uses State or local income standards for health care as the income limits for WIC eligibility, the definition of income under these standards must be restricted to money income, and may not include the value of inkind housing or other inkind benefits when being applied to WIC participants. For example, a State cannot use the State's Medicaid definition of income for determining WIC eligibility if the Medicaid definition applies the value of inkind housing to a participant's income. If a State or local agency wishes to use a definition of income that differs from the definition set forth in § 246.7(c)(3), the State agency must submit the alternative definition for FNS approval in its State plan.

Deductions

The proposed regulations allowed State agency discretion in the use of hardship deductions from gross income. Eighty-seven comments were received on deductions from income. Fifty-one of those commenters supported allowing State agency discretion in determining hardship deductions. These supporters agreed with the Department's theory that deductions for the WIC Program should be similar if not the same as those for other health programs. One local agency and two interest groups opposed allowing any State discretion in determing deductions. Twenty-one commenters wanted hardship deductions applied in all States, and mandated by the Department. The consensus of these supporters was that gross income is not an accurate economic indicator when additional expenses such as high fuel and shelter costs, child care, child support costs and other similar expenses play a part in determining each family's spendable income.

Public Law 96-499 establishes the eligibility limit for reduced price school lunches at 195 percent of the poverty guidelines plus a standard deduction. The law precludes use of itemized deductions which enable families with higher incomes to qualify. Since the WIC income maximum is now tied by law to the reduced price income limit for school lunches, the Department cannot allow State or local agencies to use itemized, hardship deductions in determining WIC eligibility unless the State agency can demonstrate to FNS that any such

deduction is structured in such a way that no family found eligible for WIC will have gross income that exceeds the nationally prescribed maximum WIC income standard. (For example, a State with a WIC income standard of 175 percent of poverty might be able to allow a deduction for child care costs up to $50 per month and still demonstrate that no person could qualify with an income above the maximum income standard.) The provision allowing for limited use of itemized deductions under certain circumstances is included to allow States with similar deductions in their health care programs to coordinate the programs to the maximum degree possible.

Verification of Income—The proposed rules provided State agencies with flexibility to determine policies they wished to follow with regard to verification of information provided by applicants. Ninety-five commenters responded to the proposed regulations on verification of income. Forty-four of those commenters supported allowing State discretion in determining verification policies. They agreed with the Department's philosophy of allowing the State to use whatever method is currently in use for other health programs that are being coordinated with WIC.

Twenty-one commenters specifically supported mandating self-declaration as the method to be used for determining income in WIC. This is the method used in the school lunch and breakfast program and other child nutrition programs under which applicants indicate their income in writing. As noted by several supporters, the self-declaration method represents administratively the easiest and least costly method of income determination because no paperwork is involved.

Twenty commenters supported verification of income. Several felt verification should be used all the time, while others wanted verification to be used only when necessary. Responses varied as to the means for verifying income. Twenty-nine commenters supported using proof of participation in other Federal programs such as the Food Stamp Program, Aid to Families with Dependent Children, Medicaid, etc. Several commenters also suggested using check stubs or W-2's for verification.

The Department has decided to allow State and local agency discretion when verifying income. The Department believes that allowing State and local agency discretion in this area could alleviate administrative problems in instances where WIC intake is combined with intake for other health services offered by the State agency. An example would be where joint intake procedures are used to determine eligibility for both WIC benefits and for free or reduced price health care.

Health Services Definition—Prior to the WIC regulations published in July 1979, health services were defined as "ongoing, routine pediatric and obstetrical care such as infant and child care, prenatal and postpartum examinations, nutritional examinations or screening, diagnosis and treatment or referral for treatment." The regulations published July 27, 1979, defined health services as "ongoing, routine pediatric and obstetric care such as infant and child care, and prenatal and postpartum examinations." The portion of the definition referring to "nutritional examinations or screening, diagnosis and treatment or referral for treatment" was deleted at that time.

This change was made in an effort to tighten the relationship between WIC and health care. However, shortly after the July 1979 regulations were published, the Department began receiving expressions of strong concern, especially from State and local agencies and FNS Regional Offices, that the change could have major unintended consequences. They warned that the new definition was so strict that many WIC local agencies would be forced out of the program. This could be a particularly serious problem in poor, medically underserved areas such as parts of the rural South. It was reported to FNS that a number of local agencies in the South could not meet the new, restrictive definition.

Due to the potentially serious consequences of the new definition, it was never fully implemented. Existing local agencies continued to participate, while the Department, in the February 8, 1980, proposed rulemaking, requested comments on possible revisions of the definition.

The comments calling for revision of the definition were numerous. Four commenters supported retaining the definition, while 139 commenters asked for a change. Thirty-four commenters, including four State agencies and 21 local agencies, asked for returning to the definition contained in WIC regulations prior to July 27, 1979. Eighty-three commenters, including 22 State agencies and 24 local agencies, proposed modifying the definition to allow health services to be made available by a referral mechanism.

The comment from the Nevada State Division of Health was typical of concerns expressed by many commenters. The Division of Health stated that the Department's definition would require that WIC services be available only when a full range of other health services is also available. This, according to the Nevada State agency, would allow only the more sophisticated clinics to offer the WIC Program, and would jeopardize WIC services made available through agencies with more limited funding for health care. The commentor believed this would deemphasize the preventive health aspects of the Program.

Many commenters stated that the ability on the part of local agencies to refer participants for health services is essential if the Program is to fulfill its mission of providing benefits to those persons in greatest need in areas of greatest need.

These strong expressions of concern clearly indicates a need for a revised definition, and the desirability of allowing referral for health care services. Accordingly, the definition of health services is being revised to allow participation by local agencies that refer participants for health services. The definition will now read: "Health services means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment."

This revised definition does not alter the requirement for local agencies to have a competent professional authority on the staff of the local agency and the capabilities necessary to perform the certification procedures.

As a result of the revised definition, several other conforming changes are being made in the regulations. A change is made in the provisions concerning agreements between State and local agencies and in the local agency priority system. Section 246.6(b)(3) will now require that each local agency that makes health services available through referral must have a plan for continued efforts to make health services available to participants at the clinic or through written agreements with health care providers.

Section 246.5(e)(1) will add, as the last priority, agencies that refer participants to health care providers.

These revisions maintain the vital WIC Program by local agencies that use referral mechanisms to make health care available.

Cost of Certification

The Department has learned that some local agencies charge Program applicants a paperwork processing fee or for routine tests performed as part of the initial or subsequent certification process. This is contrary to Public Law 95-627, Section 17(c)(1), which requires

that the Program be provided to participants "at no cost." The regulations, therefore, specify the legislative intent which is to ensure that the Program imposes no financial burdens on the potential participant.

Implementation

State and local agencies must begin implementing the provisions of this rule regarding WIC income limits on July 1, 1981. After that date, all State and local agencies must begin applying the new income eligibility standards to all new applicants, as well as to all ongoing participants at the time of each participant's next regular certification. State and local agencies need not review cases of ongoing participants during the participant's certification period, but must apply the new standards at the time of subsequent certification for all certifications that occur on or after July 1, 1981.

The July 1, 1981, implementation date is timed to coincide with the regular, annual change in the poverty guidelines, which takes effect each July 1. FNS will announce on or about May 1, 1981, the maximum and minimum income limits that will take effect on July 1, 1981. This will follow the issuance by OMB of the annual revision in the poverty guidelines.

The provisions of this rulemaking that modify the definition of health services shall also become effective on July 1, 1981.

Authority: Child Nutrition Amendments of 1978, Public Law 95-627, Section 3, 92 Stat 3614, and Omnibus Reconciliation Act, Pub. L. 96-499 (December 5, 1980).

Therefore, Part 246 is amended to read as follows:

PART 246—SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN

1. Section 246.2 is amended by revising the definition of "health services" and adding in alphabetical sequence the definition of "income poverty guidelines" to read as follows:

§ 246.2 Definitions.

* * * * *

"Health services" means ongoing, routine pediatric and obstetric care (such as infant and child care and prenatal and postpartum examinations) or referral for treatment.

* * * * *

"Income poverty guidelines" means the nonfarm income poverty guidelines prescribed by the Office of Management and Budget. These guidelines are adjusted annually by the Office of Management and Budget, with each annual adjustment effective July 1 of each year. The income poverty guidelines prescribed by the Office of Management and Budget for the contiguous 48 States and the District of Columbia shall also be used for Puerto Rico and the Virgin Islands. Separate income poverty guidelines are prescribed for Alaska and Hawaii.

* * * * *

2. In § 246.4, paragraphs (a)(9) and (a)(12) are revised to read as follows:

§ 246.4 State agency plan of program operations and administration.

(a) * * *

(9) Plans to provide Program benefits to eligible migrant farmworkers and Indians, including procedures, such as expansion of services during migrant season, to be instituted by the State agency to ensure that eligible migrant farmworkers may, to the maximum extent feasible, continue to receive Program benefits when they enter the State agency's jurisdiction subsequent to original certification in another Program jurisdiction. In addition, the definition of a migrant farmworker shall be included in the Plan.

* * * * *

(12) A description of the methods used to certify participants which shall include: (i) a list of the specific nutritional risk criteria by priority level which cites conditions and indices to be used to determine a person's nutritional risk; and (ii) the State agency's income standards including the definition of income used by the State agency if it differs from the definition set forth in § 246.7(c)(3). The State agency shall also submit any local agency income standards which it has approved and which differ from the State agency's income standard; (iii) for Indian State agencies (and State agencies acting on behalf of the local agencies operated by either an Indian organization or the Indian Health Service) that wish to apply for the alternate income determination procedure in accordance with § 246.7(c)(4), the documentation that the vast majority of Indian household members in a local agency's service area have incomes below the State agency's income eligibility criterion.

* * * * *

3. Section 246.5 is amended by revising paragraphs (e)(1)(i)–(iv) and by adding a new paragraph (e)(1)(v) to read as follows:

§ 246.5 Selection of local agencies.

* * * * *

(e) * * *

(1) * * *

(i) First consideration shall be given to a public or private nonprofit health agency that will provide ongoing, routine pediatric and obstetric care and administrative services.

(ii) Second consideration shall be given to a public or private nonprofit health or human service agency that will enter into a written agreement with another agency for either ongoing, routine pediatric and obstetric care or administrative services.

(iii) Third consideration shall be given to a public or private nonprofit health agency that will enter into a written agreement with private physicians, licensed by the State, in order to provide ongoing, routine pediatric and obstetric care to a specific category of participants (women, infants or children).

(iv) Fourth consideration shall be given to a public or private nonprofit human service agency that will enter into a written agreement with private physicians, licensed by the State to provide ongoing, routine pediatric and obstetric care.

(v) Fifth consideration shall be given to a public or private nonprofit health or human service agency that will provide ongoing, routine pediatric and obstetric care through referral to a health provider.

* * * * *

4. In § 246.6, paragraph (b)(3) is revised to read as follows:

§ 246.6 Agreements with local agencies.

* * * * *

(b) * * *

(3) Makes available appropriate health services to participants up to the income level specified for the Program and informs applicants of the health services which are available. (When health services are provided through referral, the local agency must have a plan for continued efforts to make health services available to participants at the clinic or through written agreements with health care providers.)

* * * * *

5. In § 246.7, paragraph (a)(3), (b)(2) and (c) are revised and a new paragraph (n) is added to read as follows:

§ 246.7 Certification.

(a) * * *

(3) Meet the income criteria specified in paragraph (b)(2) of this section.

(b) * * *

(2) The State agency shall provide the local agencies with the income guidelines and procedures to be used in income determinations which establish eligibility for the Program. The State agency may prescribe different income limits for use by different local agencies

if there are variances in the income standards used by the local agencies for free and reduced price health care. The income guidelines established by the State agency for use in any local agency shall not be less than the applicable State or local income limit for free or reduced price health care, except that the State agency's income standard may not be greater than 195% of the income poverty guidelines for each family size plus a standard deduction prescribed by FNS. In addition, the income guidelines established by the State agency may not be less than 100% of the income poverty guidelines for each family size. Each State agency shall annually announce and transmit to each local agency the State agency's family size income guidelines to be used in making income determinations by June 1 of each year, unless changes in the income poverty guidelines do not affect the State agency income guidelines. The State and local agencies shall implement these income guidelines each July 1, beginning with July 1, 1981. Each year, State and local agencies shall apply the new income guidelines as of July 1 to all new applicants, as well as to all ongoing participants at the time of each participant's next regular certification.

* * * * *

(c) *Income Determination.* (1) The State agency shall ensure the local agencies determine income through the use of a clear and simple application provided or approved by the State agency. In applying the income poverty guidelines, the State agency may instruct the local agencies to consider 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 income. However, persons from families with adult members who are unemployed shall be eligible based on income during the period of unemployment if the loss of income causes the current rate of income to be less than the State agency's income limit for WIC eligibility.

(2) In determining the definition of income, the State agency may use a definition of income that is used by the State agency to determine eligibility for free and reduced priced health care, provided that the value of inkind housing and other inkind benefits are not counted as income for the purpose of this Program, and that any income or benefits received under any Federal program which are excluded from consideration as income by a legislative prohibition are not counted (FNS will provide State agencies with a list of such Federal programs). The State agency's definition of income may not allow deductions from income for expenses due to hardships unless the State agency can demonstrate that no household whose gross income before deductions exceeds 195 percent of the income poverty guidelines plus the standard deduction prescribed by FNS shall be found eligible under the State's income definition. The definition of income may vary between local agencies within the State agency's jurisdiction (if necessary to coincide with local agency income standards for health care) or it may be a State-wide definition that is identical for all local agencies under the State agency. The State agency shall annually request approval in the State Plan of operations and administration to use its definition of income.

(3) If the State agency does not have a definition of income that is used to determine eligibility for free or reduced price health care, the State agency shall use the following definition of income: (i) Income for the purposes of this part means gross income before deductions for income taxes, employees' social security taxes, insurance premiums, bonds, etc. Income includes the following: (A) Monetary compensation for services, including wages, salary, commissions, or fees; (B) Net income from farm and non-farm self-employment; (C) Social Security; (D) Dividends or interest on savings or bonds, income from estates or trusts, or net rental income; (E) Public assistance or welfare payments; (F) Unemployment compensation; (G) Government civilian employee or military retirement or pensions or veterans' payments; (H) Private pensions or annuities; (I) Alimony or child support payments; (J) Regular contributions from persons not living in the household; (K) Net royalties; and (L) Other cash income. Other cash income would include, but would not be limited to, cash amounts received or withdrawn from any source including savings, investments, trust accounts and other resources which are readily available to the family. (ii) Income for the purposes of this part shall not include the following: (A) 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 under the Domestic Volunteer Act of 1973, and the value of assistance to children or their families under the National School Lunch Act, the Child Nutrition Act of 1966 and the Food Stamp Act of 1977. (B) The value of inkind benefits.

(4) (i) If the Indian State agency (or a non-Indian State agency acting on behalf of a local agency operated by an Indian organization or the Indian Health Service) submits census data or other reliable documentation demonstrating to FNS that the vast majority of the Indian households in a local agency's service area have incomes at or below the State agency's income eligibility criterion, then FNS may authorize the State agency to approve the use of the following income certification system in those local agencies for which data has been provided.

(ii) The local Indian agency shall inform each Indian household applicant of the maximum family income allowed for that applicant's family size. The local agency shall ensure that the applicant signs a statement that his/her family income meets that criterion. The local agency may verify the income eligibility of any Indian applicant if WIC officials have reasonable cause to believe the applicant receives an income in excess of the State agency's income criterion.

(5) If an instream migrant farmworker participant needs to be certified again because the participant's verification of certification card has expired, the participant shall be deemed to satisfy the State agency's income standard. Any determination that a migrant has met the income standard, either in the migrant's home base area before the migrant has entered the stream for a particular agricultural season, or in an instream area during the agricultural season, shall satisfy the income criteria for that migrant participant in any State for any subsequent certification while the migrant is instream during that agricultural season. (This procedure shall not apply to participants whose verification of certification cards have expired if the participants are not instream migrant farmworkers.)

(6) To lend administrative efficiency and participant convenience to the certification process, whenever possible, WIC intake procedures shall be combined with intake procedures for other health programs or services administered by the State and local agencies. Such merging may include verification procedures, certification interviews, and income computations. A State or local agency may require verification of information which it determines to be necessary to determine eligibility for Program benefits. Each State agency which has other State administered programs that routinely obtain verification of income, such as the Medicaid, public assistance and Food Stamp Programs, may accept

verification of a WIC applicant's participation in such programs as face value evidence of income within the WIC limits; provided those programs use income eligibility limits at or below the State's WIC income limit.

* * * * *

(n) The certification procedure shall be performed at no cost to the applicant.

* * * * *

Note.—The reporting and recordkeeping requirements contained herein have been approved by the Office of Management and Budget in accordance with the Federal Reports Act of 1942.

(Catalog of Federal Domestic Asistance Program No. 10.577, National Archives Reference Service.)

Dated: January 13, 1981.

Robert Greenstein,

Administrator, Food and Nutrition Service.

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Part XVII

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

List of Laboratories Qualified To Perform Work Under the Small Operator Assistance Program

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

List of Laboratories Qualified To Perform Work Under the Small Operator Assistance Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), U.S. Department of the Interior.

ACTION: Notice of laboratories qualified to perform work under the Small Operator Assistance Program.

SUMMARY: OSM is informing the public and State regulatory authorities of laboratories that have been qualified as of November 1980, for work under the Small Operator Assistance Program (SOAP). During the interim and under permanent regulatory programs, qualified laboratories will provide the *determination* of probable hydrologic consequences and *statement* of the results of test borings for eligible small operators. The *determination* and *statement* are two important permit application requirements.

This notice is published pursuant to 30 CFR 795.17(a)(2).

FOR FURTHER INFORMATION CONTACT: Further information can be obtained by contacting the following people:

Headquarters: Donald W. Willen, Department of Interior, Office of Surface Mining, 1951 Constitution Avenue NW, Room 5215L, Washington, DC 20240 (202) 343–9104.

Region I: Keith Eggleston, Office of Surface Mining, 603 Morris Street, Charleston, West Virginia 25301 (304) 342–8125, Ext. 290.

Region II: Charles Ferst, Office of Surface Mining, Farragut Building, 530 Gay Street SW, Knoxville, Tennessee 37902 (615) 637–8060.

Region III: Leroy Davis, Office of Surface Mining, Federal Building & Court House, 46 East Ohio Street, Indianapolis, Indiana 46204 (317) 269–2632.

Region IV: Ronald Schwartz, Office of Surface Mining, Scarritt Building, 818 Grand Avenue, Kansas City, Missouri 64106 (816) 374–3920.

Region V: Charles Harrison, Office of Surface Mining, Brooks Towers, 1020 15th Street, Denver, Colorado 80202 (303) 837–5966.

SUPPLEMENTARY INFORMATION: The laboratories listed below were qualified by OSM or State regulatory authorities as of November 1980, for work under the Small Operator Assistance Program (SOAP). This list updates the earlier list of qualified laboratories published in the **Federal Register** on February 19, 1980. The *determination* of probable hydrologic consequences of proposed mining and reclamation operations and *statement* of the results of test borings or core samplings are provided to eligible small operators under the SOAP. As defined in 30 CFR 795.17(a)(1), qualified laboratory is "a designated public agency, private consulting firm, institution, or analytical laboratory which can provide the *determination* or *statement* under this Program."

To qualify for work under the SOAP, laboratories have to satisfy conditions of personnel, experience, organization and facilities, and other criteria as set forth in 30 CFR 795.17(b). The laboratory qualification process consists of two phases: 1. completion of an application form provided by the Office, and 2. an on-site inspection of laboratory personnel and facilities by the Office.

Tow basic qualification categories are: 1. prime contractors (for *determination* and/or *statement*) and; 2. subcontractors (for water quality and/or overburden and coal analysis). The prime contractors are qualified to provide hydrologic and geologic data collection and interpretative reports, and must be able to provide most of the service in-house. The subcontractors are qualified to provide analytical services to the prime contractors. In-house services must be provided by personnel employed full-time by the specific office of the laboratory requesting qualification. However, some services may be provided to the prime contractor by individual consultants (specialists) if their use has been approved by OSM during the qualification process. Lists of consulstants will not be published in the **Federal Register.** Small business, women owned, minority owned, and certified 8(a) laboratories are indicated in the list.

The list of qualified laboratories will be published periodically in the **Federal Register.** Becoming qualified or being listed in the **Federal Register** does not guarantee contracts for work in the SOAP. Under procedures for Federal administration of the SOAP, contracts will be awarded to successful offerors to Request for Proposal (RFP) solicitations. RFPs will be issued periodically as the need arises. Qualified laboratories may compete for work in States other than those States in which they are located. States that administer the SOAP under interim or permanent regulatory programs may use this list of qualified laboratories, may use similar procurement procedures, and also may qualify laboratories.

Laboratories may be disqualified and dropped from the list of qualified laboratories for inadequate performance in contracts, conflicts of interest, or for changes in personnel, facilities or organization that cause the laboratory to no longer meet the requirements set forth in 30 CFR 795.17(b).

All laboratories will be requalified periodically.

Dated: January 16, 1981.

Paul L. Reeves,

Acting Director, Office of Surface Mining Reclamation and Enforcement.

List of Qualified Laboratories

Type of Contractor:
P = prime contractor
S = subcontractor
Qualification Category:
D = field data collection, water quality analyses, data compilation and interpretation, and report writing to produce a *determination* of the probable hydrologic consequences of mining and reclamation operations
D' = same as above except that water qualify analyses will be subcontracted
S = field data collection, overburden and coal analyses, data compilation and interpretation, and report writing to produce a *statement* of the results of test borings or core samplings
S' = same as above except that overburden and coal analyses will be subcontracted
W = water quality analyses
O = overburden and coal analyses
Classes of Business:
1 = small business under the Engineering Services size standards
2 = woman-owned business
3 = minority owned as defined in Public Law 95–507
4 = certified 8(a) by the Small Business Administration
Qualifying Agency:
Laboratories qualified by State regulatory authorities are identified by letter in front of laboratory name. All other laboratories were qualified by OSM.
a = qualified by Ohio Department of Natural Resources.

BILLING CODE 4310-05-M

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
LIST OF LABORATORIES QUALIFIED TO PERFORM WORK UNDER THE SMALL OPERATOR ASSISTANCE PROGRAM

LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
REGION 1							
******DISTRICT OF COLUMBIA******							
HOWARD UNIVERSITY, DEPT. OF CIVIL ENGINEERING	2400 6TH STREET, N.W.	WASHINGTON	DC	20059	S	W O	3
******MARYLAND******							
GREENHORNE AND O'MEARA, INC.	6715 KENILWORTH AVENUE	RIVERDALE	MD	20840	P	D S	1
HITTMAN ASSOCIATES	9190 RED BRANCH ROAD	COLUMBIA	MD	21045	P	D'S	
NUS CORPORATION	4 RESEARCH PLACE	ROCKVILLE	MD	20850	P	D'S	
PEER CONSULTANT	1160 ROCKVILLE PIKE, SUITE 101	ROCKVILLE	MD	20852	P	D S	1 2 3 4
PENNIMAN & BROWNE, INC.	6252 FALLS ROAD	BALTIMORE	MD	21209	S	O	1
******NEW JERSEY******							
FUGRO ATLANTIC, INC.	23 BELMONT DRIVE	SOMERSET	NJ	08873	P	D S	
WOODWARD-CLYDE CONSULTANTS	1425 BROAD STREET	CLIFTON	NJ	07012	P	D S	
******PENNSYLVANIA******							
AACKENHEIL AND ASSOCIATES GEO SYSTEMS, INC.	1000 BANKSVILLE ROAD	PITTSBURGH	PA	15216	P	D'S'	1
ALCHEMIS	AIRPORT ROAD, COMMERCIAL PARK, 4626 PARK DRIVE	BATH	PA	18014	S	W O	1
ANDREW S. MCCREATH AND SON, INC.	610 WILLOW STREET, P. O. BOX 1453	HARRISBURG	PA	17105	S	W O	
ATEC ASSOCIATES	75 ACCO DRIVE	YORK	PA	17402	P	D S	
BASIC TECHNOLOGY CORPORATION	7125 SALTSBURG ROAD	PITTSBURGH	PA	15235	P	D S	
BCM-BETZ-CONVERSE-MURDOCH, INC.	ONE PLYMOUTH MEETING MALL	PLYMOUTH MEETING	PA	19462	P	D'S'	

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
LIST OF LABORATORIES QUALIFIED TO PERFORM WORK UNDER THE SMALL OPERATOR ASSISTANCE PROGRAM

LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
BERGER ASSOCIATES	P.O. BOX 1943	HARRISBURG	PA	17105	P	D S	1
BROCKWAY LABORATORIES	R.D. #2 - BOX 840	BROCKWAY	PA	15824	S	W O	1
CENTRAL ENVIRONMENTAL SERVICES	12 WATER STREET	CLEARFIELD	PA	16830	S	W	1
D'APPOLONIA	10 DUFF ROAD	PITTSBURGH	PA	15235	P	D'S'	
ENERGY IMPACT ASSOCIATES	P. O. BOX 1899	PITTSBURGH	PA	15230	P	D S	1
FAIRWAY LABORATORIES, INC.	2900 FAIRWAY DRIVE, P.O. BOX 1925	ALTOONA	PA	16603	S	W	1
FREE-COL DIVISION OF FREEPORT BRICK COMPANY	P. O. BOX 557, COTTON ROAD	MEADVILLE	PA	16335	S	W O	1
G & C COAL ANALYTICAL LABORATORY	RD #1	SUMMERVILLE	PA	15864	S	O	1
GAI CONSULTANTS, INC.	570 BEATTY ROAD	MONROEVILLE	PA	15146	P	D S	1
GANNETT FLEMING CORDDRY AND CARPENTER, INC.	P. O. BOX 1963	HARRISBURG	PA	17105	P	D'S'	
GARBART ENGINEERING COMPANY	R.D. #1, BOX 340	LEMONT FURNACE	PA	15456	P	D S	1
GENERAL ENGINEERING	P. O. BOX 311, GREENVILLE AVENUE EXTENDED	CLARION	PA	16214	P	D S	1
GEO-TECHNICAL SERVICES, INC.	851 SOUTH 19TH STREET	HARRISBURG	PA	17104	P	D S	1 3
GEOMEGA, INC.	P. O. BOX 13127	PITTSBURGH	PA	15243	P	D S	1 3
GILBERT/COMMONWEALTH	P. O. BOX 1498	READING	PA	19603	P	D S	
GREEN INTERNATIONAL, INC.	504 BEAVER STREET	SEWICKLEY	PA	15143	P	D'S'	1
INDIANA ANALYTICAL LABORATORIES, INC.	P. O. BOX 87	SHELOCTA	PA	15774	P	D'S'	1
L. ROBERT KIMBALL AND ASSOCIATES	615 W. HIGHLAND AVENUE	EDENSBURG	PA	15931	P	D'S'	
LANCASTER LABORATORIES, INC.	2425 NEW HOLLAND PIKE	LANCASTER	PA	17601	S	W	1
LEE-SIMPSON	DEPOSIT NATIONAL BANK	DUBOIS	PA	15801	P	D'S	1
MAHAFFEY LABORATORY	P. O. BOX 28, BANNER RIDGE ROAD	MAHAFFEY	PA	15757	S	W	1
MEISER AND EARL, HYDROGEOLOGISTS	1512 WEST COLLEGE AVENUE	STATE COLLEGE	PA	16801	P	D S	1

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MICHAEL BAKER, JR., INC.	301 DUTCH RIDGE ROAD, P. O. BOX 280	BEAVER	PA	15009	P	D'S	
MOODY AND ASSOCIATES, INC.	R.D. #4, COTTON ROAD	MEADVILLE	PA	16335	P	D S	1
MRM COMPANY - ENGINEERS	918 PARK AVENUE	PITTSBURGH	PA	15234	P	D S	1 4 3
NUS CORPORATION	MANOR OAK TWO, 1910 COCHRAN ROAD	PITTSBURGH	PA	15220	P	D'S'	
OMNI CONSULTANTS, INC.	VALLEY FORGE PLAZA, SUITE 660	KING OF PRUSSIA	PA	19406	P	D S	1
PENN-LAUREL ASSOCIATES, INC.	R.D. #1, ROUTE 30	CENTRAL CITY	PA	15926	P	D'S	1
PENNSYLVANIA ENVIRONMENTAL CONSULTANTS, INC.	FORT PITT PROF. BLDG., 1517 WOODRUFF STREET	PITTSBURGH	PA	15220	P	D'S'	1
REGINALD B. ADAMS LABORATORY	618 SWISSVALE AVENUE	PITTSBURGH	PA	15221	S	W	1
ROBINS AND ASSOCIATES	704 LISBURN ROAD	CAMP HILL	PA	17011	P	D'S'	1
SCIENCE MANAGEMENT ENGINEERING	900 WEST VALLEY FORGE ROAD, P. O. BOX 190	KING OF PRUSSIA	PA	19406	P	D'S'	
SEWALD LABORATORIES	1403 WEST FOURTH STREET	WILLIAMSPORT	PA	17701	S	W	1
SKELLY AND LOY	2601 NORTH FRONT STREET	HARRISBURG	PA	17110	P	D'S'	1
SRW ASSOCIATES, INC.	630 IDLEWOOD AVENUE	CARNEGIE	PA	15106	P	D S	1
STEWARD LABS	R.D. #1	STRATTANVILLE	PA	16258	S	W D	1 2
TALLAMY, VANKUREN, GERTIS AND THIELMAN	LEGISLATIVE ROUTE 17065	LANSE	PA	16849	P	D S	
THE CHESTER ENGINEERS	845 FOURTH AVENUE	CORAOPOLIS	PA	15108	P	D'S'	
VAPCO ENGINEERING CO., INC.	99 NORTH GILPIN STREET	PUNXSUTAWNEY	PA	15767	P	D S	1
VEP ASSOCIATES, INC.	543 BELMONT AVENUE, ROUTE 611	MT. POCONO	PA	18344	P	D S	1
WAPORA, INC.	511 OLD LANCASTER ROAD	BERWYN	PA	19312	P	D'S'	
Z & M LABORATORIES	R.D. #1, ROUTE 30	CENTRAL CITY	PA	15926	S	W	1

