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# federal register

Tuesday
May 18, 1982

## Selected Subjects

**Air Transportation:**
Civil Aeronautics Board

**Agricultural Commodities:**
Agricultural Marketing Service

**Animal Diseases:**
Animal and Plant Health Inspection Service

**Animal Drugs:**
Food and Drug Administration

**Antibiotics:**
Food and Drug Administration

**Coal Mining:**
Surface Mining Reclamation and Enforcement Office

**Employee Benefit Plans:**
Pension and Welfare Benefit Programs Office

**Fisheries:**
National Oceanic and Atmospheric Administration

**Food Additives:**
Food and Drug Administration

**Hazardous Materials Transportation:**
Nuclear Regulatory Commission

**Indian Lands:**
Surface Mining Reclamation and Enforcement Office

**Loan Programs—Agriculture:**
Farmers Home Administration

**Loan Programs—Communications:**
Rural Electrification Administration

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# Selected Subjects

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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.

**Marine Mammals:**
National Oceanic and Atmospheric Administration

**Marine Safety:**
Federal Trade Commission

**Radio:**
Federal Communications Commission

**Securities:**
Federal Reserve System

**Television:**
Federal Communications Commission

**Editor's Note:**

The list of subjects on the cover is designed to assist those users who review the **Federal Register** for broad subject areas. The list is compiled from subject terms supplied by agencies for certain of their rule and proposed rule documents as required by 1 CFR 18.20. Subject terms in the list may refer to more than one document. To locate the documents in the **Federal Register** covered by the subject terms in the list, users should consult the Table of Contents under the appropriate agency. We remind users that the list is a selective supplement to the Table of Contents and should not be construed as comprehensive.

This list is an experiment. We hope it will prove useful to those users inconvenienced by the discontinuation of the "Highlights" in February because of reduced personnel resources at the Office of the Federal Register. For this new list our editors simply select subject terms from those appearing in the edition's rule and proposed rule documents rather than perform the detailed analytical work which was needed to produce the "Highlights".

Comments on this list may be sent to Martha Girard, Director, Executive Agencies Division (NFE), Office of the Federal Register, NARS/GSA, Washington, D.C. 20408. Phone (202) 523–5240 (not a toll free number).

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# Presidential Documents

Title 3—

The President

## Executive Order 12362 of May 12, 1982

## Overseas Employment

By the authority vested in me as President of the United States of America by Sections 3301 and 3302 of Title 5 and Section 301 of Title 3 of the United States Code, and in order to permit certain overseas employees to acquire competitive status upon returning to the United States, it is hereby ordered as follows:

**Section 1.** A United States citizen who is a family member of a civilian employee or of a member of a uniformed service and who has completed a total of 24 months of fully satisfactory service under one or more overseas appointments in the excepted or competitive civil service, may be appointed noncompetitively to a competitive service position in the Executive branch within the United States (including Guam, Puerto Rico and the Virgin Islands) if he or she meets the qualifications and other requirements established by the Director of the Office of Personnel Management and the provisions of this Order.

**Sec. 2.** In order to be eligible for noncompetitive appointment to positions within the United States under this authority, such an individual must:

(a) have been appointed to an overseas position or positions while residing in the overseas area under local hire procedures approved by the Director of the Office of Personnel Management;

(b) have completed 24 months of overseas service in an appropriated fund position after January 1, 1980 within a ten year period from the date of initial appointment;

(c) have received a satisfactory or better performance rating for such overseas service;

(d) have been a family member of a civilian employee or of a member of a uniformed service (the civilian or uniformed sponsor) while serving in the overseas position or positions;

(e) have accompanied the civilian or uniformed sponsor on official assignment to an overseas post of duty while serving in the overseas position or positions; and

(f) exercise the eligibility for noncompetitive appointment within two years of returning to the United States.

**Sec. 3.** The Director of the Office of Personnel Management shall prescribe such regulations as may be necessary to implement this Order, including uniform local hire procedures to assure merit selection of overseas employees.

**Sec. 4.** To the extent there is any conflict between this Order and Civil Service Rule 8.2 (5 CFR 8.2), the provisions of this Order shall control.

Ronald Reagan

THE WHITE HOUSE,
*May 12, 1982.*

[FR Doc. 82-13686
Filed 5-17-82; 10:32 am]
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# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Parts 46 and 47

### Clarification of Regulations Under the Perishable Agricultural Commodities Act

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Agricultural Marketing Sevice amends its regulations relating to perishable agricultural commodities received, shipped, sold, offered to be sold in interstate and foreign commerce. 7 CFR 46.2 is amended to reflect the increased exemption used to determine license responsibility for retailers and frozen food brokers as required by the statutory amendment effectuated by Pub. L. 97–98—December 22, 1981. 7 CFR 46.45 is amended to clarify the schedule for informal disposition of misrepresentation violations, and to allow the purging of cumulative records of misrepresentation violations which were informally resolved and which are more than three (3) years old and are not involved in a formal disciplinary action. 7 CFR 47.15 and 47.20 are amended to reflect the increased monetary level necessary to "trigger" an oral hearing as required by the statutory amendment effectuated by Pub. L. 97–98—December 22, 1981.

**EFFECTIVE DATE:** May 18, 1982.

**FOR FURTHER INFORMATION CONTACT:** Michael D. Price, Assistant Chief, Regulatory Branch, Fruit and Vegetable Division, AMS, USDA, Washington, D.C. 20250, Phone (202) 447–4180.

**SUPPLEMENTARY INFORMATION:** These final actions have been reviewed under Secretary's Memorandum 1512–1 and Executive Order 12291 and have not been classified as major because they do not meet any of the three criteria identified under the Executive Order. These actions will not have an annual effect on the economy of $100 million or more nor will they have a major increase in costs of prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions. These actions will not have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States based enterprises to compete with foreign based enterprises in domestic or export markets. This rule has also been reviewed with regard to the requirements of Pub. L. 96–354. William Manley, Administrator, Agricultural Marketing Service, has certified that these rules do not have a significant economic impact on a substantial number of small entities.

The Perishable Agricultural Commodities Act (PACA) was enacted by Congress, in 1930, to curb abuses in the marketing of perishable agricultural commodities in interstate and foreign commerce. The Act establishes a code of fair trade and provides for the enforcement of contracts. The law is enforced through a system of licensing. Commission merchants, dealers and brokers are required to be licensed.

#### Exemption From Regulation

Retailers and certain frozen food brokers are classified as dealers but receive an exemption from the licensing requirements based on the invoice cost of perishable commodities, in the case of retailers, or value of perishable commodities handled, in the case of frozen food brokers, in a calendar year. This exemption was previously established by statute at $200,000 per calendar year. On December 22, 1981, the statute was amended by Public Law 97–98, to increase the exemption level to $230,000 per calendar year. The regulations are therefore, amended to reflect this change.

#### Misrepresentation Violations

On April 15, 1981, the regulations that implement the statutory provision relating to the informal resolution of misrepresentation violations were amended to clarify the procedure to be followed. A continuing review of the procedures indicates that further clarification is needed in order to fully inform the industry as to procedures which are to be followed in dealing with such violations.

First, there is found a need for clarifying the schedule for informal disposition of violations to reflect that the option of informal settlement is not restricted to a specific number of violations. Although the chart in the regulations lists seven violations, it is intended that informal settlement be considered if there are additional violations. The regulations are, therefore, amended to reflect this.

Second, there is need to amend the regulations with regard to the length of time that records of misrepresentation violations should be maintained.

Records of misrepresentation, under the current regulations, are purged if there are no further violations in the twenty-four (24) months period immediately following the most recent violation. However, if there never was a twenty-four (24) months period entirely free of any violations, then the record of such violations was maintained indefinitely. It has now been determined that this history is not necessary. The regulations are therefore amended to reflect that records of misrepresentation violations more than thirty-six (36) months old will no longer be maintained unless they have been incorporated into a formal administrative action before the end of the thirty-six (36) months period.

#### Jurisdictional Amount for Oral Hearings

Oral hearings are made available to parties, in formal reparation proceedings under the PACA, when the amount prayed for in the complaint or counterclaim reaches a specific monetary level, or a special need for a hearing is shown. This monetary level had been established at $3,000. However, the amount necessary to trigger an oral hearing was increased to $15,000 by Pub. L. 97–98. All requests for oral hearings after December 22, 1981, must meet the new guidelines. The regulations are therefore amended to reflect this change.

#### List of Subjects in 7 CFR Parts 46 and 47

Agricultural commodities, Administrative practice and procedure.

Inasmuch as the amendments are either mandated by statute or procedural in nature, it is impracticable

and contrary to the public interest to give preliminary notice, engage in public rule-making, and postpone the effective date until thirty (30) days after publication in the **Federal Register** (5 U.S.C. 553). Therefore, 7 CFR Parts 46 and 47 are amended as follows:

## PART 46—REGULATIONS (OTHER THAN RULES OF PRACTICE) UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

### § 46.2 [Amended]

1. 7 CFR 46.2 is amended by revising paragraphs (m)(2) and (n) to read as follows:

* * * * *

(m) "Dealer" means any person engaged in the business of buying or selling produce in wholesale or jobbing quantities in commerce and includes:

* * * * *

(2) Retailers, when the invoice cost of all purchases of produce exceeds $230,000 during a calendar year. In computing dollar volume, all purchases of fresh and frozen fruits and vegetables are to be counted, without regard to quantity involved in a transaction or whether the transaction was intrastate, interstate or foreign commerce;

* * * * *

(n) "Broker" means any person engaged in the business of negotiating sales and purchases of produce in commerce for or on behalf of the vendor or the purchaser, respectively, except that no person shall be deemed to be a "broker" within the meaning of the Act if such person is an independent agent negotiating sales for or on behalf of the vendor and if the only sales of such commodities negotiated by such person are sales of frozen fruits and vegetables having an invoice value not in excess of $230,000 in any calendar year.

* * * * *

### § 46.45 [Amended]

2. 7 CFR 46.45 is amended by revising paragraphs (c)(1)(iii), (d)(2), and (e)(6) to read as follows:

* * * * *

(c) * * *

(1) * * *

(iii) The schedule for informal disposition is as follows:

| Violation | | Disposition |
|---|---|---|
| 1st | | [1] |
| 2d | | [1] |
| 3d | [2] $200 | [3] $250 |
| 4th | 350 | 500 |
| 5th | 500 | 1,000 |
| 6th | 1,000 | 2,000 |
| 7th | 2,000 | 2,000 |

[1] Warning letter.
[2] If serious violation.
[3] Very serious violation.

Informal disposition of misrepresentation violations is not limited to seven occurrences and will be considered for further violations.

* * * * *

(d) Cumulative Record. A cumulative record of licensee's misrepresentation violations will be maintained with the following limitations:

* * * * *

(2) The record of violations *not* involved in formal proceedings will be expunged if there are no violations during a twenty-four (24) month period from the date of the most recent violation, or after thirty-six (36) months from the date of said violation, unless it was made a part of a formal disciplinary complaint.

* * * * *

(e) Summary of Procedure.

* * * * *

(6) Use of record of misrepresentation. A cumulative record of misrepresentation is maintained. It is used as a basis for determining whether a warning letter should be considered, and, if so, the amount of monetary penalty which is appropriate, or whether there is cause for instituting a formal disciplinary proceeding seeking suspension or revocation of the violator's license. But after payment of a monetary penalty or after two years from the date of the last violation, no formal disciplinary use can be made of the previous record of violation. The record of misrepresentation shall be erased if there are no further violations in the twenty-four (24) month period immediately following the most recent violation, or after 36 months from the date of each individual violation unless it is involved in formal disciplinary proceedings.

## PART 47—RULES OF PRACTICE UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

3. 7 CFR 47.15(a) is revised to read as follows:

### § 47.15 Oral hearing before the examiner.

(a) *When permissible.* (1) Where the amount of the damages claimed, either in the complaint or in the counterclaim, does not exceed $15,000 an oral hearing shall not be held, unless deemed necessary or desirable by the Division or unless granted by the examiner upon application of complainant or respondent setting forth the peculiar circumstances making an oral hearing necessary for a proper presentation of the case. In lieu of an oral hearing in any proceeding where the amount of damages claimed does not exceed $15,000 the proceeding shall be decided upon a record formed under the shortened procedure provided in § 47.20.

(2) Where the amount of damages claimed, either in the complaint or in the counterclaim, is in excess of $15,000, the procedure provided in this section (except as provided in § 47.20(b)(2)) shall be applicable.

* * * * *

4. 7 CFR 47.20 is amended by revising (b) (1) and (2) to read as follows:

### § 47.20 Shortened procedure.

* * * * *

(b) *When applicable*—(1) *Where damages claimed do not exceed $15,000.* The shortened procedure provided for in this section shall (except as provided in § 47.15(a)) be used in all reparation proceedings in which the amount of damages claimed, either in the complaint or in the counterclaim, does not exceed $15,000.

(2) *Where damages claimed exceed $15,000.* In any proceeding in which the amount of damages claimed, either in the complaint or in the counterclaim, is greater than $15,000, the examiner, whenever he is of the opinion that proof may be fairly and adequately presented by use of the shortened procedure provided for in this section, shall suggest to the parties that they consent to the use of such procedure. Parties are free to consent to such procedure if they choose, and declination of consent will not affect or prejudice the rights or interests of any party. A party, if he has not waived oral hearing, may consent to the use of the shortened procedure on the condition that depositions rather than affidavits be used. In such case, if the other party agrees, deposition shall be required to be filed in lieu of verified statements. If any party who has not waived oral hearing does not consent to the use of the shortened procedure, the proceeding will be set for oral hearing. The suggestion that the shortened procedure be used need not originate with the examiner. Any party may address a request to the examiner asking that the shortened procedure be used.

Done at Washington, D.C. on May 13, 1982.

**William T. Manley,**

*Deputy Administrator, Marketing Program Operations.*

[FR Doc. 82-13450 Filed 5-17-82; 8:45 am]

BILLING CODE 3410-02-M

**Farmers Home Administration**

**7 CFR Parts 1924, 1941, 1943, and 1945**

## Farmer Programs Insured Borrower Responsibilities and Loan Servicing Options

**AGENCY:** Farmers Home Administration, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Farmers Home Administration (FmHA) amends its regulation for supervision and servicing of Farmer Program insured borrowers. Form FmHA 1924–14, "Farmer Program Borrower Responsibilities," will be used to explain borrowers' loan responsibilities and available servicing options and will be given to all applicants/borrowers during the process of loan making.

Circumstances creating the need for this amendment are cited in recent Office of Inspector General (OIG) audits indicating that many FmHA Farmer Programs insured borrowers do not understand their loan responsibilities. Also, it is FmHA policy to discuss conditions for consolidation, reamortizing, rescheduling and deferring payments of loans with applicants/borrowers; however, there is no formal document notifying the applicant/borrower of these available FmHA servicing options.

The intended effect of this action is to make sure that the conditions for consolidation, reamortizing, rescheduling and deferring payments of existing loans are explained to applicants/borrowers and, furthermore, to educate the applicant/borrower about loan responsibilities, resulting in better servicing of loan accounts.

**EFFECTIVE DATE:** May 18, 1982.

**FOR FURTHER INFORMATION CONTACT:** Mr. A. Veldon Hall, Loan Officer, Farmer Programs, Emergency Loan Division, Farmers Home Administration (FmHA), Room 5344, South Agriculture Building, Washington, DC 20250, telephone: (202) 382–1652, or Mr. George T. Moore, Acting Director, Farm Real Estate and Production Division, FmHA, Room 5322, South Agriculture Building, 14th and Independence Avenue, SW, Washington, D.C. 20250, (202) 447–5352.

**SUPPLEMENTARY INFORMATION:** This final rule has been reviewed under USDA procedures established in Secretary's Memorandum No. 1512–1 which implements Executive Order 12291, and has been determined to be non-major because there is not an annual effect on the economy of $100 million or more, or a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This action does not directly affect any FmHA programs or projects that are subject to A–95 Clearinghouse review.

CFDA program numbers and titles are listed as follows:

10.404 Emergency Loans
10.406 Farm Operating Loans
10.407 Farm Ownership Loans
10.408 Grazing Association Loans
10.409 Irrigation, Drainage, and other Soil and Water Conservation Loans
10.416 Soil and Water Loans
10.428 Economic Emergency Loans

This document has been reviewed in accordance with 7 CFR Part 1901, Subpart G, "Environmental Impact Statement". It is the determination of FmHA that the proposed action does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969, Pub. L. 91–190, an Environmental Impact Statement is not required.

### Need for Governmental Action

Sections 1951.33 and 1951.40 of Part 1951, Subpart A of this chapter gives FmHA authority to defer, consolidate, reamortize and reschedule Farmer Program insured loans when circumstances occur that will not permit borrowers to pay as scheduled or to refinance their loans. The present policy in Farmer Programs is for County Supervisors to discuss these options with the borrowers when circumstances warrant taking one of the actions. However, there is no formal document notifying applicants/borrowers of these options or mandatory language in FmHA procedure that requires the County Supervisor to discuss these options with applicants/borrowers. Thus, FMHA decided to adopt such a document, which new borrowers or existing borrowers receiving another loan will be required to sign during the preparation and revision of Form FmHA 431–2, "Farm and Home Plan."

Part 1924, Subpart B, of this chapter, "Management Assistance to Borrowers," requires County Supervisors to provide credit counseling to all FmHA borrowers. Part 1910, Subpart A, of this chapter "Receiving and Processing Applications," requires the County Supervisors to discuss and explain applicant/borrower loan responsibilities. Therefore, action was taken to provide the County Supervisors with a formal instrument for effectively meeting these objectives.

A proposed rule was published in the **Federal Register** (46 FR 54751) on November 4, 1981. That rule provided for a 60-day comment period through January 4, 1982. Comments on the proposed rule were received from one concerned group, Center For Rural Affairs. Although Form FmHA 1924–14, "Farmer Program Borrower Responsibilities," was inadvertently reproduced for distribution, FmHA's review of these comments and suggestions received during the proposed rule making comment period resulted in minor changes of Form FmHA 1924–14 making it more understandable. The present inventory of Form FmHA 1924–14 will be distributed for use until exhausted, at which time the revised version reflecting FmHA's consideration of the comments received will be distributed.

The following is a discussion of the comments received.

(1) The Center For Rural Affairs commented that Form FmHA 1924–14, "Farmer Program Borrower Responsibilities," is misleading to the borrowers.

We disagree because it is the intent of Form FmHA 1924–14 to call attention to FmHA borrowers of certain of their responsibilities, including that of inquiring about available FmHA loan servicing options, which are consolidation, reamortizing, rescheduling and deferring payments of existing loans. However, we do agree that the subtitle for addressing the available FmHA loan servicing options, "Additional Information," needs improvement, and therefore, have changed it to read "Available FmHA Loan Servicing Options," and made other minor changes which are more appropriate for highlighting FmHA borrower's responsibilities.

(2) They also felt that Form FmHA 1924–14 was too brief, and would not be readily understood by FmHA borrowers; and that it does not explicitly provide information which borrowers can keep in their records.

We believe this charge is not well founded. The purpose of Form FmHA 1924–14 is to notify FmHA borrowers of their responsibilities and available FmHA loan servicing options through the authorities of the Farmer Programs. Further detail in the form would not be appropriate. The change in the subtitle and other minor modifications to Form FmHA 1924–14 should adequately clarify this concern.

(3) The Center For Rual Affairs also commented that the local FmHA County and District Offices have not understood FmHA Instructions which implement Farmer Programs "deferral/moratorium servicing options" and that the use of Form FmHA 1924–14 will only partially correct such misunderstandings.

We do not agree. Current Farmer Programs loan servicing regulations do not even use the term "moratorium." However, these regulations do provide for deferrals of principal and interest payments for up to three years. This has the same effect as a moratorium on payments. Also, the FmHA borrower and County Supervisor will now be signing Form FmHA 1924–14, which provides clear and adequate information to the borrower concerning the available FmHA deferral servicing option. We believe the recommended statement signed by both the County Supervisor and borrower will adequately inform and correct any problem relative to use of deferrals.

(4) The Center for Rural Affairs also commented on a change recently made to FmHA Instruction 1960–A, "Special Servicing of Delinquent and Problem Case FmHA Farm Borrowers." Their comments on that revision were dated well after the comment period for the change had expired. Nevertheless, we will discuss them briefly. The Center suggested that FmHA Guide Letter 1960–A–1 was too brief and should include a list of circumstances under which a borrower might qualify for one of the FmHA servicing options and a description of the procedure used to apply for these options. This is not the purpose of that Guide Letter. It is merely intended to notify FmHA borrowers of their problems and how they can be corrected. Further detail in the form would not be appropriate. That will be supplied by further contact with the FmHA County Supervisor.