******VIRGINIA******

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APPALACHIAN ANALYTICAL. & WATER QUALITY LAB., INC.	391 SINKING CREEK ROAD	BRISTOL	VA	24201	S	W	1
CENTEC ANALYTICAL SVCS., INC.	P. O. BOX 956, 2160 INDUSTRIAL DRIVE	SALEM	VA	24153	S	W O	1
DEWBERRY, NEALON AND DAVIS	626 SOUTH MAIN STREET	MARION	VA	24354	P	D S	
ENGINEERING SCIENCE	7903 WEST PARK DRIVE	MCLEAN	VA	22102	P	D S	
ENVIRONMENTAL TECHNICAL SERVICES	204 MAIN STREET, P. O. BOX 689	WISE	VA	24293	S	W	1
FOUNDATION ENGR. OF VIRGINIA, P.C.	106 FEATHERBED LANE	WINCHESTER	VA	22601	P	S	1
FROEHLING AND ROBERTSON	3015 DUMBARTON ROAD	RICHMOND	VA	23261	P	D'S'	1
HAYES, SEAY, MATTERN AND MATTERN	1351 FRANKLIN ROAD, S.W.	ROANOKE	VA	24016	P	D S	1
LEE LABORATORY	P. O. BOX 588	JONESVILLE	VA	24263	S	W	1 2
OLVER,INC	1531 N. MAIN STREET	BLACKSBURG	VA	24060	P	D'S'	1
PARAMONT MINING CORPORATION	P. O. BOX 800	WISE	VA	24293	S	W O	
POWELL VALLEY ENGINEERING	P. O. BOX 595	PENNINGTON GAP	VA	24277	P	D S	1
QUALITY TESTING, INC.	P. O. BOX 931	GRUNDY	VA	24614	S	W O	1
QUILLEN AND GILLENWATER	P. O. BOX 607	GATE CITY	VA	24251	P	D S	1
RESOURCE APPLICATIONS, INC.	226 MAPLE AVE.,WEST,SUITE 401	VIENNA	VA	22180	P	D S	1 3
STEARNS, CONRAD AND SCHMIDT	11800 SUNRISE VALLEY DRIVE, SUITE 432	RESTON	VA	22091	P	D S	1
THOMPSON AND LITTON, INC.	P. O. BOX 1307	WISE	VA	24293	P	D S	1
TRIANGLE RESEARCH, INC.	P. O. BOX 886	GRUNDY	VA	24614	S	W	1
VERSAR, INC.	6621 ELECTRONIC DRIVE	SPRINGFIELD	VA	22151	S	W O	1
WATER TESTING, INC.	P. O. BOX 979	WISE	VA	24293	S	W	1
******WEST VIRGINIA******							
ALLEGHENY LAND & MINERAL CO.	227 WASHINGTON AVENUE, P.O. BOX 1740	CLARKSBURG	WV	26301	P	D S	1

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BERGER ASSOCIATES	1204 KANAWHA BLVD., EAST	CHARLESTON	WV	25301	P	D S	
BLACK ROCK LABORATORIES	P. O. BOX 5, EAST GATE PLAZA	MORGANTOWN	WV	26505	S	W O	1
BRACKENRICH AND ASSOCIATES	P. O. BOX 207	LEWISBURG	WV	24901	P	D'S'	1
BURGESS AND NIPLE, LIMITED	400 BERRY'S RUN ROAD	PARKERSBURG	WV	26101	P	D S	
COMMERCIAL TESTING & ENG. CO.	5793 MACCORKLE AVE., S.E. - P.O. BOX 808	CHARLESTON	WV	25323	S	W O	
DESCOALS, INC.	P. O. BOX 789	ELKINS	WV	26241	P	D S	1
DUNLAP SURVEY, INC.	BOX 148	SUMMERSVILLE	WV	26651	P	D S	1
ENVIRONMENTAL EXPLORATION	165 SCOTT AVE., SUITE 104	MORGANTOWN	WV	26505	P	D S	1
ESMER AND ASSOCIATES, INC.	P. O. BOX 397	BOOMER	WV	25031	P	D'S'	1 3
GEOLOGICAL SERVICES, INC.	910 4-TH AVE, SUITE 1005 WEST VIRGINIA BLDG.	HUNTINGTON	WV	25701	P	D S	1
HARRAH ENGINEERING	P. O. BOX 309	SUMMERSVILLE	WV	26651	P	D S	1
HOWARD, NEEDLES, TAMMEN & BERGENDOFF	1120 KANAWHA BLVD., E.	CHARLESTON	WV	25301	P	D S	
JHM LABORATORIES	325 13-TH STREET	DUNBAR	WV	25064	S	W O	
JOHNSON AND ANDERSON, INC.	1206 VIRGINIA AVE., EAST - SUITE 101	CHARLESTON	WV	25301	P	D S	
KELLY, GIDLEY, BLAIR AND WOLFE	1260 GREENBRIER STREET	CHARLESTON	WV	25311	P	D S	1
MILAM/BCM ENGINEERING, INC.	1400 OHIO AVENUE	DUNBAR	WV	25064	P	D'S'	
MOUNTAIN STATE SURVEYING COMPANY	P. O. BOX 63	KINGWOOD	WV	26537	P	D'S	1
PEERLESS EAGLE COAL	P. O. BOX 488	SUMMERSVILLE	WV	26651	S	W O	
RELIANCE LABORATORIES	213 E. PHILADELPHIA AVENUE, P. O. BOX 625	BRIDGEPORT	WV	26330	S	W O	1
ROBINS AND ASSOCIATES	16241/2 KANAWHA BOULEVARD, EAST	CHARLESTON	WV	25311	P	D S	1
SCIENCE APPLICATIONS, INC.	SUITE 8, CHESTNUT RIDGE PROFESSIONAL BUILDING	MORGANTOWN	WV	26505	P	D S	
SCIENCE MANAGEMENT ENGINEERING	P. O. BOX 757	NITRO	WV	25143	P	D S	

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SKELLY AND LOY	CHARLESTON NATIONAL PLAZA, SUITE 401	CHARLESTON	WV	25301	P	D S	1
STAGG ENGINEERING SERVICES, INC.	P. O. BOX 5217	CHARLESTON	WV	25311	P	D S	1
STANDARD LABORATORIES, INC.	3322 PENNSYLVANIA AVENUE	CHARLESTON	WV	25302	S	W O	1 2
STRUM ENVIRONMENTAL SERVICES	P.O. BOX 650	BRIDGEPORT	WV	26330	P	D'S'	1
TECHNICAL TESTING LABORATORIES, INC.	1263 GREENBRIER STREET	CHARLESTON	WV	25311	P	D'S'	1 3
THE H. C. NUTTING CO.	912 MORRIS STREET	CHARLESTON	WV	25301	P	D S	
TRA-DET, INC.	WHEELING-OHIO COUNTY AIRPORT	WHEELING	WV	26003	P	D'S'	1
UTD CORPORATION	BEVERLY PIKE, ROUTE 3, BOX 260	ELKINS	WV	26241	P	D S	
VANDE LINDE, INC. ROBINSON & ROBINSON	1317 HANSFORD STREET	CHARLESTON	WV	25301	P	D S	1
WEST AUGUSTA COMPANY	334 RANDOLPH AVENUE, P. O. BOX 1303	ELKINS	WV	26241	P	D S	1
WHITLEY ENGINEERING COMPANY	910 4-TH AVE., SUITE 1001 WEST VIRGINIA BLDG.	HUNTINGTON	WV	25701	P	D S	1
	REGION 2						
	******ALABAMA******						
ALMON & ASSOCIATES	P. O. BOX 2687	TUSCALOOSA	AL	35401	P	D'	1
ANALYTICAL LABS	2007 WHITESBURG DRIVE	HUNTSVILLE	AL	35801	S	W O	
BETZ-CONVERSE-MURDC	108 ST. ANTHONY STREET	MOBILE	AL	36601	P	D'	
BIO-CHEM ANALYSIS	4940 N. MEMORIAL PARKWAY	HUNTSVILLE	AL	35810	S	W O	
C.F. HAINS HYDROLOGY	P.O. BOX 238	NORTHPORT	AL	35476	P	D'	1
COMMERCIAL TESTING	216 OXMOOR CIRCLE	BIRMINGHAM	AL	35209	S	O	
ENGINEERING ANALYSIS	2109 CLINTON AVENUE, W.	HUNTSVILLE	AL	35805	P	D'S'	1
FEDERER-BHATE ASSOCIATE	5217 5TH AVENUE, SOUTH	BIRMINGHAM	AL	35212	P	D'S'	1 3

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FRANK HOLLIS & ASSOCIATES	P. O. BOX 911	ONEONTA	AL	35121	P	D'	
GILBERT-FOSTER-BROOKS	3500 SKYLAND BOULEVARD, EAST	TUSCALOOSA	AL	35405	P	D O	1
HARMON ENGINEERING	AUBURN IND. PARK	AUBURN	AL	36830	P	D S	
HYDRO SCIENCE RESEARCH GROUP	P.O. BOX 314	MCCALLA	AL	35111	P	D'S'	
LAW ENGINEERING	3608-7TH CT. SOUTH	BIRMINGHAM	AL	35222	P	D S	
METCO LABORATORIES	514 GAULT AVENUE, N.	FT. PAYNE	AL	35967	P	D S	1
MINING SERVICES	1429 - 39TH AVENUE, E.	TUSCALOOSA	AL	35404	P	D S	
P. E. LAMOREAUX	P. O. BOX 2310	TUSCALOOSA	AL	35401	P	D'S'	1
R. E. MALLETTE	2610 3RD AVENUE, S.	BIRMINGHAM	AL	35233	P	D'S'	
SCIENTIFIC SERVICES	500 WYNN DRIVE	HUNTSVILLE	AL	35805	S	W O	1
T.L. DOUGLAS	1720-3RD AVENUE	N. BESSEMER	AL	35020	P	D S	1
TUSCALOOSA TEST LAB	3516 GREENSBORO ROAD	TUSCALOOSA	AL	35403	P	D S	1
	******FLORIDA******						
AGRO SERVICES INTERNATIONAL	P. O. BOX 667	ORANGE CITY	FL	32763	P	S	1
ARDAMAN & ASSOCIATES	P. O. BOX 13003	ORLANDO	FL	32809	P	D'S'	1
BREEDLOVE & ASSOCIATES	618 NW 13TH AVE.	GAINESVILLE	FL	32601	P	D	1
CLARK ENGINEERS-SCI.	7520 S.W. 57TH AVENUE	MIAMI	FL	33143	P	D	1
ENVIRONMENTAL CENTER	JACKSONVILLE UNIVERSITY	JACKSONVILLE	FL	32211	P	D'	1
FLOWERS CHEMICAL LABS	P. O. BOX 597	ALTAMNTE SPRINGS	FL	32701	P	S W	1
GREINER ENGINEERING SCIENCE	P. O. BOX 23646	TAMPA	FL	33623	P	D'	
HYDRO-SCIENCE RESEARCH GROUP	2928 FRANKLIN	LAKELAND	FL	33801	P	D'S'	1
JOYCE ENVIRONMENTAL CONSULTANTS	LIVE OAK BOULEVARD	CASSELBERRY	FL	32707	S	W	
ORLANDO LABS., INC.	P. O. BOX 8008	ORLANDO	FL	32856	S	W O	1

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P. E. LAMOREAUX	4313 S. FLORIDA AVENUE	LAKELAND	FL	33803	P	S W	1
PRIEDE SEDGEWICK,INC	P.O. BOX 8117	JACKSONVILLE	FL	32211	P	D'	1 3
SEABURN AND ROBERTSON	P. O. BOX 23184	TAMPA	FL	33623	P	D'S'	1
TECHNICAL SERVICES	P. O. BOX 52329	JACKSONVILLE	FL	32201	S	W O	1
ZELLARS-WILLIAMS	4222 S. FLORIDA AVENUE	LAKELAND	FL	33803	P	D'S'	1
	******GEORGIA******						
APPLIED BIOLOGY	641 DEKALB IND. WAY	ATLANTA	GA	30033	S	W	1 2
ARMOUR & CAPE, INC.	2295 PARKLAKE DRIVE	ATLANTA	GA	30345	P	D'	1
ATEC ASSOC. OF GEORGIA	3936 SHIRLEY DRIVE, SW	ATLANTA	GA	30336	P	S	
CAMP-DRESSER-MCKEE	1945 THE EXCHANGE	ATLANTA	GA	30339	P	D'	
DAMES & MOORE	455 E. PACES FERRY	ATLANTA	GA	30305	P	D'S	
KUN-YOUNG CHIU	109 E. ADAIR STREET	VALDOSTA	GA	31601	P	D'S'	1 3
LAW ENGINEERING	P.O. BOX 98008	ATLANTA	GA	30359	P	D S	
MAYS-SUDDERTH-ETHEREDGE	1775, THE EXCHANGE	ATLANTA	GA	30339	P	D'S'	1
SOIL AND MATERIAL ENGINEERING	1937 BRIARWOOD COURT	ATLANTA	GA	30329	P	D'S	1
VERSITECH	6855 JIMMY CARTER,	NORCROSS	GA	30071	P	D'S'	
WAPORA, INC.	3301 BUCKEYE ROAD NE	ATLANTA	GA	30341	P	D S	
	******KENTUCKY******						
BECK MAR LABS	4010 DUPONT CIRCLE	LOUISVILLE	KY	40207	S	W	1 2
BOOKER ASSOC. INC.	343 WALLER AVE.	LEXINGTON	KY	40504	P	D'	1
BOWSER-MORNER TESTING LABS., INC.	P. O. BOX 636	MAYSVILLE	KY	41056	P	D'S'	
CLAY LABORATORIES	RT. 3 BOX, 11A	MANCHESTER	KY	40962	S	W O	

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COMMONWEALTH TECHNOLOGY	2520 REGANCY ROAD	LEXINGTON	KY	40503	P	D S	1
CUMBERLAND CHEM. LAB	RT. 4, BOX 895	WILLIAMSBURGH	KY	40769	S	W O	1 2
DAMES AND MOORE	1015 RICHMOND ROAD	LEXINGTON	KY	40502	P	D'S'	
DONAN ENGINEERING	P.O. BOX 528	MADISONVILLE	KY	42431	P	D'S'	1
EARTH LABORATORIES	P.O. BOX 571	CORBIN	KY	40701	S	W O	1
ENGINEERING-SCIENCE	345 BLUE SKY PARKWAY	LEXINGTON	KY	40511	P	D'S'	
ENKENCO, INC.	RR 3 BOX 16	HAZARD	KY	40701	P	S W	
FAST FACT LAB	RT. 6, BOX 47	LONDON	KY	40741	S	W O	
FULLER-MOSSBARGER	1315 LEESTOWN ROAD	LEXINGTON	KY	40508	P	D'S'	1
G. COX & ASSOCIATES	P. O. BOX 447	WILLIAMSBURG	KY	40769	P	D'S'	1
GEOLOGICAL ASSOCIATES	P. O. BOX 634	SOMERSET	KY	42501	P	S'	1
HILL ENGINEERING	NORTH LAKE DRIVE	PRESTONBURG	KY	41653	P	D'S'	1
HILL-JACKSON	P. O. BOX 548	PRESTONBURG	KY	41653	S	W	1
HITTMAN ASSOC.	P.O. BOX 13024	LEXINGTON	KY	40511	P	D'S'	
J. S. GRIFFIN AND ASSOCIATES	P. O. BOX 676	HENDERSON	KY	42420	P	S	1
MAYS-SUDDERTH-ETHEREDGE	DELZAN PLACE	LEXINGTON	KY	40503	P	D'S'	1
MCCOY & MCCOY	BOX 238	MADISONVILLE	KY	42431	S	W O	1
MILLER-WIHRY-LEE	1387 SOUTH FORTH STREET	LOUISVILLE	KY	40208	P	D'S'	1
NESBITT ENGINEERING	400 E. VINE ST.	LEXINGTON	KY	40507	P	D'S'	1
PARROTT, ELY & HURT	6220 EUCLID AVENUE	LEXINGTON	KY	40522	P	D'	
PAUL D. LUNDY AND ASSOCIATES	1901/2 CUMBERLAND	MIDDLESBORO	KY	40965	P	D'S'	1
PRASAD ENGINEERING	P. O. BOX 360	WHITESBURG	KY	41858	P	D'S'	1 3
PRASAD ENGINEERING, INC.	1460 NEWTOWN PIKE	LEXINGTON	KY	40511	S	W O	
PROCTOR-DAVIS-RAY	210 MALIBU	LEXINGTON	KY	40502	P	D'	1

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R. R. CRAWFORD	P. O. DRAWER 929	WHITESBURG	KY	41858	P	S'	1
RESOURCE CONSULTANT	P. O. BOX 202	WILLIAMSBURG	KY	40769	P	S'	1
RHODES AND ASSOCIATES	1910 HARRODSBURG ROAD	LEXINGTON	KY	40503	P	D'S'	
S.M.R. ENGINEERS AND ENVIRONMENTAL	DRAWER NO. 761	CENTRAL CITY	KY	42330	P	D SS	1
SKELLY & LOY	P.O. BOX 11604	LEXINGTON	KY	40576	P	D'S'	1
STANONIS & ASSOC.	105.5 N. MAIN	HENDERSON	KY	42420	P	S'	
SUMMIT ENGINEERING	P.O. BOX 933	PIKEVILLE	KY	41501	P	D S	1
T.M. REGAN, INC.	377 WALLER AVE.	LEXINGTON	KY	40504	S	W O	1
TEE ENGINEERING	1314 S. BROADWAY	LEXINGTON	KY	40504	P	D S'	1
TRI-STATE TESTING	P. O. BOX 681	ASHLAND	KY	41101	S	W O	
VAUGHAN ENGINEERS	1002 N. MAIN STREET	MADISONVILLE	KY	42431	P	D'S'	1
VAUGHN AND MELTON	P. O. BOX 1425	MIDDLESBORO	KY	40965	P	D	1
WATKINS & ASSOC.	P.O. BOX 951	LEXINGTON	KY	40588	P	D O	1
	******NORTH CAROLINA******						
OCEAN DATA SYSTEMS	4505 FRANKLIN AVENUE	WILMINGTON	NC	28403	P	D	1
RESEARCH AND ANALYTICAL LAB	P. O. BOX 473	KENERSVILLE	NC	27284	S	W	
	SOUTH CAROLINA******						
ENWRIGHT ASSOC., INC.	BOX 5287 STATION B	GREENVILLE	SC	29606	P	D S	1
J.E. SIRRINE	P.O. BOX 5456	GREENVILLE	SC	29606	P	D	
	******TENNESSEE******						
ARD, INC.	P.O. BOX 884	TULLAHOMA	TN	37388	S	W O	
ENVIRONMENTAL MGMT. PLANNING	151 ATHENS WAY	NASHVILLE	TN	37228	P	D	1

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ENVIRONMENTAL PLANNING ENGR.	224 PETERS RD. RM 200	KNOXVILLE	TN	37923	P	D'S'	1
ENVIRONMENTAL SYSTEMS CORP.	P.O. BOX 2525	KNOXVILLE	TN	37901	P	D S'	1
ENVIRONMENTAL TEST CONSUL	751 E. BROOKHAVE COURT	MEMPHIS	TN	38117	S	W O	1
KENWILL, INC.	BOX 432	MARYVILLE	TN	37801	P	D S	1 2
LAW ENGINEERING	333 TROY CIRCLE	KNOXVILLE	TN	37919	P	S	
MILLER-WITHRY-LEE	2147 BELCOURT AVE.	NASHVILLE	TN	37212	P	D'S'	
MINING CONSULTANTS	REYNOLDS RD.	FRANKLIN	TN	37064	P	D S'	
RUSSELL AXON	UNITED AMERICAN PLAZA	KNOXVILLE	TN	37929	P	D'	
SCIENCE APPLICATION	P. O. BOX 843	OAK RIDGE	TN	37830	P	D'	
STEWART LABORATORY	5815 MIDDLEBROOK PARK	KNOXVILLE	TN	37917	S	W O	1 2
TECHNICAL LAB.	515 CHEROKEE BOULEVARD	CHATTANOOGA	TN	37405	S	W O	
TERRE-AQUA RESEARCH ENGINEERS	P. O. BOX 846	CROSSVILLE	TN	38555	P	D O	1
U.S. TESTING	3765 PREMIERE COVE	MEMPHIS	TN	38118	P	S W	
WOODSON-TENENT LAB	P.O. BOX 2135	MEMPHIS	TN	38101	S	W O	
	REGION 3						
	******ILLINOIS******						
—AQUALAB, INC.	RT. 20 AT VALLEY LANE	STREAMWOOD	IL	60103	S	W O	1
BROWN & ROTHMAN ENGINEERS	500 W. POPLAR ST.	HARRISBURGH	IL	62946	P	D'S'	
CAMP DRESSER & MCKEE, INC.	302 E. JOHN ST.	CHAMPAIGN	IL	61820	P	D S	
CEPHEUS INDUSTRIES, INC.	BOX 525	MARION	IL	62959	S	W O	1
—CITY OF CARBONDALE WATER AND *WASTEWATER CENTRAL LAB.	1001 S. WALL STREET	CARBONDALE	IL	62901	S	W O	

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT
LIST OF LABORATORIES QUALIFIED TO PERFORM WORK UNDER THE SMALL OPERATOR ASSISTANCE PROGRAM

LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
COAL EXTRATION & UTILIZATION RESEARCH CTR.	SOUTHERN ILLINOIS UNIVERSITY	CARBONDALE	IL	62901	P	D S	
COMMERCIAL TESTING & ENG. CO.	228 NORTH LASALLE ST.	CHICAGO	IL	60601	S	W O	
DAILY & ASSOC. ENGINEERS, INC.	1703 WEST LUTHY DRIVE	PEORIA	IL	61614	P	D S	1
DAMES & MOORE	1350 NORTHWEST HIGHWAY	PARK RIDGE	IL	60068	P	D'S'	
DELEUW, CATHER & CO.	165 WEST WACKER DRIVE	CHICAGO	IL	60601	P	D'S'	
ENERGY ENVIRONMENTAL CONSULTANT	820 DAVIS ST., SUITE 400	EVANSTON	IL	60201	S	W O	
ERLIN HIME & ASSOC.	811 SKOKIE ROAD	NORTHBROOK	IL	60093	S	O	1
ESCOR, INC.	1845 OAK STREET, SUITE 3	NORTHFIELD	IL	60093	P	D S'	1
ESPEY HUSTON & ASSOC.	10400 HIGGINS ROAD	ROSEMONT	IL	60018	P	D'S'	1
HANSON ENGINEERS	1525 S. 6TH STREET	SPRINGFIELD	IL	62703	P	D'S'	1
HARDING LAWSON & ASSOC.	125 WINDSOR DRIVE, SUITE 107	OAK BROOK	IL	60521	P	D'S'	
HARZA ENGINEERING	150 S. WACKER DRIVE	CHICAGO	IL	60606	P	D S'	
KEY AGRICULTURAL SERVICES	114 SHADY LANE	MACON	IL	61455	S	W O	1 3
RANDOLPH & ASSOC., INC.	8901 N. INDUSTRIAL RD.	PEORIA	IL	61614	P	D S	
TRACE ELEMENTS, INC.	460 SOUTH NORTHWEST HIGHWAY	PARK RIDGE	IL	60062	S	W	1
WAPORA, INC	35 EAST WACKER DRIVE, SUITE 2380	CHICAGO	IL	60601	P	D'S'	
WOODWARD-CLYDE CONSULTANTS	SUITE 1500, 11 EAST ADAMS	CHICAGO	IL	60603	P	D'S'	
WOODWARD-CLYDE CONSULTANTS	901 CHARLESTON AVE.	MATTOON	IL	61938	P	D'S'	
	******INDIANA******						
A & L GREAT LAKES AGRICULTURAL LABS	5011 DECATUR ROAD	FORT WAYNE	IN	46806	P	D	1
AMERICAN CONSULTING ENGINEERS	525 EAST 38TH STREET	INDIANAPOLIS	IN	46205	P	D'	1 2 4
AMERICAN TESTING ENGINEERING COMPANY	5150 EAST 65TH STREET	INDIANAPOLIS	IN	46220	P	D'S	1

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CHEMICAL SERVICE LABORATORY, INC.	3408 INDUSTRIAL PARKWAY, BOX 22 0	JEFFERSONVILLE	IN	47130	S	W O	
CRANOR LAND SERVICE	R.R.#1, BOX 127	RUSHVILLE	IN	46173	P	D'S'	1
D'APPOLONIA-DISTRICT OFFICE	MOUNTED ROUTE 522B	CHESTERTON	IN	46304	P	D'S'	
ECOL SCIENCES, INC.	211 W. WASHINGTON ST.	SOUTH BEND	IN	46601	P	D'S'	1
EMS LABORATORIES	7901 W. MORRIS STREET	INDIANAPOLIS	IN	46220	S	W O	1
ETS, INC.	6523 CARROLLTON AVE.	INDIANAPOLIS	IN	46220	P	S	
GEOSCIENCES RESEARCH ASSOC.	414 S.WALNUT STREET	BLOOMINGTON	IN	47401	P	D'S'	1
HOWARD NEEDLES TAMMEN & BERGENDOFF	3333 FOUNDERS LANE	INDIANAPOLIS	IN	46238	P	D'	
LAWSON-FISHER ASSOC.	101 JMS BUILDING	SOUTH BEND	IN	46601	P	D'S'	1
NATIONAL LABORATORIES, INC.	600 BOND STREET	EVANSVILLE	IN	47708	P	D S	1 4
NICTL	540 TYLER STREET	GARY	IN	46402	S	W O	
REID, QUEBE, ALLISON, WILCOX, AND ASSOCIATES	3901 INDUSTRIAL BLVD.	INDIANAPOLIS	IN	46254	S	W O	4 1
SIECO, INC.	309 WASHINGTON ST.	COLUMBUS	IN	47201	P	D S'	1 3 4
WILLIAMS LABORATORY SVCS.,INC	1843 COMMERCE DRIVE	SOUTH BEND	IN	46628	P	D S	1
	******MICHIGAN******						
AQUATIC SYSTEMS, INC.	120 WEST LUDINGTON AVE.	LUDINGTON	MI	49431	P	D S	1
BONEL ENTERPRISES	18159 DORSET	SOUTHFIELD	MI	48075	P	D S	1 3
JOHNSON AND ANDERSON, INC.	2300 DIXIE HWY., P. O. BOX 1166	PONTIAC	MI	48056	P	D'S'	1 4
SNELL ENVIRONMENTAL GROUP	1120 MAY STREET	LANSING	MI	48096	S	W O	1 4
	******OHIO******						
A. R. ZAPLATA COMPANY	P. O. BOX 308	LISBON	OH	44432	P	D'S'	1 4
ASSOCIATES MAPPING SERVICES, INC.	1450 SOUTHEAST PLAZA, FRANKLIN AVENUE	SALEM	OH	44460	P	D'S'	1 4

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LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
ATEC ASSOCIATES	11306 TAMARCO DRIVE	CINCINNATI	OH	45242	P	D S	1
BOWSER-MORNER TESTING LAB., INC.	420 DAVIS AVE.	DAYTON	OH	45401	P	D S	1
▲BUCKEYE LAND SURVEYING, INC.	215 S. 5TH STREET	COSHOCTON	OH	43812	P	D'S'	
▲BUCKEYE SERVICES	162 1/2 BROADWAY, P.O. BOX 546	NEW PHILADELPHIA	OH	44663	P	D S	1 4
▲BURGESS & NIPPLE LIMITED	5058 REED ROAD	COLUMBUS	OH	43220	P	D S	
CLC LABS	1046 CRUPPER AVENUE BUSCH CORPORATE CENTER	COLUMBUS	OH	43229	S	W O	1
DAMES AND MOORE	1150 WEST 8TH STREET	CINCINNATI	OH	45203	P	D'S'	
ECO-DATA ANALYSIS, LTD.	11001 CEDAR AVE.	CLEVELAND	OH	44106	P	D S	1 3 4
▲GLM MAPPING	236 EAST WASHINGTON STREET	LISBON	OH	44432	P	D S	1
HOWARD LABORATORIES	3601 S. DIXIE	DAYTON	OH	45439	S	W O	
▲M.A.S AND ASSOCIATES	11453 MARKET STREET	NORTH LIMA	OH	44452	P	D'S'	1
MID-EASTERN GEOTECHNICAL, INC.	BOX 587	MARIETTA	OH	45750	P	S'	1
▲MINE SERVICES COMPANY	1286 WEST LANE AVENUE	COLUMBUS	OH	43221	P	D'S'	
▲MINING AND RECLAMATION COMPANY	129 N. TENTH STREET	CAMBRIDGE	OH	43769	S	W O	
▲MODERN CHEMICALS	100 KERR STREET	POMEROY	OH	45769	S	W O	
OHIO AGRICULTURE RESEARCH AND DEVELOPMENT CENTER		WOOSTER	OH	44691	S	O	
—OHIO DEPT. OF HEALTH	OHIO STATE UNIVERSITY	COLUMBUS	OH	43210	S	W	
▲OHIO MINING CONSULTANTS	240 HURON STREET	JACKSON	OH	45640	P	D'S'	
STILSON LABORATORIES, INC.	170 N. HIGH STREET	COLUMBUS	OH	04321	P	D S	1
▲THE H. C. NUTTING COMPANY	4120 AIRPORT ROAD	CINCINNATI	OH	45226	P	D S	
▲THE STANDARD TESTING COMPANY	610 WEST MAIN STREET	CANFIELD	OH	44406	S	W O	
THE TCW COMPANY	SOUTH MAIN STREET BOX 648	NEW LEXINGTON	OH	43764	P	D S'	1 3 4