They also suggested that the regulation should provide formal notice of servicing options as soon as a borrower is identified as a "problem" or delinquent borrower. It is true that FmHA Guide Letter 1960–A–1 includes notification of loan servicing options available regarding consolidation, rescheduling, reamortization and deferring of accounts only to those delinquent and problem case borrowers who will have not shown substantial progress but who continue their operations for the coming year. Whether to provide notice of the type contemplated by the Center's comment is something which goes beyond the scope of the published change to FmHA Instruction 1960–A.

**The Major Alternative Actions Considered Are as Follows**

*Continue with present policy in servicing problem case and delinquent accounts.*

The FmHA County Supervisor does consider the alternatives and borrower loan responsibilities, and discusses them on a case by case basis. However, the present policy does not require that *all* borrowers be provided specific advice concerning the conditions for rescheduling, consolidating, reamoritizing and deferring payments of FmHA loans.

*Revise all acceleration notices to include language describing alternatives.*

An acceleration letter could be developed for notifying borrowers of alternative servicing options: However, FmHA does not consider this satisfactory. Acceleration letters are usually sent to the borrower as an early step in foreclosure proceedings and by that time all other alternatives have already been considered.

*Develop a document explaining borrower's loan responsibilities and available loan servicing options.*

The Farmers Home Administration adopted this alternative and developed a document, Form FmHA 1924–14, "Farmer Program Borrower Responsibilities," that explains borrower responsibilities and available FmHA loan servicing options for borrowers who are unable to pay in accordance with their security instruments and other agreements with FmHA.

The projected USDA and other Federal costs and savings as a result of the final rule are undetermined.

**List of Subjects**

*7 CFR Part 1924*

Agriculture, Loan programs—agriculture.

*7 CFR Part 1941*

Crops, Livestock, Loan programs—Agriculture, Rural areas, Youth.

*7 CFR Part 1943*

Credit, Loan Programs—Agriculture, Recreation, Water resources.

*7 CFR Part 1945*

Agriculture, Disaster assistance, Intergovernmental relations, Livestock, Loan programs—Agriculture.

FmHA amends Chapter XVIII, Title 7, Code of Federal Regulations as follows:

## PART 1924—CONSTRUCTION AND REPAIR

### Subpart B—Management Assistance to Individual Borrowers and Applicants

1. Section 1924.57 is amended by adding paragraph (f)(3) to read as follows:

**§ 1924.57 Planning.**

* * * * *

(f) * * *

(3) Whenever a Farmer Program initial or subsequent loan is to be made, all items of borrower responsibility enumerated on Form FmHA 1924–14, "Farmer Program Borrower Responsibilities," will be discussed and clearly understood by the applicant(s)/borrower(s). Form FmHA 1924–14 will be executed in accordance with the FMI during the preparation or revision of Form FmHA 431–2.

## PART 1941—OPERATING LOANS

### Subpart A—Operating Loan Policies, Procedures and Authorizations

2. Exhibit A, paragraph A, is amended to read as follows:

*A. Applicant Interview*

* * * * *

| Form No | Name | |
|---|---|---|
| 410–1 | Application for FHA Services | *. |
| 410–5 | Request for Verification of Employment. | *. |
| 410–8 | Applicant Reference Letter | *. |
| 410–9 | Statement Required by the Privacy Act. | *. |
| 410–10 | Privacy Act Statement to References. | *. |
| 431–1 | Long-Time Farm and Home Plan | *. |
| 431–2 | Farm and Home Plan | *. |
| 431–4 | Business Analysis—Nonagricultural Enterprise. | *. |
| 440–32 | Request for Statement of Debts and Collateral. | *. |
| 1924–14 | Farmer Program Borrower Responsibilities. | *. |
| 1940–51 | Crop-Share-Cash Farm Lease | *. |
| 1940–53 | Cash Farm Lease | *. |
| 1940–55 | Livestock-Share-Farm Lease | *. |
| 1940–56 | Annual Supplement to Farm Lease | *. |

* * * * *

## PART 1943—FARM OWNERSHIP, SOIL AND WATER AND RECREATION

### Subpart A—Insured Farm Ownership Loan Policies, Procedures and Authorizations

3. Section 1943.32, paragraph (a) is amended by adding, in numerical sequence, a new entry *1924–14* to read as follows:

**§ 1943.32 Loan docket processing and forms.**

(a) *Forms.* * * *

| FmHA form No. | Name of form | Total No. of copies | Signed by borrower | Loan docket | Copy for borrower |
|---|---|---|---|---|---|
| *1924-14 | Farmer Program Borrower Responsibilities | 2 | 2 | 1-O | 1-C. |

### Subpart B—Insured Soil and Water Loan Policies, Procedures, and Authorizations

4. Section 1943.82, paragraph (a) is amended by adding, in numerical sequence, a new entry *1924-14* to read as follows:

**§ 1943.82 Loan docket processing.**

(a) *Forms.* * * *

| FmHA form No. | Name of form | Total No. of copies | Signed by borrower | Loan docket | Copy for borrower |
|---|---|---|---|---|---|
| *1924-14 | Farmer Program Borrower Responsibilities | 2 | 2 | 1-O | 1-C. |

### Subpart C—Insured Recreation Loan Policies, Procedures, and Authorizations

5. Section 1943.132, paragraph (a) is amended by adding, in numerical sequence, a new entry *1924-14* to read as follows:

**§ 1943.132 Loan docket processing.**

(a) *Forms.* * * *

| FmHA form No. | Name of form | Total No. of copies | Signed by borrower | Loan docket | Copy to borrower |
|---|---|---|---|---|---|
| *1924-14 | Farmer Program Borrower Responsibilities | 2 | 2 | 1-O | 1-C. |

## PART 1945—EMERGENCY

### Subpart B—Emergency Loan Policies, Procedures and Authorizations for Those Applications Associated With Disaster Designations Having a Beginning Incidence Period Date Prior to May 26, 1981

6. In Subpart B, Exhibit A, paragraph III. A. 6. is amended by adding in numerical sequence a new entry *1924-14* to read as follows:

6. The following FmHA Forms will be used as appropriate:

| FmHA Form No. | Name | Use |
|---|---|---|
| 1924-14 | Farmer Program Borrower Responsibilities. | *. |

### Subpart C—Economic Emergency Loans

7. In Subpart C, Exhibit A, paragraph A, is amended by adding, in numerical sequence, a new entry *1924-14* to read as follows:

A. *Application Interview.* * * *

| Form No. | Name | EE |
|---|---|---|
| 1924-14 | Farmer Program Borrower Responsibilities. | (*). |

### Subpart D—Emergency Loan Policies, Procedures and Authorizations, for Applications Associated With FmHA Disaster Designations Having a Beginning Incidence Period Date on or After May 26, 1981

8. In Subpart D, Exhibit A, Paragraph III. A. 6. is amended by adding in numerical sequence, a new entry *1924-14* to read as follows:

6. The following FmHA Forms will be used as appropriate:

| Form No. | Name | Use |
|---|---|---|
| 1924-14 | Farmer Program Borrower Responsibilities. | (*). |

(7 U.S.C. 1989; 7 CFR 2.23; 7 CFR 2.70)

Dated: March 29, 1982.

**Charles W. Shuman,**

*Administrator, Farmers Home Administration.*

[FR Doc. 82-13411 Filed 5-17-82; 8:45 am]

BILLING CODE 3410-07-M

## Animal and Plant Health Inspection Service

## 9 CFR Part 82

**[Docket 82-053]**

## Exotic Newcastle Disease; and Psittacosis or Ornithosis in Poultry Area Quarantined

**AGENCY:** Animal and Plant Health Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The purpose of this amendment is to quarantine a portion of Los Angeles County in California because of the existence of exotic Newcastle disease. Exotic Newcastle disease was confirmed in such portion of Los Angeles County in California on May 10, 1982. Therefore, in order to prevent the dissemination of exotic Newcastle disease, it is necessary to quarantine the affected area.

**EFFECTIVE DATE:** May 12, 1982.

**FOR FURTHER INFORMATION CONTACT:** W. W. Buisch, Chief, National Emergency Field Operations, Emergency Programs, Veterinary Services, USDA, Federal Building, Room 748, Hyattsville, MD 20782, 301-436-8073.

**SUPPLEMENTARY INFORMATION:**

### Executive Order 12291 and Emergency Action

This final action has been reviewed in conformance with Executive Order 12291, and has been determined to be not a "major rule." The Department has determined that this rule will have an annual effect on the economy of less than $100 million; will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and will not have any significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. For this rulemaking action, the Office of Management and Budget has waived their review process required by Executive Order 12291.

Dr. E. C. Sharman, Assistant Deputy Administrator, Animal Health Programs, APHIS, VS, USDA, has determined that

the emergency nature of this final rule warrants publication without opportunity for public comment. This amendment is necessary to prevent the interstate spread of exotic Newcastle disease, a communicable disease of poultry, and must be made effective immediately to accomplish its purpose in the public interest.

Therefore, pursuant to the administrative procedure provisions in 5 U.S.C. 553, it is found upon good cause that notice and other public procedure with respect to this final rule are impracticable and contrary to the public interest and good cause is found for making this final rule effective less than 30 days after publication of this document in the **Federal Register.**

**Certification Under the Regulatory Flexibility Act**

Dr. Harry C. Mussman, Administrator of the Animal and Plant Health Inspection Service, has determined that this action will not have a significant economic impact on a substantial number of small entities because the quarantine imposed due to the existence of exotic Newcastle disease affects only one premises, and that premises is not owned by a small entity.

This amendment quarantines a portion of Los Angeles County in California because of the existence of exotic Newcastle disease. Therefore, the restrictions pertaining to the interstate movement of poultry, mynah, and psittacine birds, and birds of all other species under any form of confinement, and their carcasses, and parts thereof, and certain other articles, from quarantined areas, as contained in 9 CFR Part 82, as amended, will apply to the quarantined area.

**List of Subjects in 9 CFR Part 82**

Animal diseases, Poultry & Poultry products, Quarantine, Transportation, Exotic Newcastle Disease, Ornithosis, Psittacosis.

## PART 82—EXOTIC NEWCASTLE DISEASE IN ALL BIRDS AND POULTRY; PSITTACOSIS AND ORNITHOSIS IN POULTRY

Accordingly, Part 82, Title 9, Code of Federal Regulations, is hereby amended in the following respect:

In § 82.3, new paragraph (c)(1) is added to read:

**§ 82.3 Imposition and removal of quarantine.**

* * * * *

(c) * * *

(1) *California.* (i) The premises of Fancy Feather Pet Shop, 9355 Telegraph Road, Pico Rivera, Los Angeles County.

(Secs. 4–7, 23 Stat. 32, as amended; secs. 1 and 2, 32 Stat. 791–792, as amended; secs. 1–4, 33 Stat. 1264, 1265, as amended; secs. 3 and 11, 76 Stat. 130, 132; (21 U.S.C. 111–113, 115, 117, 120, 123–126, 134b, 134f; 37 FR 28464, 28477; 38 FR 19141))

Done at Washington, D.C., this 12th day of May 1982.

**J. K. Atwell,**

*Deputy Administrator, Veterinary Services.*

[FR Doc. 82-13336 Filed 5-17-82; 8:45 am]

**BILLING CODE 3410-34-M**

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 220

**[Docket No. R-0370]**

### Regulation T; Credit by Brokers and Dealers; Deposit Required for Borrowing and Lending Securities

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** On November 10, 1981, the Board published for comment a proposal to amend § 220.6(h) Regulation T to permit brokers and dealers to borrow and lend securities against letters of credit issued by banks insured by the Federal Deposit Insurance Corporation and against U.S. government securities (46 FR 55533). The existing rule requires a deposit of cash.

The Board has adopted a modified version of its November 10, 1981 proposal. The amendment will permit, in addition to cash, the use of securities issued or guaranteed by the United States government or its agencies, certain letters of credit, bank CD's and bankers acceptances, as permissible collateral in stock lending and borrowing transactions. The amendment will also permit foreign banks to issue letters of credit in such transactions if they have filed with the Board agreements to comply with the same rules and regulations applicable to member banks in securities credit transactions.

**EFFECTIVE DATE:** May 17, 1982.

**FOR FURTHER INFORMATION CONTACT:** Laura Homer, Securities Credit Officer or Robert Lord, Attorney, Division of Banking Supervision and Regulation, Board of Governors of the Federal Reserve System, Washington, D.C. (202) 452–2781.

**SUPPLEMENTARY INFORMATION:** The Board's November 10, 1981 proposal to amend § 220.6(h) of Regulation T would have expanded acceptable kinds of collateral in stock lending transactions to include letters of credit and U.S. government securities. Many commenters believed the Board's proposed limitation with respect to acceptable kinds of collateral was too restrictive. These commenters suggested that CD's bankers acceptances, commercial paper and equities security be included as permissible collateral in transactions governed by § 220.6(h). The Board has determined that certain negotiable CD's and bankers acceptances along with letters of credit and U.S. government securities, will be permitted as acceptable collateral when securities are lent or borrowed by brokers and dealers.

The Board's proposal to limit use of letters of credit in stock lending and borrowing transactions to letters issued by FDIC-insured banks was opposed by many foreign banks doing business in the United States. These banks regarded the Board proposal as discriminatory and unnecessary. The Board believes that their position is not without merit, and will permit use of foreign bank letters of credit for purposes of § 220.6(h) if such bank has filed a Form F.R. T–2 with the Board agreeing to comply with all laws relating to securities credit that are applicable to their U.S. counterparts. Only foreign banks with branches or agencies that are supervised and examined by State or Federal banking authorities are eligible to file such agreements.

In its original proposal, the Board certified for the purpose of 5 U.S.C. 605(b) that its action would not have a significant impact on a substantial number of small entities. No comments were received which would lead the Board to conclude that the adoption of this amendment would have a significant impact on a substantial number of small entities.

**List of Subjects in 12 CFR Part 220**

Banks, banking, Brokers, Credit, Margin, Margin requirements, Reporting requirements, Securities.

Accordingly, pursuant to sections 7 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78g, 78w), the Board revises § 220.6(h) of Regulation T (12 CFR Part 220) to read as follows:

## PART 220—CREDIT BY BROKERS AND DEALERS

**§ 220.6 Certain technical details.**

* * * * *

"(h) *Borrowing and lending securities.* Without regard to the other provisions of this part, a creditor may borrow or lend securities for the purpose of making delivery of the securities in the case of short sales, failure to receive securities required to be delivered, or other similar

situations. Each borrowing shall be secured by a deposit of one or more of the following: cash, securities issued or guaranteed by the United States government or its agencies, negotiable bank certificates of deposit and bankers acceptances issued by banking institutions in the United States and payable in the United States, or irrevocable letters of credit issued by a bank insured by the Federal Deposit Insurance Corporation or a foreign bank that has filed an agreement with the Board on Form F.R. T–2. Such deposit made with the lender of the securities shall have at all times a value at least equal to 100 percent of the market value of the securities borrowed, computed as of the close of the preceding business day."

* * * * *

*OMB Control Number:* Approval by OMB is pending.

*Paperwork Reduction Act*

In accordance with the Paperwork Reduction Act of 1980 (Pub. L. 96–511), the reporting or recordkeeping provisions that are included in this regulation have been or will be submitted for approval to the Office of Management and Budget (OMB).

By order of the Board of Governors of the Federal Reserve System, May 12, 1982.

**William W. Wiles,**

*Secretary of the Board.*

[FR Doc. 82–13426 Filed 5–17–82; 8:45 am]

BILLING CODE 6210–01–M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 176

[Docket No. 81F–0303]

### Indirect Food Additives: Paper and Paperboard Components; Mono-, di-, tri-(1-Methyl-1-Phenylethyl)-Phenol, Ethoxylated, Sulfated, Ammonium Salt (Average 12 to 16 Moles Ethylene Oxide)

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the food additive regulations to provide for the safe use of mono-, di-, tri-(1-methyl-1-phenylethyl)-phenol, ethoxylated, sulfated, ammonium salt with an average of 12 to 16 moles of ethylene oxide as a component of paper and paperboard in contact with aqueous and fatty foods. This action is in response to a petition filed by the Westvaco Corp.

**DATES:** Effective May 18, 1982; objections by June 17, 1982.

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

**FOR FURTHER INFORMATION CONTACT:** Geraldine E. Harris, Bureau of Foods (HFF–334), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5690.

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** of October 23, 1981 (46 FR 52033), FDA announced that a petition (FAP 1B3554) had been filed by the Westvaco Corp., Box 70848, Charleston Heights, SC 29405, proposing that § 176.170 (21 CFR 176.170) be amended to provide for the safe use of mono-, di-, tri-(1-methyl-1-phenylethyl)-phenol, ethoxylated, sulfated, ammonium salt with an average of 12 to 16 moles of ethylene oxide as a component of paper and paperboard in contact with aqueous and fatty foods.

FDA has evaluated data in the petition and other relevant material, and concludes that the proposed food additive use is safe and that § 176.170 should be amended as set forth below. In accordance with § 171.1(h) (21 CFR 171.1(h)), the petition and the documents that FDA considered and replied upon in reaching its decision to approve the petition are available for inspection at the Bureau of Foods (address above) by appointment with the information contact person listed above. As provided in § 171.1(h)(2), the agency will delete from the documents any materials that are not available for public disclosure before making the documents available for inspection.

The agency has carefully considered the potential environmental effects of this action and has concluded that the action will not have a significant impact on the human environment and that an environmental impact statement therefore will not be prepared. The agency's finding of no significant impact and the evidence supporting this finding, contained in an environmental impact analysis report (pursuant to 21 CFR 25.1(j)), may be seen in the Dockets Management Branch (address above), between 9 a.m. and 4 p.m., Monday through Friday.

**List of Subjects in 21 CFR Part 176**

Food additives; Food packaging; Paper and paperboard.

## PART 176—INDIRECT FOOD ADDITIVES: PAPER AND PAPERBOARD COMPONENTS

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 5.10 (formerly 5.1; see 46 FR 26052; May 11, 1981)), Part 176 is amended in § 176.170(a)(5) by alphabetically inserting a new item in the list of substances, to read as follows:

**§ 176.170 Components of paper and paperboard in contact with aqueous and fatty foods.**

* * * * *

(a) * * *

(5) * * *

| List of substances | Limitations |
|---|---|
| * * * * * | |
| Mono-, di-, tri-(1-methyl-1-phenylethyl)-phenol, ethoxylated, sulfated, ammonium salt with an average of 12 to 16 moles of ethylene oxide (CAS Reg. No. 68130–71–2). | For use only as an emulsifier for rosin based sizing at a level not to exceed 0.03 percent by weight of the finished dry paper and paperboard. |
| * * * * * | |

* * * * *

Any person who will be adversely affected by the foregoing regulation may at any time on or before June 17, 1982 submit to the Dockets Management Branch (address above), 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. Three 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 shall become effective May 18, 1982.

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

Dated: May 12, 1982.

**William F. Randolph,**

*Acting Associate Commissioner for Regulatory Affairs.*

[FR Doc. 82-13427 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

## 21 CFR Part 452

**[Docket No. 82N-0076]**

## Antibiotic Drugs; Erythromycin Ethylsuccinate for Oral Suspension

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the certification of a new strength of erythromycin ethylsuccinate for oral suspension and to revise test methods for potency and pH for this drug. The manufacturer has supplied sufficient data and information to establish the safety and efficacy of this drug.

**DATES:** Effective May 18, 1982; comments, notice of participation, and request for hearing by June 17, 1982; data, information, and analyses to justify a hearing by July 19, 1982.

**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 M. 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 strength (80 milligrams) of erythromycin ethylsuccinate for oral suspension and to revise test methods for potency and pH for this drug. The revised potency assay procedure incorporates a blending method for sample preparation in lieu of the existing method and is adequate for all strengths of the drug. The agency has contacted the only other known affected manufacturer, and the firm supports the revised potency assay. The pH test method is also revised for the 80-milligram strength of the drug to provide for a delay in the period of time it takes for the test solution to reach equilibrium. The agency has concluded 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 452 (21 CFR 452) 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.

**List of Subjects in 21 CFR Part 452**

Antibiotics, Macrolide.

## PART 452—MACROLIDE ANTIBIOTIC DRUGS

Therefore, under the Federal Food, Drug, and Cosmetic Act (secs. 507, 701 (f) and (g), 52 Stat. 1055–1056 as amended, 59 Stat. 463 as amended (21 U.S.C. 357, 371 (f) and (g))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10 (formerly 5.1; see 46 FR 26052; May 11, 1981)), § 452.125c is amended by revising the second sentence of paragraph (a)(1) and by revising paragraph (b) (1) and (2) to read as follows:

**§ 452.125c Erythromycin ethylsuccinate for oral suspension.**

(a) * * *

(1) *Standards of identity, strength, quality, and purity.* Erythromycin ethylsuccinate for oral suspension is a dry mixture of erythromycin ethylsuccinate with suitable and harmless buffer substances, dispersing agents, diluents, colorings, and flavorings. It contains the equivalent of 40 milligrams or 80 milligrams of erythromycin per milliliter of the reconstituted suspension. * * *

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(b) * * *

(1) *Potency.* Proceed as directed in § 436.105 of this chapter, preparing the sample for assay as follows: Reconstitute as directed in the labeling. Place an accurately measured representative portion of the sample into a high-speed glass blender jar containing sufficient methyl alcohol to give a final volume of 200 milliliters. Blend for 3 to 5 minutes. Further dilute an aliquot with 0.1*M* potassium phosphate buffer, pH 8.0 (solution 3), to the reference concentration of 1.0 microgram of erythromycin base per milliliter (estimated).