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LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
TOLEDO TESTING LAB	1810 N. 12TH STREET	TOLEDO	OH	43624	P	D S	1 4
WAPORA, INC.	5700 HILLSIDE AVE.	CINCINNATI	OH	45233	P	D S	
	******WISCONSIN******						
DONOHUE AND ASSOCIATES, INC.	4738 NORTH 40TH STREET	SHEBOYGAN	WI	53081	P	D'S'	
OWEN AYRES & ASSOC.	1300 W. CLAIREMONT	EAU CLAIRE	WI	54701	P	D S	
	REGION 4						
	******ARKANSAS******						
AMERICAN INTERPLEX CORPORATION	3400 ASHER AVENUE	LITTLE ROCK	AR	72204	S	W O	1
ARKANSAS MINING & MINERALS RESOURCES INSTITUTE	MCEVER HALL, ARKANSAS TECH. UNIVERSITY	RUSSELLVILLE	AR	72801	P	S W	
HOLMAN/PYLE COMPANY	5616 PATTERSON	LITTLE ROCK	AR	72209	S	W	1
	******IOWA******						
IOWA GEOLOGICAL SURVEY	123 NORTH CAPITOL STREET	IOWA CITY	IA	52242	P	D'S	
IOWA UNIVERSITY HYGIENIC LABORATORY	OAKDALE CAMPUS	IOWA CITY	IA	52242	S	W O	
MINNESOTA VALLEY TESTING LAB., INC.	35 WEST LINCOLN WAY	NEVADA	IA	50201	S	W O	1
	******KANSAS******						
ENVIRONMENTAL LABORATORIES, INC.	P. O. BOX 2368	TOPEKA	KS	66601	S	W	1
LANGSTON LABORATORIES, INC.	2005 WEST 103RD TERRACE	LEAWOOD	KS	66206	S	W	1 4
LUMAN'S LABORATORIES	505 MAPLE	CHETOPA	KS	67336	S	W	1
QUALITY WATER ANALYSIS LAB., INC.	121 E. FOURTH	PITTSBURG	KS	66762	P	S W	1
TALIAFERRO AND BROWNE	710 MINNESOTA	KANSAS CITY	KS	66101	P	D'	1 3

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WOODWARD-CLYDE CONSULTANTS	5055 ANTIOCH ROAD	OVERLAND PARK	KS	66203	P	D'S	
	******MISSOURI******						
BOOKER ASSOCIATES, INC.	1139 OLIVE STREET	ST. LOUIS	MO	63101	P	D'	1 4
BRUCE WILLIAMS CONSULTING ENGINEERING AND ASSOCIATES	P.O. BOX 169	JOPLIN	MO	64801	S	W O	1 4
ENGINEERING SURVEYS & SERVICES	1113 FAY STREET	COLUMBIA	MO	65201	P	D S	1
INDUSTRIAL TESTING LABORATORIES, INC.	2350 SEVENTH BLVD.	ST. LOUIS	MO	63104	S	W	
MID MISSOURI ENGINEERS, INC.	506 NICHOLS	COLUMBIA	MO	65201	S	W	1 4
SHANNON & WILSON, INC.	11500 OLIVE BLVD.	ST. LOUIS	MO	63141	P	D'S'	1
WOODWARD-CLYDE CONSULTANTS	1350 BAUR BLVD.	ST. LOUIS	MO	63104	P	S	
	******NEBRASKA******						
HOSKINS-WESTERN-SONDEREGGER, INC.	825 "J" STREET	LINCOLN	NE	68501	P	D S	1
	******OKLAHOMA******						
ENGINEERING ENTERPRISES, INC.	1225 WEST MAIN STREET	NORMAN	OK	73069	P	D'S'	1
ENVIRONMENTAL CONTROL LABORATORY	P. O. BOX 274	NORMAN	OK	73070	S	W	1
ESPEY, HUSTON & ASSOCIATES	4545 LINCOLN BLVD.	OKLAHOMA CITY	OK	73105	P	D'S'	1 4
KAY, KAY AND ASSOCIATES	P. O. BOX 366	NOBLE	OK	73068	P	D S'	1 3
MID-STATES ANALYTICAL LAB., INC.	5460 S. 101ST EAST AVENUE	TULSA	OK	74145	S	W	1
PETRA, INC.	4505 E. 68TH ST.	TULSA	OK	74136	P	D'S'	1
STANDARD TESTING AND ENGINEERING COMPANY	3400 LINCOLN BLVD.	OKLAHOMA CITY	OK	73105	S	W O	1
WILLIAMS BROTHERS ENGINEERING CO.	6600 S. YALE AVENUE	TULSA	OK	74177	P	D S	

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LABORATORY NAME	ADDRESS	CITY	ST	ZIP	TYPE OF CONTRTR	QUAL CAT.	BUSINESS CLASS
	******TEXAS******						
ANA-LAB CORPORATION	2600 DUDLEY ROAD	KILGORE	TX	75662	S	W O	1
CORE LABORATORIES, INC.	11061 SHADY TRAIL	DALLAS	TX	75229	P	D S	
FARNER & WINSLOW	10500 N.W. FREEWAY	HOUSTON	TX	77092	P	D'	1
SOUTHWESTERN LABORATORIES	222 CAVALCADE	HOUSTON	TX	77009	S	W O	
SOUTHWESTERN LABORATORY ANALYTICAL SERVICES DIVISION	P. O. BOX 10687	DALLAS	TX	75207	S	W O	
SOUTHWESTERN LABORATORY GEOTECHNICAL ENGINEERING DIV.	812 GREAT S.W. PARKWAY, P.O. BOX 1526	ARLINGTON	TX	76010	P	S	
SPECTRIX CORPORATION	7408 FANNIN	HOUSTON	TX	77054	S	W O	1
	REGION 5						
	******CALIFORNIA******						
CORE LABORATORIES, INC.	401 CANAL STREET	WILMINGTON	CA	09074	S	W O	
ESCA-TECH CORP.	3001 RED HILL AVENUE, BLDG.II, SUITE 212	COSTA MESA	CA	92626	P	D'S'	1 4
G. E. TEMPO	816 STATE STREET	SANTA BARBARA	CA	93101	P	D	1
GEOSCIENTIFIC SYSTEMS AND CONSULTING	8405 PERSHING DRIVE SUITE 402	PLAYA DEL RAY	CA	80033	P	D'S'	1
HYDROCOMP	201 SAN ANTONIO CIRCLE	MOUNTAIN VIEW	CA	94040	P	D	1
TRUDSDAIL LABORATORIES, INC.	4101 N. FIGUEROA STREET	LOS ANGELES	CA	90065	S	W O	1
	******COLORADO******						
BOOKCLIFF COMMERCIAL LAB., INC.	737 LINCOLN AVE., SUITE 300 BOX 505	STEAMBOAT SPGS.	CO	80477	S	W	
C H 2 M HILL	5995 SO. SYRACUSE STREET	ENGLEWOOD	CO	80111	P	D'S'	

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CAMP DRESSER & MCKEE, INC.	11455 WEST 48TH AVENUE	WHEATRIDGE	CO	80033	P	D'S'	
CHARLES S. ROBINSON AND ASSOCIATES, INC.	622 GARDENIA COURT	GOLDEN	CO	80401	P	D'S'	1
COLORADO SCHOOL OF MINES RESEARCH INSTITUTE	P.O. BOX 112	GOLDEN	CO	80401	P	D S	
COMMERCIAL TESTING & ENG. CO.	490 ORCHARD STREET	GOLDEN	CO	80401	S	W O	
DAMES & MOORE	605 PARFET STREET	DENVER	CO	80215	P	D'S'	
ENGINEERING SCIENCE	2785 N. SPEER, SUITE 140	DENVER	CO	80211	P	D'S'	
HITTMAN ASSOCIATES, INC.	WOODSIDE PLAZA I, SUITE 112 5500 S. SYRACUSE CIRCLE	ENGLEWOOD	CO	80111	P	D S	1
J. F. SATO AND ASSOCIATES	5898 SOUTH RAPP	LITTLETON	CO	80122	P	D'S'	1 4
LEONARD RICE CONSULTING WATER ENGINEERS	2695 ALCOTT	DENVER	CO	80215	P	D	1
NUS	720 S. COLORADO BLVD.	DENVER	CO	80222	P	S'	
WILLARD OWENS, ASSOCIATES	7391 WEST 38TH AVENUE	WHEATRIDGE	CO	80033	P	D'S'	1
WOODWARD-CLYDE CONSULTANTS	2909 WEST 7TH AVENUE, P. O. BOX 4036	DENVER	CO	80204	P	D'S'	
	******MONTANA******						
EARTH SCIENCE SERVICES	EXECUTIVE BUILDING 1115 NORTH SEVENTH AVE.	BOZEMAN	MT	59715	P	S	1
ENERGY LABORATORIES	1107 SO.BROADWAY,P.O.BOX 595	BILLINGS	MT	59103	S	W O	1
GEO. SERVICES WEST	P. O. BOX 7182 - 520 NORTH PLATTE STREET	MISSOULA	MT	59807	P	S'	1
GEO. WEST, INC.	P. O. BOX 1252 - 119-1/2 N. BROADWAY	BILLINGS	MT	59103	P	S'	1
HKM ASSOCIATES	P.O. BOX 31318 EXECUTIVE PLAZA, AIRPORT	BILLINGS	MT	59107	P	D'S'	1
NORTHERN TESTING LABORATORIES	600 SOUTH 25TH STREET, P.O. BOX 306 15	BILLINGS	MT	59107	S	W	
OLSON-ELLIOTT & ASSOCIATES	P. O. BOX 1209, POWER BLOCK, SUITE 616	HELENA	MT	59601	P	D'S'	1

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	******NEW MEXICO******						
CPI	POST OFFICE BOX 1844	SANTE FE	NM	87501	P	D'S'	1
EARTH ENVIRONMENTAL CONSULTANTS, INC.	9426 INDIAN SCHOOL ROAD, N.E.	ALBUQUERQUE	NM	87112	P	D	1
	******OREGON******						
CENTURY-WEST ENGINEERING	61360 SOUTH HIGHWAY 97, P. O. BOX 1174	BEND	OR	97701	P	D S	1
	******UTAH******						
UNITEX	4575 BERNADA CIRCLE	SALT LAKE CITY	UT	84117	S	W O	1 4
UTE RESEARCH LABORATORIES	P. O. BOX 119	FORT DUCHESNE	UT	84026	S	W O	1 4
	******WYOMING******						
IN-SITU CONSULTING, INC.	253 NO. THIRD	LARAMIE	WY	82070	P	S	1
INTERMOUNTAIN LAB, INC.	450 MAIN, NORTH	SHERIDAN	WY	82801	S	W O	1
WYOMING ANALYTICAL LABS, INC.	BOX 638 - 605 SOUTH ADAMS	LARAMIE	WY	82070	S	W O	1 2

federal register

Friday
January 23, 1981

Part XVIII

Department of Agriculture

Food and Nutrition Service

Special Supplemental Food Program for Woman, Infants, and Children; Food Delivery Systems

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 246

Special Supplemental Food Program for Women, Infants, and Children; Food Delivery Systems

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This notice proposes strengthened requirements for the operation of Special Supplemental Food Program for Women, Infants and Children (WIC) food delivery systems and vendor monitoring. The proposal includes changes in many areas of the food delivery systems of State agencies which operate the Program: stronger criteria to be used in authorizing vendors for participation; more detailed vendor agreements; more explicit vendor training requirements; stronger requirements for vendor on-site monitoring, including provisions for detection of high risk vendors; strengthened requirements for the review of food instruments for possible overcharges and for other errors; provisions which allow limiting the number of authorized vendors; allowance of up to 50 percent of funds collected from vendor overcharges to be used for administrative purposes; and requirement of prior notification to FNS for development of automatic data processing systems. The proposed changes would assure greater accountability for delivery of food instruments and supplemental foods. The changes are designed to decrease vendor abuse and loss of Program funds. These, in turn, would increase funds available for participant service and would improve Program integrity.

DATE: To be assured of consideration, comments must be received on or before March 24, 1981.

ADDRESS: Send comments to: Barbara Sandoval, Director, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250.

FOR FURTHER INFORMATION CONTACT: Lynda Couvillion, Acting Branch Chief, Policy and Program Development Branch, Supplemental Food Programs Division, Food and Nutrition Service, U.S. Department of Agriculture, Washington, D.C. 20250, (202) 447–8704.

The draft impact analysis describing the options considered in developing this proposed rule and the impact of implementing each option is available on request from the above named individuals.

SUPPLEMENTARY INFORMATION:

Note.—This proposal has been reviewed under USDA criteria established to implement Executive Order 12044 "Improving Government Regulations" and has been classified "not significant."

The Special Supplemental Food Program for Women, Infants and Children (WIC) provides supplemental foods and nutrition education to pregnant, breastfeeding and postartum women, infants and children up to age five. Eligibility must be determined by a competent professional authority on the basis of low income and nutritional risk.

The delivery of the prescribed foods to WIC participants is administered by State agencies within requirements specified in the Program regulations. Each State agency designs its own food delivery system which must provide effective service to participants within its jurisdiction and assure that the funds granted to the State agency for this purpose are expended accordingly.

Program regulations allow State agencies to operate three types of food delivery systems: retail purchase, home delivery and direct distribution. In a retail purchase system, the participant receives from the WIC agency a food instrument—which prescribes specific quantities of specific foods. The participant redeems this food instrument (a check or voucher) at an authorized retail vendor, usually a grocery store, who must indicate the actual purchase price of the foods. With a check, the vendor deposits the check in his or her bank, which is then reimbursed by the State agency. With a voucher, the vendor submits the voucher directly to the State or local agency for payment. In a home delivery system, the WIC agency contracts with a vendor, often a dairy, who delivers the prescribed food to the participant's home. In a direct distribution system the WIC agency itself purchases food, often on the wholesale market, and distributes it to participants.

Overall Purpose of the Proposal

The overall purpose of this proposal is to set forth regulations which would correct problems in the WIC food delivery system identified in audits and management evaluations and prevent loss of Program funds, and to solicit comments from State agences, local agencies, vendors, public interest groups and other interested parties on the desirability and feasibility of the proposed changes prior to issuance of final rules.

The results of audits and management evaluations of the WIC Programs have indicated the need for improving the efficiency and effectiveness of the food delivery system in order to prevent a loss of Program funds. Of particular interest have been audits conducted by the Office of the Inspector General of the Department of Agriculture: one of a large State agency, submitted in late 1979, and a national audit of the WIC Program which examined operations in ten States, submitted in late 1980. (*1 2*)

A number of problems have been identified in State agencies operating retail purchase food delivery systems. Problems directly involving retail vendors have included payment of improper or overpriced food instruments, and vendors who have provided ineligible items instead of the authorized supplemental foods. The WIC Program is a more complex program for retailers then the Food Stamp Program and this can lead to errors by vendors due to insufficient understanding of WIC Program rules. In addition, in many cases the level of training and monitoring of vendors has been less in the WIC Program than in the Food Stamp Program. The Department greatly values the cooperation of the many conscientious vendors who work with the WIC Program. The identification of problems in audits and management evaluations does, however, indicate the need for strengthened guidance to and monitoring of participating vendors.

Other problems in the food delivery systems have involved accountability of State agency operations, such as inadequate reconciliation of redeemed food instruments and poor measures to provide secure transportation and storage of food instruments. Proposals to resolve these problems are included in this notice as well.

Similarly, some problems have been identified in States which operate home delivery systems. The problems have included a lack of competitive bidding to select home delivery vendors and inadequate measures to verify proper delivery of supplemental foods to participants.

In formulating these proposals, the Department has undertaken extensive discussions at the National and Regional levels of FNS, including compliance officers of the Food Stamp Program, and has solicited comments and discussion with State and local agencies, members of the National Advisory Council on Maternal, Infant and Fetal Nutrition, Program participants, and other interested parties. At the National State Directors' Meeting on Program Management in December 1979,

workshops on vendor monitoring and food delivery systems provided many suggested changes.(3) Studies sponsored by FNS have examined the feasibility of major changes in the food delivery system, the role of participants, and possible improvements in State agency performance standards. The national WIC audit made many recommendations for Program improvement. Prior to publication of this proposal, discussions have been held with State agencies on the basic items proposed and preliminary State input was used in bringing the proposed changes to their current version.

Based on the analysis of the many recommendations, the Department is proposing to retain the basic structure of the food delivery system, but to strenghen and clarify a wide variety of the specific components in the current framework. Therfore, the proposed changes touch upon many interrelated aspects of Program operations, especially vendor relations and financial management. Many State agencies have already undertaken many of these changes on their own initiative and already meet or exceed the proposed requirements. Other States may need to make more extensive changes in their food delivery systems in order to be in compliance.

The improvement of accountability for food delivery systems for the WIC Program is a top priority concern. Balancing this is a strong concern that the regulations not create so many administrative burdens that State agencies are forced to cut back on other vital areas of Program operations. The Department is well aware that many State and local agencies are operating in a very restricted fiscal environment with tight budgets and personnel ceilings. The Department believes that the proposed changes are feasible and impose a modest administrative burden in return for the potential savings in Program funds. The Department is seriously interested in comments from those who are actually operating the Program at the State and local level on the expected impact of the proposal on State agency administrative capabilities.

Similarly, there is concern about the impact of these regulations on vendors who participate in the Program in the actual provision and distribution of supplemental foods. The WIC Program provides a great deal of sales to vendors not only in the direct contribution of WIC sales, but because WIC participants who come to an authorized store to purchase supplemental foods normally purchase other products at the same time. In return for the business directed to them as a result of Program participation, vendors are expected to meet certain standards of accountable behavior. The proposal clarifies the mutual obligations of State agencies and food vendors and strengthens State agency review of the propriety of vendor actions and of payments to vendors for supplemental foods. The Department is interested in comments from vendors, State agencies and other interested parties on the expected effect of these regulations on vendor relations and vendor workload in fulfilling Program obligations.

Background on Proposed Changes

The following are explanations of the various proposed regulatory changes. The overall proposal has been designed to allow flexibility in the procedures which State agencies choose to implement the requirements. For example, though the proposal would require that all vendors be trained at least once every two years, there are ways that this can be combined with the vendor authorization process or with the vendor monitoring requirements. States may establish policies and procedures which meet the regulatory requirements, but which also meet the needs of their individual State conditions. In examining the following proposals, State and local agencies may wish to consider how they could blend the various requirements in creating an integrated food delivery system applicable to their individual conditions.

Vendor Authorization

Experience in both WIC and the Food Stamp Program has indicated that a key control of vendor abuse lies in the process of selecting vendors authorized to operate the Program. The participation of conscientious and well-informed vendors means better delivery of food to participants and improved Program operations. Therefore, the Department is proposing to strengthen the vendor authorization requirements, especially criteria to be considered in approving vendors. In order to ensure the proper collection of information, it is proposed in Section 246.10(d)(3) that State agencies use a standard vendor application form. The application form would contain the information required to review and evaluate vendors' qualifications. If the State desires, this vendor application form can be used as part of the vendor agreement. This issue will be explained in more depth later.

In addition to the vendor application form, a documented on-site visit by a State or local official prior to or at the time of the initial authorization of a vendor will be required. However, after the initial authorization, additional authorization visits will no longer be required and contact with the vendor may be handled by mail or telephone. This ensures that a State or local official actually sees the vendor and his or her facilities prior to entry into the Program. This also affords the opportunity for personal contact of the vendor with a WIC official who can explain the operation of the Program.

The Department does not expect State agencies to visit or to document visits to the vendors already authorized. There are two reasons for this: (1) There are tens of thousands of vendors already authorized to participate and it would create a serious burden to require documentation for the vendors already participating. (2) There are other requirements which would assure visits to vendors at a certain frequency which would afford the chance to review vendor operations and to give them Program training.

State agencies will be required to consider certain specific criteria prior to authorization. Recognizing that different areas will have different needs for vendors, the Department is not requiring that a vendor meet all of the standards in order to participate, but that States at least review the vendor qualifications. States are allowed to establish mandatory standards or to add additional criteria at their discretion.

The specific criteria mandated are: (1) availability of all categories of WIC supplemental foods, with the exception of special infant formulas; (2) reasonable prices for supplemental foods, as determined by the State agency; (3) no conflict of interest between State or local officials or their immediate families and the vendor; (4) suitability of location and business hours for participant access; (5) presence of an approved State or local health inspection certificate, where this is appropriate; (6) no current disqualification from other FNS programs, such as the Food Stamp Program, and (7) satisfactory compliance of the vendor with prior WIC agreements.

Most of these criteria are self-evident. Reasonable prices can be an important factor in areas with a large number of vendors available. Stores which charge higher prices ultimately cost the Program more money and decrease availability of foods for participants. On the other hand, when an area has relatively few vendors, then it may be necessary to accept high-priced vendors to assure participant access. State or local health inspection certificates are included since this is a commonly available sign that a store meets certain

standards of quality. However, there are some areas in which health inspection certificates are given only for stores that cut meat; such a certificate would not necessarily be applicable to WIC since meat is not a WIC supplemental food. Other criteria are related to the vendor's record of honest and fair business practices—whether the vendor has been disqualified from other FNS programs and whether the vendor's compliance with prior WIC agreements is satisfactory. The other major FNS program is the Food Stamp Program, though some other vendors, such as home delivery vendors or wholesalers, can be involved with other FNS programs, such as the Summer Food Service Program.

The Department is also proposing to amend Section 246.10(e)(7) to allow State agencies to establish criteria to limit the number of vendors authorized. Current regulations require a minimum of four vendors within each clinic service area, unless there are documented reasons why this is not feasible. This requirement will be maintained. However, there are many communities where participant convenience does not require authorization of a large number of vendors. By utilizing selection criteria carefully, it should be possible to authorize only the vendors who would provide the best service to the program.

The State agency may utilize various methods to limit the number of vendors: the criteria could be based on vendor qualifications or there could be a maximum number of vendors per clinic service area. The criteria may be utilized State wide or only in selected local agencies.

Limitation of the number of vendors may offer the administrative advantage of allowing limited State or local staff to focus guidance and monitoring on a manageable number of vendors. Some of the other requirements of this proposal will increase the workload of some State and local agencies in authorizing, training, and monitoring vendors; the allowance of criteria to limit the number of vendors can reduce the administrative workload involved. In fact, the limitation of the number of vendors is already allowable under current regulations and this proposal is largely a clarification of policy. A number of State agencies have expressed interest in the concept, but have been hesitant to undertake limitations without stronger regulatory support.

Vendor Agreements

Effective use of the vendor agreement can reduce vendor problems. The purpose of the agreement is to specify the performance expectations between the vendor and the WIC agency, and to provide both parties recourse if the terms are not met. While some requirements regarding vendor agreements are specified in the current regulations, it is apparent that stronger agreements are necessary to insure proper retail transactions in the Program. Therefore, the Department is proposing a number of changes in § 246.10(d)(3)(iii).

One issue regarding vendor contracts is whether they should be time-limited or open-ended. Current regulations do not address this question. While an open-ended contract allows State flexibility in dealing with vendors, it may make it more difficult to assure vendor accountability. The Department is proposing to require a time-limited agreement. A time-limited agreement offers an opportunity for both the vendor and the WIC agency to evaluate their own and the other's performance, and to deliberately renew their commitments under a new agreement, or to decline to enter into a new agreement. The vendor agreement would specify that neither the vendor nor the State agency has an obligation to renew the agreement. The Department is proposing to require that the maximum effective period for a vendor agreement be two years. This time period is seen as offering sufficient frequency for reconsidering and renewing the commitments, without being unduly burdensome.

The Department is also proposing to require that the agreement be signed by someone who has the legal authority to obligate the store. This provision is essential for assuring that vendor rights and obligations are clearly understood and agreed to by the person responsible for the daily operation of the store. In some chain stores, there are rules which prohibit managers of individual outlets to sign agreements; they may only be signed by officials in the district office. In such situations, the vendor agreements must clearly state the particular store outlets to be included in the agreement. The Department is interested in issues regarding chain stores and the WIC Program and would welcome comments concerning how this and other proposed measures should best be applied to chain stores.

The vendor agreement can be an important way to clearly state the mutual obligations of the State agency and the vendor. In order to clarify responsibilities, the Department is proposing to expand significantly the items which must be specified in the vendor agreements. State agencies are allowed to add more provisions at their discretion and will be allowed to use their own language as long as the intent of the provisions is maintained.

The provisions fall into five basic groups. The first group concerns the provision of supplemental foods and policies for reimbursing the vendor. They are: (1) the vendor will only provide approved WIC supplemental foods to participants, (2) the vendor will charge the same or less as is charged to other customers, (3) the vendor will accept food instruments from participants only in the valid time period and will submit them for payment in the allowed time period, (4) the State may demand refunds for overcharged food instruments, (5) the State may deny payment for or may demand refunds for improper food instruments, and (6) the vendor will not seek restitution from participants for food instruments not redeemed by the State. All of the above items are already part of the WIC policy and their inclusion in the vendor agreement would notify the vendor of these policies.

The second group concerns vendor responsibilities for training and for employee action. Provisions include: (1) the manager of the store or home delivery service will accept WIC training at least once every two years and the State or local agency shall provide such training, (2) the vendor will train cashiers, warehouse or delivery route personnel on Program requirements, and (3) the vendor is accountable for actions of employees in WIC transactions. The first provision clearly states the mutual obligations of the WIC Program staff and the vendor in ensuring that vendors are trained. In order to make sure that training is directed to those who are responsible for store procedures, the training must be given to the managers who are responsible for the day-to-day operation of the stores. For example, if a store is part of a retail chain, then the managers for each particular authorized outlet must be trained. The training could be provided during visits by State or local agency personnel to the store, or in the case of chains, during a meeting sponsored by the chain that included store managers in a given geographical area. Two years is believed to be a minimum frequency of training for a Program as complex as the WIC Program. The other two provisions clearly state vendor obligations for employee knowledge and behavior.

The third group of specifications deal with monitoring of vendors. They are: (1) the vendor may be monitored for

compliance, (2) if monitored, a retail vendor will provide access to food instruments negotiated that day, (3) retail vendors will allow access to shelf price records, if available, and (4) home delivery vendors will keep WIC records and allow access to State or Federal officials. Essentially, these provide for agreement by the vendor to be monitored and to allow access to relevant records of operations.

The fourth group of provisions center on civil rights and related issues. Provisions include: (1) the vendor will offer the same courtesies to WIC participants as to other customers and (2) the vendor will meet Departmental non-discrimination requirements. The nondiscrimination clause is in the current regulations and prohibits discrimination on the basis of race, color, or national origin.

The final group of provisions focuses on the terms of the agreement and possible vendor sanctions. Provisions include: (1) neither the vendor nor the State are obligated to renew the vendor agreements, (2) either the State or the vendor may terminate the agreement with cause with at least 15 days written notice, (3) the State may disqualify a vendor for Program abuse and the vendor has a right to appeal the decision, (4) the vendor will notify the State if it ceases operations or ownership changes and the agreement is terminated if ownership changes, and (5) the vendor is notified of liability to prosecution for deliberate fraud under penalties of Section 246.18.

Because of the increased complexity of the vendor agreements under the proposal, the Department is proposing that the vendor agreement be standard Statewide. This would ensure that the vendors are treated equitably Statewide. Exceptions would be allowed with State approval. Occasionally, there are vendors, such as Army PX stores, who are only allowed to sign certain types of agreements. In such cases, the State agency can approve modification of the vendor agreement.

At the present time most State agencies use an agreement which consists of one document signed by both the vendor and a WIC official. Another format which could be used is one similar to that used in the Food Stamp Program. Under this approach, the vendor application form would contain the stipulations required of the vendor, as well as a place for the vendor's signature signifying his or her agreement to abide by these stipulations. Upon approval of the vendor, a State or local official would sign the application agreement and also sign a permit which would be returned to the vendor. This permit, which the State agency could require the vendor to display, would serve as the authorization for that vendor to redeem WIC food instruments for the time period specified in the agreement.

This application permit format is seen as offering greater potential for enforcement of vendor accountability. A permit displayed on the vendor's wall (if the State agency requires it) is easily checked by participants, local agency staff and the public for assurance of the vendor's authority to participate in the Program. When a vendor is removed from the Program, the permit would be removed and returned to the State agency. The Department proposes to make this format a State option, rather than a requirement, however, because some States have been successful in assuring vendor accountability through the use of a well written, single-document vendor agreement.

Vendor Training

In § 246.10(d)(5) the Department is proposing to require that vendors be trained at least once every two years. Current regulations require vendor training, but specify no timeframes. Two years was selected as a timeframe sufficiently frequent to keep the vendor aware of the Program without being unduly time-consuming for State or local staff or the vendor. Since vendors will be authorized at most for two years at a time, this links the training requirements and the authorization process.

This training by either State or local agency staff can be provided in a number of ways. Vendor training can be provided during the pre-authorization visit; vendor training can be provided during monitoring visits; additional vendor visits aimed specifically at training can be made; or vendor attendance at WIC training sessions could be used. The particular method is primarily up to the State or local agency, in accordance with its policies and workload. For some State or local agencies, the most convenient method may be to conduct group training sessions in which a number of vendors are educated together. However, the WIC staff must realize that there is a mutual obligation for training. For example, if a vendor cannot go to a group training session, then the WIC staff should attempt to visit the vendor.