(2) *pH.* Proceed as directed in § 436.202 of this chapter, using the suspension prepared as directed in the labeling. If the suspension contains 80 milligrams per milliliter, equilibrium usually is reached in approximately 15 minutes.

* * * * *

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 (21 U.S.C. 357), FDA permits the manufacturer to market this drug on a "release" status pending this regulation's effective date. 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 May 18, 1982. However, interested persons may, on or before June 17, 1982, submit written comments on this rule to the Dockets Management Branch (address above). Two 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 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, and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before June 17, 1982, a written notice of participation and request for hearing, and (2) on or before July 19, 1982, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 430.20. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes the action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the

heading of this order and filed with the Dockets Management Branch.

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

*Effective date.* This regulation shall be effective May 18, 1982.

(Secs. 507, 701 (f) and (g), 52 Stat. 1055–1056 as amended, 59 Stat. 463 as amended (21 U.S.C. 357, 371, (f) and (g)))

Dated: May 7, 1982.

**James C. Morrison,**

*Acting Assistant Director for Regulatory Affairs.*

[FR Doc. 82-13301 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

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**21 CFR Part 510**

## New Animal Drugs; Change of Sponsor Address

**AGENCY:** Food and Drug Administration.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the animal drug regulations to reflect approval of several supplemental new animal drug applications (NADA's) filed by Byk-Gulden, Inc., providing for a change of sponsor address.

**EFFECTIVE DATE:** May 18, 1982.

**FOR FURTHER INFORMATION CONTACT:** John R. Markus, Bureau of Veterinary Medicine (HFV–104), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4313.

**SUPPLEMENTARY INFORMATION:** Byk–Gulden, Inc., filed several supplemental NADA's providing for changing its address to 60 Baylis Rd., Melville, NY 11747.

This action concerns a change of sponsor address, and does not involve any changes in manufacturing facilities, equipment, procedures, or production personnel. Under the Bureau of Veterinary Medicine's supplemental approval policy (42 FR 64367; December 23, 1977), this is a Category I change which does not require reevaluation of the safety and effectiveness data in the parent applications. The supplemental NADA's for the change of sponsor address are approved and the regulations are amended to reflect the approvals.

The Bureau of Veterinary Medicine has determined pursuant to 21 CFR 25.24(d)(1)(i) (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.

This action is governed by the provisions of 5 U.S.C. 556 and 557 and is therefore excluded from Executive Order 12291 by section 1(a)(1) of the Order.

**List of Subjects in 21 CFR Part 510**

Administrative practice and procedure; Animal drugs; Labeling; Reporting requirements.

## PART 510—NEW ANIMAL DRUGS

Therefore, under the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347 (21 U.S.C. 360b(i))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10 (formerly 5.1; see 46 FR 26052; May 11, 1981)) and redelegated to the Bureau of Veterinary Medicine (21 CFR 5.83), Part 510 is amended in § 510.600 by revising the entry "Bky-Gulden, Inc." in paragraph (c)(1) and revising the entry "025463" in paragraph (c)(2) to read as follows:

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

* * * * *

(c) * * *

(1) * * *

| Firm name and address | Drug labeler code |
|---|---|
| * * * * * | |
| Byk-Gulden, Inc., 60 Baylis Rd., Melville, NY 11747 | 025463 |
| * * * * * | |

(2) * * *

| Drug labeler code | Firm name and address |
|---|---|
| * * * * * | |
| 025463 | Byk-Gulden, Inc., 60 Baylis Rd., Melville, NY 11747. |
| * * * * * | |

*Effective date.* May 18, 1982.

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

Dated: May 11, 1982.

**Robert A. Baldwin,**

*Associate Director for Scientific Evaluation.*

[FR Doc. 82-13302 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

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**DEPARTMENT OF LABOR**

**Office of Pension and Welfare Benefit Programs**

**29 CFR Part 2550**

## Rules and Regulations for Fiduciary Responsibility; Trust Requirement and Definition of Plan Assets—Governmental Mortgage Pools

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations that: (1) Describe the assets that an employee benefit plan is considered to acquire, for purposes of the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA), when it invests in certain governmental mortgage pools; and, (2) descibe the way in which the requirement of ERISA that plan assets must be held in trust is satisfied with respect to specified kinds of property. There has been considerable uncertainty regarding what constitutes "plan assets" with respect to a plan's investment in governmental mortgage pools, as well as uncertainty regarding the manner in which the trust requirement of ERISA is satisfied. The regulations will provide guidance to plan fiduciaries, participants and beneficiaries of plans, persons borrowing from plans, certain mortgage pool sponsors and other affected parties.

**DATE:** The regulation is effective June 17, 1982.

**FOR FURTHER INFORMATION CONTACT:** William A. Schmidt, Plan Benefits Security Division, Office of the Solicitor, telephone (202) 523–9592, or R. F. Nuissl, Office of Fiduciary Standards, Pension and Welfare Benefit Programs, telephone (202) 523–8369, U.S. Department of Labor, Washington, D.C. 20210.

**SUPPLEMENTARY INFORMATION:** On August 28, 1979, the Department of Labor (the Department) published a notice in the **Federal Register** (the 1979 proposal) (44 FR 50363) containing proposed regulations that would: (1) Describe property interests that would be regarded as assets of an employee benefit plan under ERISA, and (2) Provide a limited exemption from the

requirement of section 403(a) of ERISA that plan assets be held in trust. The notice gave interested persons an opportunity to comment on the proposal. At the request of certain members of the public, the comment period was extended and, after the expiration of the extended period, subsequently reopened (44 FR 61618, October 26, 1979; 44 FR 74858, December 18, 1979). The comment period was later reopened again in connection with the Department's public hearing on the proposals (45 FR 7521, February 1, 1980).

The public hearing on the proposals was held in Washington, D.C., on February 27 and 28, 1980. At the conclusion of the hearing, the record in the proceeding was held open until March 28, 1980, in order to permit the filing of additional submissions. On June 6, 1980, the Department reproposed paragraph (e) of proposed § 2550.401b–1 (the 1980 proposal) (45 FR 38084) which described the assets that a plan would be considered to own by reason of its acquisition of an equity security, and additional comments were received with respect to the matters covered by the reproposal.

In response to the proposals, the Department received comments from a great number of interested parties who raised questions regarding a variety of different arrangements that might be affected by the proposed regulation defining the term "plan assets." Among the commentators were representatives of certain governmental entities and quasi-governmental entities that sponsor mortgage pools in which a plan may invest. These commentators questioned whether certain provisions of the proposed regulation should apply to a plan's investment in such a pool. Since these comments involve issues that can be addressed separately from other issues that have been raised with respect to the proposed regulation, the Department has decided, in order to eliminate uncertainty, to issue a final regulation at this time which deals with the investments referred to above. This regulation describes the assets that a plan is considered to own, for purposes of the fiduciary responsibility provisions of ERISA [1] when it acquires an interest in a governmental pool.

[1] The regulation applies to Part 4 of Title I of ERISA and to section 4975 of the Internal Revenue Code. Section 102 of Reorganization Plan Number 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), gives the Department authority to issue regulations under most provisions of section 4975 of the Code, including those provisions to which the definition of the term "plan assets" is relevant.

The Department also believes that most of the issues raised in connection with the proposed regulation under section 403(a) of ERISA (relating to the requirement that plan assets be held in trust) may also be resolved at this time. Accordingly, this document also includes a final regulation which describes how the trust requirement of ERISA may be satisfied in specified situations.

The Department intends to address the other issues that have been raised with respect to the proposed plan assets regulation in the near future.

The discussion below summarizes the comments that were received by the Department in connection with those aspects of the proposed regulations that are being dealt with here and describes the provisions of the final regulations.

**Plan Assets Regulation—Governmental Mortgage Pools**

A. *Description of Governmental Mortgage Pools.* The Department received a number of comments regarding certain investment pools consisting of mortgage notes held for the benefit of investors who acquire certificates which represent a fractional undivided beneficial interest in, or are backed by, the pooled mortgages. Some of these mortgage pools are sponsored by a government agency or a quasi-governmental organization. The commentators were concerned that, under the proposed regulation, the assets of a plan that invests in a mortgage pool might be deemed to include the underlying mortgages of the pool (and the sponsor of such a pool might, therefore, be considered to be a fiduciary with respect to investing plans) under either paragraph (a) or paragraph (e) of the proposal. Paragraph (a) of the proposal provided, as a general rule, that the assets of a plan include any property in which the plan has a "beneficial ownership interest." Paragraph (e) of the proposal provided that the assets of an entity (other than an investment company registered under the Investment Company Act of 1940) in which a plan makes an equity investment will be deemed to include plan assets, unless a specified exception applied.[2] Since ERISA defines the term "fiduciary" to include, among others, persons who exercise authority or control respecting the management or disposition of the assets of a plan,[3] the effect of this provision would be to cause the managers of certain entities in which a plan makes an equity investment to be subject to all of the fiduciary responsibility provisions of ERISA with respect to their dealings with the entity's assets.

[2] The exceptions in the 1979 proposal were for securities issued by companies engaged primarily in the provision, production or sale of a product or service other than the investment of capital (operating companies) and securities that are widely held, freely transferable and registered pursuant to certain requirements of the Federal securities acts. The 1980 proposal also excluded securities issued by companies engaged directly in the management or development of real estate, and securities issued by certain venture capital companies, from the general rule.

Although some of the governmental mortgage pools described by the commentators involve instruments of the kind described in paragraph (b) of the proposed regulation (which stated that when a plan acquires certain interest-bearing securities that are issued by an agency or instrumentality of the United States, its assets would include the securities, but would not include any property underlying the securities), each of these governmental programs has certain different features. These features are described below.

1. *Government National Mortgage Association (GNMA) Mortgage Pools.* GNMA mortgage-backed securities are issued by a private lender, but are backed by pools of mortgages that are insured by the Department of Housing and Urban Development or guaranteed by the Veterans Administration. A holder of such securities acquires the right to receive a proportionate share of the principal and interest attributable to collections on the pooled mortgages, and, when a mortgage is liquidated as a result of prepayment or foreclosure, the security holder becomes entitled to a proportionate share of the unscheduled recovery of principal.

The issuer of GNMA guaranteed securities administers monthly payments to securities holders, and services the pooled mortgages. In addition, an issuer is required to make up from its own funds any shortfalls in scheduled collections as well as certain losses associated with foreclosure. If an issuer of GNMA guaranteed securities is unable to make any required payments as scheduled, GNMA either advances funds to the issuer or pays security holders directly so as to assure timely payment by the fifteenth day of each month. GNMA's guarantee is backed by the full faith and credit of the United States.

Upon the issuance of GNMA guaranteed securities, GNMA becomes the owner of the pooled mortgages, including any past or future collections attributable to the mortgages. Although the issuer, for administrative convenience, remains the mortgagee of

[3] See section 3(21)(A)(i) of ERISA.

record with respect to the pooled mortgages, its interest in such mortgages is, upon the issuance of the securities, reduced to the right to receive a service fee from GNMA (derived from mortgage collections) for so long as it remains an issuer in good standing.

2. *Federal National Mortgage Association (FNMA) Mortgage Pools.* FNMA engages in certain mortgage pool operations pursuant to the Federal National Mortgage Association Charter Act (the Charter Act).[4] The FNMA mortgage pools consist of mortgage loans purchased by FNMA and assembled into separate pools. FNMA holds the mortgages in each pool in trust for the benefit of investors in the pool and issues a "guaranteed mortgage pass-through certificate" to each investor which evidences a pro-rata undivided beneficial interest in the equitable ownership of the mortgage loans comprising each separate identified pool. FNMA is obligated to distribute to certificate holders amounts representing scheduled payments of principal and interest attributable to the underlying mortgages whether or not such amounts are actually received and is also obligated to distribute the full principal amount of any foreclosed or otherwise fully liquidated mortgage loan whether or not such principal amount is actually recovered.

FNMA was originally established in 1938 as a subsidiary of a government corporation. It is now a privately-owned corporation under the Charter Act. However, FNMA is regulated by the U.S. Department of Housing and Urban Development, its securities are provided the same exemption from the registration requirements of the Federal securities laws as that provided for securities issued by the government of the United States, and all offerings of FNMA debt securities and FNMA guaranteed mortgage pass-through certificates must be approved by the Secretary of the Treasury. In addition, one third of the members of the FNMA's board of directors are appointed by the President of the United States.

3. *Federal Home Loan Mortgage Corporation (FHLMC) Mortgage Pools.* FHLMC issues participation certificates and guaranteed mortgage certificates which convey a beneficial ownership interest in certain underlying mortgages. FHLMC guarantees payment of interest on the mortgages underlying guaranteed mortgage certificates or participation certificates to the extent of the certificate rate and also guarantees collection of principal on the mortgages. FHLMC is a corporate instrumentality of the United States created by Congress[5] for the purpose of increasing the availability of mortgage credit for the financing of housing. The Board of Directors of FHLMC is composed of the three members of the Federal Home Loan Bank Board, whose Chairman is the Chairman of the Board of FHLMC. The members of the Federal Home Loan Bank Board are appointed by the President of the United States with the advice and consent of the Senate. The capital stock of FHLMC consists solely of non-voting common stock held by the twelve Federal Home Loan Banks.[6]

B. *Discussion of the Final Regulation Relating to Governmental Mortgage Pools.* When an employee benefit plan invests in a governmental mortgage pool of the kind described above, it acquires a certificate that represents an undivided beneficial interest in, or is specifically backed by, the underlying mortgages of the pool. Thus, under the "beneficial ownership" test in paragraph (a) of the proposed regulation, the underlying mortgages might be considered to be "plan assets" by reason of such an investment. However, the governmental mortgage pool investments described above involve guarantees of the plan's investment by a government agency or government-sponsored corporation. In view of these special characteristics, the Department has concluded that it would be inappropriate to consider such underlying mortgages as plan assets solely because a plan may acquire an interest in the mortgages as an incident of its investment.

Even if the mortgages underlying a governmental mortgage pool are not considered to be plan assets under a "beneficial ownership" rule, the mortgages, might be considered to be plan assets under paragraph (e) of the proposed regulation, relating to equity securities.[7] As discussed in the preambles to both the 1979 proposal and the 1980 proposal, paragraph (e) reflected the Department's concern that, unless the underlying assets of certain entities in which an employee benefit plan invests are characterized as including "plan assets", the purposes of the fiduciary responsibility provisions of ERISA might easily be defeated. However, the special characteristics of governmental mortgage pools described above indicate that a plan's investment in such an entity is not the kind of investment that might be used to avoid fiduciary responsibility.[8] GNMA guaranteed pass-through mortgage certificates are guaranteed by the United States, and where such a guarantee by the United States exists with respect to a plan's investment in a mortgage pool, the Department believes that a plan that invests in the pool will look to the guarantee, rather than to the mortgages underlying the pool, for assurance that amounts due on its investment will be paid. Although FHLMC and FNMA mortgage pool certificates are not guaranteed directly or indirectly by the United States, each corporation guarantees principal and interest on such investments and, accordingly, an investing plan will rely on the creditworthiness of the issuing corporation in making its investment decision. Since there is a significant Federal government involvement in the management of each corporation, and protections similar to those provided to holders of GNMA mortgage pool certificates are afforded to holders of certificates in mortgage pools that are sponsored by FNMA and FHLMC, the Department has concluded that plan investments in these pools should, for purposes of the regulation, be treated in the same way as investments in mortgage pools that have a "full faith and credit" guarantee.

In view of the foregoing, the Department has decided that it is appropriate to treat all governmental mortgage pool investments in the manner contemplated by paragraph (b) of the proposal (relating to obligations of the United States or an agency or instrumentality thereof). Accordingly, the final regulation provides that when a plan invests in a governmental mortgage pool, its assets include its investment,

[4] 12 U.S.C. 1716–1723h.

[5] Title III of the Emergency Home Finance Act of 1970, as amended, 12 U.S.C. 1451–1459.

[6] Legislation has recently been introduced that would, among other things, result in the conversion of the non-voting capital stock of FHLMC to voting common stock and would provide authority for distribution of voting stock to the shareholders of the various Federal Home Loan Banks. FHLMC also would have authority to sell common and preferred stock to the public, and, after a transitional period, six of the nine directors of FHLMC would be elected by the common stockholders.

[7] The exception in paragraph (e), as proposed, for securities that are widely held, freely transferable and registered under certain provisions of the Federal securities acts would not be available for interests in governmental mortgage pools because such interests are issued pursuant to an exemption from the registration requirements of the Securities Act of 1933. *See* 15 U.S.C. 77c(a)(2) (relating to securities guaranteed by the United States or an instrumentality thereof) and 12 U.S.C. 1719(b) (relating to interests in FNMA pools).

[8] Although the distinction between investments in governmental mortgage pools and those equity investments that would be subject to the general "look through" rule of paragraph (e) of the proposal is significant to the Department's decision to adopt a special rule for governmental mortgage pools, the discussion in this notice should not be read to imply that paragraph (e) will ultimately be adopted substantially as it was proposed.

but do not, solely by reason of such investment, include any of the underlying mortgages. Thus, the sponsor or manager of a governmental mortgage pool would not be a fiduciary of a plan merely by reason of the plan's investment in the pool. The regulation specifically states that interests in FHLMC, GNMA and FNMA mortgage pools are among the investments to which the regulation's general rule applies.[9]

C. *Other Issues Under the Proposed Plan Assets Regulation.* As noted above, the Department has decided to issue a final regulation relating to governmental mortgage pools at this time in view of the widespread concern regarding the potential effect of the proposed regulation, if adopted, on employee benefit plan investments in such pools and the consequent need for guidance in this area. However, the Department is not prepared at this time to issue a final regulation which deals comprehensively with the definition of "plan assets" as it relates to the fiduciary responsibility provisions of ERISA. Nonetheless, the Department contemplates that the regulation being adopted here will be redesignated and incorporated in the forthcoming plan assets regulation.

**Regulation Relating to the Trust Requirement**

A. *General Considerations.* The comments received by the Department in connection with the proposed regulation under section 403(a) of ERISA indicated that there is uncertainty regarding the manner in which the requirement of that section that plan assets be "held in trust" may be satisfied with respect to various kinds of property. The final regulations under section 403(a) contain specific rules for those arrangements that were of most concern to the commentators. These specific rules are discussed below.

The rules in the final regulation are intended to permit trustees to hold plan assets in conventional ways, but are also intended to be consistent with the purposes underlying the trust requirement of section 403(a) of ERISA. In this respect, the Department noted in the preamble to its original proposed regulation under section 403(a) that an underlying rationale of the trust requirement is to prevent commingling of plan assets.[10] In addition, the Department believes that the trust requirement also should be interpreted in the context of the further requirement of section 403(a) that the plan's trustee [11] must have exclusive authority and discretion to manage and control the assets of the plan (except as otherwise specifically provided). In the Department's view, the purposes underlying the trust requirement suggest that the two primary considerations in determining whether a particular arrangement satisfies the trust requirement are: (1) The segregation of the property so as to prevent commingling of the property held in trust with property held for his own account by the person managing the property; and, (2) The trustee's retention of the exclusive authority and discretion to manage and control all of the plan's rights with respect to the property.

When the primary considerations identified above are taken into account, it is apparent that plan trustees should have considerable flexibility under the trust requirement to determine the manner in which an asset of the plan will be held. Nonetheless, plan assets must, in any event, be held in a manner that is consistent with the general fiduciary provisions of ERISA, including the "prudence" rule of section 404(a)(1)(B).[12] In addition, a person holding property on behalf of the plan's trustee may be acting as agent for the trustee. The Department is not addressing here the question of the extent to which a plan trustee is responsible as principal for the acts of such a person.

B. *Street Name and Nominee Registration.* In footnote 14 to the preamble of the 1979 proposal, the Department suggested that, generally, the practice of registering securities in which a plan has invested in the name of a broker-dealer or its nominee (sometimes referred to as "street name" registration) [13] would violate the requirement of section 403(a) of ERISA that plan assets be held in trust, unless the broker-dealer held the securities as trustee for the plan pursuant to an executed trust agreement. Several commentators stated that it is customary for the securities of employee benefit plans to be held in street name and urged that the Department reconsider whether it is permissible to hold securities in this manner under section 403(a).

According to the commentators, where securities are owned by an employee benefit plan, but registered in street name, the interests of the plan are adequately protected, and a plan trustee's control over such assets is assured, even though the securities are not actually registered in the name of the trust under which the plan is maintained. In this regard, the commentators pointed out that the Securities and Exchange Commission has promulgated rules that specifically regulate the conduct of a broker-dealer with respect to its holdings of customer securities.[14]

Moreover, the commentors noted, insurance is provided (under the Securities Investor Protection Act of 1970) [15] against losses resulting from the insolvency of a broker-dealer in whose name, or in the name of whose nominee, securities of a plan are held. In addition, the commentators noted that most major broker-dealers also carry additional insurance against losses which exceed the amount covered by the Securities Investor Protection Act. The commentators also pointed out that the Federal Bankruptcy Code establishes certain preferences in bankruptcy with respect to claims against a broker-dealer in whose name securities are held on behalf of a customer,[16] and those

[9] Of course, the plan's interest in a governmental mortgage pool would itself be an asset of the plan, and would include all of the rights of a holder of such an interest under applicable law.

[10] 39 FR 44456, December 24, 1974.

[11] The discussion in this notice refers to a single plan "trustee" for purposes of convenience. However, section 403(a) expressly contemplates that a plan may have more than one trustee, and, where a plan does have more than one trustee, such trustees are generally obligated, under section 405(b)(1)(B) of ERISA, to jointly manage and control the assets of the plan. The discussion of the trust requirement in this document also applies to a plan with two or more trustees.

[12] Whether a person holding property on behalf of a plan is a fiduciary with respect to such property would be determined under the definition of that term in section 3(21) of ERISA.

[13] Securities also are frequently held in the name of a nominee of an institutional investor (such as a bank or insurance company) and such arrangements are referred to as "nominee" name registration. *See* Final Report of the Securities and Exchange Commission on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities 1 (1976).

[14] The commentators specifically referred to Rules 8c–1, 15c–1 and 15c3–3 under the Securities Exchange Act of 1934 (17 CFR 240.8c–1, 240.15c2–1 and 240.15c3–3). Rules 8c–1 and 15c2–1 restrict the hypothecation of customers' securities by a broker-dealer; rule 15c3–3 establishes rules relating to a broker-dealer's control over securities held on behalf of a customer and also requires a broker-dealer to establish a special reserve account with a bank for the exclusive benefit of customers.

[15] 15 U.S.C. 78aaa–78*lll*. The Securities Investor Protection Act of 1970 established the Securities Investor Protection Corporation, which has authority to bring actions in order to assure the protection of customers of a broker-dealer and also administers a fund from which advances may be made, subject to certain limitations, in order to satisfy a broker-dealer's obligation to its customers.

[16] 11 U.S.C. 752. Section 752 provides for the priority distribution of customer property to a broker-dealer's customers to the extent of their "allowed net equity claims." In general, the customer's "net equity claim" is equal to the amount

Continued

provisions provide additional protection against loss.

The commentators also pointed out that the plan trustee does not relinquish control over securities of an employee benefit plan merely because they are registered in street name. For example, the owner of stock registered in street name must be given proxy solicitations and has the right to vote the stock, and, in addition, is entitled to bring stockholder derivative actions.

The commentators also stated that street name registration may, in some respects, be advantageous to employee benefit plans. Several commentators pointed out that a plan's actual registration of securities increases the costs associated with holding and transfer of the securities. In addition, some commentators asserted that street name registration is particularly important for plans that allow a participant to direct the investment of his individual account [17] because such transactions are normally relatively small and their timing is not under the control of the plan's trustee.

According to the commentators, the use of street name registration is an important factor in the promotion of a Congressional policy favoring the establishment of a national clearance and settlement system because the ability to deposit and maintain customers' securities in a securities depository (thereby eliminating the necessity for the physical movement and delivery of stock certificates and making possible book entry transfers) is an essential component of such a national clearance and settlement system.[18] In this respect, some commentators called particular attention to certain central securities depositories which routinely hold securities in the name of a nominee.

The Department has reconsidered its position with respect to the application of the trust requirement to securities that are owned by an employee benefit plan, but are registered in street name. On the basis of the comments received, it appears that where securities owned by a plan are held in the name of a nominee or in street name, the trustee of the plan ordinarily retains exclusive control over all of the rights of ownership of such securities. For example, notwithstanding that securities are held in street name, the trustee may freely sell the securities, or pledge them, and, in the case of stock, may vote the shares. In addition, the comments received indicate that other statutes and regulations relating to such arrangements provide certain meaningful protections to the owners of securities (including plans) against the risks arising from the registration of the securities in the name of an entity other than their beneficial owner. Therefore, the Department has determined that the holding of securities of an employee benefit plan in nominee or street name will not, in itself, be a violation of the trust requirement of section 403(a). A new paragraph has accordingly been added to the final regulation to make it clear that the trust requirement of section 403(a) does not prohibit the holding of securities in street name or in the name of a nominee, provided such securities are held on the plan's behalf by a bank or its nominee, a broker-dealer or its nominee, or a "clearing agency" (as defined in the Securities Exchange Act of 1934) or its nominee.[19]

Notwithstanding the inclusion of a specific provision relating to street name registration in the final regulation, the Department notes that plan trustees and other plan fiduciaries should take steps to assure that any such arrangement in fact provides the trustee or trustees of the plan with authority and control over the securities. In addition, plan trustees and other fiduciaries have an obligation to evaluate the safeguards against loss that exist with respect to an arrangement under which securities owned by a plan are held in street name.[20] Such an evaluation is a particularly important part of a fiduciary's obligations in this context because the plan might be unable to dispose of securities held in street name on its behalf if the holder of such securities becomes bankrupt.

C. *Corporations Described in Section 501(c)(2) of the Internal Revenue Code.* Some commentators expressed concern that the regulation relating to the trust requirement as proposed by the Department would prevent a trustee of a plan from holding real property in a corporation described in section 501(c)(2) of the Internal Revenue Code.[21] According to these commentators, certain trustees have traditionally established such corporations in order to hold title to real property in states in which they do not do business because many states prohibit corporations other than those domiciled or doing business in the state from owning real property that is located within the state.

In the case of a corporation described in section 501(c)(2) of the Code that is organized for purposes of holding real property on behalf of a plan, the plan's rights to the assets of such corporation—*i.e.* the real property held by the corporation—are evidenced by shares of stock. Therefore, it appears that, under such an arrangement, a plan trustee would control all of the plan's rights with respect to such property if he holds all of the stock in trust.[22] Accordingly, the final regulation has been revised to make it clear that the trust requirement of section 403(a) would be satisfied with respect to real property held in a 501(c)(2) corporation on behalf of the plan if the stock of the corporation is held in trust.

D. *Certain Plan Investments.* Under the Department's proposed regulation dealing with the definition of plan assets, the assets of an entity in which a plan makes an equity investment under certain circumstances would include "plan assets".[23] Several commentators

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that would have been realized at the time of filing of the bankruptcy petition, upon liquidation of the customer's security position, less the amount of any claims of the broker-dealer against the customer. *See* 11 U.S.C. 741(a)(5).

[17] Section 404(c) of ERISA specifically contemplates participant directed individual account plans.

[18] The commentators referred specifically to Pub. L. No. 94–21 (May 9, 1975) which amended certain provisions of the Federal securities acts. Section 2 of that statute states that one of Congress' purposes in enacting the amendments was to "remove impediments to and perfect mechanisms of * * * a national system for clearance and settlement of securities transactions and the safeguarding of securities and fails related thereto."

[19] The specific provision relating to securities held in street name or by a nominee deals with those arrangements which were brought to the attention of the Department in the public comments. The regulation does not specifically address how the trust requirement would be satisfied with respect to other arrangements under which securities might be held on behalf of a plan.

[20] See the general discussion above regarding the application of the trust requirement. Among the factors that would be relevant to such an evaluation in cases where securities are held in the name of a broker-dealer or its nominee would be the financial stability of the broker-dealer, the safeguards established for the holding of securities, the extent to which adequate insurance is provided against loss (relative to the value of the securities held on behalf of the plan), and the feasibility of alternative methods of holding the securities.

[21] Section 501(c)(2) of the Code exempts from taxation a "(c)orporation organized for the exclusive purpose of holding title to property, collecting income therefrom and turning over the entire amount thereof, less expenses, to an organization which is itself exempt under this section." (Section 501(a) of the Code exempts from taxation trusts that form part of an employee pension plan that meets the requirements of section 401(a) of the Code).

[22] The Department will separately address the issue of when the assets of a plan will be considered to include the underlying assets of a corporation which is wholly owned by the plan in its final regulation dealing with the definition of "plan assets." The Department also notes that Interpretive Bulletin 75–2, 29 CFR 2509.75–2 describes the application of certain of the fiduciary responsibility provisions of ERISA in cases where a corporation is controlled by a plan.

[23] See paragraph (e) of the proposed plan assets regulation, discussed above.

noted that the proposed regulation relating to the trust requirement did not state how the requirement that plan assets be held in trust is satisfied in such cases.

The Department is not at this time addressing all of the issues that have been raised in connection with the proposed regulations relating to plan investments in entities such as corporations and partnerships. Nonetheless, the Department believes that is both feasible and appropriate to describe, in the regulation being issued here, how the trust requirement of ERISA is satisfied where the assets of an entity include plan assets by reason of a plan's investment in the entity.

In the Department's view, the fact that the assets of an entity in which a plan invests may, for purposes of the fiduciary responsibility provisions ERISA, be considered to include plan assets does not, in itself, have the effect of requiring that the assets of the entity be held in trust. In such circumstances, the plan's rights in the entity, and the terms and conditions to which its interest in the entity is subject, are usually governed by a contract, certificate, or other instrument. Where control over such an instrument is sufficient to provide the plan's trustee with exclusive authority to exercise all to the plan's rights with respect to the assets of the entity (other than those rights which arise from the fiduciary obligations of either the management of the entity or other persons who are fiduciaries with respect to such assets) the trustee's control of such instrument is sufficient to satisfy the trust requirements of section 403(a). For example, if the assets of a limited partnership are considered (for purposes of ERISA) to include plan assets by reason of a plan's acquisition of an interest in the partnership, persons with discretionary authority or control with respect to the assets of the partnership would be fiduciaries (because they are exercising discretion over plan assets). However, under the final trust regulation, it is the evidence of the plan's interest in the partnership, rather than some other evidence of ownership of an interest in each of the partnership's assets, that must be held in trust.

In view of the foregoing, the final regulation relating to the trust requirement includes a new paragraph which indicates that when the assets of an entity are considered to include plan assets by reason of a plan's investment in the entity, the trust requirement is satisfied if the certificate, contract or other instrument evidencing the plan's investment is held in trust.

E. *Administrative Exemptions From the Trust Requirement.* Several commentators discussed various issues concerning the provision of the proposed regulations that would have provided a limited exemption from the trust requirement of section 403(a) for certain employee contributions under welfare plans. This provision has been reserved in the final regulation. Many of these commentators also raised issues relating to when employee contributions become "plan assets," and the Department intends to deal with all of the comments relating to employee contributions in its regulation relating to the definition of that term.

Another commentator requested that the Department provide an exemption from the trust requirement for certain organizations described in section 501(c)(9) of the Internal Revenue Code. The Department will also deal separately with that issue.

F. *Conforming Change.* Section 403b–1(b) of the final regulation has been modified to include an additional exemption from the trust requirement of ERISA that was enacted as part of the Multiemployer Pension Plan Amendments Act of 1980. This exemption concerns certain unfunded plans of companies owned by employees and former employees.[24]

G. *Organization of the Final Regulation Relating to the Trust Requirement.* In view of the revisions that have been made to the final regulation, the Department has decided to reorganize the regulation for the purpose of clarity. Paragraph (a) of the regulation under section 403(a) sets forth the general rule that plan assets must be held in trust; paragraph (b) of the regulation describes the manner in which the trust requirement is satisfied in certain specific situations; paragraph (c) sets forth specific obligations of trustees and is derived from paragraph (a) of the proposed regulation.

The final regulation under section 403(b) sets forth the exemptions from the trust requirement specifically established by statute.

In addtion, a minor revision has been made to paragraph (a)(3) of the regulation under section 403(b) to make it clear that the language limiting the availability of the statutory exemption in section 403(b)(3) of ERISA to assets held under certain custodial accounts applies to plans covering employees described in section 401(c)(1) of the Internal Revenue Code as well as to individual retirement accounts.

[24] See section 411(c), Pub. L. 96–364, September 25, 1980.

**Regulatory Flexibility Act**

The requirements of 5 U.S.C. 603–604 are not applicable to regulations with respect to which a notice of proposed rulemaking was published before January 1, 1981. *See* section 4 of the Regulatory Flexibility Act, Pub. L. 96–354, 94 Stat. 1165 (1980).

**Executive Order 12291**

The Department has determined that the regulations being issued here are not "major" rules as defined in section 1(b) of Executive Order 12291, because they are not likely to result in: an annual effect on the economy of $100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Estimates recently compiled by the Department of Housing and Urban Development indicate that approximately 7.3% of current (1981) private non-insured plan assets are in housing related entities, or approximately $20 billion. To the extent pension fund fiduciaries have avoided investing pension fund assets in governmental mortgage pools because of concern or uncertainty as to the extent of their fiduciary liabilities or fear of engaging in prohibited transactions, this regulation could increase investments by pension funds in governmental mortgage pools. This possible transfer of funds from other investments to governmental mortgage pools, will, of course, result in no net increase in pension fund investments in the economy.

While no additional pension investments will result from the regulation relating to governmental mortgage pools, the allocation of plan assets among competing investments would be expected to be more efficient to the extent there have been impediments imposed on investment managers. In addition, the regulation would not result in a reduction in protection offered plan participants and beneficiaries. Therefore, the regulation should not have any adverse, and could have a positive, effect on competition for funds and the functioning of the market.

Similarly, the clarification of the trust requirement will allow normal business practices to continue while still protecting the interests of participants and beneficiaries.

**Paperwork Reduction Act**

The regulations being issued here are not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) because they do not contain an "information collection request" as defined in 44 U.S.C. 3502(11).

**Statutory Authority**

The regulations below are adopted pursuant to the authority contained in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and under section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR, 1978 Comp., .332.

**List of Subjects in 29 CFR Part 2550**

Employee benefit plans, Employee Retirement Income Security Act, Employee Stock Ownership Plans, Exemptions, Fiduciaries, Investments, Investments, foreign, Party in interest, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and trustees.

**Regulation**

For the reasons stated above, Subchapter F, Chapter XXV, Subtitle B, of Title 29, Code of Federal Regulations, is amended as set forth below.

## PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for Part 2550 is revised to read as follows:

**Authority:** Sec. 505, Employee Retirement Income Security Act of 1974. Pub. L. 93–406, 88 Stat. 894 (29 U.S.C. 1135) unless otherwise noted. Sec. 401b–1 also issued under sec. 102, Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR, 1978 Comp. .332.

2. In Part 2550, a new § 2550.401b–1 is added, in the appropriate place, to read as follows:

**§ 2550.401b–1 Definition of "Plan Assets"—Governmental Mortgage Pools.**

(a) *In General.* (1) Where an employee benefit plan acquires a guaranteed governmental mortgage pool certificate, as defined in paragraph (b), then, for purposes of part 4 of Title I of the Act and section 4975 of the Internal Revenue Code, the plan's assets include the certificate and all of its rights with respect to such certificate under applicable law, but do not, solely by reason of the plan's holding of such certificate, include any of the mortgages underlying such certificate.

(b) A "guaranteed governmental mortgage pool certificate" is a certificate backed by, or evidencing an interest in, specified mortgages or participation interests therein and with respect to which interest and principal payable pursuant to the certificate is guaranteed by the United States or an agency or instrumentality thereof. The term "guaranteed governmental mortgage pool certificate" includes a mortgage pool certificate with respect to which interest and principal payable pursuant to the certificate is guaranteed by:

(1) The Government National Mortgage Association;

(2) The Federal Home Loan Mortgage Corporation; or

(3) The Federal National Mortgage Association.

3. In Part 2550, § 2550.403a–1 and § 2550.403b–1 are added in the appropriate place to read as follows:

**§ 2550.403a–1 Establishment of trust.**

(a) *In General.* Except as otherwise provided in § 403b–1, all assets of an employee benefit plan shall be held in trust by one or more trustees pursuant to a written trust instrument.

(b) *Specific applications.* (1) The requirements of paragraph (a) of this section will not fail to be satisfied merely because securities of a plan are held in the name of a nominee or in street name, provided such securities are held on behalf of the plan by:

(i) A bank or trust company that is subject to supervision by the United States or a State, or a nominee of such bank or trust company;

(ii) A broker or dealer registered under the Securities Exchange Act of 1934, or a nominee of such broker or dealer; or

(iii) A "clearing agency," as defined in section 3(a)(23) of the Securities Exchange Act of 1934, or its nominee.

(2) Where a corporation described in section 501(c)(2) of the Internal Revenue Code holds property on behalf of a plan, the requirements of paragraph (a) of this section are satisfied with respect to such property if all the stock of such corporation is held in trust on behalf of the plan by one or more trustees.

(3) If the assets of an entity in which a plan invests include plan assets by reason of the plan's investment in the entity, the requirements of paragraph (a) of this section are satisfied with respect to such investment if the indicia of ownership of the plan's interest in the entity are held in trust on behalf of the plan by one or more trustees.

(c) *Requirements concerning trustees.* The trustee or trustees referred to in paragraphs (a) and (b) shall be either named in the trust instrument or in the plan instrument described in section 402(a) of the Act, or appointed by a person who is a named fiduciary (within the meaning of section 402(a)(2) of the Act). Upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that:

(1) The plan instrument or the trust instrument expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to the proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to the provisions of Title I of the Act of Chapter XXV of this Title, or

(2) Authority to manage, acquire or dispose of assets of the plan is delegated to one or more investment managers (within the meaning of section 3(38) of the Act) pursuant to section 402(c)(3) of the Act.

**§ 2550.403b–1 Exemptions from Trust Requirement.**

(a) *Statutory exemptions.* The requirements of section 403(a) of the Act and section 403a–1 shall not apply—

(1) To any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) To any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) To a plan—

(i) Some or all of the participants of which are employees described in section 401(c)(1) of the Internal Revenue Code of 1954; or

(ii) Which consists of one or more individual retirement accounts described in section 408 of the Internal Revenue Code of 1954 to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of such Code, whichever is applicable;

(4) To a contract established and maintained under section 403(b) of the Internal Revenue Code of 1954 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b)(7) of such Code.

(5) To any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their

beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to the Act.

(b) [Reserved]

Signed at Washington, D.C. this 13th day of May, 1982.

**Jeffrey N. Clayton,**

*Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13400 Filed 5-13-82; 3:17 pm]

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## POSTAL SERVICE

### 39 CFR Part 265

### Release of Information; Disclosure of Listings of Employees at Postal Facilities

*Correction*

In FR Doc. 82-13047, appearing at page 20303, in the issue of Wednesday, May 12, 1982, make the following correction:

On page 20304, in § 265.6(e) the 8th line should read "names or addresses (past or present) of".

BILLING CODE 1505-01-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

### 50 CFR Parts 216 and 228

### Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities

**AGENCY:** National Oceanic and Atmospheric Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** Section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, directs the Secretary to allow, upon request, the taking of small numbers of marine mammals incidental to specified activities if the Secretary makes certain findings and prescribes regulations. These regulations establish a mechanism for the submission and evaluation of requests and establish requirements for specific regulations and Letters of Authorization to conduct allowed activities. In addition, pursuant to a request and available information, specific regulations allowing the taking of ringed seals incidental to on-ice seismic exploratory activities in the Beaufort Sea for the period 1982 to 1986, which set forth permissible methods of taking and requirements for monitoring and reporting, are established.

**EFFECTIVE DATE:** These regulations become effective on May 18, 1982.

**FOR FURTHER INFORMATION CONTACT:** Mr. R. B. Brumsted, Acting Deputy Director, Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, U.S. Department of Commerce, Washington, D.C. 20235, Telephone (202) 634-7529.

**SUPPLEMENTARY INFORMATION:**

#### Background

Pub. L. 97-58 amended the Marine Mammal Protection Act of 1972 (MMPA), by adding, among other things, a new Section 101(a)(5) (16 U.S.C. 1371(a)(5)) which directs the Secretary to allow, upon request by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, the incidental, but not intentional, taking of small numbers of marine mammals. This permission may be granted for periods of five years or less. Such taking may be allowed only if the species involved is not depleted and if the Secretary, after notice and opportunity for public comment, (a) finds that the total taking will have a negligible impact on the species, its habitat, and the availability of the species for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking.