The Department is proposing to require that when vendor training is delegated to the local agency, the State agency will provide training to local agency staffs on effective vendor training methods. The Department believes this requirement to be necessary in order to ensure that local agencies understand how to effectively educate vendors about the Program. The Department envisions that State training of local agency staff in this area can be easil incorporated into the current management activities of State and local agencies. The expectation is that such training would enable agency staffs to work more effectively, rather than longer. If vendors can be effectively instructed in Program purposes and requirements, there should be less work needed to handle vendor-related problems.

Compared to the Food Stamp Program, WIC is a complex operation for the vendor: only certain specific foods are allowable; food instruments are valid for only a certain time; and the food instruments must be completed correctly to ensure payment. Unquestionably, many of the vendor-related problems are due to unintentional errors of the vendor. Improved training of vendors should help reduce these problems. The Department is interested in comments on the vendor training requirements. One particular issue of interest is whether the training requirements for chain stores should be the same as for independent stores. Many chain stores have regular training programs which may be efficient and effective in training store personnel, and the Department is interested in how to provide training to chain stores in a manner that is both efficient for the State agency and these stores, and effective in securing understanding of WIC Program rules.

Vendor Monitoring

On-site visits are important for assuring that State or local personnel can directly observe vendor operations and collect evidence of any possible violations. The current regulations require that at least 10 percent of all vendors have an on-site visit each year. A majority of State agencies conduct far more than this level. Nonetheless, audits and management evaluations have documented a number of instances of vendor problems which had gone undetected or uncorrected, some of which caused a loss of Program funds.

Weaknesses have been identified in the current system for vendor monitoring: (1) Current regulations only ensure that a minimum quantity of vendors are reviewed; they do not ensure the quality of the review. (2) Adequate vendor monitoring cannot be assured by requiring only 10 percent of vendors be visited annually. Under this requirement it is very possible that a large number of vendors would never be visited. (3) Adequate documentation to substantiate the performance or quality

of vendor reviews is not generally available, nor is it required in the WIC Program regulations. (4) Data analysis which could enhance the effectiveness of vendor monitoring was often not done or not utilized effectively. For example, in some States, lists of vendors who were suspected of problems were generated, but local agencies did not use them. Therefore, the Department has proposed a number of changes to strengthen the requirements for vendor monitoring in § 246.10(d)(6).

It is proposed that if a State agency chooses to delegate the authority for on-site monitoring visits to local agency staff, then the State must provide training to local agency staff on effective methods of vendor monitoring. Whereas many State agencies have staff who specialize in vendor affairs, very few local agencies have staff with special expertise in this area. When the local agency staff visit vendors they may be uncertain of how to look for problems and they may be prompted to view the chief function of an on-site monitoring visit as a public relations visit. The proposal would help assure a minimal level of quality to on-site vendor monitoring visits in a State.

In order to assure proper documentation of on-site visits, the Department is proposing that the State or local agency document the following: names of vendor and reviewer; date of review; nature of problem(s) detected or the observation that the vendor appears to be in compliance with Program requirements; how the vendor plans to correct any problem noted; and the signature of the reviewer. Most of these specifications are self-explanatory. It should be noted that the method of correction for problems does not mean that a formal corrective action plan must be established, but means that the reviewer has gained some understanding of how the vendor intends to correct any problems detected.

It is proposed that allowable methods of on-site monitoring include, but are not limited to: compliance purchases, review of cashier check-out procedures, and review of the availability and prices of WIC supplemental foods. The primary purpose of this is to clearly distinguish the functions of on-site monitoring from the functions of vendor training. It is allowable to combine training visits with monitoring visits in some circumstances, for the sake of administrative efficiency and effectiveness. There are cases in which training visits should not be combined with monitoring, such as when conducting covert compliance purchases. Overall, the method to be used in any given situation is left to State discretion.

The Department would like to strengthen State capabilities to conduct compliance purchases. In a compliance purchase, an investigator will covertly visit a vendor and submit food instruments in order to determine whether the vendor is engaging in unacceptable practices. The Department believes that the compliance purchase is the strongest method to gain solid evidence of vendor fraud. If a State agency needs to go to court to prosecute a vendor for fraud, then evidence from a compliance purchase is one of the best types of evidence. Many State agencies do not currently conduct compliance purchases. Therefore, this rulemaking would require that States have the authority to conduct compliance purchases. The Department recognizes that in some States, the authority to conduct compliance purchases may reside outside the State agency, such as in the State Attorney-General's office or in a welfare fraud investigation unit. The proposal would require State agencies either to have the authority to conduct compliance purchases themselves, or be able to arrange for this responsibility to be assumed by other appropriate authorities. This proposal does not require any particular level of compliance purchases, but assures that State agencies are prepared to conduct compliance purchases when they appear to be necessary.

The proposed rules also set new requirements regarding the number of vendors to be monitored. The rules would allow for two alternate systems: a broad range system and a high risk screening system. State agencies would need FNS approval to operate either system. FNS could disapprove the application if it determined that the system described is not effective or that the system selected is not appropriate to the conditions of that State agency. The chart below outlines the differences between the two systems.

Proposed WIC Vendor Monitoring Systems

Broad Range System

Minimal level of on-site monitoring: 35 percent of all authorized vendors per year, with all vendors visited at least once every five years.

Selection criteria: In selecting vendors to be visited, participant complaints and high volume of WIC sales must be among the factors taken into account.

High Risk Screening System

Documentation: State agency must document effectiveness of system.

Minimal level of on-site monitoring: Visits to *all* vendors detected as high risk, *plus* visits to vendors not detected as high risk at a level equivalent to 10 percent of all authorized vendors per year.

Selection criteria: State must be able to identify high risk vendors through effective detection of vendors with:

(1) suspected overcharges on redeemed food instruments, and

(2) errors in redeemed food instruments, including at least: redemption outside valid dates, vendor identification missing, and purchase price missing.

Participant complaints must also be used to identify high risk vendors, as well as other screening or detection mechanisms which the State may develop.

In the broad range system, the required level of vendor on-site monitoring visits is at least 35 percent of all authorized vendors per year, with all vendors visited at least once every five years. Analysis of average State agency food package costs indicates that average food costs are lower in States with 35 or more percent vendor monitoring. It is expected that the broad range system would be of particular use in States with relatively few vendors or States without adequate funds or staff to detect high risk vendors through reviews of redeemed food instruments. For these State agencies, it may be more efficient to visit more vendors than to develop the more sophisticated screening capacity. The required criteria for selecting vendors for review are relatively simple: participant complaints and high volume of WIC sales. No State agencies should have trouble in selecting vendors using these criteria. Further, if they so choose, States can use the broad range system while simultaneously developing the capability to conduct high risk screening.

In many respects, the high risk screening system represents a more powerful way to monitor vendors. In addition to targeting high risk vendors, screening can provide more effective monitoring visits. Since a reviewer already has an idea of the type of offenses which are suspected, a more effective and efficient visit can be conducted. Operation of the high risk screening system required that a State agency not only have a sophisticated system to review food instruments and account for participant complaints, but that criteria based on these capacities

be integrated into a system for monitoring the vendors and pursuing those who appear to be violating Program regulations. In designing such a system, States should attempt to keep the system selective so that it produces a manageable number of vendors to monitor effectively.

The high risk screening proposal also requires additional on-site monitoring of vendors not detected by the high risk system at a level equivalent to at least 10 percent or more of all authorized vendors per year. The purposes of the additional visits are twofold: (1) It guarantees a minimal monitoring presence, so that all vendors are aware that there is a certain fixed probability that they will be monitored. (2) Any screening system has weaknesses. An unscrupulous vendor may be able to violate program rules without triggering the screening system criteria. This requires the States to monitor some vendors not selected by the high risk criteria.

In order to utilize the high risk screening system, State agencies must document the effectiveness of their system to FNS. The necessary documentation would need to be arranged between the State agency and the corresponding FNS Regional Office. Examples of the types of documentation which might be appropriate include a description of the system to screen high risk vendors and evidence of effectiveness. The description of the system to screen high risk vendors could include: The criteria used to select high risk vendors for review (e.g., "X" number of food instruments submitted by a vendor have suspected overcharges or participant complaint indicates that a vendor may be providing unauthorized items instead of the approved WIC foods, etc.); the method or reviewing food instruments (e.g., all submitted food instruments are reviewed by the ADP system prior to payment, or all redeemed food instruments are reviewed manually at a certain frequency, or other appropriate specifications, such as, manually-issued food instruments will be reviewed in a separate system from ADP-issued food instruments, etc.); and methods of conducting on-site monitoring visits to detected high risk vendors (e.g., all high risk vendors will be visited by State agency staff within a certain date of the detection, or vendors detected of being high risk will be reported to the appropriate local agency staff who will visit them within a certain time period or certain types of suspected violations will justify a compliance purchase visit, etc.). The evidence to indicate the effectiveness of the system could include: a sample list of high risk vendors generated by the system and the suspected problems; sample reports of results of the on-site monitoring visits; and reports of sanctions brought against vendors for offenses. The Department is not proposing such specific methods for detecting or monitoring high risk vendors or precise numerical criteria for defining high risk vendors in recognition that some variation from State to State or from food delivery system to food delivery system may be warranted.

The Department is interested in comments on the feasibility of the proposed amendment to § 246.10(d)(6) for vendor monitoring. In comments from State agencies, the Department is especially interested in receiving an idea of which vendor monitoring systems the State plans to operate, the broad range or the high risk screening system. Another item of interest is the implementation time. The Department is planning to make the regulations effective one year from the date of inssuance of the final regulations. The overall implementation time will be discussed in more depth later. Do commenters believe that one year is a feasible implementation time for the vendor monitoring requirements?

Participant and Vendor Complaints

In order to guarantee that participant complaints can be untilized in the vendor monitoring system, § 246.10(d)(7)(i) is being revised. It would require the State agency to have procedures which document the handling of complaints reported by participants. Appropriate complaints should be followed up with monitoring visits or other measures to correct the problem. This does not mean that all complaints need formal follow-up actions; there will often be petty complaints or comments from chronic complainers which do not necessarily justify a response. However, all complaints reported should be documented, regardless of whether they are acted upon. Corresponding to the participant complaint procedures, another part of the regulation will be amended to require that participants and proxies are informed of how the food delivery system works, including vendor responsibilities, and the right to complain about improper vendor practices.

A similar provision will be made that the State agency must document vendor complaints. As considered appropriate, the State agency shall attempt to correct the problem. The problems of Program abuse are not merely confined to vendors; participants will sometimes knowingly or unknowingly violate Program requirements. Many times, vendors can identify problems which should be reported to the State or local agency, whether they are problems of specific participants or procedural problems. This proposal would guarantee that all vendor complants are documented.

Sanctions and Disqualifications

The first proposal in this area is a change of terminology. In the current regulations, the term "suspension" is used for vendors and participants who are disqualified due to Program abuse. Unfortunately, "suspension" implies that the party will be reinstated in the Program after the suspension period. This is not always the case. In some cases, after the suspension period the offending party may apply to reenter the Program, but may be denied. However, any vendor or participant who had been disqualified for a certain time period should always be able to reapply for Program participation at the end of the disqualification period. If a State so chooses, then the reentry can be automatic for certain situations. In order to clarify this problem in terminology the word "suspension" is being changed to "disqualification" in § 246.10(d)(7)(iii) and (iv) and § 246.23(a) and (c).

A strong enforcement and sanction system is just as important as the system to detect Program abuse. A prompt, well-publicized vendor disqualification will not only remove the abusive vendor and save Program funds, it will also serve as a warning to other vendors that they can also be sanctioned for Program violations. Because of reports that some State agencies are lax in sanctioning vendors, the Department is proposing to heighten the importance of the sanction system. The maximum disqualification period for vendors will be increased to three years for serious or repeated Program abuse. More important, State agencies will be required to establish policies to determine the type and level of vendor sanctions to be applied against vendors, based upon the nature of the Program violations and such other factors as the State agency determines appropriate, such as whether the violations represented repeated offenses, whether the offenses represented the vendor's policy or the actions of an untrained employee who did not understand Program rules, and whether prior warning and an opportunity for correction were provided. Sanctions which can be used include disqualification, claims for improper or overcharged food instruments, and the penalties cited in § 246.18 for deliberate

fraud. Therefore, the State would be required to determine specific penalties for specific offenses. For example, a State might establish a policy under which it would send a claim and a warning letter upon detecting the first overcharged food insntrument; would disqualify the vendor for a certain time period after detecting a certain number of overcharges; and if evidence indicated repeated, serious offenses despite warnings, such as providing cash for food instruments, would disqualify the vendor for up to the maximum period and possibly refer the vendor to the proper legal authorities for prosecution.

The Department requests comments on the area of sanctions. If State agencies believe that more regulatory support is needed in order to obtain effective sanction capabilities, then their comments should express this.

Control of Food Instruments

Audits have reported incidents of disregard for food instrument security, such as boxes of negotiable food instruments sitting in places accessible to the public and failure to document serial numbers of food instruments shipped to or received by local agencies. Current regulations specify the State agency's responsibility for control of food instruments, as well as its liability for claims for lost or misused food instruments. In order to emphasize this State agency responsibility, the Department is proposing to add in § 246.1C(d)(9) the clarification that the State agency is responsible for the secure transportation and storage of unissued food instruments. Steps must be taken to provide secure transportation for food instruments, such as use of certified mail, specially designed vehicles, or personal delivery.

It is intended that documentation be maintained regarding the receipt and issuance of all food instruments, and that local agencies provide secure space for unissued food instruments. While these procedures can be cumbersome, they are essential for prevention of theft, and they should be followed at all times under current regulations.

Reconciliation of Food Instruments

An important element of the financial management system for WIC is the reconciliation of issued and redeemed food instruments. In order to clarify the obligations of State agencies with respect to reconciliation, the Department proposes to revise the definition of reconciliation in § 246.1C(d)(1C). State agencies will be required to identify disposition of all food instruments within 150 days of issuance as either redeemed, unissued, issued but unredeemed, voided in the issuance process, stolen, lost, or expired.

Reconciliation will specifically entail reconciliation of each food instrument issued with food instruments redeemed and adjustment of previously reported financial obligations to account for actual redemptions and other changes in the status of the food instruments (e.g., expired). The 150 day timeframe is based upon the maximum time for valid payment of a food instrument after issuance: a participant has 30 days to use it, the store has 60 days to submit it for payment, and the State agency must pay within 60 days.

An issue which has been raised in the national WIC audit is whether reconciliation should reconcile redeemed food instrument with issuance records or with certification records. If a redeemed food instrument is suspected of being fraudulent in some manner, such as illegitimate issuance by a WIC employee, then it would be worthwhile to be able to check that the food instrument was issued to a valid certified participant. The Department recognizes, however, that to require this as a routine procedure could necessitate costly revision of procedures and is likely to be cost-ineffective, especially since there is not evidence of significant problems in this area. Therefore, it is proposed that a State agency must be able to demonstrate to FNS that it has the capability to reconcile a given redeemed food instrument to valid certification records when necessary, but no requirement is proposed that States perform this task as a routine matter. This capability could be demonstrated by the State agency during FNS management evaluation visits. The capability is important so that States, FNS, or auditors can track the validity of redeemed food instruments all the way to certification if this becomes necessary in individual cases.

Finally, the Department is proposing a one percent tolerance level for reconciliation of food instruments. Though reconciliation is a crucial area of proper financial management, there are often minor problems that prevent 100 percent reconciliation, such as data misreads or keypunch errors. For many of these minor problems, it is not cost effective to pursue the problem for every single food instrument. Therefore, it is proposed that Section 246.18(a) be revised to allow FNS to determine that the reconciliation process is satisfactorily completed for State agencies which can demonstrate that one percent or less of the number of food instruments are not accounted for in the reconciliation process. It should be noted that FNS does not necessarily need to grant the one percent tolerance if it believes that a problem in reconciliation can be rectified. For example, if a local agency in a State has improper accounting for the manually-issued food instruments, then this is a problem which can and should be rectified systematically, as opposed to a random problem such as a keypunch error which is more difficult to correct systematically. Overall, the Department believes that including a one percent tolerance in reconciliation will ease State agency administrative burdens by relieving them of unrealistic expectations of 100 percent reconciliation.

Proxies and Participant Notification

Many State agencies allow authorized proxies to pick up and use food instruments when the participant is unable to do so. The Department recognizes the value of proxies and wishes to utilize them in the WIC Program. Some States have requested that there be specific provisions for this in the regulations. Therefore, in § 246.10(d)(12) it is proposed that all States establish uniform procedures for proxies. In order to help assure that the participant has access to nutrition education and health services, the State agency will be directed to consider the adequacy of nutrition eduction and health services provided to the participant when deciding whether an individual participant can utilize a proxy. The reasons for using a proxy shall be documented.

An issue of similar importance is participant notification about the food delivery system and the right to complain about improper vendor practices. Therefore, § 246.10(d)(12) will be revised to require instruction of participants or their authorized proxies on the proper use of food instruments, including vendor responsibilities. Participants and proxies shall also be notified of their right to complain about improper vendor practices. The purpose of these changes is to help ensure that participants are fully aware of what the vendor ought to do in accepting WIC food instruments or in providing supplemental foods. It also helps to involve the participant and proxy in the vendor monitoring system. The inclusion of proxies in the notification is very important. A small survey in New York City revealed that many participants used proxies and that the proxies were usually not trained in using the food instruments.[4]

Conflict of Interest

Section 246.10(d)(13) is being modified slightly to prohibit conflict of interest between a State or local agency official or a member of an official's immediate family and an authorized food vendor within the official's jurisdiction. Conflict of interest is defined as a situation in which the official or family member owns, in whole or in substantial part, or controls the authorized vendor. Under these providions, no conflict of interest would exist if an official is a member of a cooperatively-owned food store or owns a small numer of shares of stock in a corporate vendor.

Delivery of Food Instruments

In § 246.10(e)(2) there are many references to the use of mailing as an alternate system to provide food instruments to participants. The preferred system is one in which participants personally pick up food instruments, in order to ensure access to nutrition education and heath services. Some State agencies have pointed out that the regulations are over-specific in this area since there are viable alternative delivery systems aside from mailing. Therefore, the references to mailing are being changed to "mailing or deliveries through other means" in this provision of the regulations, in order to broaden the alternate systems which a State may implement.

Design of the Food Instrument

Current regulations specify requirements for food instruments used to purchase WIC foods. The design of a food instrument has a significant bearing on its appropriate and effective use. The Department is proposing two changes in the requirements regarding items on the face of the food instrument in Section 246.10(e)(3)(v). The first is to delete the requirement that the maximum value of the food instrument be printed on the face of the food instrument. Instead, this would be allowed, but would be done at the discretion of the State agency. Experience has shown that printing the maximum value on the food instrument has drawbacks as well as advantages. Some States find the maximum value necessary for limiting their financial liability. On the other hand, the maximim value appearing of the face of the food instrument can encourage vendors to charge higher prices and thereby can be inflationary.

The second change would be to require that if the maximum value is printed, that it be clearly distinguishable from the space for the actual amount of pruchase. The purpose of this change is to eliminate the perception that a vendor is always entitled to the full maximum value of the food instrument. It reduces the probability that a confused cashier would automatically write in the maximum price for the actual purchase price. Examples of ways this could be done include: having the words "actual amount of sale" printed larger and in a different area of the food instrument from the maximum value.

Review of Food Instruments

In retail purchase systems, two types of food instruments are used—check and voucher. Approximately half of the WIC State agencies use a check system and half use vouchers. In a check system, the vendor deposits the food instrument in his or her own bank, thereby receiving payment immediately. The food instrument is itself a bank check and is drawn against the WIC agency's bank. In a voucher system, the vendor submits the food instrument to the State or local agency, which reimburses the vendor. In either system, certain information must be provided on the food instrument to ensure that the payment requested is proper. The State agency is responsible for ensuring that the necessary information is provided.

The State agency should review food instruments to ensure that the necessary information is provided and that the price appears appropriate. A food instrument missing information or with an inappropriate price either should not be paid or, if it was already paid, then either the missing information should be provided or a claim should be assessed against the vendor for the improper food instrument. The State agency's review procedures are, in turn, subject to audit and review by the Department. Unfortunately, audits have found that payments have been made to vendors in spite of serious errors in filling out food instruments. These errors have included: banks redeeming a check-type instrument for maximum value when the actual purchase price is left blank; vendors who routinely charge the maximum value regardless of the price of the food provided; food instruments being paid when the vendor's identification is omitted; and the redemption of food instruments either before or after their valid period.

In order to ensure that State agencies review food instruments thoroughly, the Department is proposing changes in Section 246.10(e)(4). The proposed changes may require modification of State agency food instrument redemption procedures. However, the Department believes that the measures are largely a clarification of the type of accountable procedures which should be utilized now by State agencies in paying food instruments.

In order to review the food instruments for suspected overcharges, most State agencies utilize a price edit in which the purchase price given by the vendor on the food instrument is compared to an expected price for the food instrument. The expected price is usually based upon an average price of the food instrument for the given food item(s), based on prior redemptions, or on information regarding the prices of the given store or in the local area. If the food instrument price given by the vendor is a certain percent or a certain value above the expected price, then the food instrument is noted as a possible overcharge.

The proposed regulations specify that all food instruments must be reviewed for proper price. It is further specified that if the review is conducted prior to payment to the vendor, as would usually be done in the voucher system, and the food instrument contains an overcharge, then the State agency will either deny or delay payment for the food instrument or for the excess amount. Further work may then be necessary to determine the correct amount that the vendor should be paid. If the review is conducted after the payment, as would be done in the check system, then a claim against the vendor shall be assessed for the excess amount, when this is determined. Regardless of when the review is conducted, the State agency shall adjust the payment accordingly, or issue a claim in the appropriate amount, if the vendor corrects the food instrument. If the vendor substantiates that the food instrument does contain the proper charge, no claim shall be pursued and prompt payment shall be made, if this has not already been done.

The proposal will also establish requirements concerning State agency review of food instruments for other errors. The State must review food instruments for three specific errors, although the State agency may check for other errors at its discretion. The errors are: (1) vendor identification is missing, (2) the actual purchase price of the supplemental foods is missing, and (3) the food instrument was submitted by the participant or the vendor outside the valid dates.

Similar to the provisions for overcharges, the State agency is given the option of reviewing before or after payment of food instruments. If the State agency reviews the food instruments prior to payment and finds that an instrument contains one of these three errors, then the payment shall not be made at that time. If a vendor can correct the error, then the State shall

make payment in the appropriate amount. For example, if vendor identification was missing, the vendor may place the identification on the vouchers. If the price was missing, the vendor may demonstrate what price should have been included. If the State reviews after payment and finds one of these errors, then a claim shall be assessed against the vendor for the value of the erroneous food instruments unless the vendor corrects the error.

Vendor identification is considered a necessary element of the food instrument. This can be a name of the vendor, an identification number or a similar unique identifier (if a chain store, it should identify the specific outlet in some manner). In many cases, the vendors batch their food instruments so that only a small number actually have the vendor identification readily accessible. The requirement for vendor identification on each food instrument is being proposed in order to assure that all food instruments can later be assigned to a specific vendor whether as a part of the vendor monitoring system or as an audit trail.

The actual purchase price is necessary to assure proper expenditures in redeeming the food instrument. In some check systems, if the actual price is missing, then the bank redeems the check for the maximum value. Under the proposals, even if the bank redeems the check for maximum value, the State agency will later assess a claim for the excess value. In turn, this should lead the vendor to learn that the actual price should always be written on the food instrument.

The final requirement will be that the food instrument was utilized in the proper time frame. If the participant submitted it after the expiration date, then the vendor should not honor it. If the vendor submits the food instrument after the vendor expiration date, then the State should not honor it. In the current regulations, the State agency is allowed to reimburse vendors who submit the food instruments after the expiration date up to $200.00 per submission without FNS approval. This provision would be retained in the proposal.

The Department has proposed that all food instruments be reviewed to detect overcharges and errors. It is believed that this is necessary in order to assure strong financial accoutability and to effectively detect possible vendor violations. However, it is also recognized that such review processes may be arduous and costly. Therefore comments are requested on the feasibility of such reviews or alternate ways to accomplish the same ends, such as sampling of food instruments. Commenters who suggest alternative plans are encouraged to be as specific as possible.

Home Delivery Systems

Audits have found problems in the home delivery systems operated by some State agencies. In order to correct problems identified, the Department is proposing several changes to Section 246.10(f) which deals solely with home delivery systems.

One problem identified is that some home delivery vendors are given exclusive rights in an area, but are not selected in accordance with approved Federal procurement procedures, especially competitive bidding. The home delivery vendors given exclusive rights are guaranteed a large volume of business which will be paid by Federal funds. Section 246.10(f)(2) would specify that such vendors must be selected in accordance with relevant Federal regulations.

Another problem found is that home delivery vendors are oftern paid in advance of delivery of foods, and there may not be procedures to assure that the food is actually delivered to participants. In § 245.10(f)(3) the Department proposes to require that home delivery vendors be paid only after the delivery of food to participants. It is further proposed that there must be procedures to verify, at least once a month, the actual delivery of supplemental foods to participants. For example, the State may require that, once a month, the home delivery vendor secure from participants a signed statement acknowledging receipt of food, and that the vendor submit these to the State or retain them for possible review by the State. In this example, the State should also ensure that the vendor has alternate means to verify delivery in case the participant does not return the statement for foods actually received (e.g., the participant could be out of town at the time in question or could have lost the statement slip). However, the requirement for verification of delivery does not mean that the payment to the vendor must await the verification. Payments can be make after the delivery, but prior to the verification. If the verification fails to substantiate the delivery of food to certain participants, then a claim or other adjustment of payment can be made at a later time.

In order to have access to relevant records of home delivery vendors for State of Federal reviews or audit, it is proposed that home delivery vendors be required to retain records of the delivery of supplemental foods and of bills sent and payment received for the supplemental foods. Further, the home delivery vendor must allow State or Federal authorities access to the records.

The last change in home delivery systems relates to the actual delivery of supplemental foods. One problem which has sometimes occurred is the delivery of too much food. Home delivery vendors usually make weekly deliveries based on 4 week cycles as one month. There have been instances where this has resulted in the delivery of 13 food packages over a year, as opposed to the authorized 12 packages. At the opposite end of the spectrum, other vendors have delivered food so infrequently and in such large quantities that participants cannot store the foods. Therefore, it is proposed that State agencies ensure that the proper supplemental foods are delivered in accordance with § 246.8 and in accordance with participant convenience. This is a fairly broad mandate which allows great flexibility in actually implementing the regulations.

The purpose of these proposals is to assure accountability in home delivery systems while not discouraging State agencies and home delivery vendors from participating in these systems. The Department is interested in comments on how successfully these proposals achieve these goals.

Program Costs

In order to aid in implementation of the proposals, three new provisions are made in the program costs area of the regulations in § 246.12. These provisions are: cost of food instruments used in monitoring, ADP prior notification, and recovery of vendor overcharges.

In § 245.12(b)(5), the cost of food instruments used in monitoring would be added as an allowable administrative cost. This is considered as an administrative cost, as opposed to a food cost, since it is used in an administrative function and not to directly serve a participant.

At the present time, about half of the State agencies are using or developing ADP systems to manage Program operations. During the procurement of some of these systems serious problems arose, particularly when State agencies waited too long to inform FNS that they were seeking computerization. These problems have including bidding practices not strictly in compliance with Federal requirements and purchase of systems which failed to meet Program needs adequately. Current regulations require prior approval by FNS of State agency purchase of ADP systems. However, some States have not understood the importance of early FNS

involvement in ADP system procurement, in order that effective technical assistance can be offered by FNS. Therefore, the Department is proposing to clarify in § 246.12(c)(1) of the regulation that FNS must be informed of a State agency decision to seek automation for any Program operation, other than those dealing solely with staff payroll and related general management functions. In light of past experience, in which some State agencies have had to abort their initial work toward purchase and design of ADP systems, the Department believes that this proposal may reduce State agency workloads. This proposal would also correspond to the requirements for submission of Advance Planning Documents to FNS for computer systems over $100,000 in value.

Many of the requirements in this proposal will increase the workload of some State agencies. The Department believes that the proposed requirements are within the capabilities and the budget of the State agencies. In order to aid State agencies, the Department is proposing, in § 246.12(d), an incentive to State agencies to collect vendor overcharges more aggressively. Funds recovered from vendor overcharges would be returned to the State agencies and the State would be allowed to use up to 50 percent for administrative costs, with the remainder to be used for food costs. This division of funds would allow States to acquire more administrative funds based on the effectiveness of their systems to collect overcharges from vendors and would also allow the collected funds to be used to benefit more participants. The Department hopes that this would serve as an effective incentive for improved State agency performance in monitoring vendors and recovering vendor overcharges.

Historically, WIC funds have often been subject to reallocation in order to redistribute funds to States based on need and prior expenditure. The funds which are gained from the recovery of vendor overcharges should not be taken away in the reallocation process. Therefore, in § 246.14(f), it is proposed that the funds gained from recovery of vendor overcharges should be held harmless in the event of reallocation. This provision would protect the gains in administrative or food funds earned by the State agency recovery process.

Implementation Time

The Department is considering issuing the final regulations with an implementation time of one year. This proposal was issued with a 60 day comment period; the Department expects issuance of final rules in mid-1981, barring unforeseen circumstances. If final regulations are issued at that time, then this would give State agencies until mid-1982 to achieve implementation of the regulations. The Department would appreciate comments on the feasibility of the one year implementation time. If commenters foresee problems in one particular area of the proposal, then they can request a different timeframe for that one section.

Alternatives to This Proposed Rule

As always, the Department is willing to consider comments and alternatives to any of the specific provisions detailed in this proposal. However, there is also a much broader alternative to these amendments. In preliminary discussion of these issues, some State agencies have suggested that the Department should avoid issuing regulations which require a State agency to use a certain method in operating the food delivery system. They have stated that the regulations should express broad goals to be achieved and should allow State agencies to implement methods as they see fit. The Department appreciates the nature of this comment and wishes to avoid over-regulation of the WIC Program.

Nonetheless, the Department feels the need for strengthening regulations in this area, because of the reports of vendor violations and overcharges and other serious problems in the State administration of the food delivery system. The current regulations are already clear in the expressed goals of accountable State administration of the food delivery system, but significant problems have still been found. It is clear that broad regulatory goals are not adequate by themselves.

This leaves the Department with two regulatory options: (1) issuing specific regulations on specific activities in the food delivery system or (2) issuing broad performance standards to be used in evaluating State agency food delivery systems. Presumably, the second option would allow greater State agency flexibility in the manner in which it administers its food delivery system, as long as the State meets the performance standards. The Department has followed the first option in this proposal. However, the proposal still allows ample State flexibility in actual implementation of the provisions. The Department has avoided the second option because it is unaware of any performance standards which are appropriate. In order to be useful in this area, a good performance standard or standards would need to: (1) accurately evaluate the administration of the food delivery system, especially control of vendor abuse, (2) encompass the broad range of activities involved, (3) be readily measurable, and (4) be equally valid for all State agencies and food delivery systems.

The Department is aware of some broad indicators of the food delivery system, such as average food package costs or the number of maximum value vouchers submitted by vendors. However, these indicators are not sufficiently accurate or equitable for use as State agency performance standards. The Department is willing to consider comments in this area.

Lessening of Regulatory Burdens

The final area in which the Department is requesting comments concerns the lessening of regulatory burdens in the WIC Program. The Department recognizes that this proposed rule may cause an increase in workload in some State agencies. The Department believes that there should be a priority given to the proper administration of food delivery systems. In order to achieve this in a workable manner, some other State or local duties may need to be adjusted.

Therefore, comments are requested on other, existing regulatory requirements which could be revised or eliminated in order to ease State or local administrative burdens. In considering this question, commenters should be aware that the mandates of the Program's authorizing legislation, Public Law 95-627, must be followed and that regulations cannot supercede or eliminate the requirements imposed by law.

Analysis of Regulatory Flexibility

This proposed rulemaking has been reviewed with regard to the provisions 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 bulk of this proposal modifies current requirements regarding State agency operation of the WIC food delivery system. Standards for monitoring and training of food retailers, strengthened requirements for review of food instruments, requirements for reconciliation of redeemed food instruments, and provisions for the design of food instruments are included. These requirements devolve on State agencies, and should not have a significant economic impact on retailers. In some States, retailers may be visited more frequently by State reviewers or trainers, but this will not have a

significant economic impact upon retailers.

The proposal does make explicit the authority of State agencies to limit the number of approved retailers in an area, but this is an authority the State agencies have always had. While some State agencies may choose not to reauthorize some retailers, a substantial number of retailers is not likely to be so affected.

The proposal also provides more specific guidance on disqualification of retailers who are defrauding or otherwise abusing the Program, and requires State agency actions to assure that participating retailers are not overcharging the Program. Since most retailers are complying with Program requirements and are not defrauding, overcharging, or otherwise abusing the Program, a substantial number should not be affected.

Changes in the language of the vendor agreements or in the design of food instruments will not have a significant economic impact on retailers; these changes will not increase workload or staffing requirements of retailers.

The provisions regarding home delivery systems will affect some businesses involved in home deliveries of WIC foods, but the effect would not be a significant economic impact. The requirements, that there be regular verification of delivery of foods at least once a month and that payment not precede delivery, are in accord with the normal home delivery practices in many areas. In addition, there are not a substantial number of home delivery routes participating in the Program. Over 90 percent of the Program operates through retailers or direct distribution.

The provisions regarding monitoring and training of retailers may also affect local agencies in those areas where State agencies choose to delegate some of this responsibility to local agencies. A number of local agencies are already performing these functions. The added functions, where delegated to local agencies, should not be so workload intensive as to generate a significant economic impact. Moreover, the smaller the local agency, the fewer the number of retailers it would need to monitor and the smaller the impact on its workload.

(Child Nutrition Amendments of 1978, Public Law 95-627, 92 Stat. 3611 (42 U.S.C. 1786))

References

(1) Audit Report, FNS-Special Supplemental Food Program for Women, Infants and Children, California State Department of Health, Sacramento, California, as of October 18, 1979. Conducted by the Office of the Inspector General, U.S. Department of Agriculture.

(2) Audit Report, Food and Nutrition Service, Special Supplemental Food Program for Women, Infants and Children, Food Instrument Delivery System, Washington, D.C., as of October 1, 1980. Conducted by the Office of the Inspector General, U.S. Department of Agriculture.

(3) *National State Directors Meeting on Program Management: Summary Report*, Food and Nutrition Service, U.S. Department of Agriculture, 1980.

(4) New York City WIC Committee of the Hunger Task Force, *WIC Vendor Monitoring Report: 1980*, Community Center of Greater New York.

Accordingly, it is proposed that Part 246 be amended as follows:

1. Section 246.10 is revised to read as follows:

§ 246.10 Food delivery system.

(a) *General.* This section sets forth design and operational requirements for State and local agency food delivery systems.

(b) *Uniform food delivery systems.* The State agency may operate up to three types of food delivery systems: retail purchase, home delivery or direct distribution. Each system shall be uniform within the jurisdiction of the State agency. When used, food instruments shall be uniform within each type of system.

(c) *Free of charge.* Participtants shall receive the Program's supplemental foods free of charge.

(d) *State agency responsibilities.* Each State agency is responsible for the fiscal management of, and accountability for, food delivery systems under its jurisdiction and shall comply with the following requirements:

(1) The State agency shall design all food delivery systems to be used by local agencies under its jurisdiction. FNS may, for a stated cause and by written notice, require revision of a proposed or operating food delivery system and shall allow a reasonable time for the State agency to effect such a revision. The State agency shall ensure that these food delivery systems are accessible for WIC participants. All contracts entered into by the State or local agency for the managment or operation of the food delivery systems shall be in conformance with the requirements of A-102, Attachment O.

(2) The State agency shall ensure that food vendors are promptly paid for food costs. Payments for valid food instruments shall be made within 60 days after receipt of the food insturments. Actual payment to food vendors may be made by local agencies.

(3) The State agency shall ensure that all food vendors selected to participate in the Program are properly authorized. Only food vendors authorized by the State or local agency may redeem food instruments or otherwise provide supplemental foods to participants. Procedures for authorization shall include at least the following:

(i) The State agency shall use a uniform vendor application form for all food vendors applying for Program participation. The application form shall have all information required for vendor approval. A documented on-site visit shall precede intial authorization of the food vendor. However, such visits are not required for subsequent authorizations.

(ii) In approving food vendors for authorizaiton, the State or local agency shall consider at least the following criteria:

(A) The retail vendor stocks all categories of WIC supplemental foods, except special infant formulas. The State agency may authorize a retail vendor which stocks only special infant formulas.

(B) The food vendor has reasonable prices for supplemental foods, as determined by the State agency;

(C) The food vendor is not owned, in whole or in substantial part, or controlled by a State or local agency official in whose jurisdiction the food vendor is located or a member of any such official's immediate family;

(D) The food vendor has a suitable location and hours of business for participant access, as determined by the State agency;

(E) The food vendor has a current approved State or local health inspection certificate, where such a certificate is appropriate;

(F) The food vendor is not currently disqualified from participation in any other FNS programs; and

(G) The food vendor has satisfactorily complied with prior agreements to participate in the Program.

(iii) The State agency shall ensure that all food vendors participating in the Program enter into written agreements with the State or local agency. Copies of these agreements shall be on file at the State agency. Agreements shall be in effect for a period not to exceed two years. The food vendor agreement shall be signed by a representative of the food vendor who has legal authority to obligate the vendor. When the vendor representative is obligating more than one outlet, then all the outlets shall be specified in the agreement. A standard vendor agreement form shall be used Statewide, though exceptions may be made with the approval of the State

agency. The agreement shall contain the following specifications, although the State agency may determine the precise wording to be used:

(A) In providing supplemental foods to participants, the food vendor shall only provide the approved supplemental foods.

(B) The food vendor shall provide supplemental foods at the current price or at less than the current price charged to other customers.

(C) When food instruments are used, the food vendor shall submit those food instruments for payment within the allowed time period and accept food instruments from a participant only within the allowed time period.

(D) The State agency has the right to demand refunds for charges of more than the actual purchase price for supplemental foods.

(E) The State agency may deny payment to the food vendor for improper food instruments or may demand refunds for payments already made on improper food instruments.

(F) The food vendor shall not seek restitution from participants for food instruments not redeemed by the State agency.

(G) The manager of the store or home delivery service shall accept training in WIC procedures at least once every two years and the State or local agency shall provide such training.

(H) The food vendor shall inform and train cashiers, warehouse staff or delivery route personnel on Program requirements.

(I) The food vendor shall be accountable for actions of employees in the utilization of food instruments or provision of supplemental foods.

(J) The food vendor shall offer WIC participants the same courtesies as offered to other customers.

(K) The food vendor may be monitored for compliance with WIC rules.

(L) During a monitoring visit of a retail vendor, the food vendor shall provide access to food instruments negotiated the day of the review at the request of the reviewer.

(M) For retail vendors, the vendor shall provide access to shelf price records, if available.

(N) Home delivery vendors shall retain records relevant to the provision of supplemental foods and shall allow access to them by State and/or Federal officials.

(O) Under § 246.18 of the regulations, those who have willfully misapplied, stolen or fraudulently obtained WIC funds shall be subject to a fine of not more than $10,000 or imprisonment for not more than five years or both, if the value of the funds is $100 or more. If the value is less than $100, then the penalties are a fine of not more than $1,000 or imprisonment for not more than one year or both.

(P) The food vendor shall comply with the nondiscrimination procedures of Department regulations (7 CFR 15).

(Q) Neither the State agency nor the food vendor have an obligation to renew the vendor agreement.

(R) Either the State agency or the food vendor may terminate the agreement for cause after providing at least 15 BLL/DB days written notice.

(S) The State agency may disqualify a food vendor for reasons of Program abuse. The vendor has the right to appeal a State agency decision pertaining to denial of application to participate or to vendor disqualification.

(T) The food vendor shall notify the State agency when the vendor ceases operations or ownership changes. The agreement is null and void if the ownership changes.

(iv) The format of the agreement shall be limited to either of the following:

(A) A single document signed by both the vendor and a State or local agency official;

(B) A vendor application form which contains the stipulations required of the vendor agreement and is signed by both the vendor and the State or local agency official plus a permit signed by the State or local agency official. The State agency may require the vendor to display the permit in public view.

(4) The State agency shall ensure that food vendors are transmitted pertinent information and are provided guidance concerning the authorized supplemental foods, including a list of acceptable brand name products, and all other applicable FNS guidelines and instructions.

(5) The State agency shall ensure that training is provided by the State or local agency personnel for participating food vendors. When vendor training is delegated to the local agency, the State agency shall provide training for local agency staff on effective vendor training methods. The State agency shall ensure that personal contact is made with the manager of each authorized retail outlet or home delivery service for the purpose of providing training about Program requirements at a minimum of once every two years. The required training contact may be provided during a pre-authorization visit, a monitoring visit, a group training session or a visit conducted solely for training purposes.

(6) The State agency shall be responsible for the monitoring of food vendors within its jurisdiction. If the State agency chooses to delegate all or part of this responsibility to local agencies, then the State agency must provide training to local agency staff in effective methods of vendor monitoring.

(i) The following shall be documented for all on-site vendor monitoring visits, at a minimum: names of both vendor and reviewer; date of review; nature of problem(s) detected or the observation that the vendor appears to be in compliance with Program requirements; how the vendor plans to correct deficiencies detected; and the signature of the reviewer. Methods of on-site monitoring visits may include, but are not limited to: compliance purchases, review of cashier check-out procedures, and review of the availability and prices of WIC supplemental foods.

(ii) The State agency shall have the authority to conduct compliance purchases to collect evidence of vendor practices or shall be able to arrange for this responsibility to be assumed by the proper State or local authorities.

(iii) The State agency shall obtain FNS approval to operator either of the vendor monitoring systems described in paragraphs (d)(6)(iv) or (v) of this section

(iv) In the broad range system, the State agency shall conduct on-site monitoring visits of at least 35 percent of all authorized vendors in its jurisdiction each year. At a minimum, each authorized vendor shall be visited at least once every five years. Food vendors shall be selected for review on the basis of at least the following criteria: participant complaints and high volume of WIC sales.

(v) In the high risk screening system, the following is required:

(A) The State agency shall describe to FNS its systems both for detecting and for monitoring high risk vendors, and shall document to FNS the effectiveness of these systems.

(B) Criteria to distinguish high risk vendors shall include at least the following: a specific level or other distinguishing measure regarding the scope and/or severity of suspected overcharges of redeemed food instruments; a specific level or levels, or other distinguishing measures, regarding the scope and/or severity of errors in food instruments, which shall include at a minimum, redemption outside valid dates, vendor identification missing, and missing purchase prices; and participant complaints which indicate possible serious vendor violations of Program rules.

(C) An on-site monitoring visit shall be conducted of every vendor detected as being at high risk.

(D) The State agency shall conduct on-site monitoring visits to food vendors

not detected by the high risk monitoring criteria at a level equivalent to 10 percent or more of all authorized vendors per year, in order to maintain a routine monitoring presence.

(7) The State agency shall implement a system of management review to limit food vendor and participant abuses of the program. The system shall incude the following:

(i) The State agency shall have procedures which document the handling of complaints reported by participants. As considered appropriate by the State agency, correction of improper practices and/or compensation shall be sought from the vendor.

(ii) The State agency shall have procedures which document the handling of complaints reported by vendors. As considered appropriate by the State agency, the State agency shall attempt to correct the problems.

(iii) The State agency shall establish policies which determine the type and level of sanctions to be applied to food vendors, based upon the severity and nature of the Program violations observed, and such other factors as the State agency determines appropriate, such as whether the violation represented repeated offenses over a period of time, whether the offenses represented vendor policy or whether they represented the actions of an individual employee who did not understand Program rules, and whether prior warning and an opportunity for correction was provided to the vendor.

The period of disqualification from Program participation shall be a reasonable period of time, not to exceed three years. The maximum period of disqualification shall be imposed only for serious, or repeated Program abuse. The State agency shall provide adequate procedures for vendors to appeal a disqualification from participation under the Program as specified in Section 246.24. Prior to disqualifying a food vendor, the State agency shall consider whether the disqualification would create undue hardships for participants. A food vendor's current disqualification from participation in any other FNS program shall be grounds for review of that vendor's operation of the WIC Program. Food vendors may be subject to sanctions in addition to disqualification, such as claims for improper or overcharged food instruments and the penalties outlined in Section 246.18 in the case of deliberate fraud.

(iv) The State agency shall establish procedures designed to control participant abuse of the Program. Participant abuse includes, but is not limited to, knowing and deliberate misrepresentation of circumstances to obtain benefits, sale of supplemental foods or food instruments to, or exchange with, other individuals or entities, and receipt from food vendors of cash or credit toward purchase of unauthorized food or other items of value in lieu of authorized supplemental foods. The State agency shall establish sanctions for participant abuse. Such sanctions may, at the discretion of the State agency, include disqualification from the Program. Warnings may be given prior to the imposition of sanctions. Before a participant is disqualified from the Program for alleged abuse, that participant shall be given full opportunity to appeal a disqualification as set forth in Section 246.23. At the State agency's discretion, participants may be disqualified for a period not to exceed three months. However, the disqualification may be waived if a competent professional authority determines that a serious health risk may result.

(v) The State agency shall refer food vendors and participants who abuse the Program to the Federal, State or local authorities for prosecution under applicable statutes, where appropriate.

(8) The State agency shall ensure that the food delivery system is compatible with the delivery of health and nutrition education services to the participants.

(9) The State agency shall control the receipt and issuance of supplemental foods and food instruments. The State agency shall ensure the secure transportation and storage of unissued food instruments.

(10) The State agency shall identify disposition of all food instruments as either redeemed, unissued, issued but unredeemed, voided in the issuance process, lost, stolen, or expired. Reconciliation of food instruments shall entail reconciliation of each food instrument issued with food instruments redeemed and adjustment of previously reported financial obligations to account for actual redemptions and other changes in the status of food instruments.

(i) Reconciliation of food instruments shall be performed within 150 days of the date of issuance and shall be in accordance with the financial management requirements of § 246.11.

(ii) The state agency shall be able to demonstrate to FNS its capability to reconcile a given redeemed food instrument to valid certification records.

(11) The State agency shall ensure that supplemental foods are not issued for use in institutions, such as homes for unmarried mothers.

(12) The State agency shall ensure that each participant or representative signs a receipt for supplemental foods or food instruments. This requirement shall not pertain to systems which deliver food instruments by alternate means, such as by mailing. All State agencies shall establish uniform procedures which allow proxies designated by participants to act on their behalf. In determining whether an individual participant should be allowed to designate a proxy, there shall be consideration of whether there are adequate measures for the provision of nutrition education and health services to that participant. The reasons for allowing the participant to designate a proxy shall be documented. State agencies shall ensure that participants and their proxies receive instructions on the proper use of food instruments, including vendor responsibilities, or on the procedures for receiving supplemental foods. Participants and their proxies shall also be notified that they have the right to complain about improper vendor practices with regard to Program responsibilities.

(13) The State agency shall ensure that no authorized food vendor is owned, in whole or in substantial part, or controlled by any State or local agency official in whose jurisdiction for food vendor is located, or a member of any such official's immediate family.

(e) *Retail purchase system.* Retail purchase food delivery systems are systems in which participants obtain supplemental foods by submitting a food instrument to local retail outlets. All retail purchase food delivery systems shall meet the following requirements:

(1) The State agency shall use uniform food instruments within its jurisdiction. The State agency is responsible for the design and printing of the uniform food instruments, and their serialization.

(2) To ensure that nutrition education and health services are frequently available to participants, FNS recommends that, wherever feasible, participants personally obtain their food instruments from the local agency. However, the State agency shall develop guidelines for the delivery of food instruments to participants through means other than direct pick-up of food instruments, such as through the mailing of food instruments. Food instruments may be mailed or otherwise delivered to participants on a local agency-wide basis only if approved by the State agency. In making its determination regarding the mailing, or delivery through other means, of food instruments by a local agency, the State agency shall consider participant hardships, such as seasonal inclement

weather, which may be encountered by the target population of local agency if food instruments are not mailed or othewise delivered. The State agency shall approve a local agency's request for the mailing or delivery through other means of food instruments if accountability is ensured and if either a reasonable level of health and nutrition education services can be provided, or if the State agency determines that persons in need of the Program in rural areas will be unable to participate in the Program if food instruments are not mailed, or otherwise delivered, to them. A local agency may mail, or deliver through other means, food instruments in individual cases only if, in each case:

(i) The participant encounters difficulties in personally obtaining food instruments for such reasons as illness, imminent childbirth, inclement weather conditions, distance to travel, high cost of travel, or inability to get to the local agency during business hours;

(ii) The reasons for mailing or otherwise delivering the food instruments are documented by the State of local agency in the participant's certification file; and

(iii) The mailing or delivery through other means of food instruments to the participant is discontinued if the participant's initial hardship is resolved.

(3) Each food instrument shall clearly bear on its face the following information:

(i) The first date from which the food instrument may be used by the participant to obtain supplemetal foods.

(ii) The last date by which the participant may use the food instrument to obtain supplemental foods. This date shall be a minimum of 30 days from the date specified in paragraph (e)(3)(i) of this section or, for the participant's first month of issuance, it may be the end of the month or cycle for which the food instrument is valid.

(iii) An expiration date by which the food vendor is required to submit the food instrument for payment. This date shall be no more than 90 days from the date specified in paragraph (e)(3)(i) of this section. If the date is less than 60 days from the date specified in paragraph (e)(3)(ii) of this section, the State agency shall ensure that the food vendor is able to submit food instruments for redemption within the required time limit without undue burden.

(iv) A unique and sequential serial number.

(v) At the discretion of the State agency, a maximum purchase price which is higher than the price of the food for which it will be used, but low enough to be a reasonable protection against potential losses of funds. When the maximum value is shown, the space for the actual value of the supplemental foods purchased shall be clearly distinguishable. For example, the words "actual amoumt of sale" could be printed larger and in a different area of the food instrument than the maximum value.

(4) The State agency shall establish procedures to assure the propriety of redeemed food instruments:

(i) The State agency shall assure that food vendors are not reimbursed in excess of the actual purchase price of the supplemental foods. The State agency shall review all food instruments submitted by food vendors to identify those that are unreasonably priced. If the State agency pays food vendors after such a review, then payment for food instruments that contain overcharges, or for the amounts that represent overcharges shall be denied, or delayed in accordance with paragraph (e)(4)(iii) of this section. If the State agency pays food vendors prior to such a review, then claims shall be made against the vendor for excess amounts, when they are determined.

(ii) The State agency shall review all food instruments submitted by food vendors for errors. At a minimum, all food instruments submitted by food vendors shall be reviewed for the following errors: the vendor identification is missing; the actual purchase price of the supplemental foods is missing; and the food instrument was submitted by the participant or vendor outside the specified valid dates. If the State agency pays food vendors after such a review, then payment for food instruments containing any of these three errors shall be denied at that time. If the State agency pays food vendors prior to such a review, then claims shall be made against the vendor for the value of the food instruments with any of these three errors present unless the vendor corrects the error.

(iii) When payment for a food instrument is denied or delayed, or a claim for reimbursement is assessed, then the affected food vendor shall have an opportunity to correct or justify the overcharge or error. For example, if vendor identification was missing, the vendor may place his or her identification on the vouchers. If the actual price is missing, the vendor may demonstrate what price should have been included. If the State agency is satisfied with the correction or justification, then it shall provide payment, or adjust the payment or claim to the vendor accordingly.

(5) With justification and documentation, State agencies may reimburse food vendors for food instruments submitted after the expiration date if the total value of the food instruments submitted at one time is $200.00 or less. If the total value of the food instruments submitted at one time exceeds $200.00, reimbursement may not be made without the approval of the FNS Regional Office.

(6) The State agency shall ensure that no more than a three month supply of food instruments is issued to any participant at one time and that nutrition education and health services are frequently made available to the participant, and that nutrition education services are made available in accordance with § 246.9(e).

(7) The State agency shall enter into written agreements with as many food vendors as is necessary to assure convenience to participants in obtaining supplemental foods. At a minimum, the State agency shall enter into written agreements with at least four food vendors in each clinic service area, unless the State agency determines that it is impossible to enter into written agreements with four food vendors in the clinic service area for reasons such as lack of retail outlets which meet Program requirements or refusal of vendors to participate. The State agency may establish criteria which limit the number of vendors authorized to participate.

(f) *Home food delivery systems.* Home food delivery systems are systems in which food is delivered to the participant's home. Systems for home delivery of food shall provide for:

(1) Uniform food instruments, where applicable, which comply with the appropriate requirements set forth in paragraph (e) of this section ;

(2) Procurement of supplemental foods in accordance with § 246.17, which may entail measures such as the purchase of food in bulk lots by the State agency and the use of discounts that are available to States. The selection of home delivery vendors that are given exclusive contracts to an area shall conform to requirements of A–90, A–102, A–110 or FMC 74–4; and

(3) The accountable delivery of supplemental foods to participants. The State agency shall ensure that:

(i) Home delivery vendors are paid only after the delivery of supplemental foods to the participants.

(ii) There exists a routine procedure to verify the actual delivery of supplemental foods to participants. At a minimum, such verification must occur at least once a month.

(iii) Each authorized home delivery vendor retains records of the delivery of supplemental foods to participants, and of bills sent and payment received for provision of these supplemental foods, and allows access to these records by State and/or Federal authorities.

(iv) The proper amount of supplemental foods are delivered, in accordance with Section 246.8 and in accordance with the convenience of the participants.

(g) *Direct distribution systems.* Direct distribution food delivery systems are systems in which participants pick up food from storage facilities operated by the State or local agency. Systems for direct distribution of food shall provide for:

(1) Uniform food instruments, where applicable, which comply with the appropriate requirements set forth under paragraph (e) of this section;

(2) Adequate storage and insurance coverage that minimizes the danger of loss due to theft, infestation, fire, spoilage, or other causes;

(3) Adequate inventory control of food received, in stock, and issued;

(4) Procurement of supplemental foods in accordance with § 246.17, which may entail measures such as purchase of food in bulk lots by the State agency and the use of discounts that are available to States;

(5) The availability of Program benefits to participants and potential participants who live at great distances from storage facilities; and

(6) The accountable delivery of supplemental foods to participants.

2. Section 246.12 is amended by revising paragraphs (b)(5), (c)(1), and adding (d) to read as follows:

§ 246.12 Program costs.

* * * * *

(b) * * *

(5) The cost of administering the food delivery system, including the cost of transporting food and the cost of food instrument used solely for monitoring or investigation.

* * * * *

(c) * * *

(1) Computerized information systems which are required by a State or local agency, except for those used in general management and payroll, including purchase of automatic data processing equipment or systems whether by outright purchase, rental-purchase agreement or other method of acquisition. Approval shall be granted by FNS if the proposed system meets the requirements of this part, A–90, A–102, and FMC 74–4. When a State agency decides to seek computerization, except for use in general management or payroll, FNS shall be informed, in order to allow adequate opportunity for provision of technical assistance.

* * * * *

(d) *Recovery of vendor overcharges.* Funds collected by the recovery of claims assessed against food vendors for overcharges on food instruments or supplemental foods may be retained by the State agency. The State agency may use up to 50 percent of these funds for administrative purposes and the remainder shall be used to pay food costs.

3. Section 246.14 is amended by adding paragraph (f) to read as follows:

§ 246.14 Distribution of funds.

* * * * *

(f) *Recovery of vendor overcharges.* Funds which are gained by the State agency through the recovery of claims assessed against food vendors for overcharges, in accordance with Section 246.12(d), shall be held harmless by FNS in the event of reallocation of funds.

4. In § 246.18, paragraph (a) is amended by adding two new sentences at the end to read as follows:

§ 246.18 Claims and penalties.

(a) * * * FNS is authorized to establish claims against a State agency for unreconciled food instruments. When a State agency can demonstrate that 99 percent or more of the food instruments issued have been accounted for by the reconciliation process, then FNS may determine that the reconciliation process has been completed to satisfaction.

* * * * *

§ 246.23 [Amended]

5. Section 246.23 is amended by removing the word "suspension" and inserting, in its place, the word "disqualification" in paragraphs (a) and (c).

(Catalog of Federal Domestic Assistance Program No. 10.557, National Archives Reference Service.)

Signed in Washington, D.C. on January 16, 1981.

Carol Tucker Foreman,

Assistant Secretary for Food and Consumer Services.

[FR Doc. 81–2324 Filed 1–23–81; 8:45 am]

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Friday
January 23, 1981

Part XIX

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Prime Farmlands: Interim and Permanent Regulatory Programs

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 716 and 785

Prime Farmlands: Interim and Permanent Regulatory Programs

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rules.

SUMMARY: The Department is revising the grandfather exemption to the prime farmland provisions of Section 510(d) of the Surface Mining Control and Reclamation Act in the interim regulatory program, 30 CFR 716.7(a)(2), and the permanent regulatory program, 30 CFR 785.17(a). The final rules exempt all pre-August 3, 1977, permits and all revisions or renewals of those permits from the special prime farmland performance standards established by Section 510(d)(1) of the Act. They also allow continuations of pre-existing mining operations where the lands to be grandfathered are an extension of a mining pit or pits permitted and in existence on August 3, 1977. All such prime farmland exemptions will terminate on August 3, 1982.

EFFECTIVE DATE: February 23, 1981.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

Background

Section 510(d)(1) of the Surface Mining Control and Reclamation Act of 1977 (the Act) gives special protection to the nation's prime farmlands in two main ways. First, an operator who desires to mine these lands must show that he has the technological capability to restore the lands to their premining productivity. Second, if a satisfactory showing is made, the Act then mandates the operator to take special environmental protection measures during operations, including soil handling measures not required of other mining operations. Section 515(b)(7).

The Congress chose, however, not to apply this standard immediately to all surface coal mining operations and provided in Section 510(d)(2) of the Act:

> Nothing in this subsection shall apply to any permit issued prior to the date of enactment of this Act, or to any revisions or renewals thereof, or to any existing surface mining operations for which a permit was issued prior to the date of enactment of this Act.

This provision exempts or "grandfathers" the listed operations from the restoration showing requirement and from the performance standards designed for prime farmlands.

To carry out Section 510(d)(2), the Department adopted separate regulations for the interim and permanent regulatory programs. As originally adopted for the interim program on December 13, 1977 (42 FR 62693–94, codified at 30 CFR 716.7(a)(2)), the regulations provided:

> The requirements of this section are applicable to any permit issued on or after August 3, 1977. Permits issued before that date and revisions and renewals of those permits need not conform to the provisions of this section regarding actions to be taken before a permit is issued. Permit renewals or revisions shall include only those areas that—
>
> [i] Were in the original permit area or in a mining plan approved prior to August 3, 1977; or
>
> [ii] Are contiguous and under State regulation or practice would have normally been considered as a renewal or revision of a previously approved plan.