On November 20, 1981 (46 FR 57098), the National Marine Fisheries Service (NMFS) published a Request for Information and Advanced Notice of Proposed Rulemaking in the **Federal Register**, which solicited information and suggestions from interested persons on (a) the types of activities that may be authorized under Section 101(a)(5); (b) the structure and content of regulations relating to permissible methods of taking, monitoring and reporting; and (c) a processing system for individual requests for such permission to take. In particular, NMFS specifically invited relevant information concerning seismic activities which might affect marine mammals so that appropriate implementing regulations could be considered.

The NMFS published proposed regulations in the **Federal Register** on March 3, 1982 (47 FR 9027), to implement Section 101(a)(5) of the MMPA by establishing a mechanism for the submission and evaluation of requests and establishing requirements for specific regulations and Letters of Authorization to conduct allowed activities (50 CFR Part 228, Subpart A). In addition, pursuant to a request from the International Association of Geophysical Contractors and available information, specific regulations to allow the taking of ringed seals (*Phoca hispida*) incidental to on-ice seismic exploratory and associated activities in the Beaufort Sea for the period 1982 to 1986 were proposed which set forth permissible methods of taking and requirements for monitoring and reporting (50 CFR Part 228, Subpart B). These regulations were based on a proposed finding that on-ice seismic exploratory activities in the Beaufort Sea of Alaska over the next five years may involve the taking of small numbers of non-depleted marine mammals, specifically ringed seals, and that the total of such taking will have a negligible impact on the species, on its habitat, and on the availability of such species for subsistence uses. The **Federal Register** notice also invited requests and outlined the information required for Letters of Authorization to conduct activities pursuant to final regulations, if established, for on-ice seismic activities.

#### Comments and Discussion

Ten comments were received from the public on the proposed regulations: The Whale Center felt the general regulations were appropriate, but expressed concern over the specific regulations governing the taking of ringed seals incidental to on-ice seismic activities.

The Environmental Defense Fund submitted comments on the general and specific regulations to ensure that the regulations provide for a system of accountability designed to evaluate the effects of each activity, and that the allowed activity be reevaluated annually.

The Animal Protection Institute of America expressed concern that the regulations regarding the incidental taking of ringed seals by seismic activities did not seem to address the effects of such taking on the health and stability of the ecosystem, and that the harassment and displacement of nursing females, which they feel will result in pup mortality, appear to violate at least the spirit of the MMPA which was intended to offer special protection to infant and nursing marine mammals.

The Alaska Department of Fish and Game expressed a general concern about the annual differences in the

geographical extent and intensity of seismic exploration since the impact is directly proportional to these factors. The ADF&G felt that all seismic lines actually shot should be plotted to monitor the intensity and assess the probable impacts. Further, the ADF&G felt that in the vicinity of Point Barrow, on-ice seismic activity conducted after mid-April may be in close proximity to the migratory corridors of the bowhead and beluga whales, and that this should be considered.

The Mayor, North Slope Borough, felt that the effects on the Beaufort Sea population of ringed seals would be more than negligible and that no taking should be allowed until the study by the Alaska Department of Fish and Game assessing the degree of disturbance of ringed seals has been completed. The Mayor also expressed concern that the seismic work might impact bowhead and beluga whales. The law firm of Terris and Sunderland, which submitted additional comments on behalf of the North Slope Borough, felt that the definition of "small numbers" should be changed, and that the specific regulations governing seismic activities would allow the taking of large numbers of ringed seals, would involve significant adverse impacts on the population, would impose inadequate monitoring and research obligations, and would be inconsistent with NMFS' April 1, 1982, biological opinion on Outer Continental Shelf activities in the Arctic Region.

Defenders of Wildlife, while not opposed to the regulations, did express reservations about the new amendment which sanctions human activities which have some degree of adverse impact on marine mammals. Defenders felt that NMFS must ensure that progress is made towards eliminating adverse effects on all marine mammals and that research be conducted to address the effects of seismic activities on other species including beluga whales, bearded and spotted seals, and endangered whales.

The taking of a depleted species cannot be allowed under Section 101(a)(5) of the MMPA. The bowhead whale is listed as depleted under the MMPA and is listed as endangered under the Endangered Species Act of 1973. Under Section 7 of the Endangered Species Act, the Bureau of Land Management and the Minerals Management Service, Department of the Interior, are required to consult with NMFS to ensure that activities associated with the Outer Continental Shelf oil and gas program are not likely to jeopardize the continued existence of endangered species or result in the destruction or adverse modification of critical habitat. In biological opinions issued pursuant to Section 7(b) of the Endangered Species Act, NMFS has included reasonable and prudent alternatives and recommendations to assist the Department of the Interior in planning OCS acitivities in the Arctic Region and fulfilling its obligations under Section 7 of the Endangered Species Act.

The NMFS does not have information which indicates that on-ice seismic activities will result in the taking of beluga whales, bearded or spotted seals, or other species of marine mammals. Further, these regulatons would not allow the taking of species of marine mammals other than ringed seals.

The International Association of Geophysical Contractors and the National Ocean Industries Association submitted joint comments in support of the regulations and findings, as proposed. The IAGC and NOIA offered to cooperate in a training program to assure that the observations and reports are made on a sound basis, and have been advised by the Alaska Department of Fish and Game that they would be willing to cooperate in such a venture. Further, IAGC and NOIA stated that geophysical operators have met with members of the Alaska Department of Fish and Game to assist in the design of the scientific studies. Exxon suggested certain changes to the wording of the regulations.

Chevron U.S.A. Inc. felt that the regulations proposed are not necessary and should not be adopted because: there can be no justification for a regulation on an activity that admittedly will have a negligible impact on the species; contrary to a statement in the discussion, the proposed regulations would regulate or restrict seismic activities because of the burden and the bureaucracy required to implement the regulations; the contention that the requirements of the Paperwork Reduction Act are inapplicable was erroneous; and the propriety, if not the authority, to change the definition of "taking" to accommodate the proposed regulations was questioned.

In regard to Chevron's comments, the MMPA requires the establishment of regulations to allow the taking of small numbers of marine mammals where the taking will have a negligible impact. The definition of "taking" has not been changed; however, "incidental, but not intentional, taking" has been defined since only this type of taking is allowed under Section 101(a)(5) of the MMPA. The NMFS does not believe that the requirements of the regulations place an undue burden or restrict seismic activities. Nor does NMFS have any indication that more than nine contractors will be requesting Letters of Authorization, and therefore has determined that the requirements of the Paperwork Reduction Act are not applicable.

In addition, comments were received from NMFS Regional Offices, the Marine Mammal Commission, and the Minerals Management Service and the Office of OCS Program Coordination, U.S. Department of the Interior. All comments are available for review in the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, 3300 Whitehaven Street, N.W., Washington, D.C.

Specific substantive comments on Subpart A and Subpart B of the regulations and the proposed findings under MMPA will be discussed separately.

**Subpart A—General**

*Section 228.1 Purpose.* It was suggested that the purpose statement be clarified to state that the permission to take can be allowed only "for a specified period of time not to exceed five consecutive years." The House Report on the Amendment (No. 97–228) states that the permission to take can be granted for periods of five years or less, but does not imply that taking cannot be allowed after the five-year (or less) period originally authorized for a specified activity is reached. After the initial period authorized, the permission to take could be allowed again for the same activity only after additional opportunity for public comment and after the necessary findings were made. Therefore, the purpose statement has been modified to state that the taking can be allowed during periods of not more than five consecutive years each.

*Section 228.2 Scope.* The required finding of negligible impact has been modified to read "* * * finds that the total taking during the specified time period will have a negligible impact * * *," as suggested by one reviewer. Further, it was suggested that the total taking must be considered with other factors which impact the population, such as predation and taking for subsistence use, in a determination of negligible impact. The NMFS agrees and feels that the present wording takes this into account.

Section 228.2 states that the taking can be allowed only after NMFS "prescribes regulations setting forth permissible methods of taking and other

means of effecting the least practicable adverse impact on the species and their habitat * * *." It was suggested that the phrase "means of effecting the least practicable adverse impact" be replaced by language indicating that activities should be conducted so as to minimize adverse effects. The NMFS has used the specific language contained in Section 101(a)(5) of the MMPA, which NMFS believes includes specifying methods of conducting an activity. Therefore, the suggested change has not been made.

*Section 228.3 Definitions.* It was suggested that the definition of incidental taking include activities such as directed harassment to accommodate situations where directed harassment could prevent accidental mortality, such as blasting for harbor construction. The House Report notes that the phrase "incidental, but not intentional" is intended to mean accidental taking; however, the MMPA also requires the Secretary to prescribe regulations setting forth permissible methods of taking and means of effecting the least practicable adverse impact on the species and its habitat. It is conceivable that a specified activity could involve the accidental taking of small numbers of marine mammals which would have a negligible impact on the species and its habitat, but that the impact, although negligible, could be reduced by requiring certain measures such as directed harassment to prevent mortality. However, it is not clear whether such activities could be allowed under Section 101(a)(5) of the MMPA since other exceptions to the MMPA which allow directed taking are more explicit. Therefore, the definition of "incidental, but not intentional, taking" has not been changed; however, NMFS may consider a change in the future with additional opportunity for public comment.

One reviewer argued that the definition of "small numbers" equates it with "negligible impact" and is, therefore, inconsistent with the intent of Congress as cited in the House Report to make the small number requirement separate from, and in addition to, the negligible impact requirement. The reviewer suggested that the definition of "small numbers" be changed to refer to takings which are "infrequent, unavoidable, or accidental," and should contain a standard separate from the one for "negligible impact," such as a specified percentage of the relevant population (e.g. 1 percent). In discussing the term "small numbers," the House Report recognizes "the imprecision of the term * * *, but was unable to offer a more precise formulation because the concept is not capable of being expressed in absolute numerical limits. The Committee intends that these provisions be available for persons whose taking of marine mammals is infrequent, unavoidable, or accidental." The NMFS does not believe that the term can be expressed as an absolute number or percentage or be defined in any absolute terms. However, NMFS feels that by defining "small numbers" to mean a portion of a marine mammal species or stock whose taking would have a negligible impact, an upper limit is placed on the term, and the phrase more effectively implements the Congressional intent underlining the new Section 101(a)(5) of the MMPA.

It was suggested that a definition for "total taking" be added to make clear that total taking refers to the taking that results from the combination of all applicants' activities. Since a finding of negligible impact is made for the specified activity, it cannot be made unless the total taking by all persons conducting the specified activity is found to be negligible. The NMFS feels that a separate definition would not add to the clarity of the regulations; therefore, a separate definition has not been added.

In general, commenters were concerned that NMFS define the terms of new Section 101(a)(5) in a fashion consistent with Congressional intent. A potential problem area is that the new Section speaks in terms of "citizens of the United States" requesting authority to take small numbers of marine mammals in carefully proscribed circumstances. The NMFS believes that a definition of "citizens of the United States" is necessary with respect to corporations, partnerships, associations, or governmental entities that may request Section 101(a)(5) authorization. Thus, a definition has been added to the effect that any of these entities will be deemed citizens of the United States for purposes of this Part.

The NMFS, for good cause, finds that a comment period regarding this particular definition is impractical and contrary to the public interest under 5 U.S.C. 553(b)(B) because it would impede the Agency's timely and orderly implementation of new Section 101(a)(5) and otherwise would prevent the Agency from properly administering and enforcing these new rules.

*Section 228.4 Submission of Requests.* One reviewer questioned the appropriateness of requiring that requests include the biological information in § 228.4(a) (3) and (4) since comprehensive knowledge of these biological parameters is the responsibility of NMFS. Another reviewer questioned whether requestors would be able to specify the numbers of animals, much less their probable age, sex, and reproductive condition. The NMFS recognizes that for certain activities it may not be possible to supply specific and detailed information. Furthermore, NMFS feels that it is the responsibility of the person seeking authorization to demonstrate that the taking would be consistent with the purposes of the MMPA. Inherent in this demonstration is a description of the potential taking and potential impacts resulting from the activities. However, NMFS will use all available information, in addition to any information provided, in its determinations of negligible impact.

Section 228.4(a)(5) has been separated into two statements, as suggested, and the subsequent sections renumbered accordingly. It was recommended that § 228.4(a)(7), which requests information on the likelihood of restoration of the habitat, specify that only restoration by natural causes is relevant; however, NMFS feels that information concerning restoration of the habitat by both natural and man-made causes is appropriate to consider and is encompassed by the proposed wording. Therefore, no change has been made. Section 228.4(a)(10), which concerns means of accomplishing the necessary monitoring and reporting, has been changed to specify monitoring and reporting "which will result in increased knowledge of the species, level of taking or impacts," as suggested. It was recommended that § 228.4(a)(11), which asks for suggested means of encouraging and coordinating research, be supported by a specific commitment of the applicant's resources. The NMFS feels that the commitment, if appropriate to a specific activity, should be requested from the individuals requesting Letters of Authorization under established regulations, rather than from the person making the general request for NMFS to consider regulations. In addition, minor changes in wording suggested by reviewers have been made to § 228.4(a) for clarification.

One reviewer objected to § 228.4(b), which states that the Assistant Administrator shall determine the adequacy of a request prior to review by the public, and felt that public comments should be solicited before the agency determines its adequacy. If a request is received which contains insufficient information for evaluating impacts, NMFS sees no reason to expend the time and money of publishing a notice in the **Federal Register**, newspapers of general circulation and appropriate

electronic media. Therefore, the regulations have not been changed. However, this initial determination of adequacy does not preclude NMFS, based on comments and suggestions, from requiring further information at any time concerning the request.

*Section 228.6 Letters of Authorization.* Under § 228.6, the Assistant Administrator will make available the information to be included in requests for Letters of Authorization. It was suggested that the information required in requests for Letters of Authorization be specifically noted in § 228.6(a) or in each subpart addressing a specified activity. The information required for a Letter of Authorization will be specific for each specified activity and, therefore, would be inappropriate to address in the general regulations. Further, based on experience, the information required may be altered or additional information may be required. In order to avoid the necessity of modifying regulations in the future, NMFS feels it more appropriate to have the Assistant Administrator specifically inform requestors about the informational requirements, all of which will be noted in the **Federal Register.** For Letters of Authorization requested this year for on-ice seismic activities, the information required was outlined in the proposed rulemaking and is again outlined in this rulemaking.

Further, certain reviewers felt it was redundant and inappropriate to request the same type of information already provided in the general request under § 228.4. One reviewer felt that in light of the information already provided, the only useful information for determining whether effects of a specific operation would exceed those estimated by NMFS would be information on the area to be disturbed by a specific operation and that requiring estimates of the age, sex, etc., of seals estimated to be taken would result only in speculation. However, in order to be assured that the specific request is covered by the general request and findings, NMFS feels that the information requested is necessary. For this reason, it is important for potential users of the regulations to submit comments on proposed rules to ensure that final regulations will cover the activities which they seek to conduct.

One reviewer suggested that the time frame within which NMFS will act on a request for a Letter of Authorization should be specified, and recommended that it be no greater than 30 days. The NMFS will act as expeditiously as possible on all requests; however, depending on the nature and completeness of a request, the time frame may vary. Although not possible this year, NMFS suggests that requests be made at least 60 days prior to the desired effective date to allow sufficient time for processing.

One reviewer expressly supported the required annual renewal of Letters of Authorization, while another felt that it was an unnecessary administrative burden to make a general one-year restriction on Letters of Authorization and that it would be more appropriate to determine the period of validity on a case-by-case basis depending on the specific activity. The NMFS agrees that the term of Letters of Authorization should be based on the specified activity and has modified § 228.6(d) to reflect this. However, for the Letters of Authorization issued under the specific regulations under Subpart B—Taking of Ringed Seals Incidental to on-Ice Seismic Activities, NMFS has determined that a one-year Letter of Authorization is appropriate. The purpose of this requirement for new Letters of Authorization each year is to ensure that the authorized taking will be consistent with the original findings. This assessment will be based on the required reports, ongoing research, and information contained in the requests for Letters of Authorization.

As was suggested, § 228.6(e) has been clarified to read that Letters of Authorization "shall" (as opposed to "may") be withdrawn or suspended "either on an individual or class basis, as appropriate."

A new § 228.6(g) has been added to state that a violation of the terms and conditions of a Letter of Authorization or the specific regulations will subject the Holder to the penalties provided in the MMPA.

**Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities**

As suggested, the title of Subpart B has been renamed "Taking of Ringed Seals Incidental to on-Ice Seismic Activities," to emphasize that these regulations do not allow the taking of any other species of marine mammals which occurs as a result of the seismic activities.

Two comments addressed the general scheme of Letters of Authorization under these specific regulations. One reviewer felt that an annual limit should be established on the number of seals which can be taken, and that when the quota is reached, no new authorizations should be issued and existing ones should be suspended. The other reviewer questioned whether operators would be allotted or assigned authorizations on a first come, first served basis, or whether new operators could request that the total allowable take be reallocated. As each request for a Letter of Authorization is received, it will be reviewed and evaluated to determine whether it is consistent with the specific regulations and findings, and, if so, a Letter of Authorization with appropriate conditions would be issued. If the request is for activities not covered by the regulations, no authorization would be granted. A general request would be needed, and the procedures, findings, and opportunity for public comment as outlined in Subpart A would be required to either develop new regulations or modify existing regulations. If it is determined that the level of taking for the specified activity would exceed that upon which the findings were made, then all existing Letters of Authorizations along with the one proposed to be issued would have to be amended with restrictions to ensure that the total taking by all Holders of Letters of Authorization would be negligible and involve only small numbers. Therefore, NMFS does not believe it necessary to establish specific numerical quotas.

*Section 228.11 Specified Activity and Specified Geographical Region.* It was suggested that seismic work be allowed only in areas where the ADF&G is conducting research. The NMFS feels that it is not appropriate to restrict the areas of operation solely on the basis of where research is being conducted since the intent of the regulations is to insure that the taking is negligible. However, if the total requested taking was determined to have more than a negligible impact, restriction could be imposed to insure that the allowed taking would be negligible.

*Section 228.12 Effective Dates.* Two reviewers objected strongly to the proposed five-year term of the regulations because of the uncertainties concerning the level of taking, adverse effects and impacts, and the successfulness of the program under the new amendment. Based on information and research collected during the suggested one-year term, NMFS could then consider a longer period of effectiveness for these, or modified regulations. The NMFS agrees in part that the activities, along with new information which becomes available, should be re-evaluated after each year to determine if the level of taking is consistent with the findings, and has, therefore, determined to make the required Letters of Authorization valid for only one year. Further, additional

requirements could be developed and incorporated sooner under the existing scheme of annual Letters of Authorization than by new regulations. One reviewer suggested that the five-year effective date period be changed to 1983–1987 since these regulations will be promulgated too late to be effectively applied to the 1982 seismic season. While we recognize that the information to be gained from this year's activities will be limited, NMFS feels it desirable to require the monitoring and reporting for any period remaining this year in order to have better information for evaluating subsequent requests for Letters of Authorization.

Another reviewer noted that while Section 101(a)(5) allows authorization of incidental taking for up to a five-year period, the scheme accomplishes the authorization through the Letter of Authorization, not through the regulations themselves, and therefore suggested that this section on effective dates be deleted to avoid the need to repromulgate regulations. The NMFS feels that the intent of the new amendment, which requires notice and affords the opportunity for public comment, can best be served through the notice and comment rulemaking process.

The effective date statement has been modified to clarify that the regulations are effective for the entire 1982 through 1986 period, rather than from January to May each year. Although the taking is allowed only from January to May, other aspects of the regulations, such as reporting requirements, are valid throughout the year.

*Section 223.13 Permissible Methods.* It was recommended that seismic testing not be allowed during the pupping and weaning season (March through May). Unless the activities were found to have more than a negligible impact during the pupping season, NMFS does not feel such a drastic restriction is appropriate.

It was suggested that § 228.13(a)(1) include vibrator-type, airgun, "or similar energy source equipment," to allow and encourage the development and use of improved equipment. It was also suggested that the permitted activities include the "Poulter technique" which is now being tested and which has logistical and technical advantages with comparatively lesser impact on the environment. The wording has been changed to potentially allow in the future the use of other energy source equipment. Energy sources, other than the vibrator-type or airgun, would be allowed only if they were shown to have similar or lesser effects.

As was suggested, § 228.13(b) has been modified to state that activities be conducted in a manner which minimizes adverse effects "to the greatest extent practicable."

One reviewer felt that the phrase "as far as practicable" in § 228.13(c) required clarification by definition so that seals are not unnecessarily harassed. The NMFS does not feel that at this time a more precise restriction is appropriate; although, based on new information and required reports, further refinements of restrictions may be developed and required in the future. It was pointed out that the requirement in § 228.13(c), which states that no energy source be placed over a ringed seal lair, may impose an unrealistic requirement. Therefore, the wording has been changed to "observed" ringed seal lair to be consistent with the first sentence of § 228.13(c), as proposed.

*Section 228.14 Requirements for Monitoring and Reporting.* It was recommended that in § 228.14(a), the words "as necessary" be inserted after the word monitor which would allow the suspension of the five-year monitoring requirement if further research proves monitoring to be unnecessary. The requirement that Holders of Letters of Authorization cooperate with NMFS and designated agencies will not change, although the scope of monitoring may change. Therefore, the suggested change has not been made.

Certain reviewers felt that the requirements for monitoring should be strengthened. One reviewer suggested that a preliminary survey of seal distribution be required prior to any seismic testing so that test sites could be selected from the lowest seal distributions. Another reviewer suggested that since seismic testing is usually concentrated at a few locations, at a minimum, the regulations should require monitoring before and after testing to evaluate the effects on seals in those locations. One reviewer felt that in order for the monitoring program to be effective, it would be necessary to determine the locations of all lairs using trained dogs, mark all lairs for future identification, and recheck lairs following surveys to determine if they have been abandoned and determine the fate of the pup. Another reviewer questioned the effectiveness of any monitoring program in view of the difficulty of finding any lairs by simple visual inspection by untrained people. Alternatively, another reviewer felt that while it would be reasonable to require operators to make visual observations and maintain reports, it would not be reasonable to require an elaborate and costly research program, employing specialists and equipment that may be limited or not available, in order to detect and monitor the locations of lairs and seals along all shot lines and camps before, during, and after activities are conducted. The reviewer was also concerned that such unrealistic requirements may be imposed in the future as NMFS interprets and refines its perceived needs, and requested that NMFS clarify this section to indicate that operators will be responsible only for visual observations. At this time, NMFS feels that the regulations concerning monitoring which require observations and reports as proposed are sufficient. The industry has been in contact with the Alaska Department of Fish and Game, which has offered its assistance concerning a training program to teach designated individuals how best to make observations. Further, the ADF&G is conducting research designed to study the effects of the seismic operations on ringed seals. However, since additional monitoring requirements may be needed in the future, NMFS reserves the option to do so.

One reviewer, who felt that the reporting requirements were inadequate, recommended that the information required in annual reports parallel the requirements of the initial request, including information on the number of ringed seals taken by age, sex, reproductive condition, type of taking, and description of the seismic activity, and information pertaining to means of minimizing impacts on the marine mammals. Another reviewer suggested that information on all recovered carcasses and the number of expected mortalities should be included in required reports to help assess the rate of natural and man-related mortality. Also, to adequately assess impacts, one reviewer suggested that data on seismic operations should include total number, frequency, decibel level, timing, site-specific distribution, and duration of tests conducted and observations on direct seal reactions to seismic activities. Further, it was suggested that these and other data should be identified and then collected as part of a well-designed and coordinated research/monitoring program through NMFS Alaska Regional Office, but that in the absence of such an articulated program at this time, it may be desirable to add an item calling for submission of such other information as may be requested in the Letter of Authorization. As a result of these comments, the information required in annual reports has been expanded along with the option of requiring additional information, if appropriate, in the future.

It was also recommended that an incident report be required to ensure adequate reporting of any incident of non-negligible taking of marine mammals. Due to the extremely small numbers of expected actual, observable takings, NMFS feels that an annual report is sufficient.

There was also concern expressed as to how the information from the required reports is to be used in view of the extremely low probability of direct observations. The NMFS concurs with the views expressed that the information provided by operators be considered as very conservative data and not be used as an indication of seal distribution or as proof that only the observed seals are affected by activities.

The due date for the required annual report has been clarified, as suggested, to be within 90 days of completion of the year's activities. Since activities are allowed only through May 31, this report is due not later than August 31.

Certain reviewers referenced the House Report which states that "the Committee expects that persons operating under the authority of Section 101(a)(5) shall engage in appropriate research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned," and felt that the regulations should require the industry to initiate and conduct research designed to reduce the effects of seismic activities on ringed seals. The industry has met with the Alaska Department of Fish and Game to assist in the design of studies during the present operating season that will help to assure that the effects of seismic activity on ringed seals will be addressed more directly, is coordinating their operations with the ADF&G, and is providing information and logistical support. Further, industry is now testing the "Poulter technique" as an alternative method which may have lesser environmental impacts. In view of the ongoing efforts and research, NMFS does not feel any regulatory requirement is necessary, but encourages industry to continue and expand efforts to assist, coordinate, and conduct appropriate research.

**Proposed Findings Under the MMPA**

Two reviewers felt that in determining the impact of the taking, an overly broad geographic region, that being the Bering, Chukchi, and Beaufort Seas, was identified in defining the relevant population of ringed seals. One of the reviewers referenced the House Report which states that the specified geographical region "should not be larger than is necessary to accomplish the specified activity," and interpreted this to mean that only those animals in the specified geographical region could be considered the relevant population in determining effects. The NMFS feels it is more appropriate to evaluate the effects on the population of animals, rather than on just those animals which coincide with the specified activity, in its determination of negligible impacts. These reviewers felt that the appropriate population to consider was the winter residents of the Beaufort Sea, estimated at 40,000 animals. Further, they felt that the taking would involve more than small numbers compared to the population size and would have more than a negligible impact. There is no evidence that the Beaufort Sea population is discrete. There is a seasonal migration of seals which winter in the Bering Sea northward to the edge of the permanent ice pack and near shore ice remnants. There is also evidence of year to year changes in abundance within the same area. Lower ringed seal densities in the Beaufort Sea and northern Chukchi Sea, apparently due to heavy ice in 1975 and 1976, were noted concurrently with increased densities in the Bering and southern Chukchi Seas. Based on available information, NMFS feels that the Bering, Chukchi, and Beaufort population of ringed seals is the relevant "stock" to consider in its findings.

Certain reviewers questioned the statement in the request for IAGC that the preferred habitat of ringed seals is ice which is two feet or less thick, and, therefore, was less likely to coincide with seismic activities. Because of the lack of evidence supporting this assumption, this rationale was not used as a basis for NMFS' proposed finding of negligible impact.

One reviewer questioned the use of the word "may" in the proposed finding that seismic activities may result in the taking or ringed seals. However, since there is no definitive evidence that any specific seismic activity has or will result in actual takings of ringed seals, NMFS feels that the wording is appropriate.

One reviewer felt that since the taking is largely by displacement, the potential impact on opportunity for subsistence hunters is minimal. Another reviewer felt that it was premature to state that seismic activities will have negligible impact on subsistence use until proper studies have been conducted. The NMFS has no basis to support a finding that the potential taking, which would be mainly by displacement of animals, would have more than a negligible impact on the availability of ringed seals for subsistence uses.

**Statement of Findings**

Based on a review of the available data and comments received, NMFS has found that on-ice seismic activities may result in the taking of small numbers of ringed seals and that the total taking during the period 1982 through 1986 will have a negligible impact on the Bering, Chukchi, and Beaufort Seas stock, its habitat, and on the availability of such stock for subsistence uses.

**Letters of Authorization**

A Letter of Authorization is required to conduct activities pursuant to the specific regulations governing the taking of ringed seals incidental to on-ice seismic activities. United States citizens who engage in on-ice seismic exploratory activities which may result in the incidental take of ringed seals in the Beaufort Sea may submit a request for a Letter of Authorization. Requests should include the following information:

(1) Name, address, and telephone number of requestor;

(2) A description of the activities, including methods, dates and duration, and general locations of activities, including estimated area to be surveyed;

(3) Anticipated numbers of ringed seals which may be taken by age, sex, and reproductive condition, and the type of taking (e.g., disturbance or harassment, displacement, or abandonment of pups);

(4) Anticipated impact of the activity upon the habitat and the likelihood of restoration;

(5) Actions which will be taken to minimize potential adverse impacts on the ringed seals, their habitat, and on their availability for subsistence uses; and

(6) Actions which will be taken to assist in, cooperate with, or conduct research related to reducing the incidental taking or evaluating its effects.

Letters of Authorization issued under 50 CFR Part 228, Subpart B—Taking of Ringed Seals Incidental to on-Ice Seismic Activities will be valid for one year only. Each year, a written request containing the information outlined above will be required, and a new Letter of Authorization issued. If further or different information is required in subsequent years, Holders of Letters of Authorization will be so notified. As stated in § 228.6(d), Letters of Authorization may contain additional terms and conditions appropriate for the specific request.

**Applicability to Other Laws and Requirements**

The general regulations in Subpart A implement section 101(a)(5) of the MMPA by providing a mechanism for authorizing the incidental, but not intentional, taking of small numbers of non-depleted marine mammals by U.S. citizens engaged in a specified activity in a specified geographical region, for up to five years. Also included are specific regulations in Subpart B allowing the taking of small numbers of ringed seals incidental to on-ice seismic operations in the Beaufort Sea for the period 1982 to 1986.

The NMFS has determined that the general regulations will have no impact on the human environment. The NMFS has prepared an Environmental Assessment reflecting the determination that the specific regulations allowing the taking of ringed seals will have an insignificant impact on the human environment and, therefore, do not constitute a major action under the National Environmental Policy Act. The Environmental Assessment is available on request from the Office of Marine Mammals and Endangered Species, National Marine Fisheries Service, Washington, D.C. 20235.

These regulations are not likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or government agencies; or (3) significant adverse effect on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets. The NMFS has determined, therefore, that these regulations do not constitute a major rule and require no regulatory impact analysis under Executive Order 12291.

The General Counsel of the Department of Commerce has certified that the general regulations will not have a significant economic impact on a substantial number of small entities, and that the specific regulations allowing the taking of ringed seals will not have a major significant impact on a substantial number of small entities since the oil companies and their contractors identified as possible applicants under the specific regulations cannot be identified as small businesses under the Small Business Act. Therefore, a regulatory flexibility analysis is not required.

Since the number of requests expected under the general regulations is expected to be less than ten, and the number of applicants under the specific regulations allowing the taking of ringed seals is expected to be less than ten, the requirements of the Paperwork Reduction Act are inapplicable.

These regulations contemplate exemptions to the moratorium on the taking of marine mammals imposed by the Marine Mammal Protection Act and potentially relieve a restriction by authorizing the taking of marine mammals subject to certain conditions. For these reasons, the requirements of Section 553(d) of the Administrative Procedure Act, that the publication of a substantive rule be made not less than 30 days before its effective date is waived. These regulations shall become effective May 18, 1982.

To ensure consistency, 50 CFR 216.11 is also revised to indicate that takings allowed under the new Part 228 of 50 CFR are not prohibited. Because of the non-substantive nature of this revision to 50 CFR 216.11 and in view of the public's participation in commenting on the substantive aspects of the new Part 228 to 50 CFR, NMFS for good cause finds that a further comment period is impractical, unnecessary, and contrary to the public interest. Further, because the revision refers to exemptions that may be granted under the new 50 CFR Part 228, NMFS finds good cause for making this revision effective immediately upon the date of publication under 5 U.S.C. 553(d).

**List of Subjects in 50 CFR Part 228**

Marine mammals, Administrative practice and procedure, Outer Continental Shelf, Oil and gas exploration.

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

Accordingly, 50 CFR Chapter II, Subchapter C—Marine Mammals, is amended as set forth below.

1. The authority citation for Part 216 is revised to read as follows:

**Authority:** 16 U.S.C. 1361 et seq., unless otherwise noted.

2. The introductory text of § 216.11 is revised to read as follows:

**§ 216.11 Prohibited taking.**

Except as otherwise provided in Subparts C, D, and I of this Part 216 or in Part 228, it is unlawful for:

* * * * *

3. A new Part 228 is added as follows:

## PART 228—Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities

**Subpart A—General**

Sec.

228.1 Purpose.
228.2 Scope.
228.3 Definitions.
228.4 Submission of Requests.
228.5 Specific Regulations.
228.6 Letters of Authorization.

**Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities**

228.11 Specified Activity and Specified Geographical Region.
228.12 Effective Dates.
228.13 Permissible Methods.
228.14 Requirements for Monitoring and Reporting.

**Authority:** 16 U.S.C. 1371(a)(5), unless otherwise noted.

### Subpart A—General

**§ 228.1 Purpose.**

The regulations in this part implement Section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1371(a)(5), Pub. L. 97–58, which provides a mechanism for allowing, upon request, during periods of not more than five consecutive years each, the incidental, but not intentional, taking of small numbers of non-depleted marine mammals by U.S citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region.

**§ 228.2 Scope.**

The taking of small numbers of marine mammals under Section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the species involved are not depleted and if the National Marine Fisheries Service (a) finds that the total taking during the specified time period will have a negligible impact on the species and their habitat, and on the availability of the species for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking. The specific regulations governing specified activities are contained in subsequent subparts to this Part 228.

**§ 228.3 Definitions.**

In addition to definitions contained in the Act and in 50 CFR 216.3 and unless

the context otherwise requires, in this Part 228:

"Citizens of the United States" and "U.S. citizens" mean individual U.S. citizens or any partnership, corporation, association, or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13) and controlled by individuals who are U.S. citizens. U.S. Federal, state and local government agencies shall also constitute citizens of the United States for purposes of this Part.

"Incidental, but not intentional, taking" means accidental taking. It does not mean that the taking is unexpected, but rather it includes those takings which are infrequent, unavoidable or accidental. (Complete definition of take is contained in 50 CFR 216.3).

"Negligible impact" means an impact which can be disregarded or which is so small, unimportant, or of so little consequence as to warrant little or no attention. A finding of negligible impact cannot be made if a species or stock is depleted under 16 U.S.C. 1362(1).

"Small numbers" means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

"Specified activity" means any activity, other than commercial fishing, which takes place in a specified geographical region and potentially involves the taking of small numbers of non-depleted marine mammals. The specified activity and specified geographical region should be identified so that the anticipated effects on non-depleted marine mammals will be substantially similar.

"Specified geographical region" means an area within which a specified activity is conducted and which has certain biogeographic characteristics.

### § 228.4 Submission of requests.

(a) In order for the National Marine Fisheries Service to consider allowing the taking by U.S. citizens of small numbers of non-depleted marine mammals incidental to a specified activity, a written request must be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235. Requests shall include the following information on the activity in general and cumulative impacts of the total potential taking (by all persons conducting the activity):

(1) A description of the specific activity or class of activities that can be expected to result in incidental taking of non-depleted marine mammals;

(2) The dates and duration of such activity and the specific geographical region where it will occur;

(3) The species and numbers of marine mammals likely to be taken by age, sex and reproductive condition, and the type of taking (e.g., disturbance by sound, injury or death resulting from collision, etc.) and the number of times such taking is likely to occur;

(4) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks likely to be affected by such activities;

(5) The anticipated impact of the activity upon the species or stocks;

(6) The anticipated impact of the activity on the availability of the species or stocks for subsistence uses;

(7) The anticipated impact of the activity upon the habitat of the marine mannal populations, and the likelihood of restoration of the affected habitat;

(8) The anticipated impact of the loss or modification of the habitat on the marine mammal populations involved;

(9) The availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance;

(10) Suggested means of accomplishing the necessary monitoring and reporting which will result in increased knowledge of the species, level of taking or impacts and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity; and

(11) Suggested means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects.

(b) The Assistant Administrator shall determine the adequacy and completeness of a request, and if found to be adequate, will invite information, suggestions, and comments through notice in the **Federal Register**, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity. All information and suggestions will be considered by the National Marine Fisheries Service in developing, if appropriate, the most effective regulations.

(c) The Assistant Administrator shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking constitutes a negligible impact on the species or stocks of marine mammals, their habitat, and on the availability of the species for subsistence uses. Any preliminary finding of negligible impact shall be proposed for public comment before specific regulations are promulgated.

### § 228.5 Specific regulations.

(a) Specific regulations will be established for each allowed activity which set forth permissible methods of taking and requirements for monitoring and reporting.

(b) Regulations will be established based on the best available information. As new information is developed, through monitoring, reporting or research, the regulations may be modified, in whole or part, after notice and opportunity for public review.

### § 228.6 Letters of authorization.

(a) A Letter of Authorization, which may be issued only to U.S. citizens, is required to conduct activities pursuant to any regulations established. Requests for Letters of Authorization shall be submitted to the Assistant Administrator for Fisheries, National Marine Fisheries Service, Washington, D.C. 20235. The information to be submitted in a request may be obtained by writing the Assistant Administrator.

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the finding that the total of such taking will have a negligible impact on the marine mammal species or stocks and their habitat, and on the availability of the species for subsistence uses.

(c) Notice of issuance of all Letters of Authorization will be published in the **Federal Register** within 30 days of issuance.

(d) Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request.

(e) Letters of Authorization shall be withdrawn or suspended, either on an individual or class basis, as appropriate, if, after notice and opportunity for public comment, the National Marine Fisheries Service determines that (1) the regulations prescribed are not being substantially complied with, or (2) the taking allowed is having, or may have, more than a negligible impact on the species or stocks concerned, their habitat, or on their availability for subsistence uses.

(f) The requirement for notice and opportunity for public review in § 228.6(e) shall not apply if the National Marine Fisheries Service determines that an emergency exists which poses a significant risk to the well-being of the species or stocks of marine mammals concerned.

(g) A violation of any of the terms and conditions of a Letter of Authorization or of the specific regulations shall subject the Holder and/or any individual who is operating under the authority of the Holder's Letter of Authorization to penalties provided in the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361–1407).

### Subpart B—Taking of Ringed Seals Incidental to On-Ice Seismic Activities

#### § 228.11 Specified activity and specified geographical region.

Regulations in this subpart apply only to the incidental taking of ringed seals (*Phoca hispida*) by U.S. citizens engaged in on-ice seismic exploratory and associated activities over the Outer Continental Shelf of the Beaufort Sea of Alaska, from the shore outward to 45 miles and from Point Barrow east to Demarcation Point, from January 1 through May 31 of any calendar year.

#### § 228.12 Effective dates.

Regulations in this subpart are effective for the period 1982 through 1986.

#### § 228.13 Permissible methods

(a) The incidental, but not intentional, taking of ringed seals from January 1 through May 31 by U.S. citizens holding a Letter of Authorization is permitted during the course of the following activities:

(1) On-ice geophysical seismic activities involving vibrator-type, airgun, or other energy source equipment shown to have similar or lesser effects; and

(2) Operation of transportation and camp facilities associated with seismic activities.

(b) All activities identified in § 228.13(a) shall be conducted in a manner which minimizes to the greatest extent practicable adverse effects on ringed seals and their habitat.

(c) All activities identified in § 228.13(a) shall be conducted as far as practicable from any observed ringed seal or ringed seal lair. No energy source shall be placed over an observed ringed seal lair, whether or not any seal is present.

#### §228.14 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization are required to cooperate with the National Marine Fisheries Service and any other Federal, State, or local agency monitoring the impacts on ringed seals.

(b) Holders of Letters of Authorization shall designate an individual or individuals to make observations and record the presence of ringed seals and ringed seal lairs along shot lines and around camps, and the information required in §228.14(c).

(c) An annual report shall be submitted to the Assistant Administrator for Fisheries within 90 days of completion of the year's activities which shall include the following information:

(1) Location(s) of survey activities;

(2) Level of effort (e.g., duration, area surveyed, number of surveys), methods used, and a description of habitat (e.g., ice thickness, surface topography) for each location;

(3) Numbers of ringed seals observed, proximity to seismic or associated activities, and any seal reactions observed for each location;

(4) Numbers of ringed seal lairs observed and proximity to seismic or associated activities for each location; and

(5) Other information as required in a Letter of Authorization.

Dated: May 12, 1982.

**William H. Stevenson,**

*Deputy Assistant Administrator for Fisheries National Marine Fisheries Service.*

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## National Oceanic and Atomospheric Administration

### 50 CFR Part 640

### Spiny Lobster Fishery of the Gulf of Mexico and South Atlantic

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Extension of emergency interim rule.

**SUMMARY:** An interim rule in effect through May 15, 1982, implements certain provisions of the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic. NOAA extends this emergency interim rule from May 16, 1982, through June 29, 1982. The extension will continue the protection of the spawning stock in the fishery conservation zone (FCZ) until the final regulations become effective.

**DATES:** Emergency rule effective from May 16, 1982 through June 29, 1982.

**FOR FURTHER INFORMATION CONTACT:** Jack T. Brawner, Acting Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702; telephone 813–893–3141.