The intent of this regulation was "to allow permit renewals or revisions to include expansions of existing operations" under limited conditions, thereby assuring a reasonable transition period for the industry. 42 FR 62661, December 13, 1977.

By contrast, the permanent program regulation, 30 CFR 785.17(a), adopted on March 13, 1979 (44 FR 15373), provided an exemption only for those "areas where mining is authorized under permits issued or mining plans approved prior to August 3, 1977 * * *." The permanent rule exemption was designed to implement congressional intent "to prevent indefinite expansion of mining in prime farmland areas if operators cannot achieve compliance with the prime farmland performance standards." 44 FR 15084, March 13, 1979.

Both the interim and permanent regulations were challenged by the coal industry. The interim regulations were generally sustained in the District Court as a reasonable exercise of the Secretary's discretion in implementing the Act (*In Re: Surface Mining Regulation Litigation*, 452 F. Supp. 327, 340 (D.D.C. 1978)), but were overturned in the Court of Appeals (*In Re: Surface Mining Regulation Litigation*, No. 78–2190, 78–2191, 78–2192, Slip op. at 26 (D.C. Cir., May 2, 1980) as amended by order dated June 30, 1980. Prior to the decision of the Court of Appeals, the Department voluntarily suspended the permanent program regulation. 44 FR 77454–55, December 31, 1979.

In the litigation, as well as in the interim and permanent program rulemakings, the primary issue has been whether the Act allows an exemption for areas of ongoing mines that were not covered by state permits prior to August 3, 1977, and, if so, how extensive an area could be exempt. The legislative history of the Act shows that this issue was of major congressional concern. During presentation of the final Conference Committee Report, H.R. Rep. No. 95–493, 95th Cong., 1st Session (July 12, 1977) to both Houses of Congress, contradictory statements of intent were made on the floor of both Houses. On one side were several members of Congress who believed that the grandfather exemption would be limited to those lands already included in state permits. On the other side were those who understood that the grandfather exemption protected not only permitted operations, but also allowed continuation for an extended period of those operations outside permit areas. For example, Congressman Tsongas, with the approval of Congressman Udall, stated that the exemption was not intended to give grandfathered operations "the right of contiguous or noncontiguous expansions that were not specified or authorized in the originally approved and grandfathered permits." 123 Cong. Rec. H7583–89 (Daily ed., July 21, 1977). On the other hand Senator Metcalf noted agreement with Senator McClure's statement that "the exclusion will apply to continued operation of an ongoing mine beyond the acreage and time covered in the existing permit * * * just so long as the continuance does, in fact, constitute a continued operation of an ongoing mine." 123 Cong. Rec. S12442 (Daily ed., July 20, 1977).

While the legislative history contains conflicting views, the Court of Appeals has ruled on the issue of whether any lands unpermitted as of August 3, 1977, may be grandfathered. In responding to a petition for rehearing of its May 2, 1980, panel decision in the interim program litigation, the Court made it clear that the Secretary must extend the grandfather exemption beyond the actual, pre-1977 permit area:

> The issue essentially is whether, under the Section 502(d) exclusion from the Act's more rigorous reclamation requirements of "any existing surface mining operations for which a permit was issued prior to August 3, 1977," there can be *any* ongoing operations on land that, although contiguous, was not covered by

the permit. We believe that, if the quoted statutory provision is to have any meaning at all, there can be; and that the legislative history of the last-minute addition to the Act of the words quoted above, disclosed a Congressional purpose that there can be. The Secretary's interim regulation to the contrary was thus in conflict with the statute. (footnote omitted). *In re: Surface Mining Regulation Litigation*, No. 78-2190, 78-2191, 78-2192, Slip op. (D.C. Cir., June 30, 1980).

In reaching this conclusion the Court deleted language previously used in its May 2, 1980, decision which implied that the exemption was nearly limitless. The Secretary thus interprets the June 30, 1980, decision to authorize him to place a reasonable limit on the extent of grandfathering in order to carry out the "purposes and provisions" of the Act. See Section 201(c)(2) of the Act.

Proposed Rules

After the District Court's ruling, but prior to the Court of Appeals' May 2, 1980, decision, the Secretary proposed identical interim and permanent program grandfather regulations interpreting Section 510(d)(2). 45 FR 25992-25995, April 16, 1980. The rules took a new approach and did not directly follow either of the prior rules. The Secretary proposed to allow grandfathering in three specific instances. First, the proposed regulations grandfathered lands included in permits prior to August 3, 1977. This proposal corresponds to the first of the three statutory clauses in Section 510(d)(2). Second, the proposed regulations grandfathered permitted lands if the permits were "renewed" or "revised" within the meaning of the Act. In other words, the grandfather exemption would be available if the term of the permit were lengthened (a renewal) or if the method of mining within the permit were changed (a revision). Neither of these exemptions would allow new lands (other than incidental boundary changes) to be grandfathered. This approach corresponds to the second statutory clause in Section 510(d)(2). Third, to cover the third clause of Section 510(d)(2), the proposed regulations added a new basis for grandfathering contiguous mining areas, and placed a 1982 limitation on the period of time for which this exemption would be valid.

The comment period on the proposed rule was extended once and later reopened to allow the public to comment on how the Court of Appeals' decision of June 30, 1980, affected the proposal. 45 FR 39448, June 10, 1980; 45 FR 56384, August 25, 1980. The Secretary has now considered all of the comments and the recent court decisions and has decided to adopt the rules as proposed, with only minor changes, for both the interim and permanent programs.

Final Rulemaking

The final rules exempt all lands included in pre-August 3, 1977, permits and all revisions or renewals of those permits. 30 CFR 716.7(a)(2)(i) and (ii) and 785.17(a)(1) and (2). The final rules also allow continuations of pre-existing surface coal mining operations where the lands to be exempted are: (1) an extension of a continuous mining pit or pits; (2) part of a single permitted operation; and (3) part of a continuous recoverable coal seam. Moreover, the permittee must demonstrate that he or she had a pre-August 3, 1977, legal right to mine the exempted lands. 30 CFR 716.7(a)(2)(iii) and 785.17(a)(3).

The proposed regulations substantially anticipated the modified decision of the Court of Appeals. In accordance with that decision's interpretation of the Act, the final regulations allow some grandfathering outside of the original pre-August 3, 1977, permit area and establish a grandfathering cut-off date of August 3, 1982. The regulations respond to the congressional concern that the grandfather clause give some flexibility to existing operations. See, e.g., 123 Cong Rec. S8104 (Daily ed., May 20, 1977).

The regulations also respond to congressional concern that mining operations in different states be accorded equal grandfathering treatment. 123 Cong. Rec. S8802 (Daily ed., May 26, 1977). This concern is reflected in Section 101(g) of the Act in which Congress has noted that uniform mining and reclamation standards are essential to avoid distortions of competition among coal producers in different states. The Secretary believes that a fixed cut-off date for grandfathering is necessary to respond fully to these congressional concerns.

The regulations are also based on the prevailing congressional concern, the protection of the nation's prime farmlands. See for example, Sections 102(f), 510(d)(1), and 515(b)(7) of the Act and 123 Cong. Rec. S8104 (Daily ed., May 20, 1977). To satisfy this concern and these statutory requirements, the Secretary believes that he has a duty to ensure that full environmental protection is made applicable to all prime farmlands within a reasonable time. A cut-off date ensures that mining operations cannot continue for a period far beyond the time needed to provide a fair and reasonable transition period.

In establishing a fixed cut-off date while extending the grandfather exemption beyond the immediate permit area in special cases, the Secretary is mindful of Illinois' experience with grandfathering and has considered the practical implications of these changes. Illinois has been the state where application of these changes has raised the most controversy. In applying a fixed cut-off date and extended grandfathering, Illinois has grandfathered 12 thousand acres which were not included in pre-August 3, 1977, permits. Illinois limited the scope of these decisions by having all exemptions expire in 1982. See discussion of *In re: Southwestern Illinois Coal Corporation (The Captoin Mine*, Docket No. RA 78-1) at 45 FR 25994, April 16, 1980. Conversely, Illinois' decisions were expansive in that mining sites were deemed contiguous even if two sites were physically unconnected except by long stretches of haul-roads. See discussion of *Midland Coal Company v. Andrus*, No. 79-1172 (D. Ill. Dec. 21, 1979), vacated May 28, 1980, at 45 FR 25994, April 16, 1980. The state's policy with respect to contiguity was based on its view that some reasonable extension of grandfathering beyond the permit area was needed. The Secretary has reviewed Illinois' exemption decisions and finds that virtually all come within the new rule; two exceptions have been identified but both involve mines that are now inactive and consequently will not be affected by this rulemaking.

The final regulations allow a five-year period for pre-existing, permitted prime farmland operations to remain exempt from the Act's special prime farmlands permitting and performance standard requirements. This five-year period gives the mining companies adequate time for transition and allows them opportunity to meet the new permitting and performance standards and to conduct any new tests they might need. This five year period is identical to the basic five year permit term established by Section 506(b) of the Act. (The Secretary, however, does not view the proviso in Section 506(b) as an appropriate vehicle for extending the August 3, 1982, date). The Secretary believes that the statutory permit term creates an inference of the reasonableness of this provision. Finally, and perhaps most importantly, the five-year term is identical to that chosen by Illinois after that state carefully considered the condition of the mining industry there. Companies in Illinois (and, to a lesser degree, elsewhere) have relied upon this limit. While this reliance does not prevent the Secretary from adopting a different

standard, it has been a major factor in seeking a workable resolution of this difficult problem.

The Secretary considered several alternatives in addition to the August 3, 1982, time limit: no time limitation, a later limit such as 1987, and an earlier limit. Each of the alternatives is less successful than the final regulation in carrying out the multiple congressional concerns noted above and frustrates one or more of the purposes to be achieved. A shorter limit would tend to restrict the ability of mining companies to make a smooth transition and does not share the statutory basis of the five year term. Longer or unrestricted time limits err in the other direction. They would provide too much time, thereby unnecessarily sacrificing the productivity of prime farmlands, and would undermine the progress that Illinois has made in reaching a reasonable solution to the problem. For these reasons, the Secretary has decided not to change the 1982 cut-off date as set forth in the proposed rule.

With respect to physical contiguity, there is further need to define those operations that qualify for the exemption. For example, an operation partially or fully permitted before August 3, 1977, which mines continously along a seam, clearly qualifies under the regulation. The more difficult question involves partially or fully permitted operations where mining areas are physically separated. The regulation promulgated today will not allow breaks except those caused by roads or similar facilities which *bisect* but do not *connect* two parcels.

Upon further consideration, however, the Secretary has concluded that a single continuous surface coal mining operation for purposes of grandfathering could include non-contiguous parcels. Accordingly, the proposed rule has been amended by changing Sections 716.7(a)(2)(iii)(A) and (C) and 785.17(a)(3)(i) and (iii) to include the concept of "continuous surface coal mining operation" and by adding §§ 716.7(a)(2)(v) and 785.17(a)(5) to explain that phrase. The additions and amendments allow non-contiguous parcels to be grandfathered if the operator can present clear and convincing evidence that, prior to August 3, 1977, the non-contiguous parcels were part of a single continuous surface coal mining operation. A single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit unless the permittee can meet the "clear and convincing" proof requirement.

The Secretary cannot anticipate nor has a rule been established for the type or amount of evidence an operator must produce to meet this burden of proof. This is an evidentiary matter to be determined by the regulatory authority. Examples of such evidence might include signed contracts, mining plans, permit applications or other legal documents specifically treating physically separate parcels as a single mining unit. On the other hand, if an operator lacked a legal interest in all of the property, there would be a strong presumption against a finding of a single unit. Convenience of the operator or generalized plans without specific proof of a legal interest would be inadequate to meet the "clear and convincing proof" test. This limited expansion of the grandfather exemption is also adopted with the express understanding that its expansion is closely and integrally tied to the August 3, 1982, time limit. Without the time limit, the expanded exemption would clearly present an unacceptable risk that operations could be indefinitely exempted.

Finally, there is a minor change in § 716.7(a)(2). "After August 3, 1977," has been changed to "on or after August 3, 1977," in order to comport with the statutory language at Section 510(d)(2). For additional clarity, "and" has been added after the semi-colon at §§ 716.7(a)(2)(iii)(A) and 785.17(a)(3)(i); "or" has been added after the semi-colon at §§ 716.7(a)(2)(i) and 785.17(a)(1). "Surface mining operation" has been changed to "surface *coal* mining operation" whenever necessary to comport with the Act, the regulations, and congressional intent (see discussion under the analysis of public comments).

Related Rulemaking

On June 11, 1979, the Department proposed six revisions to 30 CFR 716.7 of the interim regulations in order to implement the District Court's decision generally sustaining those regulations. See, *In Re: Surface Mining Regulation Litigation*, 452 F. Supp. 327, 340 (D.D.C. 1978), and 44 FR 33628, June 11, 1979. Briefly described, these proposed changes were as follows: (1) defining *historically used for cropland* as 5 out of 10 years; (2) measuring the historical use period from the date of acquisition of the land for mining purposes; (3) providing for the regulatory authority to have flexibility to classify as prime farmland those lands important to the State or local economy; (4) providing for the regulatory authority to have flexibility to classify as prime farmland those lands taken out of cropland use for more than 5 years in 10 due to ownership circumstances which do not relate to the capability of the land to produce crops; (5) substitution of the term "cropland" for "cultivated crops"; and (6) implementing the grandfather exemption of the Act (Section 510(d)(2)).

Final regulations on these six changes will soon be published by the Department in the **Federal Register** (citation and date of publication presently unavailable; hereinafter referred to as the "historical use" rulemaking). The first five changes described above and in the final "historical use" rulemaking notice are not affected by the instant rulemaking. The sixth proposed change, the revision of the interim program grandfather exemption (42 FR 62661, December 13, 1977, codified at 30 CFR 716.7(a)(2)), is affected by the instant rulemaking. Following is a discussion of the evolution and current status of the grandfather exemption regulation.

On June 11, 1979, the Department proposed to revise 30 CFR 716.7(a)(2) to clarify that Section 510(d)(2) of the Act exempted surface coal mining operations operating under permits issued prior to August 3, 1977, or renewals or revisions thereof, *from both the prime farmland permit application requirements and special performance standards of the Act.* 44 FR 33628, June 11, 1979. This revision was accomplished by proposing the deletion of the words "regarding actions to be taken before a permit is issued" from 30 CFR 716.7(a)(2) as originally promulgated on December 13, 1977 (44 FR 62694). Subparagraphs (i) and (ii) of 30 CFR 716.7(a)(2), as published on December 13, 1977, were not affected by the June 11, 1979, proposal. This proposed deletion was mandated by the District Court's decision in *In Re: Surface Mining Regulation Litigation*, 452 F. Supp. at 340 (D.D.C. 1978).

As noted in the recent "historical use" rulemaking, the Department received no comments on this proposed change. Comments on other exemption issues such as contiguity, revisions, renewals, and other matters were, however, received. These have been transferred to this rulemaking for review, consideration and response, and are analyzed below. In summary, the Department has recently published in its "historical use" rulemaking as final rules the six changes proposed on June 11, 1979. As part of the recent "historical use" notice of final rulemaking, the clause "regarding actions to be taken before a permit is issued" has been deleted from 30 CFR 716.7(a)(2).

In the instant rulemaking, the Department is affecting all subsections of 30 CFR 716.7(a)(2). Accordingly, the version of 30 CFR 716.7(a)(2) recently published as part of the "historical use"

rulemaking is now entirely replaced by the final regulations published today.

For the convenience of the public, the following table shows the current status of all subsections of 30 CFR 716.7:

Subsection of regulation (§ 716.7)	Where to find the final regulation
(a)(1)	The "historical use" rulemaking.
(a)(2)	The instant rulemaking (published today).
(b)(1)	The "historical use" rulemaking.
(b)(2)	The "historical use" rulemaking.
(b)(3)	The "historical use" rulemaking.
(c)	42 FR 62694, Dec. 13, 1977, codified at 30 CFR 716.7(c).
(d)(1) remainder of (d), (e), (f), (g).	The "historical use" rulemaking 42 FR 62694-95, Dec. 13, 1977, codified at 30 CFR 716.7(d) *et seq.*

State Programs

State programs must have provisions which are consistent with the final permanent rule, §785.17(a), in accordance with 30 CFR Part 732. However, at this time, resubmission is pending for numerous other state programs because of injunctions issued against the states. The Secretary is also developing other new permanent program legislative rules at this time. Accordingly, the Secretary has determined that state programs need not contain provisions consistent with today's new permanent program rule at this time. After review and final decision on state programs submitted before March 4, 1980, the states will be given the opportunity to amend their programs as appropriate to make them consistent with the new permanent rule.

In the meantime, state programs must have provisions consistent with the Surface Mining Control and Reclamation Act of 1977 and those Federal regulations issued on March 13, 1979, and which have not been suspended. States may, if they wish, adopt provisions implementing federal regulations adopted after March 13, 1979.

Nonetheless, the interim program rule, § 716.7(a)(2), will be effective in those states with *and* without approved permanent state programs 30 days from publication in the **Federal Register**.

All states, regardless of primacy status, are therefore expected to apply the interim program rule commencing 30 days from publication to each operation until that operation receives it permanent program permit. The Secretary believes that efficient implementation of these revised rules would lead states with approved programs to encourage all permit applicants to comply with the new rules in their permanent program applications, even if the state program is not yet revised to reflect the new rules.

Public Hearings

Public hearings on the proposed grandfather regulations were held on April 30, 1980, in Washington, D.C. and on May 15, 1980, in Springfield, Illinois. Sessions were scheduled to begin in the morning and to continue until all those intending to speak had opportunity to do so. Members of the public took advantage of these public hearings by submitting their comments, both verbally and written, to representatives from OSM. These comments were then made part of the public record and were carefully considered in preparation of the final rules.

Public Meetings

Representatives of OSM were available to meet members of the public at their request between April 16 and May 30, 1980, between June 10 and June 25, 1980, and between August 25, and September 4, 1980, to receive their advice and recommendations concerning the content of the proposed regulations. Notice of OSM's availability was published in the proposed rules at 45 FR 25993, April 16, 1980, the extension notice at 45 FR 39448, June 10, 1980, and the reopening notice at 45 FR 56364, August 25, 1980.

Analysis of Comments

In its April 16, 1980, **Federal Register** notice, 45 FR 25992–25995, the Department proposed identical interim and permanent program prime farmland grandfather regulations interpreting Section 510(d) of the Act. Briefly described, the Secretary proposed to allow grandfathering on prime farmlands permitted prior to August 3, 1977, for renewals or revisions of pre-August 3, 1977, permits, and for certain extensions of pre-existing mining operations where the grandfathered lands are an extension of a mining pit. All exemptions were proposed to terminate on August 3, 1982. The proposed rule was opened to public comment, meetings and hearings as noted above.

As a result of a thorough review and consideration of the submitted comments, the Department has promulgated final rules. These are uniform for the interim and permanent program. They depart from the proposed rules only by the addition of a limited modification which allows non-contiguous parcels, which are found by the regulatory authority to be part of a single continuous surface coal mining operation permitted prior to August 3, 1977, to be exempted until August 3, 1982, from the special prime farmlands permitting requirements and performance standards.

In response to the proposed rule on the grandfather exemption, the Department received 30 sets of written comments in addition to the oral testimony taken at the public hearings of April 30 and May 15, 1980. Written comments were received essentially from four sources: governmental authorities, concerned citizens (primarily farmers), private environmental organizations, and coal mining companies and organizations composed of such companies.

This section discusses the comments presented by the public and the decisions made by the Department in response to those comments. The Department considered significant comments to be those urging the adoption of viable alternatives or questioning the provisions in the proposed regulation, and those which provided reasonable rationale, justification, technical references, or other materials supporting the recommendations or comments. Insignificant comments, that is, those of a more general nature or which correct minor errors, are included in the administrative record for this rulemaking but are not discussed here.

General Comments

While the bulk of the comments discussed specific aspects of the proposed rulemaking, some comments were directed toward the rules in general. One group of comments concerned the impacts of *In re: Surface Mining Regulation Litigation*, No. 78–2190 *et al.* (D.C. Cir., May 2, 1980), as modified (D.C. Cir., June 30, 1980), which postdated the publication of the proposed rules. Some commenters suggested that the proposed regulations be withdrawn and new regulations proposed to ensure compliance with the findings in those decisions. The Secretary is of the opinion that the final rules comply with the Court of Appeals' modified decision. Because there are no major changes from the proposed rules, it is unnecessary for the rules to be withdrawn and reproposed. The changes that have been made in the proposed rules have resulted largely from the Department's accepting certain comments.

Commenters have disagreed about the Court decision's effect on the interim and permanent program regulations relating to the grandfather clause. One commenter contended that the decision touched only interim program regulations and thus the permanent program regulation could be

independently formulated and contain separate provisions. Another contended that both the interim and permanent program regulations were governed by the Court decision. The Secretary agrees with the latter viewpoint. The Court of Appeals based its decision on the language in Section 510(d)(2) of the Act. That section does not differentiate between the interim and permanent program with respect to the grandfather clause. Moreover, as noted in the April 16, 1980, proposed rulemaking at 45 FR 25993, the decision to adopt similar rules "is an attempt to respond to the difficulty the Department has encountered in attempting to enforce the current grandfather clause and in problems State have had in applying the regulation." Hence, the Secretary has decided to promulgate identical provisions for the grandfather clause exemption in the interim and permanent programs.

A second group of comments suggested alternative mechanisms for the implementation of the grandfather clause exemptions. One commenter recommended returning to the approach in the permanent regulations adopted March 13, 1979 (44 FR 15373) and suspended December 31, 1979 (44 FR 77454–55). The Secretary concluded, however, that further rulemaking was necessary as a result of issues raised in the permanent program litigation. See 44 FR 77454, December 31, 1979.

Some commenters favored a case-specific determination on the applicability of the exemption to individual mining operations based on suggested criteria (*e.g.*, mining plans, maps, and documents relating to the mining operation which were prepared before August 3, 1977; information concerning the company's legal and financial commitments relating to the operation; governmental documents and approvals relating to the operation). The flaw in this approach is that it would undermine the uniform treatment of mining operations in different states as required by the Act. The criteria suggested by the commenters of necessity depend upon information developed in conjunction with pre-Act state permit requirements. The application of these suggested criteria would thus result in exemptions based on the vagaries of pre-Act state permit procedures. See testimony of John Conlon (National Coal Association/American Mining Congress), May 15, 1980, pp. 53–54. Congress clearly intended "* * * that such existing mines should continue in operation independent of the tortuitous nature of states' permit machinery." *In re: Surface Mining Regulation Litigation, supra.* (May 2, 1980) at 31, ftnt. 18. Moreover, Congress explicitly stated in the Act that national standards were necessary to insure that competition among coal producers in different states would not undermine the ability of the individual states to control coal operations within the states. Section 101(g). Congress recognized the importance of uniformity in the regulatory standards. Thus the commenters' approach is at odds with congressional intent. In any event, operators have some opportunity to demonstrate the particular circumstances of each case for purposes of proving the existence of "a single continuous surface coal mining operation" under these regulations.

Pre-existing Permits

Section 716.7(a)(2)(i) of the interim rules, and § 785.17(a)(1) of the permanent rules provide an exemption for mines that are operating under a permit issued prior to August 3, 1977. To a large extent, commenters accepted or supported the wording of these sections. However, two critical comments were received. One commenter wanted the regulations to specify that only *surface mining* permits (meaning a permit to mine coal) issued prior to August 3, 1977, would exempt a mining operation from the prime farmlands provisions of the Act. The Secretary believes that the language of the regulations as proposed is sufficient to provide this interpretation.

Another commenter suggested that the mine operator, when applying for a permit under the permanent program, be required to have commenced mining in addition to possessing a permit issued prior to August 3, 1977. The Secretary did not adopt this suggestion. The language of the Act specifically extends the prime farmlands exemption to mining operations possessing a permit issued prior to August 3, 1977. Imposing the suggested limitation would exclude permitted mining operations in violation of congressional intent. H.R. Rep. No. 95–493, 95th Cong., 1st Sess. 105 (1977).

Renewals and Revisions of Pre-existing Permits

Pursuant to the Act, the regulations (in §§ 716.7(a)(2)(ii) and 785.17(a)(2)) extend the exemption to include renewals or revisions of a permit issued prior to August 3, 1977. Most commenters accepted the wording of these sections in the proposed form. One commenter asserted that a "renewal" or "revision" of the permit cannot allow the expansion of the mining operation beyond the permit boundaries. The Secretary believes the commenter has misunderstood the effect of the rule. The intent of the grandfather exemption is not to issue renewals or revisions of permits. Instead the rule exempts permit "revisions or renewals" from the special prime farmlands permitting and performance standards requirements, as mandated by Section 510(d)(2) of the Act. The Department's use of the term "revisions" in §§ 716.7(a)(2)(ii) and 785.17(a)(2), which include "incidental boundary changes to the original permit," is based on Section 511(a)(3) of the Act.

Existing Surface Coal Mining Operations

The proposed interim regulations at § 716.7(a)(2)(iii) and the permanent rule counterpart at § 785.17(a)(3) provide an exemption for existing surface coal mining operations. In addition, the proposed regulations list three requirements for an existing surface coal mining operation: the land is part of a single continuous mining pit permitted prior to August 3, 1977; the operator must have possessed the legal right to mine the land prior to August 3, 1977; and the land must contain a continuous recoverable coal seam.

Comments critical of the proposed regulations were numerous. One commenter asserted that the Secretary's interpretation of the language in the Act underlying these provisions is mistaken. That commenter claimed that the scope of the mining operation was limited by the scope of the permit issued to the operation. Thus, the exemption could not apply to property beyond the original permit boundaries. This interpretation of the Act is at variance with the Appeals Court's holding that Section 510(d)(2)'s provision for "any existing surface mining operations for which a permit was issued prior to August 3, 1977" includes ongoing operations on land that was not a part of the original permit. *In Re: Surface Mining Regulation Litigation, supra.* (June 30, 1980). The Department has based the final regulations in part on the Court's holding.

A commenter urged that the regulations be altered to specify that all three conditions listed in 30 CFR 716.7(a)(2)(iii) and 785.17(a)(3) must be met by the mining operation to receive the prime farmlands exemption. The final rule includes "and" after 716.7(a)(2)(iii)(A) and 785.17(a)(3)(i) to insure that this interpretation is understood.

Numerous commenters expressed concern that the use of "surface mining operations" in the regulations was intended to exclude the surface impacts of underground mines from the exemption. The term employed in the

proposed regulations is the same term used by Congress in Section 510(d)(2) of the Act. However, elsewhere in the Act and particularly in the definitions (Section 701), Congress employed the term "surface *coal* mining operations." There is no indication from the language of the Act or the legislative history of Section 510 that Congress intended these two terms to differ. The Secretary is of the opinion that the language in Section 510(d)(2) was a mere oversight by Congress. As a result, the Secretary has used the term "surface coal mining operation" in the final regulation to insure that surface effects of underground mines are included in the exemption.

Commenters criticized the use of the term "single continuous mining pit" because it excluded mining operations involving multiple pits. They assert that Congress did not intend multiple pit mining operations to be treated differently than single pit operations. The Secretary concurs with this comment and has altered the regulations accordingly. See 30 CFR 716.7(a)(2)(v) and 785.17(a)(5) and the discussion above related thereto.

Commenters also criticized the requirement that permittees must have had a "legal right to mine the lands prior to August 3, 1977." They argued that because the limitation was not explicitly included in the Act, the Department was not justified in imposing it in the regulations. It is clear, however, that Congress intended and the Court of Appeals recognized the prime farmlands exemption is limited in scope. The Secretary has concluded that a "right to mine" as indicated by ownership, contract, or lease is both indicative of the geographical scope of the mining operation at the time the permit was issued and effective in fairly limiting the scope of the exemption. This limitation certainly will not exclude any ongoing mining operations intended to be included in this exemption because ongoing operations could be expected to possess a right to mine. Some commenters have criticized the exclusion of options to purchase, contract or lease. They assert that the acquisition of such an option is indicative of an intent to include the property within the ongoing mining operation. The Secretary does not accept this assumption. By the very nature of an option, an operator is in no way bound or committed to including the property within the operation. At most, an option can be said to indicate that the operator is considering including the land in the operation. Thus, the Secretary believes that an option does not demonstrate that the land is within an ongoing mining operation.

Definitions of "Continuous Mining Pit" and "Continuous Surface Coal Mining Operation"

Sections 716.7(a)(2)(iv) and 785.17(a)(4) of the proposed regulations defined the term "continuous mining pit" for the purpose of these regulations. To clarify the intent of the final regulations at §§ 716.7(a)(2)(iii) and 785.17(a)(3), the definition of the term "continuous surface coal mining operations" was added in §§ 716.7(a)(2)(v) and 785.17(a)(5). The inclusion of this term in the final regulations is the result both of a number of comments concerning the potential exclusion of surface effects of underground mines from the exemption and the Court of Appeals' decision including non-contiguous parcels within the exemption for existing operations.

A number of commenters suggested that a pit (or by implication, a mining operation) could not be considered "continuous" where it was divided physically by anything—be it road or bare land. Drawing an analogy to farmlands, these commenters noted that farmland bisected by a road, pipeline, railroad, powerline or bare land would not be considered a continuous land tract. It would be operated and taxed independently. So, they argued, a mining pit should be similarly divided.

The Secretary recognizes that such a situation may exist with regards to farmlands the analogy is not applicable here. Under the Court of Appeals' decision, the Department is compelled to conclude that such a division would not alter the "continuous" nature of the pits or mining operations.