**SUPPLEMENTARY INFORMATION:** Under Section 305(e)(1) of the Magnuson Fishery Conservation and Management Act, emergency interim regulations implementing certain provisions of the Fishery Management Plan for Spiny Lobster in the Gulf of Mexico and South Atlantic were published on March 30, 1982 (47 FR 13353). The rulemaking stated that the regulations would be effective for 45 days and that they could be repromulgated for an additional 45-day period, if necessary. The emergency interim rule (1) establishes a closed season in the fishery conservation zone (FCZ) during the peak spawning period; and (2) provides the authority for any Authorized Officer to dispose of lobster traps that are in the management area during the period April 6–July 20. The intended effect of this interim rule is to provide protection for the spawning stock in the FCZ during the major spiny lobster reproductive period. The Assistant Administrator for Fisheries, NOAA, acting on behalf of the Secretary of Commerce, has determined that the emergency situation described in the initial emergency rule continues to exist, and therefore extends the emergency regulations through June 29, 1982.

The NOAA Administrator has determined that these regulations are non-major under Executive Order 12291, and that the emergency provisions in section 8 of the Order apply to this action.

(16 U.S.C. 1801 *et seq.*)

### List of Subjects in 50 CFR Part 640

Fish; Fisheries.

Dated: May 13, 1982.

**William H. Stevenson,**

*Deputy Assistant Administrator, National Marine Fisheries Service.*

[FR Doc. 82-13447 Filed 5-17-82; 8:45 am]

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### 50 CFR Part 661

### Ocean Salmon Fisheries Off the Coasts of California, Oregon, and Washington

**AGENCY:** National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Emergency interim rule, notice of availability of plan amendment, and request for comments.

**SUMMARY:** NOAA issues emergency regulations to implement on an interim basis the 1982 amendment to the fishery management plan for the ocean salmon fisheries in the fishery conservation zone off the coasts of Washington, Oregon, and California. This action constitutes a notice of availability and request for comments on the plan amendment which was partially approved by the Assistant Administrator for Fisheries, NOAA, on May 6, 1982. Also, comments are requested on the interim rule which will be used in preparing the final rule implementing the 1982 amendment. Specific management measures in the implementing regulations vary by fishery and area, but generally establish fishing seasons, quotas, necessary inseason management modifications, daily catch limits for recreational fisheries, and minimum size limits for salmon. The 1982 amendment and implementing regulations are intended to prevent overfishing, to apportion equitably the ocean harvest between commercial and recreational fisheries, to allow more salmon to survive the ocean fisheries and reach the various inside fisheries, to meet the U.S. obligations to treaty Indian fisheries, and to achieve spawning escapement requirements.

**DATES:** Interim rule is effective on May 14, 1982 and remains effective until June 28, 1982.

**ADDRESSES:** Send comments on the 1982 FMP amendment and these implementing rules to the Director, Northwest Region, National Fisheries Service (NMFS), BIN C15700, Seattle, WA 98115. Copies of the 1982 amendment, the regulatory impact review/initial regulatory flexibility analysis, and the final supplement to the final environmental impact statement are available from the Pacific Fishery Management Council, 526 S.W. Mill St., Portland, OR 97201.

**FOR FURTHER INFORMATION CONTACT:** H. A. Larkins (Regional Director, NMFS), 206–527–6150.

**SUPPLEMENTARY INFORMATION:**

## Background

The fishery management plan (FMP) for the Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California, prepared by the Pacific Fishery Management Council (the Council), was approved by the Assistant Administrator for Fisheries (Assistant Administrator), NOAA, on March 2, 1978. Regulations to implement the FMP were first published on April 14, 1978 (43 FR 15629), as emergency rules. Regulations to implement the 1981 amendment to the FMP were last issued as final rules on September 9, 1981 (46 FR 44989), as corrected on September 16, 1981 (46 FR 45960), except off California where 1980 regulations were reinstated (published on January 29, 1982, 47 FR 4275).

The Council has amended the FMP to improve management of the salmon fisheries in 1982. A supplement to the environmental impact statement (SEIS) for the 1982 amendment has been filed with the Environmental Protection Agency. A notice of availability of the SEIS was published on April 30, 1982 (47 FR 18652). The Council held six hearings on the amendment during the period February 26 through March 1, 1982. The 1982 amendment is intended to (1) provide adequate spawning escapements from ocean salmon fisheries for the various salmon runs; (2) meet treaty obligations to Indian fishermen; and (3) allow for a viable harvest for each segment of the salmon fishery, including the commercial and recreational ocean fisheries and the various internal water fisheries. The current FMP amendment as it applies to the commercial salmon fishery north of Cape Blanco, Oregon, and to the recreational fisheries coastwide was approved by the Assistant Administrator on May 6, 1982, under section 304 of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.* (Magnuson Act). The portion of the Council's recommended amendment pertaining to seasons, gear restrictions, and chinook quotas for the commercial fisheries south of Cape Blanco, Oregon, was disapproved by the Assistant Administrator; therefore, existing measures govern the commercial fisheries south of Cape Blanco, Oregon. That action is consistent with a concern expressed in the minority report submitted by the Oregon Department of Fish and Wildlife on the 1982 amendment. Consequently, the 1981 management measures that governed the fishery in the fishery conservation zone (FCZ) off Oregon south of Cape Blanco and the 1980 management measures off California will continue to control commercial fishing open seasons, gear restrictions, and size limits in those areas, until superseded. The NOAA issues a notice of availability of the FMP amendment for public review and comment, as required by section 305(a) of the Magnuson Act.

Section 305(e) of the Magnuson Act authorizes the Secretary of Commerce to promulgate emergency regulations to implement fishery management plans and amendments thereto. The Assistant Administrator has determined that the approved portion of the 1982 amendment should be implemented by emergency regulations under that section, and that relevant portions of the 1981 and 1980 measures that are not superseded should be republished, so that all regulations pertaining to salmon fishing in the FCZ off Washington, Oregon, and California appear together in a single **Federal Register** publication. These regulations reflect the following changes from existing regulations, in addition to changes required to implement the approved portions of the 1982 amendment. First, the regulations have been partially reorganized into a standard format used for our other fishery regulations; certain sections have been simply renumbered, while others have been consolidated. The balance of that reorganization will be accomplished when the final rules for the fishery are promulgated. Second, the management measures for the commercial, recreational, and treaty Indian fisheries have been organized in a different manner in the regulations. Third, certain stylistic changes have been made (e.g., using "this part" for "this Part 661," or "begins" for "shall begin"). Fourth, former section 661.4 "Effective dates" has been deleted as unnecessary. Fifth, certain definitions have changed: (a) Definitions of ODF&W, OPI, WDF, and WPP have been deleted as obsolete, since those terms were used in inseason management provisions deleted by the 1982 amendment; and (b) certain definitions have been modified to reflect changed underlying realities (definition of "Act," "Authorized Officer," and "Regional Director") or to clarify the intended meaning ("land or landing" and "troll fishing gear"). Sixth, certain "General restrictions" provisions have been modified to delete unnecessary and confusing references to definitional provisions and to simplify the specification of the applicable restrictions. Seventh, provisions regarding boarding procedures and signals have been added to the "Facilitation of enforcement" section. Finally, certain portions of the "Treaty Indian fishing" section and the "Inseason adjustments" section have been changed to more clearly reflect current law.

This emergency rulemaking remains in effect for 45 days and may be extended for a second 45-day period.

These interim regulations also are being published for public review. All comments received will be considered when developing the final regulations. Following publication in the Federal Register, the final regulations will be effective for 1982 and subsequent years unless superseded or otherwise modified.

**Status of the Salmon Resource in 1982**

Current information on abundance of the major stocks of chinook and coho salmon available to the ocean fisheries in 1982 indicates (1) that some stocks continue to be depressed to such an extent that ocean harvests must be reduced to assure adequate survival to inside fisheries and spawning escapements, and (2) other stocks continue to be at or near optimum levels of population abundance. The status of stocks is discussed in detail in Chapter IV of the Report accompanying the 1982 FMP amendment. The management objectives set forth in the 1982 FMP amendment can only be achieved by carefully balancing a decrease of the ocean harvest in some areas with relatively less restrictive regulations in other areas. The Council and its advisors considered the status-of-stocks information included in the Report accompanying the 1982 amendment, along with many other factors, during their deliberations on the 1982 amendment. Except for those measures controlling commercial fishing south of Cape Blanco, which were not approved, the management measures adopted by the Council are considered to be consistent with the FMP objectives, as revised in the 1982 amendment, and with the requirements of the Magnuson Act.

**Treaty Indian Obligations**

Dissatisfaction on the part of some tribes with the level of returns of salmon to tribal "usual and accustomed" fishing areas prompted litigation in Federal District Court in 1981. One suit, *Hoh v. Baldrige*, involves three Washington coastal tribes (the Hoh, Quileute, and Quinault), the Secretary of Commerce, and the State of Washington. The other suit, *Confederated Tribes v. Baldrige*, involves four Columbia River tribes (the Yakima, Umatilla, Warm Springs, and Nez Perce), the Secretary of Commerce, and the States of Oregon and Washington.

**Hoh v. Baldrige**

In this case, the U.S. District Court ruled that the tribes were entitled to take up to 50 percent of each run of coho salmon returning to each river where the tribes traditionally fished, but noted that this rule is not inflexible. Strict compliance with such an order would require that ocean fisheries be managed in a manner which assures that returns of the weakest run be sufficient to allow a treaty Indian harvest equal to the non-Indian ocean harvest while meeting spawning escapement goals. If strictly applied, such a rule would preclude the non-Indian ocean fishery from taking its 50 percent share of salmon produced in many streams where runs are healthier.

The court also ordered the development of a long-range plan consistent with the equal-sharing rule for managing the various coastal runs relevant to the lawsuit. Despite continued effort, the parties have been unable to agree on all significant points. One of the major items yet to be agreed on is coho spawing escapement goals. The State of Washington has set strict numerical goals for coho spawning escapement based on the occurrence of average environmental conditions every year and on the use of the entire watershed of each stream as a rearing area, including the main stream. In turn, the State of Washington Department of Fisheries (WDF), in a minority report on the 1982 amendment, has opposed any approach to management of coho in the ocean north of Cape Falcon that will result in spawning escapements other than those which the State proposes. In contrast, however, optimum water flows can be expected to occur one year in five on the average, and experience has confirmed that coho are primarily reared in tributary streams, while few successfully rear in the main stem of coastal streams. Furthermore, rigid adherence to Washington State's coho spawning escapement goals will result in wasting fish which could otherwise be caught without jeopardizing reproduction of stocks and will cause unnecessary instabilities in the fishery. Management of all fisheries to achieve spawning escapement within a range of spawning escapement goals for each coastal stream, rather than a single numerical goal for each coastal stream, would maintain coho production at a favorable level while obtaining the data necessary to determine the optimum level of escapement and would also provide some stability to the fisheries operating on these stocks.

The State in its minority report contends that the Council's choice of an ocean coho quota which is derived from a range of spawning escapements is inconsistent with prior orders of the Federal Court endorsing State escapement goals. The Court's order of September 29, 1981, referred to in the WDF minority report, was intended to encourage mutual agreement among the parties on escapement goals before the beginning of each season consistent with existing orders in *U.S. v. Washington*, primarily an order entered on August 31, 1977. In recognition of the fact that no judicially endorsed or established spawning escapement goals exist for the Washington coast, the Court on April 12, 1982, ordered the parties to the negotiations to continue deliberations in an effort to arrive at agreement on spawning escapement policy for the duration of the agreement.

In the absence of any court-approved management plan and spawning escapement goals, the tribes and the Council, therefore, agreed on 1982 quotas for ocean coho that were intended to recognize the advantages of management to achieve spawning escapements within given ranges.

The reports of the Council's salmon plan development Team and in-Court testimony acknowledge that the ocean coho quota north of Cape Falcon will not allow achievement of State escapement goals this year. However, those same reports and testimony indicate that overfishing will not occur even if coho return in fewer numbers than anticipated; and this is true of the run which is expected to be the weakest (Queets River fall coho) as well as stronger runs. On the other hand, escapement goals recommended by the State combined with strict imposition of weakest-run management principles would have required reducing the 1982 ocean harvest to about half the 1981 harvest. Indeed, the primary difference between the State's recommended ocean quotas and those chosen by the Council emanates from a disagreement as to the number of fish which must escape to maximize the harvestable portion of each run. The State believes a greater number of fish must be allowed to escape to acheive optimum spawning escapement than do the tribes and the Council. However, by using a range of spawning escapement goals for coho, established by the tribes for the coastal streams, rather than the fixed goal set by the State, the allowable harvest was set at a higher level. Further, the tribes agreed to target on hatchery-produced coho in their Queets River fishery to the extent possible, which further increased the number of coho that could be taken by the ocean fisheries. This cooperative approach should prevent overfishing of any coho run, meet the treaty fishing right of the plaintiff tribes, and preserve a viable, although reduced, ocean fishery.

**Confederated Tribes v. Baldrige**

In this action, the U.S. District Court directed the Secretary to evaluate possible management measures for the FCZ off Alaska, Washington, and Oregon which would return more fall chinook salmon to the upper reaches of the Columbia River (bright fall chinook destined for the river above Bonneville Dam, or upriver brights). Analysis by the technical staffs of the Alaska and Northwest Regions of the NMFS indicates that a total closure of all U.S. ocean salmon fisheries north of Cape Falcon, off Oregon, Washington, and Alaska in State and Federal waters, would add an estimated 27,100 upriver brights to the 1981 run size of 63,900 upriver brights, for a total inriver run of about 91,000 fish. Of this additional 27,100 fish, only 4,600 would be attributable to a total closure of all ocean fishing off Washington and Oregon north of Cape Falcon. An ocean catch, sport and commercial, on the order of 200,000 chinook (other than upper Columbia River fall chinook) and 500,000 coho would be lost as a result of such an ocean closure. Even if 4,600 upriver brights were saved as a result of a total FCZ closure north of Cape Falcon, only 2,600 of those additional fish could be expected to escape above McNary Dam due to an unexplained but ever present interdam loss between Bonneville and McNary of about 50 percent.

NMFS also plans to tag upriver brights at Bonneville Dam using radio tags to investigate the cause of the loss of upriver brights between Bonneville and McNary Dams, which was about 50 percent in 1981. The goal is to discover the cause of the unaccounted for loss of upriver brights in this reach of the river, and correct it if possible.

The tribes have also questioned the propriety of the May chinook fishery off Washington and Oregon north of Cape Falcon because of its impact on upper Columbia River springs, summer, and fall chinook. Although these runs of chinook are not subjects of the lawsuit brought by the tribes, analysis by the Council indicates that summer chinook comprise less than three percent of the total May catch of chinook north of Cape Falcon, and that spring chinook contribute negligibly to any ocean fishing in that area; these salmon have already left the area on their way to the spawning grounds. Upriver fall chinook are not found in the ocean between Cape Falcon and the Canadian border in May.

**Council proposals for 1982**

In January 1982, the Council adopted for public review the draft 1982 FMP amendment, which contained five options for managing the commercial fishery and three options for the recreational fishery. The options ranged from more to less restrictive than 1981 management measures. That document, including the draft supplemental environmental impact statement, was widely distributed and was the subject of discussion at six public hearings held in the three coastal states and Idaho. As a result of these hearings, over 100 written comments on the draft amendment, and the analysis produced by the Council's salmon plan development team of the impacts of the options, the Council adopted the management measures contained in the 1982 amendment.

**1982 Management Measures**

The Council's approved management measures for commercial fishing in the area north of Cape Blanco and for recreational fishing along the entire coast are intended to achieve expected spawning escapements and treaty Indian allocations, while equitably apportioning the regulatory burden and minimizing shifts in fishing effort along the coast. The approved measures are a combination of fishing areas, seasonal restrictions, and quotas on the harvests.

*North of Leadbetter Point, Washington,* the recreational season for all species except coho runs from May 29 through 11. Recreational fishing for all species opens on June 12, with a coho quota of 115,000. Fishing for all species ends when the coho quota is taken. Minimum sizes are 24 inches for chinook and 16 inches for coho with a 2-fish bag limit. Commercial fishing for all species except coho begins on May 1 and ends on May 31. The all-species commercial season opens July 15 with a 204,000 coho quota. Fishing for all species ends when the coho quota is taken. Minimum sizes are 28 inches for chinook and 16 inches for coho.

*From Leadbetter Point to Cape Falcon, Oregon,* the recreational season for all species begins on June 12, with a coho quota of 100,000 fish. Fishing for all species ends when the coho quota is taken. Minimum sizes are 24 inches for chinook and 16 inches for coho. The commercial season for all species except coho runs from May 1 thorugh May 31. The commercial season for all species runs from July 1 until the 89,000 coho quota is taken. Minimum sizes are 28 inches for chinook and 16 inches for coho.

*From Cape Falcon to Cape Blanco, Oregon,* the recreational season for all species opens June 12 and ends when the 114,000 coho quota is taken. No minimum size is imposed on this fishery, but anglers must keep and are limited to the first two fish taken each day. The commercial season for all species except coho runs from May 1 through June 15 with special gear required from June 1 through June 15. The all-species, commercial season opens July 1, with a coho quota of 488,000. Fishing for all species except coho using special gear begins when the coho quota is taken, and continues until September 5. An all-species-except-coho season using barbless hooks begins September 6 and continues through October 31. Minimum sizes are 26 inches for chinook and 16 inches for coho.

*From Cape Blanco to the Oregon-California border,* recreational fishing for all species begins on May 29 and continues until the 114,000 coho quota south of Cape Falcon is reached, after which time fishing for all species except coho continues through October 31. No minimum size limit applies, but anglers must keep and are limited to the first two fish taken each day. The 1981 management measures pertaining to open seasons, gear restrictions, and size limits for commercial fishing between Cape Blanco and the Oregon-California border remain in effect; hence, commercial fishing for all species except coho begins May 1 and ends May 31. The all-species season begins July 1 and ends on September 8 unless terminated sooner because the 1982 coho commercial quota south of Cape Falcon (488,000 fish) is reached. Fishing for all species except coho using special gear begins after the coho quota is taken and continues through September 8 between Cape Blanco and Cape Sebastian, Oregon. In this management area, a second all-species-except-coho season opens on September 9 and closes on October 31. Minimum sizes are 26 inches for chinook and 16 inches for coho.

*For California,* recreational fishing for all species begins February 13 and ends November 14. The bag limit is two salmon of any species with a 22-inch minimum length, except that one fish may be between 20 and 22 inches. Management measures pertaining to open seasons, gear restrictions, and size limits for commercial fishing will be the same as those for 1980 unless changed by subsequent amendment. For California north of Cape Vizcaíno, the commercial season for all species except coho is from May 1 through May 15 and the all-species seasons run from May 16 through May 31 and July 16 through

September 30. The minimum sizes are 26 inches for chinook, and 22 inches for coho. From Cape Vizcaino southward, the commercial season for all species except coho opens May 1; the season for all species opens on May 16 and closes on May 31. A second all-species season opens on July 1 and closes on September 30. Minimum sizes are 26 inches for chinook and 22 inches for coho.

*Inseason adjustments:* All quotas are fixed quotas that may not be changed during the season except for the coho quotas between Leadbetter Point and Cape Falcon and from Cape Falcon, southward. These quotas may be adjusted when 75 percent of the quota is taken if the contribution of coho produced by private hatcheries significantly departs from preseason forecasts. Recoveries of coded wire tags during the season will provide a basis for making any needed adjustment of the preseason estimate of the catch of coho from private hatcheries. In addition, the coho commercial quota for the area south of Cape Falcon will be adjusted to take into account estimated coho losses associated with the late season, all-species-except-coho commercial fisheries in this area. The only other inseason management actions will be automatic closures when quotas are reached.

*Treaty Indian fishing:* Persons authorized to exercise the Makah Indian treaty ocean fishing right may fish in their adjudicated ocean area for all species from May 1 through October 31 but may not retain chinook smaller than 24 inches or coho smaller than 16 inches. Either fixed or hand-held lines or poles may be used. Except as noted, all other commercial salmon fishing regulations for the area north of Leadbetter Point apply to persons exercising the Makah treaty right to fish in the ocean.

Persons authorized to exercise treaty ocean fishing rights granted the Quileute, Hoh, and Quinault tribes may fish in their respective adjudicated ocean area for all species from May 1 through September 7 but may not retain chinook smaller than 26 inches or coho smaller than 16 inches. Either fixed or hand-held lines or poles may be used. During the time that all non-Indian ocean fisheries are closed north of Leadbetter Point, there will be a closure for all treaty fishermen within a six mile radius of the mouths of the Queets and Hoh rivers to conserve Hoh and Queets chinook and coho runs. Except as noted, all other commerical salmon fishing regulations for the area north of Leadbetter Point apply to persons exercising the Quileute, Hoh, or Quinault treaty right to fish in the ocean.

**Supporting Documents and Data Sources**

The salmon FMP and the 1982 amendment incorporate by reference a number of documents and data sources utilized in deriving salmon fishery management measures. These documents and data sources or copies thereof will be made available to interested parties at reasonable times and places, and at a reasonable cost (if personal copies are desired), upon request to: H. A. Larkins, Regional Director, NMFS, 7600 Sand Point Way N.E., BIN C15700, Seattle, Washington 98115; telephone 206–527–6150.