Exemption Termination Date

The Department specifically requested comments on the August 3, 1982, exemption cut-off date proposed in §§ 716.7(a)(2)(v) and 785.17(a)(5), renumbered as §§ 716.7(a)(2)(vi) and 785.17(a)(6), in the final regulations. 45 FR 25992–25995, April 16, 1980. Most of the commenters did not suggest alternate dates, but rather stated that the cut-off date was arbitrary, unsupported by the Act and should be deleted. While two alternative dates were suggested, both suffer the same flaw and neither complies with the congressional intent as effectively as the proposed 1982 date. One commenter suggested that the exemption terminate 8 months after the date on which the Secretary approves a state regulatory program. This date is derived from 30 CFR 771.11 (general requirements for permits).

Other commenters suggested that the termination date be determined in a case-specific manner, depending on the individual mining operation and the permit programs of the individual states. Both alternatives would vary the termination date from state to state. The latter suggestion could even result in different dates for each operation. This variation would undermine the previously discussed congressional desire for uniformity in regulations to ensure that competitive advantages to individual operations in different States are not granted based on administrative technicalities.

The Secretary believes that the proposed cut-off date is not arbitrary and is supported by the Act. As discussed above, Congress intended, and the Appeals Court recognized, that the prime farmland exemption would not be limitless. The need for geographical limitations was explained in the preamble to the proposed regulations. 45 FR 25994, April 16, 1980. The cut-off date insures an orderly transition period between pre-Act and post-Act standards, prevents mining from continuing indefinitely through expansions to contiguous and non-contiguous areas, reduces the potentially wide variations in the application of the law in the different states, and provides certainty to the public and the industry with regards to the scope of the prime farmland exemption. The five-year period chosen corresponds to that of a permit under the Surface Mining Act (Section 506(b)) and is reasonable in fulfilling the purposes stated above.

Drafting Information

The principal authors of these rules and the accompanying preamble are: Ralph E. Ewalt, Agronomist, Technical Services and Research, OSM, Indianapolis, Indiana (317/269–2666) and Arlo Dalrymple, Agronomist, Technical Services and Research, OSM, Washington, D.C. (703/756–6964).

Statements of Significance and Environmental Impact

The Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14. The final rule for the interim program is exempt from Section 102(2)(c) of the National Environmental Policy Act under Section 501(a) of the Surface Mining Act. The Department of the Interior has determined that the significant impacts of the final permanent program rules on the quality of the human environment have

previously been identified in the final environmental statement on the permanent program (OSM–EIS–1) available January 29, 1979. Accordingly, no new environmental impact statement has been prepared for this rulemaking. The documents supporting the determinations of significance and of environmental impact are available for inspection in Room 135 of the Interior South Building, 1951 Constitution Avenue N.W., Washington, D.C. 20240.

Dated: January 19, 1981.

Joan M. Davenport,

Assistant Secretary, Energy and Minerals.

Final Regulations

The following regulations in Chapter VII of Title 30 of the Code of Federal Regulations are amended as follows:

A. 30 CFR 716.7(a)(2) is revised to read:

§ 716.7 Prime farmland.

(a) * * *

(2) Except as otherwise provided in this paragraph, the requirements of this section are applicable to any lands covered by a permit application filed on or after August 3, 1977. This section does not apply to:

(i) Any permit issued prior to August 3, 1977; or

(ii) Any renewal or revision of a permit issued prior to August 3, 1977. For the purposes of this subparagraph, "renewal" of a permit shall mean a decision by the regulatory authority to extend the time by which the permittee may complete mining within the boundaries of the original permit, and "revision" of the permit shall mean a decision by the regulatory authority to allow changes in the method of mining operations within the original permit area, or the decision of the regulatory authority to allow incidental boundary changes to the original permit; or

(iii) Lands included in any existing surface coal mining operation for which a permit was issued for all or any part thereof prior to August 3, 1977, provided that:

(A) Such lands are part of a single continuous surface coal mining operation begun under a permit issued before August 3, 1977; and

(B) The permittee had a legal right to mine the lands prior to August 3, 1977, through ownership, contract, or lease but not including an option to buy, lease, or contract; and

(C) The lands contained part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

(iv) For the purposes of this paragraph a pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad, or powerline or similar crossing.

(v) For the purpose of this paragraph, a single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit begun under a permit issued prior to August 3, 1977, but may include non-contiguous parcels if the operator can prove by clear and convincing evidence that, prior to August 3, 1977, the non-contiguous parcels were part of a single permitted operation. For the purposes of this subparagraph, clear and convicing evidence includes, but is not limited to, contracts, leases, deeds or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one surface coal mining operation.

(vi) The exceptions granted by subparagraphs (i)–(v) of this paragraph apply only to lands mined to the coal face and related benches prior to August 3, 1982.

* * * * *

B. 30 CFR 785.17(a) is revised to read:

§ 785.17 Prime farmland.

(a) This section applies to any person who conducts or intends to conduct surface coal mining and reclamation operations on prime farmlands historically used for cropland except:

(1) Any permit issued prior to August 3, 1977; or

(2) Any renewal or revision of a permit issued prior to August 3, 1977. For purposes of this subparagraph, "renewal" of a permit shall mean a decision by the regulatory authority to extend the time by which the permittee may complete mining within the boundaries of the original permit, and "revision" of the permit shall mean a decision by the regulatory authority to allow incidental boundary changes to the original permit; or

(3) Lands included in any existing surface mining operation, for which a permit was issued for all or any part thereof prior to August 3, 1977, provided that:

(i) Such lands are part of a single continuous surface coal mining operation begun under a permit issued before August 3, 1977; and

(ii) The permittee had a legal right to mine the lands prior to August 3, 1977, through ownership, contract, or lease but not including an option to buy, lease or contract; and

(iii) The lands contained part of a continuous recoverable coal seam that was being mined in a single continuous mining pit (or multiple pits if the lands are proven to be a part of a single continuous surface coal mining operation) begun under a permit issued prior to August 3, 1977.

(4) For the purposes of this paragraph a pit shall be deemed to be a single continuous mining pit even if portions of the pit are crossed by a road, pipeline, railroad or powerline or similar crossing.

(5) For the purposes of this paragraph, a single continuous surface coal mining operation is presumed to consist only of a single continuous mining pit begun under a permit issued prior to August 3, 1977, but may include non-contiguous parcels if the operator can prove by clear and convincing evidence that, prior to August 3, 1977, the non-contiguous parcels were part of a single permitted operation. For the purposes of this paragraph, clear and convincing evidence includes, but is not limited to, contracts, leases, deeds or other properly executed legal documents (not including options) that specifically treat physically separate parcels as one surface coal mining operation.

(6) The exceptions granted by paragraphs (a)(1)–(5) of this section apply only to lands mined to the coal face and related benches prior to August 3, 1982.

* * * * *

[FR Doc. 81-2589 Filed 1-22-81; 8:45 am]

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Friday
January 23, 1981

Part XX

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Permanent and Interim Regulatory Program Modifications

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 700

Permanent and Interim Regulatory Program Modifications; Extraction of Coal

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Final rule.

SUMMARY: This rule change implements Section 528(2) of the Surface Mining Control and Reclamation Act of 1977 (Act) which provides an exemption from the Act's requirements for the extraction of coal where a surface mining operation affects two acres or less.

EFFECTIVE DATE: Februrary 23, 1981.

ADDRESSES: Director, Office of Surface Mining, U.S. Department of the Interior, South Building, 1951 Constitution Avenue NW., Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Carl Pavetto, Office of Surface Mining, Division of Inspection, (202) 343-5365.

SUPPLEMENTARY INFORMATION:

Background:

Section 528(2) of the Act exempts from regulation surface coal mining operations which affect two acres or less. 30 U.S.C. 1278(2). The intent of Congress in providing for this exemption was to avoid imposing the Act's requirements on the occasional "pick and shovel" operator. 119 Cong. Rec. 1357 (1973). Throughout the legislative history of the Act, Congress expressed its belief that the exemption "would cause very little environmental damage and that the regulation of [such operators] would place a heavy burden on both the miner and the regulatory authority." *See e.g.* S. Rep. 95-128, 95th Cong. 1st. Sess. 98 (1977); S. Rep. 94-28, 94th Cong. 1st Sess. 223 (1975). Clearly, Congress did not intend that the two acre exemption be used as a vehicle for circumventing the Act in a manner that would cause serious environmental harm.

The Surface Mining Act is a remedial statute which includes among its purposes for the protection of "society and the environment from the adverse effects of surface coal mining operations." Sec. 102(a). 30 U.S.C. 1202(a). The courts require that exemptions from the terms of remedial statutes, such as the Surface Mining Act, be narrowly construed. *De Luz Ranchos Inc.* v. *Coldwell Banker & Co.*, 608 F. 2d 1297, 1302 (9th Cir. 1979); *Wirtz* v. *Ti Ti Peat Humus Company*, 373 F. 2d 209, 212, (4th Cir. 1967). To interpret such exemptions otherwise would "utterly frustrate the legislative purpose." *Southern Ry. Company* v. *Occupational Safety and Health Review Comm'n*, 539 F. 2d 335, (4th Cir. 1976); *Southern Pacific Transportation* v. *Usery*, 539 F. 2d 386 (5th Cir. 1976). Accordingly, the provision exempting surface mining operations of two acres or less from the requirements of the Act must be narrowly construed to insure that society and the environment are protected from the adverse effects of surface mining.

Section 700.11(b) of the permanent program regulations as originally adopted attempted to avoid abuse of the exemption by excluding from its scope operations "conducted by a person who affects or intends to affect more than two acres at physically related sites, or any such operation conducted by a person who affects or intends to affect more than two acres at physically unrelated sites within one year." 44 FR 15312 (1979). In the litigation over the permanent regulatory program, the Commonwealth of Virginia challenged these regulations as overbroad. *In re: Permanent Surface Mining Regulation Litigation*, Civ. No. 80-1308 (D.D.C. 1980). In response to this legal challenge, OSM agreed to change the language of Section 700.11(b) to reflect more closely congressional intent. On February 6, 1980, OSM proposed new rules on the two acre exemption. 45 FR 8241 (1980). A hearing was held on the purposed rules in Washington, D.C. on February 25, 1980. The public comment period extended from February 6, 1980 to March 7, 1980.

As a result of comments received at the hearing and in writing during the comment period OSM conducted an investigation to ascertain the extent to which the two acre exemption was being abused. That investigation has revealed widespread abuse of the two acre exemption. For example, in one documented case a single operator was found to be conducting surface mining operations on four separate sites within a one-mile radius. Although the aggregate area of the four sites exceeded four acres, the operator claimed the two acre exemption for each operation. As a result of inadequate reclamation measures, erosion and acid drainage has occurred. Another instance of abuse was observed and documented where one operator is conducting mining operations on two sites within a three-mile radius. Again the two acre exemption has been claimed although the total disturbed area exceeds three acres. OSM also has observed operators opening mining operations of less than two acres then skipping 50 or 100 feet to open new operations of less than two acres, claiming the exemption in each instance.

The abuses cited are not isolated incidents. In the Administrative Record are documented hundreds of sites where a two acre exemption is claimed. While OSM does not seek to regulate bona fide pick and shovel operations it is clear that many alleged two acre operations do not properly qualify for the exemption. The number of abuses appears to be increasing as more operators learn of the exemption and new methods are devised for mining on multiple sites and claiming the exemption. Methods uncovered thus far include the use of shell corporations where an exemption is claimed by many ostensibly small operators that are in fact closely connected to larger corporations. One such scheme uncovered by OSM employed 30 individual operators, each subject to the control of the parent corporation and each claiming the exemption. Case studies of these and other examples of abuse have been collected and placed in a file labeled "two acre exemption case studies" in the administrative record for this rule.

In this amended rule, OSM adopts three methods for halting abuse of the two acre exemption: (1) Defining the term "affect"; (2) excluding related sites that exceed two acres in aggregate; and (3) excluding processing and support facilities from the exemption.

The definition of "affect" is taken from WEBSTER'S NEW INTERNATIONAL DICTIONARY, (1961), which defines that term as follows: "To act upon; to produce a material influence upon or alteration in * * *." Accordingly, under this revised rule, any impact from a surface mining operation that materially influences or alters any land or water resource is deemed to "affect" that resource for purposes of the exemption. This construction is consistent with the intent of Congress that the two acre exemption apply only where very little environmental harm would result. S. Rep. 94-128, 95th Cong., 1st Sess. 988 (1977).

The rule also provides, as part of the definition of "affect," that roads and streams affected by a mining operation shall be included in the two acre calculation. This interpretation flows directly from the language of Section 528(2) of the Act. In particular, OSM intends that roads affected by mining operations be included in the two acre calculation regardless of their ownership. The inclusion of all affected

roads will ensure that the exemption is not circumvented by statutes that authorize counties to accept into county road systems private roads used for industrial purposes and neither maintained by the county nor used by the general public. Finally, the definition of "affects" states that the area affected shall include the land or water above underground mine workings. This language reaffirms the current policy as reflected by the definition of "affected area" at 30 CFR 701.5 and makes clear that OSM intends that the definition of "affects" in no way changes the definition of "affected area" in the existing regulations.

Second the revised rule adopts both mandatory and discretionary criteria for determining whether two or more sites are related. For purposes of calculating the affected area, the acreage of related sites is added.

The two mandatory criteria which require a finding of relatedness are: (1) Sites on which operations are conducted by the same operator, principal or permittee within a one year period; and (2) sites which are located in the same State. Where both of these criteria are met, the sites shall be deemed related and their acreage added unless the operator can demonstrate affirmatively that the operations are not related. These mandatory criteria are necessary because OSM has found numerous mine sites that allegedly fall within the two acre exemption, but are owned by the same company within the same general area and appear to have been scattered deliberately so that each site remains just less than two acres. Many of these mines are connected by haul roads and use the same processing facilities. OSM does not believe that these are the "pick and shovel" operations Congress intended to exempt from the Act's requirements. Accordingly, OSM has determined that operations under the control of the same operator, principal or permittee and located in close physical proximity to one another must be treated as a single operation for the purposes of Section 528(2) of the Act.

In attempting to establish an appropriate distance between sites presumed to be "related," OSM considered radii of various lengths, but decided that the State boundary would be the most logical limit because it would be easiest to administer and enforce. Such a limit is also consistent with the concept of State primacy embodied in Section 101(f) of the Act, 30 U.S.C. 1201(f).

In addition to the two mandatory criteria for determining that sites are related, the rules contain three discretionary criteria. Two or more sites may be deemed related if: (1) Two or more operations are conducted with substantially the same personnel, equipment, haul roads, or loading or processing facilities; or (2) the coal extraction operations are conducted or controlled by the same person or persons in such a manner or under a scheme which suggests that the operations involved are related; or (3) the coal removed from the various sites is owned by the same person or persons. Whenever any of these criteria are met, the state regulatory authority, in states with approved state programs, or OSM, in the initial regulatory program, in states in which a federal program has been implemented, and in the federal lands program, may exercise its discretion and find these sites related. This provision guards against abuse of the exemption by ensuring, for example, that a contract operator, who owns and processes all of the coal being mined by subsidiary operators, protected by shell corporations, cannot avoid the requirements of the Act by claiming the two acre exemption for himself and each subsidiary operator. OSM does not believe that Congress intended to allow miners operating under such a scheme to be exempt under Section 528(2) of the Act. *See* 119 Cong. Rec. 1357 (1973).

The determination as to the relatedness of sites will be made either by OSM, during the initial regulatory program, in states where a federal program has been implemented, and in the federal lands program, or by the state regulatory authority in states with approved permanent regulatory programs. This determination will be made by the appropriate agency, either on its own initiative or at the request of any person, and must be made within a reasonable time of receipt of such a request. The determination must be made in writing and include the right of administrative appeal. Where OSM makes the determination this right of appeal will be provided in accordance with the regulations at 43 CFR 4.1280. OSM expects that a comparable appeal right shall be provided by states with approved programs.

Third and finally, the revised regulation specifically provides that the two acre exemption does not apply to coal processing and preparation facilities. By its terms, the exemption applies only to "*the extraction of coal* for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. 1278(a) [emphasis added]. Rather than extend the exemption to all "surface coal mining operations" as that term is defined in Section 701(28) of the Act (30 U.S.C. 1291(28)), Congress limited the scope of Section 528(2) activities involving the "extraction of coal."

As a final point, OSM notes that all operators of surface coal mining operations subject to the Act are required to pay to the Secretary of the Interior a reclamation fee as set forth in 30 CFR Part 837. If an operator is found to have violated the two acre exemption regulation and therefore is subject to the Act, OSM will assess a reclamation fee plus interest for all coal mined by the operator at the relevant site after the effective date of the Act.

Response To Public Comments

1. In the preamble to the proposed rules, (45 FR 8241 (1980)) OSM suggested four criteria for determining the relatedness of mine sites. Among these criteria was whether coal extraction operations occur along the same coal seam or seams. Several commenters complained that this factor is irrelevant because one coal seam may extend for hundreds of miles. OSM agrees with this criticism and accordingly has eliminated this criterion from the final rule.

The original proposed rules also considered whether coal extraction operations "are in such physical proximity as to suggest an intent by the operator to avoid the requirements of the Act." Commenters objected to this criterion as overly vague and OSM has decided to substitute a statewide geographic standard to address this objection.

2. One commenter asserted that inquiry into whether operations are conducted with substantially the same equipment, personnel, haul roads, or loading and processing facilities is inappropriate inasmuch as many small operators, for reasons of efficiency, share common support facilities and management. OSM has rejected this view. The "pick and shovel" standard announced by Congress for determining eligibility for the exemption is a narrow one; as noted above in the discussion of the legislative history of the Act, only a small percentage of surface mining operations properly fall within its scope. Moreover, under this revised rule the common use of such resources as equipment, roads and personnel does not necessitate a determination that the sites are related. OSM expects that the regulatory authority will look at all facets of the operations implicated by the discretionary criteria in deciding whether two or more sites are related.

3. One commenter suggested that determinations as to the relatedness of different sites should be carried out on a case by case basis and that advance criteria are unnecessary. OSM has

rejected this suggestion on the ground that uniform application of the exemption is essential. The Act requires that "competition in interstate commerce among sellers of coal produced in different States" be insured. 30 U.S.C. Section 1201(g). Unless the criteria for the exemption are applied uniformly among the States, persons conducting operations in States that construe the exemption broadly would gain a competitive advantage over operators in States that adopt a more restricted interpretation.

4. Several commenters argued that the regulations are inconsistent insofar as they exclude preparation facilities from the exemption while at the same time including haul roads in the two acre calculation. OSM's believes that the statutory language for the exemption applies only to the extraction of coal and the necessary concomitants of such extraction, including haul roads. Accordingly, the exemption is inapplicable to coal processing or other such activities subject to regulation under the Act, the purpose or need for which is unrelated to coal extraction.

Other Information

Pursuant to 43 CFR Part 14, the Department of the Interior has determined that the proposed rules are not significant and do not require a regulatory analysis. The "Determination of Significance" document prepared by OSM is available for inspection at the address indicated above.

OSM has prepared an environmental assessment on these proposed amendments. The assessment resulted in a finding that the proposed rules will not have a significant impact on the quality of the human environment so as to require the preparation of an environmental impact statement. The environmental assessment is available for inspection at the address indicated above.

The principal authors of these proposed rules are Carl Pavetto, OSM, and Mark Squillace, Office of the Solicitor.

Dated: January 15, 1981.

Joan M. Davenport,

Assistant Secretary, Energy and Minerals.

Section 700.11(b) is revised as follows:

§ 700.11 Applicability.

* * * * *

(b) The extraction of coal for commercial purposes where the surface coal mining and reclamation operation incident to the coal extraction affects two acres or less, but not any operation conducted by a person who affects or intends to affect more than two acres at related sites. All land and bodies of water affected by coal extraction, including roads and streams shall be included in the two acre calculation; *Provided, however,* That:

(1) For purposes of this paragraph, "affect" means, to act upon, to produce a material influence upon or alteration in; *Provided, however,* That the area affected shall include land or water which is located above underground mine workings;

(2) This exemption from the requirements of the Act is not available for coal loading, processing, or preparation facilities;

(3) Two or more sites shall be deemed related if the operations on those sites are conducted by the same operator, principal, or permittee during any one year period and the sites are located in the same State unless the operator affirmatively demonstrates that the sites are not related;

(4) The regulatory authority may exercise its discretion to find that any two or more sites are related if—

(A) The operations on those sites are conducted with substantially the same equipment, personnel, haul roads, loading or processing facilities; or

(B) The operations are conducted or controlled by the same person or persons in a manner which suggests that the sites involved are related; or

(C) The coal removed at such operations is owned by the same person or persons.

(5) The regulatory authority may on its own initiative, and shall, within a reasonable time after receipt of a request from any person, make a written determination that two or more sites are not related for purposes of this subsection. The regulatory authority shall make a reasonable effort to notify interested persons by mail at least ten (10) days prior to making such a determination. Prior to the time that the determination is made, any person may submit and the regulatory authority shall consider written information supporting or refuting the relatedness of sites under both the mandatory and discretionary criteria established by this subsection. Any determination made under this subsection shall state, with reasonable specificity, the information and criteria on which it is based. A copy of the determination shall be sent to all persons who submitted information to the regulatory authority or otherwise expressed an interest in the decision. Any person who is or may be adversely affected by the determination shall have the right of administrative appeal.

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federal register

Friday
January 23, 1981

Part XXI

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

Amendment of State Program Process

DEPARTMENT OF THE INTERIOR
Office of Surface Mining Reclamation and Enforcement
30 CFR Part 732

State Program Amendment Process

AGENCY: Office of Surface Mining Reclamation Enforcement (OSM), U.S. Department of the Interior.

ACTION: Final Rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement is amending the procedures of § 732.17 concerning amendment of State programs, to shorten and simplify in certain situations the State program amendment process.

DATE: This rule is effective January 23, 1981.

ADDRESSES: Written comments submitted on the proposed rule may be reviewed in Room 153, Office of Surface Mining, U.S. Department of the Interior, South Building, 1951 Constitution Avenue, NW., Washington, D.C. 20240, Monday through Friday, 8:30 a.m. to 5:00 p.m.

FOR FURTHER INFORMATION CONTACT: Carl C. Close, Assistant Director for State and Federal Programs, Office of Surface Mining, U.S. Department of the Interior, Washington, D.C. 20240, (202) 343–4225.

SUPPLEMENTARY INFORMATION:

I. Background

On March 13, 1979, the Secretary of the Interior promulgated the final rules for the permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* (SMCRA). The rules include the requirements of Section 503(a) of the Act that for a state to assume primary jurisdiction under the Act for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders it must submit its proposed permanent program to OSM for approval.

Sections 732.12, 732.13 and 732.15 of the permanent program regulations prescribe the procedures, time schedules and criteria for approval and disapproval of a proposed state program. Section 732.17 requires that amendments to the approved state program follow the same procedures as those required by §§ 732.12, 732.13 and 732.15.

On September 24, 1979, Ed Herschler personally and as Governor on behalf of the State of Wyoming petitioned OSM to modify Section 732.17 to streamline the process of amendment of approved State programs following changes in Federal requirements based on court decisions or amendments of the Act. The petition proposed that (1) the Regional Director be authorized to approve any proposed state program amendment containing analogous changes and the decision by the Regional Director be the final decision by the Department of the Interior; (2) the decision be made after notice of the proposed amendment is published in the **Federal Register** and the public has an opportunity to comment; and (3) the Regional Director publish his decision within 60 days from the day the proposed amendment is received and the amendment to the state program be effective the day it is approved.

On December 20, 1979, the Director, OSM granted the petition submitted by Governor Herschler. In granting the petition, the Director agreed in principle with the need to clarify 30 CFR 732.17, but indicated that he had not made a determination on how this objective could best be accomplished or what time limits should be set on actions to amend State programs.

On July 14, 1980, the Secretary published a proposed rule (45 FR 47162–47165) to amend 30 CFR 732.17 to clarify and streamline the amendment process for approved State programs.

The proposed regulation provided for:

(1) Publication of notice of receipt of an amendment by OSM within ten days;

(2) Public comment period of 30 days for the majority of all amendment requests and a minimum 15 day public comment period under certain specified conditions as required by 43 CFR Part 14;

(3) Holding public hearings on proposed amendments as necessary;

(4) Decision on amendment requests within 30 days after the close of the public comment period;

(5) A resubmission period of 30 days following the disapproval of an amendment request; and

(6) Final decision on resubmitted amendment requests within 30 days.

Under this process amendments that contain changes analogous to the Federal Act and/or regulations could be processed in two months or less. For complex amendments where public hearings are determined to be desirable the process could be expanded to the full six month maximum time. Six months was established as the maximum period for action on state program amendments to conform with Section 503(b) of SMCRA which provides that the Secretary approve or disapprove a state program within six calendar months after submission. OSM found that the proposed rule met the requirements of 43 CFR Part 14 concerning requirements for public participation.

In addition to providing a revised scheduling of the amendment review and approval process, the proposed regulation incorporated either in whole or by reference requirements of 30 CFR 732.12, 732.13 and 732.15 that are directly applicable to the amendment review process. Included in this category are provisions concerning hearing format and procedures, review by the Regional Director, review and concurrence by appropriate Federal agencies, effective dates of amendments, and criteria for amendment approval.

On August 14, 1980, a public hearing was held in Washington, D.C. to consider oral public comments on the proposed rule. The public comment period closed on August 15, 1980.

II. Public Comments on the Proposed Rule

Comments on the proposed rule were received from eight individuals and groups during the public comment period and at the public hearing on the proposed rule. Six commenters supported the overall purpose of the proposed rule. One commenter opposed adoption of the proposed rule and one commentor expressed concern about those aspects of the proposed rule that limit public review and comment on state program amendments or revised state program amendments. Specific comments and proposals for modification of the proposed rule presented by the commentors are discussed below:

1. The Appalachian Research and Defense Fund of Kentucky, Inc. (ARDFK) opposed the proposed rule because it believes it represents a process which is contrary to congressional intent that there be a uniform surface mine regulatory program in the United States. ARDFK believes the proposed rules allow a particular state to apply pressure at a local or regional level for approval of regulations or a regulatory scheme which is less stringent or in other ways not uniform with the regulatory schemes being approved or disapproved in other states. It stated that the present method for review of state programs and amendments is essential if there is going to be a uniform and fair permanent program regulatory system.

The Secretary does not agree with the commentor's contentions. The proposed rule does not in any way modify or change the criteria for approval of state regulatory programs. Amendments to state programs processed under the procedures set forth in 30 CFR 732.17 will be evaluated against the criteria established in Section 503 of SMCRA and 30 CFR 732.15 that relate to the

amendment proposed by the state. This regulation modification does not provide any changes in the standards against which state programs or amendments to state programs will be evaluated. The revised regulation only provides flexibility in the procedures for review of state program amendments. Amendment requests will vary in both scope and complexity and may range from minor wording changes in state regulations to complete revisions of all or parts of complete systems that form an approved state program. For this reason the Secretary believes that the amendment process must be flexible and provide an amendment review procedure that can be tailored to the specific amendment being considered.

2. The Environmental Policy Institute (EPI) recommended that proposed language of § 732.17(h)(2)(ii) concerning notice of the cost of copies be deleted and replaced with language comparable to the last sentence of 30 CFR 732.12(a)(1) which provides that single copies of proposed state program materials be furnished, free of charge, by the Regional Director upon request.

The Secretary agrees with the commentor's suggestion and has modified the language of § 732.17(h)(2)(ii) to provide copies of proposed state program amendments to requestors where the full text of the amendment is not included in the Federal Register.

3. EPI recommended that proposed § 732.17(h)(4) should be made fully consistent with the final amendments of 30 CFR 732.12 issued on May 20, 1980 (45 FR 33925). This section provides that public hearings shall be held no sooner than five days before the close of the public comment period and that the comment period shall end on a date following any public hearing scheduled to be held.

The Secretary agrees with the commentor's suggestion and has modified 30 CFR 732.17(h)(4) to include the revised provision.

4. EPI suggested that there should be more detailed guidelines under which the Regional Director could waive a public hearing under proposed § 732.17(h)(4). It noted that this is particularly important when the Regional Director waives a hearing on the basis of the state's hearings or meetings. In this case there is no language compelling the state to furnish the record on such hearings to the Regional Director for consideration in his or her recommendation to the Director.

The Secretary agrees that in those instances where the Regional Director determines that a public hearing will not be held on the ground that public hearings and meetings have already been held by the state, that the state regulatory authority should be obliged to provide the Regional Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments. 30 CFR 732.17(h)(4) has been modified to incorporate the suggested change.

5. EPI suggested that when a state program amendment is disapproved by the Director and there must be revisions to it prior to resubmittal under proposed § 732.17(h)(7), and that any revisions should be subject to public comment. Specifically, EPI recommends that there should be a public notice of the receipt of a revised amendment and a minimum public comment period of fifteen days from the date of the public notice. EPI states that the notice and public comment period could all occur within twenty days of the receipt of the submission, leaving OSM a full ten days to evaluate and act on the resubmission.

The Secretary agrees that a public comment period should be provided and has modified the language of § 732.17(h)(8) to provide it.

6. EPI also raised a question as to how OSM can realistically solicit and publicly disclose the views of Federal agencies within the limits of the review schedule outlined in proposed 30 CFR 732.17(h). The Secretary believes that Federal agency comments can be solicited and disclosed within the time frames outlined in 30 CFR 732.17(h). Amendment requests will normally focus on limited changes to an approved state program and therefore will not require that long review periods be available to Federal agencies. When amendment requests are complex the procedures of 30 CFR 732.17(h) provide longer review periods.

7. Three commentors indicated that the authority for approval of amendment requests in 30 CFR 732.17(h)(5) and (6) should be delegated to the Regional Director. Commentors were concerned that review and decision-making at the Director's level could make it impracticable to remain committed to the time schedule detailed in the proposed rule.

As indicated in the discussion of public comments on the petition (45 FR 47163), OSM has chosen not to seek a change in the delegation of authority for approval/disapproval actions on amendment requests. The Secretary does not believe that this issue will materially impact the review process and time schedule set forth in the rule.

8. One commentor suggested that 30 CFR 732.17(h)(3) should reflect that the 15 day public comment period *will* be provided where "an amendment concerns changes in State law, regulations or the procedures contained in the approved program that are analogous to changes in SMCRA and/or implementing regulations * * *." The commentor stated that it is unclear what purpose is served by granting discretion to vary from this period once the decision has been made that the change is in fact analogous. The commentor also suggested that a converse change be made to § 732.17(h)(4) by substituting "may" for "will."

It is the intent of OSM to provide a 15 day public comment period when state program amendments concern changes in State law, regulations or the procedures contained in an approved program that are analogous to changes in SMCRA or implementing regulations. However, general rulemaking procedures set forth by the Department of the Interior in 43 CFR 14 provide for a minimum public comment period 30 days (43 CFR 14.5(b)(3)(iv)). A shorter period may be used only in special cases requiring more timely action. The proposed rule was drafted to make allowance for those cases when providing a 30 day comment could be accommodated without impacting the operation of the surface coal mining regulatory program by the State regulatory authority. The Secretary has, therefore, made no change in the wording of the final rule. The clarifying wording change to 30 CFR 732.17(h)(4) suggested by the commentor has been adopted by the Secretary.

9. One commentor recommended that in determining if a public hearing should be held, another factor for consideration would be whether the amendment is analogous to changes in SMCRA and/or implementing regulations. The Secretary agrees that this factor would be a consideration in determining whether a public hearing should be held and believes that factors identified in the proposed rule would cover such amendment. The purpose of provisions for discretionary public hearings was to eliminate unnecessary hearings while still preserving any potential need for oral public comment.

10. One commentor indicated that 30 CFR 732.17(h)(9) should be modified to reflect that where the proposed state program amendment is in response to and consistent with court or legislative changes to the Act or regulations, consistency with the changed law is the appropriate criteria for approval or disapproval.

The Secretary believes that the language of the proposed regulation adequately reflects such criteria in that

court or legislative changes to SMCRA or implementing regulations would be incorporated in the sections of SMCRA and 30 CFR referenced in 30 CFR 732.15.

11. One commentor recommended that 30 CFR 732.17(h)(11) be modified to state that the decision approving or disapproving program amendments will be published in the **Federal Register** within 10 days after the Director's decision has been made.

The Secretary has accepted the recommendation of the commentor and has made appropriate modifications to 30 CFR 732.17(h)(11).

12. Two commentors recommended that more consideration be given to the timeframe proposed in Governor Herschler's September 19, 1979, petition and indicated that it should take OSM only 60 days for approving changes made at the state level to reflect Federal changes. One suggested that OSM approvals could be expedited by using the notice required by § 732.17(h)(1) as a means both to alert the public to the receipt of an amendment and to provide the determination by the Regional Director as to whether the amendment proposes a complex or significant change. The commentor also suggested that when it is determined that the amendment is not a complex or significant change, both the Regional Director and Director should be able to review simultaneously and concurrently approve the proposed amendment.

The regulation would allow amendment processing in 65 days premised on a **Federal Register** announcement within 10 days, a 15-day public comment period, a 30-day period for discussion by the Regional Director and Director and publication of the decision in the **Federal Register** within 10 days. A public comment period of 30 days would increase the total time to 80 days. A few days may be cut from either of the cited examples if time is saved during the Regional Director's and Director's review of **Federal Register** publications occur earlier.

However, because of normal lag time required by the **Federal Register** and time required for analysis of public comments, it is unlikely that realistic schedules of shorter duration could be developed.

The commentor also suggested that the notice of receipt be used to provide the determination of the Regional Director whether the amendment proposes a complex or significant change. The proposed rule requires that the notice announcing receipt of the state program amendment set forth the schedule for review and action on the amendment request. This action requires that a determination on both the length of comment period and a determination on hearing plans (30 CFR 732.17(h)(3) and (4)). The final point made by the commentor concerned simultaneous review by the Regional Director and Director. The proposed rule does not preclude simultaneous review and to the extent possible such a review will occur. However, until the public comment period has closed and comments have been analyzed by the Regional Director, review by the Director cannot be completed.

The Secretary, while noting the commentors suggestions, has made no change in the review schedule outlined in the proposed rule.

13. Two commentors expressed concerns about the provision in proposed 30 CFR 723.17(h)(3) which allows a shorter public comment period for changes in state law, regulations or procedures contained in the approved program that are analogous to changes in SMCRA or implementing regulations. One concern related to the belief that "analogous" would be interpreted to mean "identical to" by OSM. The Secretary does not believe that state proposals must be identical to Federal provisions to receive the benefit of the shortened review time provided in 30 CFR 732.17(h)(3). Analogous means only that provisions must be comparable or similar.

This commentor also questioned whether changes in guidelines, interpretative rules or provisions for which no Federal regulation existed could receive the benefit of any expedited review. Such changes would be considered in that the proposed rule is applicable to procedures contained in the approved program in addition to changes in state laws and regulations.

A commentor charged that the amendment to 30 CFR 732.17 makes only one small distinction between analogous and other state program amendments and that is to reduce the minimum public comment period to 15 days, rather than 30 days.

The Secretary does not agree with the commentor in that once a proposed state program amendment has been found to be "analogous" in all likelihood a public hearing would not be held and review by the Regional Director and Director could be completed more quickly than would be the case for amendments of greater complexity and scope.

The Secretary has not modified the proposed rule based on the concerns expressed by either of the commentors.

III. Action

The rule being adopted today remains largely as proposed. Changes have been made in response to public comments on the proposed rule and include:

1. Section 732.17(h)(2)(ii) has been modified to provide that requestors may upon request receive one free copy of proposed amendments to a state program from the Regional Director when the full text is not included in the **Federal Register.**

2. Section 732.17(h)(4) has been modified to provide that public hearings shall be held no sooner than five days before the close of the public comment period and provide that the public comment period shall end on a date following any public hearing scheduled to be held. This provision has also been modified to provide that when state regulatory authority public hearings or meetings are accepted in lieu of an OSM hearing, the state regulatory authority shall provide to the Regional Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments.

3. Section 732.17(h)(8) has been modified to provide for a 15 day public comment period on amendments resubmitted for approval after modification by the state regulatory authority pursuant to an initial disapproval by the Director.

4. Section 732.17(h)(11) has been modified to provide that the decision approving or disapproving program amendments will be published in the **Federal Register** within 10 days after the date of the Director's decision.

In all other substantive respects the final rule mirrors the rule proposed on July 14, 1980.

The rule has been made effective upon publication on the ground that it does not impose obligations upon any individual or State; rather, it clarifies and streamlines the amendment process for approved state programs. The public and states should receive the benefits of this process immediately. A later effective date is not in the public interest.

IV. Determination of Significance

The rule does not fall within any of the categories listed in 43 CFR 14.3(o). Consequently, the Department of the Interior has determined that this document is not a significant rule and does not require a regulatory analysis under Executive Order 12044 and 43 CFR Part 14.

V. Statement of Environmental Impact

The Department of the Interior has determined that this action will not have a significant effect on the human environment and an environmental

impact statement will therefore not be prepared.

VI. State of Authorship

The primary author of this document is Arthur Abbs, State Programs Division, Office of Surface Mining.

Dated: January 15, 1981.

Joan M. Davenport,

Assistant Secretary for Energy and Minerals.

Text of the Amendment

§ 732.17 [Amended]

30 CFR 732.17(f)(2) is removed. A new section 30 CFR 732.17(h) is added to read as follows:

* * * * *

(h) The following procedures, time schedules and criteria for approval and disapproval shall apply to state program amendments.

(1) Within ten days after receipt of a state program amendment from a state regulatory authority, the Regional Director will publish a notice of receipt of the amendment in the **Federal Register.**

(2) The **Federal Register** notice announcing the receipt of the amendment will indicate that the amendment(s) is being reviewed by the Regional Director and will include the following:

(i) The text or a summary of the amendment(s) proposed by the regulatory authority;

(ii) Addresses where copies of the proposed amendment(s) may be obtained if the text is not included in the **Federal Register** notice and that each requestor may receive, free of charge, one single copy of proposed amendment(s) from the Regional Director.

(iii) Date(s) of public comment period(s) and addresses where public comments should be directed;

(iv) Dates and locations of public hearing(s) and/or meeting(s) if public hearing(s) and/or meeting(s) are to be held; and

(v) A schedule for review and action on the amendment(s).

(3) A minimum public comment period of 30 days will be provided for each proposed state program amendment, except a 15 day public comment period may be provided where an amendment concerns changes in state law, regulations or the procedures contained in the approved program that are analogous to changes in SMCRA and/or implementing regulations: *Provided,* That the notice of receipt published in the **Federal Register** includes the full text of the proposed amendment: *And provided,* That all applicable provisions of 43 CFR Part 14 are compiled with.

(4) Public hearings may be provided at the discretion of the Regional Director and shall be held no sooner than five days before the close of the public comment period. The comment period shall end on a date following any public hearing scheduled to be held.

Public hearing plans will be announced in the notice of receipt of the amendment published in the **Federal Register.** In determining whether to hold a public hearing, the Regional Director will consider the subject of the amendment, its complexity and public hearing and meetings conducted by the state regulatory authority prior to submission of the amendment for OSM approval. When state regulatory authority public hearings or meetings are accepted in lieu of an OSM hearing, the state regulatory authority shall provide to the Regional Director a complete record of any hearings or meetings including transcripts, written presentations, exhibits and copies of all comments. Hearings shall be informal and follow legislative procedures. The format and the rules of procedure for each hearing shall be determined by the Regional Director and published in the notice required by § 732.17(h)(1).

(5) Upon the close of the public comment period, the transcript, written presentations, exhibits, and copies of all comments shall be transmitted by the Regional Director to the Director with a recommended decision from the Regional Director.

(6) Upon receipt of the Regional Director's recommendation, the Director shall consider all relevant information, including any information obtained from public hearings and comments, and shall approve or disapprove the amendment request within 30 days after the close of public comment period established in accordance with § 732.17(h)(3).

(7) If the Director disapproves the amendment request, the state regulatory authority will have 30 days after publication of the Director's decision to resubmit a revised amendment request for consideration by the Director.

(8) The Director will approve or disapprove amendment resubmissions within 30 days after receipt. There shall be a public comment period of not less than 15 days from the date of publication of the notice of receipt of the revised amendment. If the scope of the amendment has been expanded beyond that of the initial amendment request the Director may approve/disapprove portions of the initial amendment request and subject the remainder to review and approval procedures outlined in this subsection or treat the entire amendment request as a new request and initiate the review procedures of this section.

(9) The applicable criteria for approval or disapproval of state programs set forth in § 732.15 shall be utilized by the Director in approving or disapproving state program amendments.

(10) State program amendments shall not be approved until the Director has—

(i) Solicited and publicly disclosed the views of the Administrator of the Environmental Protection Agency, the Secretary of Agriculture, and the heads of other Federal agencies concerned with or having special expertise relevant to the program amendment(s) as proposed; and

(ii) Obtained written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of a state program amendment(s) which relate to air or water quality standards promulgated under the authority of the Clean Water Act, as amended (33 U.S.C. Section 1251 *et seq.*), and the Clean Air Act, as amended (42 U.S.C. Section 7401 *et seq.*).

(11) All decisions approving or disapproving program amendments shall be published in the **Federal Register** and shall be effective upon publication unless the notice specifies a different effective date. The decision approving or disapproving program amendments will be published in the **Federal Register** within 10 days after the date of the Director's decision.

(12) The Director shall complete actions on amendment requests in accordance with the schedule developed under § 732.17(h)(2)(v); however, final action on all amendment requests must be completed within six months after receipt of the proposed amendments from the state.

(Authority for establishing procedures and criteria for approval or disapproval of State program submissions is found in Sections 102, 201(c), 501(b), 503, 506–519, 521, and 522, Pub. L. 95–87, 91 Stat. 448, 449(c), 468(b), 470, 473–486, 495, 498, 499, 501, 504, and 507 (30 U.S.C. 1202, 1211(c), 1251(b), 1253, 1256–1269, 1271, and 1272)

[FR Doc. 81-2201 Filed 1-22-81; 8:45 am]

BILLING CODE 4310-05-M

federal register

Friday
January 23, 1981

Part XXII

The President

Executive Orders 12276 through 12285 Relating to the Release of the American Hostages in Iran

Legal Deposit

Federal Register
Vol. 46, No. 15
Friday, January 23, 1981

Presidential Documents

Title 3—

The President

Executive Order 12276 of January 19, 1981

Direction Relating to Establishment of Escrow Accounts

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1–101. The Secretary of the Treasury is authorized to enter into, and to license, authorize, direct, and compel any appropriate official and/or the Federal Reserve Bank of New York, as fiscal agent of the United States, to enter into escrow or related agreements with a foreign central bank and with the Central Bank of Algeria under which certain money and other assets, as and when directed by the Secretary of the Treasury, shall be credited by the foreign central bank to an escrow account on its books in the name of the Central Bank of Algeria, for transfer to the Government of Iran if and when the Central Bank of Algeria receives from the Government of Algeria a certification that the 52 U.S. diplomats and nationals being held hostage in Iran have safely departed from Iran. Such agreements shall include other parties and terms as determined by the Secretary of the Treasury to be appropriate to carry out the purposes of this Order.

1–102. The Secretary of the Treasury is authorized to license, authorize, direct, and compel the Federal Reserve Bank of New York, as fiscal agent of the United States, to receive certain money and other assets in which Iran or its agencies, instrumentalities, or controlled entities have an interest and to hold or transfer such money and other assets, and any interest earned thereon, in such a manner as he deems necessary to fulfill the rights and obligations of the United States under the Declaration of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, and the escrow and related agreements described in paragraph 1–101 of this Order. Such money and other assets may be held in interest-bearing form and where possible shall be invested with or through the entity holding the money or asset on the effective date of this Order.

1–103. Compliance with this Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets referred to in paragraphs 1–101 and 1–102 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.

Jimmy Carter

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2775
Filed 1–22–81; 9:17 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12277 of January 19, 1981

Direction To Transfer Iranian Government Assets

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1–101. The Federal Reserve Bank of New York is licensed, authorized, directed, and compelled to transfer to accounts at the Bank of England, and subsequently to transfer to accounts at the Bank of England established pursuant to an escrow agreement approved by the Secretary of the Treasury, all gold bullion, and other assets (or the equivalent thereof) in its custody, of the Government of Iran, or its agencies, instrumentalities or controlled entities. Such transfers shall be executed when and in the manner directed by the Secretary of the Treasury. The Secretary of the Treasury is also authorized to license, authorize, direct, and compel the Federal Reserve Bank of New York to engage in whatever further transactions he deems appropriate and consistent with the purposes of this Order, including any transactions related to the return of such bullion and other assets pursuant to the escrow agreement.

1–102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1–101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1–101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1–101 of this Order.

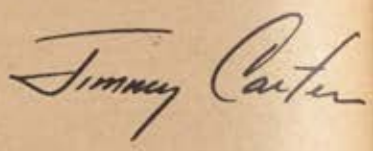
1–103. Compliance with this Order, any other Executive Order licensing, authorizing, directing, or compelling the transfer of the assests described in

section 1–101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.



THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2776
Filed 1–22–81; 9:18 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12278 of January 19, 1981

Direction To Transfer Iranian Government Assets Overseas

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1–101. Any branch or office of a United States bank or subsidiary thereof, which branch or office is located outside the territory of the United States and which on or after 8:10 a.m. E.S.T. on November 14, 1979 (a) has been or is in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities, or controlled entities, or (b) has carried or is carrying on its books deposits standing to the credit of or beneficially owned by such Government, agencies, instrumentalities, or controlled entities, is licensed, authorized, directed, and compelled to transfer such funds, securities, and deposits, including interest from November 14, 1979, at commercially reasonable rates, to the account of the Federal Reserve Bank of New York at the Bank of England, to be held or transferred as directed by the Secretary of the Treasury. The Secretary of the Treasury shall determine when the transfers required by this section shall take place. The funds, securities and deposits described in this section shall be further transferred as provided for in the Declaration of the Government of the Democratic and Popular Republic of Algeria and its Annex.

1–102. Any banking institution subject to the jurisdiction of the United States that has executed a set-off on or after November 14, 1979, at 8:10 a.m. E.S.T. against Iranian funds, securities, authorized, directed, and compelled to cancel such set-off and to transfer all funds, securities, and deposits which have been subject to such set-off, or deposits referred to in section 1–101 is hereby licensed, including interest from November 14, 1979, at commercially reasonable rates, pursuant to the provisions of section 1–101 of this Order.

1–103. If the funds, securities, and deposits described in section 1–101 are not promptly transferred to the control of the Government of Iran, such funds, securities, and deposits shall be returned to the banking institutions holding them on the effective date of this Order and the set-offs described in section 1–102 shall be in force as if this Order had not been issued and the status of all such funds, securities, deposits and set-offs shall be *status quo ante*.

1–104. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations,

with respect to the properties described in Sections 1–101 and 1–102 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in Sections 1–101 and 1–102 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. E.S.T., including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

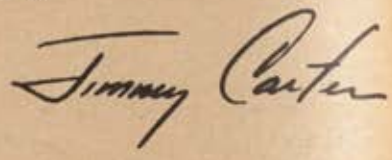
(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Sections 1–101 and 1–102 of this Order.

1–105. Compliance with this Order, any other Executive Order licensing, authorizing, directing, or compelling the transfer of the assets described in Sections 1–101 and 1–102 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–106. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1–107. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–108. This Order shall be effective immediately.



THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2777
Filed 1–22–81; 9:18 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12279 of January 19, 1981

Direction To Transfer Iranian Government Assets Held by Domestic Banks

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 22 of the United States Code, Section 1732 of 3 Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1–101. Any branch or office of a banking institution subject to the jurisdiction of the United States, which branch or office is located within the United States and is, on the effective date, either (a) in possession of funds or securities legally or beneficially owned by the Government of Iran or its agencies, instrumentalities, or controlled entities, or (b) carrying on its books deposits standing to the credit of or beneficially owned by such Government, agencies, instrumentalities, or controlled entities is licensed, authorized, directed and compelled to transfer such funds, securities, and deposits, including interest from November 14, 1979, at commercially reasonable rates, to the Federal Reserve Bank of New York, to be held or transferred as directed by the Secretary of the Treasury.

1–102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1–101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1–101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1–101 of this Order.

1–103. Compliance with this Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in section 1–101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.

Jimmy Carter

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2778
Filed 1–22–81; 9:21 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12280 of January 19, 1981

Direction To Transfer Iranian Government Financial Assets Held by Non-Banking Institutions

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1–101. Any person subject to the jurisdiction of the United States which is not a banking institution and is on the effective date in possession or control of funds or securities of Iran or its agencies, instrumentalities, or controlled entities is licensed, authorized, directed and compelled to transfer such funds or securities to the Federal Reserve Bank of New York to be held or transferred as directed by the Secretary of the Treasury.

1–102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1–101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1–101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1–101 of this Order.

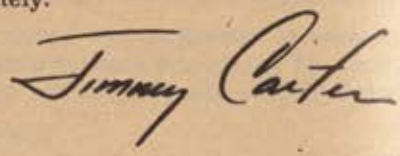
1–103. Compliance with this Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in paragraph 1–101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to

anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of and all actions taken pursuant to, each of its provisions.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.



THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2779
Filed 1–22–81; 9:22 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12281 of January 19, 1981

Direction To Transfer Certain Iranian Government Assets

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran and in which Iran and the United States instruct and require that the assets described in this Order shall be transferred as set forth below by the holders of such assets, it is hereby ordered that as of the effective date of this Order:

1–101. All persons subject to the jurisdiction of the United States in possession or control of properties, not including funds and securities, owned by Iran or its agencies, instrumentalities, or controlled entities are licensed, authorized, directed and compelled to transfer such properties, as directed after the effective date of this Order by the Government of Iran, acting through its authorized agent. Except where specifically stated, this license, authorization, and direction does not relieve persons subject to the jurisdiction of the United States from existing legal requirements other than those based upon the International Emergency Economic Powers Act.

1–102. (a) All licenses and authorizations for acquiring or exercising any right, power, or privilege, by court order, attachment, or otherwise, including the license contained in Section 535.504 of the Iranian Assets Control Regulations, with respect to the properties described in Section 1–101 of this Order are revoked and withdrawn.

(b) All rights, powers, and privileges relating to the properties described in section 1–101 of this Order and which derive from any attachment, injunction, other like proceedings or process, or other action in any litigation after November 14, 1979, at 8:10 a.m. EST, including those derived from Section 535.504 of the Iranian Assets Control Regulations, other than rights, powers, and privileges of the Government of Iran and its agencies, instrumentalities, and controlled entities, whether acquired by court order or otherwise, are nullified, and all persons claiming any such right, power, or privilege are hereafter barred from exercising the same.

(c) All persons subject to the jurisdiction of the United States are prohibited from acquiring or exercising any right, power, or privilege, whether by court order or otherwise, with respect to the properties (and any income earned thereon) referred to in Section 1–101 of this Order.

1–103. Compliance with this Executive Order, any other Executive Order licensing, authorizing, directing or compelling the transfer of the assets described in paragraph 1–101 of this Order, or any regulations, instructions, or directions issued thereunder shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the

same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, such orders, regulations, instructions, or directions.

1–104. The Attorney General shall seek to intervene in any litigation within the United States which arises out of this Order and shall, among other things, defend the legality of, and all actions taken pursuant to, each of its provisions.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81-2780
Filed 1-22-81; 9:23 am]
Billing code 3195-01-M

Presidential Documents

Executive Order 12282 of January 19, 1981

Revocation of Prohibitions Against Transactions Involving Iran

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostage and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1–101. The prohibitions contained in Executive Order 12205 of April 7, 1980, and Executive Order 12211 of April 17, 1980, and Proclamation 4702 of November 12, 1979, are hereby revoked.

1–102. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purpose of this Order.

1–103. This Order shall be effective immediately.

Jimmy Carter

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81-2781
Filed 1-22-81; 9:24 am]
Billing code 3195-01-M

Presidential Documents

Executive Order 12283 of January 19, 1981

Non-Prosecution of Claims of Hostages and for Actions at the United States Embassy and Elsewhere

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1–101. The Secretary of the Treasury shall promulgate regulations: (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran; (b) prohibiting any person not a U.S. national from prosecuting any such claim in any court within the United States; (c) ordering the termination of any previously instituted judicial proceedings based upon such claims; and (d) prohibiting the enforcement of any judicial order issued in the course of such proceedings.

1–102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1–101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

1–103. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purpose of this Order.

1–104. This Order shall be effective immediately.

THE WHITE HOUSE,
January 19, 1981.

Jimmy Carter

[FR Doc. 81–2782
Filed 1–22–81; 9:25 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12284 of January 19, 1981

Restrictions on the Transfer of Property of the Former Shah of Iran

By the authority vested in me as President by the Constitution and statutes of the United States, including Section 203 of the International Emergency Economic Powers Act (50 U.S.C. 1702), Section 301 of Title 3 of the United States Code, Section 1732 of Title 22 of the United States Code, and Section 301 of the National Emergencies Act (50 U.S.C. 1631), in view of the continuing unusual and extraordinary threat to the national security, foreign policy and economy of the United States upon which I based my declarations of national emergency in Executive Order 12170, issued November 14, 1979, and in Executive Order 12211, issued April 17, 1980, in order to implement agreements with the Government of Iran, as reflected in Declarations of the Government of the Democratic and Popular Republic of Algeria dated January 19, 1981, relating to the release of U.S. diplomats and nationals being held as hostages and to the resolution of claims of United States nationals against Iran, and to begin the process of normalization of relations between the United States and Iran, it is hereby ordered that as of the effective date of this Order:

1–101. For the purpose of protecting the rights of litigants in courts within the United States, all property and assets located in the United States within the control of the estate of Mohammad Reza Pahlavi, the former Shah of Iran, or any close relative of the former Shah served as a defendant in litigation in such courts brought by Iran seeking the return of property alleged to belong to Iran, is hereby blocked as to each such estate or person until all such litigation against such estate or person is finally terminated.

1–102. The Secretary of the Treasury is authorized and directed (a) to promulgate regulations requiring all persons who are subject to the jurisdiction of the United States and who, as of November 3, 1979, or as of this date, have actual or constructive possession of property of the kind described in Section 1–101, or knowledge of such possession by others, to report such possession or knowledge thereof, to the Secretary of the Treasury in accordance with such regulations and (b) to make available to the Government of Iran or its designated agents all identifying information derived from such reports to the fullest extent permitted by law. Such reports shall be required as to all individuals described in 1–101 and shall be required to be filed within 30 days after publication of a notice in the **Federal Register**.

1–103. The Secretary of the Treasury is authorized and directed (a) to require all agencies within the Executive Branch of the United States Government to deliver to the Secretary all official financial books and records which serve to identify any property of the kind described in Section 1–101 of this Order, and (b) to make available to the Government of Iran or its designated agents all identifying information derived from such books and records to the fullest extent permitted by law.

1–104. The Attorney General of the United States having advised the President of his opinion that no claim on behalf of the Government of Iran for recovery of property of the kind described in Section 1–101 of this Order should be considered legally barred either by sovereign immunity principles or by the act of state doctrine, the Attorney General is authorized and directed to prepare, and upon the request of counsel representing the Government of Iran to present to the appropriate court or courts within the United States, suggestions of interest reflecting that such is the position of the United States, and

that it is also the position of the United States that Iranian decrees and judgments relating to the assets of the former Shah and the persons described in Section 1–101 should be enforced by such courts in accordance with United States law.

1–105. The Secretary of the Treasury is delegated and authorized to exercise all functions vested in the President by the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) to carry out the purposes of this Order.

1–106. This Order shall be effective immediately.

Jimmy Carter

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2783
Filed 1–22–81; 9:26 am]
Billing code 3195–01–M

Presidential Documents

Executive Order 12285 of January 19, 1981

President's Commission on Hostage Compensation

By the authority vested in me by the Constitution and statutes of the United States of America, and as President of the United States of America, in accordance with the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), it is hereby ordered as follows:

1–1. *Establishment.*

1–101. There is established the President's Commission on Hostage Compensation, hereinafter referred to as the Commission, which shall be composed of not more than nine members who shall be appointed by the President.

1–102. The President shall designate a Chairman from among the members.

1–2. *Functions.*

1–201. The Commission shall study and analyze, and make recommendations to the President on, the question whether the United States should provide financial compensation to United States nationals who have been held in captivity outside the United States, either (1) by or with the approval of a foreign government, or (2) by reason of their status as employees of the United States Government or as dependents of such employees.

1–202. The Commission shall submit a report to the President ninety days after the date of this Order. The report shall contain the Commission's recommendations as to whether legislation to deal with the foregoing compensation issue is appropriate and, if so, as to what such legislation should provide. The report shall specifically contain the Commission's recommendations concerning the compensation of United States nationals held hostage in Iran on and after November 4, 1979.

1–203. In analyzing the foregoing issues the Commission shall consider all factors which it may consider relevant, including the prior practice with respect to governmental compensation, both by the United States Government and by foreign governments, of persons held in captivity abroad.

1–204. In the performance of its functions the Commission shall specifically address the following issues:

(a) whether any legislation authorizing compensation should set forth specific legislative standards, or whether the standards by which to award compensation should be administratively developed;

(b) whether any standards developed either legislatively or administratively should be applied uniformly to civilian and military government employees, dependents of such employees, and private citizens, or whether separate criteria should be developed for these or other categories;

(c) whether an existing administrative body should determine amounts of compensation, or whether a new body should be established for this purpose; and

(d) whether compensation should be paid for injuries suffered by members of families of persons who have been held in captivity.

1–3. *Administrative Provisions.*

1–301. In performing its functions the Commission shall conduct such studies, reviews, and inquiries as may be necessary. In addition to conducting open meetings in accordance with the Federal Advisory Committee Act, the Com-

mission shall conduct public hearings to identify critical issues and possible solutions related to compensation.

1–302. The Commission is authorized to request from any Executive agency such information that may be deemed necessary to carry out its functions under this Order. Each Executive agency shall, to the extent permitted by law, furnish such information to the Commission in the performance of its functions under this Order.

1–303. Each member of the Commission who is not otherwise employed in the Federal Government may receive, to the extent permitted by law, compensation for each day he or she is engaged in the work of the Commission at a rate not to exceed the maximum daily rate now or hereafter prescribed by law for GS–18 of the General Schedule, and may also receive transportation and travel expenses, including per diem in lieu of subsistence, as authorized by law (5 U.S.C. 5702 and 5703).

1–304. All necessary administrative staff services, support, facilities, and expenses of the Commission shall, to the extent permitted by law, be furnished by the Department of State.

1–4. *General Provisions.*

1–401. Notwithstanding the provisions of any other Executive Order, the functions of the President under the Federal Advisory Committee Act, as amended (5 U.S.C. App. I), except that of reporting annually to the Congress, which are applicable to the Commission, shall be performed by the Secretary of State in accordance with guidelines and procedures established by the Administrator of General Services.

1–402. The Commission shall terminate thirty days after submitting its report.

Jimmy Carter

THE WHITE HOUSE,
January 19, 1981.

[FR Doc. 81–2784
Filed 1–22–81; 9:27 am]
Billing code 3195–01–M

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