**Classification**

The Assistant Administrator has determined that the portion of the 1982 amendment to the FMP which has been approved is necessary and appropriate for conservation and management of the salmon fisheries resources off the coasts of Washington, Oregon, and California, and that it is consistent with the Magnuson Act, including the national standards, and other applicable law.

The amendment has been partially approved and comments thereon are requested for a 45-day period. Recognizing the critical need for specific regulations for the 1982 ocean salmon fisheries, the Assistant Administrator has determined that an emergency exists and these regulations are issued under section 305(e) of the Magnuson Act. He has determined that continued effect of all regulations now in force would not safeguard the resource; therefore, he determined it is necessary to promulgate these emergency regulations immediately.

The Assistant Administrator finds for good cause that the reasons for justifying promulgation of emergency regulations under section 305(e) of the Magnuson Act also make it impracticable and contrary to the public interest to provide notice and opportunity for comment upon, or to delay for 30 days the effective date of these emergency regulations, under the provisions of section 553 (b) and (d) of the Administrative Procedure Act.

The NOAA Administrator has determined that the rules implementing the 1982 amendment are not "major" rules under Executive Order (E.O.) 12291 requiring a regulatory impact analysis. A regulatory impact review/initial regulatory flexibility analysis (RIR/IRFA) has been prepared. This review focuses on the issues and problems in the fishery and contains an analysis of the expected impacts of the adopted management measures and alternative management options. Some issues could only be partially analyzed because of data limitations. Nonetheless, the review supports the determination that these rules are not "major" under the E.O. 12291 criteria.

The NOAA Administrator has determined that the resource emergency which justifies the promulgation of emergency regulations under section 305(e) of the Magnuson Act also constitutes an emergency situation under section 8(a)(1) of E.O. 12291. Because it is imperative to implement the approved portion of the 1982 amendment immediately, it is impracticable to comply with section 3(c)(3), which requires that NOAA transmit to the Director of the Office of Management and Budget (OMB) a copy of every nonmajor rule, at least 10 days prior to publication. However, a copy of these emergency regulations and a copy of the RIR/IRFA have been transmitted to the Director of OMB.

The NOAA Administrator also has determined that the rules implementing the 1982 amendment will have a significant economic impact on a substantial number of small entities, for purposes of the Regulatory Flexibility Act, 5 U.S.C. 601–12. The IRFA has been prepared in conjunction with the regulatory impact review. A summary of the IRFA follows:

The generally more restrictive management measures imposed on the ocean fisheries in 1982 will have adverse economic impacts on both commercial and recreational fishermen and industries dependent on the ocean fisheries. The RIR/IRFA estimates that losses in revenue in 1982 compared to 1981 for the areas covered by approved parts of this amendment will be $1,754,000 to the Oregon trollers and $1,520,000 to the Washington trollers. Estimated losses from reduced recreational fishing will be $4,390,000 in Oregon and $3,180,000 in Washington. No incremental losses to the ocean recreational fishery off California are expected since the regulations for that area are essentially identical to those for 1981. Appendix E, pages 5–10, to the 1982 FMP amendment describes the procedures used, and the assumptions made, to estimate these values.

The RIR/IRFA acknowledges but does not quantify gains that will result from increased harvests by fishermen fishing inshore waters, particularly treaty Indian fishermen, as a result of the 1982 regulations. It also does not attempt to quantify the benefits that will accrue to all of the fisheries including the ocean fisheries in future salmon cycles, as a result of increased spawning escapement over what would have

occurred if the ocean fisheries were allowed to harvest more salmon in 1982. Long-run benefits, resulting from maintenance and enhancement of the salmon runs are believed to more than offset the short-term adverse impacts of more restrictive regulations; that is why the Council placed first priority on meeting spawning escapement goals.

The final supplement to the environmental impact statement (SEIS) for this action, which supplements the original environmental impact statement and previous supplements prepared for the FMP, is on file with the Environmental Protection Agency. A notice of availability of this SEIS was published on April 30, 1982.

These regulations to implement the FMP, as amended, do not entail any Federal collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**List of Subjects in 50 CFR Part 661**

Fish, Fisheries, Fishing, Indians.

Dated: May 14, 1982.

**William H. Stevenson,**

*Deputy Assistant Administrator, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR Part 661 is revised to read as follows:

1. The authority citation for Part 661 reads as follows:

**Authority:** 16 U.S.C. 1801 *et seq.*

2. Part 661 is revised to read as follows:

## PART 661—OCEAN SALMON FISHERIES OFF THE COASTS OF CALIFORNIA, OREGON, AND WASHINGTON

### Subpart A—General Measures

Sec.

661.1 Purpose.
661.2 Relation to other laws.
661.3 Definitions.
661.4 [Reserved]
661.5 Reporting requirements.
661.6 [Reserved]
661.7 General restrictions.
661.8 Facilitation of enforcement.
661.9 Penalties.

### Subpart B—Management Measures

661.20 Commercial fishing.
661.21 Recreational fishing.
661.22 Inseason adjustments.
661.23 Treaty Indian fishing.
661.24 Experimental fisheries.
661.25 Scientific research.

**Authority:** 16 U.S.C. 1801 *et seq.*

### Subpart A—General Measures

#### § 661.1 Purpose.

The purpose of this part is to provide for the management of the salmon fisheries off the coasts of Washington, Oregon, and California in the Fishery Conservation Zone (the FCZ, also known as the 3-to-200 mile zone) over which the United States exercises exclusive fishery management authority (i.e., the Pacific Fishery Management Council's Fishery Management Area). This part implements the Pacific Council's Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington, Oregon, and California, under authority conferred by the Magnuson Fishery Conservation and Management Act.

#### § 661.2 Relation to other laws.

(a) This part does not apply to fishing for pink and sockeye salmon conducted under the Convention for the Protection, Preservation, and Extension of the Sockeye Salmon Fishery of the Fraser River System, as amended by the Pink Salmon Protocol, in U.S. Convention Waters between 48° N. latitude and the provisional international boundary between the United States and Canada.

(b) This part recognizes that any State law which pertains to vessels registered under the laws of that State while in the Fishery Management Area, and which is consistent with the salmon management plan, including any State landing law, shall continue to have force and effect with respect to fishing activities addressed herein.

(c) Any person fishing subject to this part shall be bound by the international boundaries of the management subareas described in § 661.3, notwithstanding any dispute or negotiation between the United States and any neighboring country regarding their respective jurisdictions, until such time as new boundaries are published by the United States.

#### § 661.3 Definitions.

*Authorized Officer* means:

(a) Any commissioned, warrant, or petty officer of the Coast Guard;

(b) Any special agent of the National Marine Fisheries Service or other officer authorized by the Secretary;

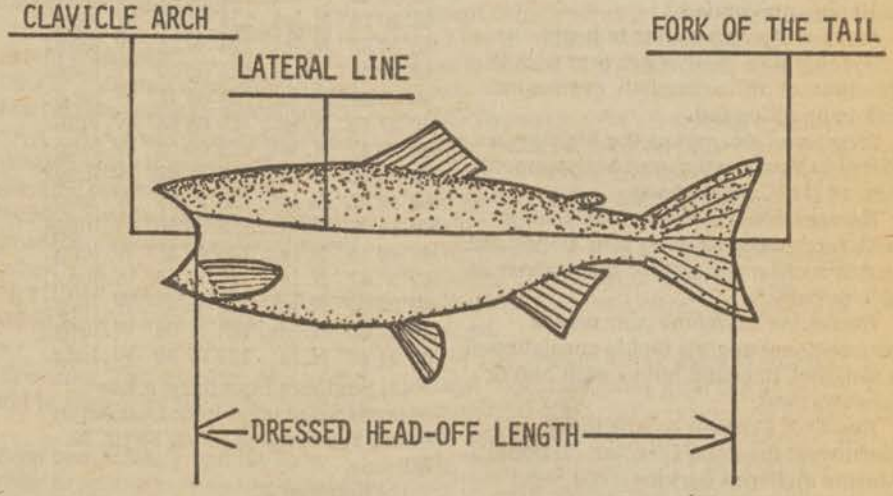
(c) Any officer designated by the head of any Federal or State agency which has entered into an agreement with the Secretary and the Secretary of Transportation to enforce the provisions of the Magnuson Act; and

(d) Any Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (a) of this definition.

*Commercial fishing* means fishing with troll fishing gear as defined in this section, or fishing for the purpose of sale or barter of the catch.

*Council* means the Pacific Fishery Management Council.

*Dressed, head-off length of salmon* means the shortest distance between the midpoint of the clavicle arch (see illustration) and the fork of the tail, measured along the lateral line while the fish is lying on its side, without resort to any force or mutilation of the fish other than removal of the head, gills, and entrails.




*Dressed, head-off salmon* means salmon that have been beheaded, gilled, and gutted without further separation of vertebrae, and are either being prepared for on-board freezing, or are frozen and will remain frozen until landed.

*Fishery Management Area* means the fishery conservation zone (FCZ) off the coasts of Washington, Oregon, and California between 3 and 200 miles offshore, and bounded on the north by the Provisional International Boundary between the U.S. and Canada, and bounded on the south by the International Boundary between the U.S. and Mexico. The inner boundary of the Fishery Management Area is a line coterminous with the seaward boundaries of the States of Washington, Oregon, and California (the "3-mile limit"). The outer boundary of the Fishery Management Area is a line drawn in such a manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured, or is a provisional or permanent international boundary between the United States and Canada or Mexico.

*Fishing* means:

(a) The catching, taking, or harvesting of fish;

(b) The attempted catching, taking, or harvesting of fish;

(c) Any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(d) Any operations at sea in support of, or in preparation for, any activity described in paragraph (a) through (c) of this definition.

*Fishing vessel* means any boat, ship, or other craft which is used for, equipped to be used for, or of a type that is normally used for fishing.

*Freezer trolling vessel* means a fishing vessel, equipped with troll fishing gear, which has a present capability for (a) on-board freezing of the catch, *and* (b) storage of the fish in a frozen condition until they are landed.

*Land* or *landing* means to begin offloading fish, to arrive in port with the intention of offloading fish, or to cause fish to be offloaded.

*Magnuson Act* means the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*

*Recreational fishing* means fishing with recreational fishing gear as defined in this section and not for the purpose of sale or barter.

*Recreational fishing gear* means conventional angling tackle consisting of a rod, reel, line, and hooks with bait or lure attached.

*Regional Director* means the Northwest Regional Director, National Marine Fisheries Service (7600 Sand Point Way, N.E., BIN C15700, Seattle, Washington 98115) or his designee.

*Salmon* means any anadromous species of the family Salmonidae and genus *Oncorhynchus*, commonly known as Pacific salmon, including but not limited to:

Chinook (king) salmon—*Oncorhynchus tshawytscha*

Coho (silver) salmon—*Oncorhynchus kisutch*

Pink (humpback) salmon—*Oncorhynchus gorbuscha*

Chum (dog) salmon—*Oncorhynchus keta*

Sockeye (red) salmon—*Oncorhynchus nerka*

*Secretary* means the Secretary of Commerce, or a designee.

*Single, barbless hook* means a hook with a single shank and point, with no secondary point or barb curving or projecting in any other direction. Hooks manufactured with barbs can be made "barbless" by forcing the point of the barb flat against the main part of the point.

*Subarea* means one of the six salmon management subdivisions of the Fishery Management Area, as follows:

(a) Subarea A:

(1) Northeastern boundary—that part of a line connecting the light on Tatoosh Island, Washington, with the light on Bonilla Point on Vancouver Island, British Columbia, southerly of the International Boundary between the U.S. and Canada (at 48°29'37" N. latitude, 124°43'33" W. longitude), and northerly of the point where that line intersects with the boundary of the U.S. territorial sea.

(2) Northern and northwestern boundary is a line [1] connecting the following coordinates:

48°29'37.19" N. lat., 124°43'33.19" W. long.;
48°30'11" N. lat., 124°47'13" W. long.;
48°30'22" N. lat., 124°50'21" W. long.;
48°30'14" N. lat., 124°52'52" W. long.;
48°29'57" N. lat., 124°59'14" W. long.;
48°29'44" N. lat., 125°00'06" W. long.;
48°28'09" N. lat., 125°05'47" W. long.;
48°27'10" N. lat., 125°08'25" W. long.;
48°26'47" N. lat., 125°09'12" W. long.;
48°20'16" N. lat., 125°22'48" W. long.;
48°18'22" N. lat., 125°29'58" W. long.;
48°11'05" N. lat., 125°53'48" W. long.;
47°49'15" N. lat., 126°40'57" W. long.;
47°36'47" N. lat., 127°11'58" W. long.;
47°22'00" N. lat., 127°41'23" W. long.;
46°42'05" N. lat., 128°51'56" W. long.;
46°31'47" N. lat., 129°07'39" W. long.

(3) Southern boundary: a line extended due west from Leadbetter Point, Washington, at 46°38'10" N. latitude.

(b) Subarea B:

(1) Northern boundary: a line extended due west from Leadbetter Point, Washington, at 46°38'10" N. latitude.

(2) Southern boundary: a line extended due west from Cape Falcon, Oregon, at 45°46'00" N. latitude.

(c) Subarea C:

(1) Northern boundary: a line extended due west from Cape Falcon, Oregon, at 45°46'00" N. latitude.

(2) Southern boundary: a line extended due west from Cape Blanco, Oregon, at 42°50'20" N. latitude.

(d) Subarea D:

(1) Northern boundary: a line extended due west from Cape Blanco, Oregon, at 42°50'20" N. latitude.

(2) Southern boundary: a line extended due west from the Oregon-California border at 42°00'00" N. latitude.

(e) Subarea E:

(1) Northern boundary: a line extended due west from the California-Oregon border at 42°00'00" N. latitude.

(2) Southern boundary: a line extended due west from Cape Vizcaino, California, at 39°43'30" N. latitude.

(f) Subarea F:

(1) Northern boundary: a line extended due west from Cape Vizcaino, California, at 39°43'30" N. latitude.

(2) Southern boundary: The United States-Mexico International Boundary, which is a line connecting the following coordinates:

32°35'22" N. lat., 117°27'49" W. long.;
32°37'37" N. lat., 117°49'31" W. long.;
31°07'58" N. lat., 118°36'18" W. long.;
30°32'31" N. lat., 121°51'58" W. long.

*Total length of salmon* means the shortest distance between the tip of the snout or jaw (whichever extends furthest while the mouth is closed) and the tip of the longest lobe of the tail, without resort to any force or mutilation of the salmon other than fanning or swinging the tail.

*Troll fishing gear* means fishing gear that consists of one or more lines that drag hooks with bait or lures behind a moving fishing vessel, *and* which lines are affixed to the vessel and are not disengaged from the vessel at any time during the fishing operation.

### § 661.4 [Reserved]

### § 661.5 Reporting requirements.

This part recognizes that catch and effort data necessary for implementation of this Fishery Management Plan is collected by the States of Washington, Oregon, and California under existing State data-collection provisions. No additional catch reports will be required of fishermen or processors as long as the

[1] The line joining these coordinates is the provisional international boundary of the U.S. FCZ as shown as NOAA/NOS Charts #18480 and #18002.

data-collection and reporting systems operated by State agencies continue to provide the Secretary with statistical information adequate for management.

**§ 611.6 [Reserved]**

**§ 661.7 General restrictions.**

Except as otherwise provided by or pursuant to this part, the following restrictions apply to all salmon fishing in all subareas of the Fishery Management Area:

(a) No person shall use nets to fish for salmon in the Fishery Management Area, except that a hand-held net may be used to bring hooked salmon on board a vessel.

(b) No person shall fish for or take and retain any species of salmon:

(1) During closed seasons or in closed areas;

(2) Once any catch limit is attained;

(3) By means of gear or methods other than recreational fishing gear or troll fishing gear; or

(4) In violation of any field order issued under § 661.22.

(c) No person shall take and retain or possess aboard a fishing vessel any species of salmon which is less than the applicable minimum total length specified in §§ 661.20(c), 661.21(c), 661.23(a), or 661.23(b)(4).

(d) No person aboard a fishing vessel shall possess a salmon, for which a minimum total length is set by this part, in such a condition that its minimum total length is extended, or cannot be determined, except that "dressed, headoff salmon" may be possessed aboard a "freezer trolling vessel" (unless the adipose fin of such salmon has been removed—see paragraph (f) of this section).

(e) No person shall fail to return to the water immediately and with the least possible injury any salmon the retention of which is prohibited by this part.

(f) No person shall remove the head of any salmon caught in the Fishery Management Area, nor possess a salmon with the head removed, if that salmon has been marked by removal of the adipose fin to indicate that a coded wire tag has been implanted in the head of the fish.

(g) No person shall possess, have custody or control of, ship, transport, offer for sale, sell, purchase, import, export, or land, any species of salmon or salmon part which was taken and retained in violation of the Magnuson Act, this part, or any regulation issued under the Magnuson Act.

**§ 611.8 Facilitation of enforcement.**

(a) No person shall:

(1) Refuse to permit an Authorized Officer to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of the Magnuson Act, this part, or any other regulation issued under the Magnuson Act;

(2) Forcibly assault, resist, oppose, impede, initimidate, or interfere with any Authorized Officer in the conduct of any search or inspection described in paragraph (a)(1) of this section;

(3) Resist a lawful arrest for any act prohibited by this part; or

(4) Interfere with, delay, or prevent, by any means, the apprehension or arrest of another person knowing that such other person has committed any act prohibited by this part.

(b) *General.* Each person aboard a fishing vessel subject to this part shall immediately comply with instructions issued by an Authorized Officer to facilitate safe boarding and inspection of the vessel, its gear, equipment, and catch for purposes of enforcing the Magnuson Act and this part.

(c) *Signals.* Upon being approached by U.S. Coast Guard cutter or aircraft, or other vessel or aircraft authorized to enforce the Magnuson Act, the operator of the fishing vessel shall be alert for signals conveying enforcement instructions. The VHF–FM radiotelephone is the normal method of communicating between vessels. Listen to VHF–FM channel 16 (emergency channel) for instructions to shift to another VHF–FM channel and receive boarding instructions. Visual methods or loudhailer may be used if the radio does not work. The following signals, extracted from U.S. Hydrographic Office publication H.O. 102 International Code of Signals, may be communicated by flashing light or signal flags:

(1) "L," meaning "You should stop your vessel instantly."

(2) "SQ3," meaning "you should stop or heave to; I am going to board you."

(3) "AA AA AA etc.," meaning "Call for unknown station or general call." The operator should respond by identifying his vessel by radio, visual signals or illuminating the vessel name or number.

(4) "RY–CY," meaning "You should proceed at slow speed. A boat is coming to you."

(d) *Boarding.* The operator of a vessel signaled to stop or heave to for boarding shall:

(1) Stop immediately and lay to or maneuver in such a way as to permit the boarding party to come aboard; and

(2) Take such other actions as necessary to ensure the safety of the boarding party.

**§ 661.9 Penalties.**

Any person or fishing vessel found to be in violation of this part will be subject to the civil and criminal penalty provisions and forfeiture provisions prescribed in the Magnuson Act.

## Subpart B—Management Measures

**§ 661.20 Commercial fishing.**

(a) *Open seasons and areas.* The Fishery Management Area is closed to commercial salmon fishing except as opened by this part or superseding regulations. All open fishing periods begin at 0001 hours and end at 2400 hours local time on the dates specified herein. Applicable quotas are specified in § 661.22(a)(1).

(1) Subarea A (U.S.-Canada border to Leadbetter Point, Washington):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 31; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, including coho, begins on July 15 and ends when the commercial coho quota is reached.

(2) Subarea B (Leadbetter Point, Washington, to Cape Falcon, Oregon):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 31; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, including coho, begins on July 1 and ends when the commercial coho quota is reached.

(3) Subarea C (Cape Falcon, Oregon, to Cape Blanco, Oregon):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 31; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, except coho, reopens on June 1 and ends on June 15; during this season, only the gear specified in § 661.20(b)(3) may be used.

(iii) The season for all salmon species, including coho, begins on July 1 and ends when the commercial coho quota is reached.

(iv) The season for all salmon species, except coho, continues from the date the commercial coho quota is reached and ends on October 31; during this season, only the gear specified in § 661.20(b)(3) may be used before September 6, and only the gear specified in § 661.20(b)(2) may be used after September 5.

(4) Subarea D (Cape Blanco, Oregon, to the Oregon-California border):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 31; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, including coho, begins on July 1 and ends on September 8 or when the commercial coho quota is reached, whichever occurs first.

(iii) In that part of Subarea D between Cape Blanco and Cape Sebastian (at 41°19'26" N. latitude), the season for all salmon species, exept coho, continues from the date the commercial coho quota is reached and ends on September 8; during this season, only the gear specified, in § 661.20(b)(3) may be used.

(iv) The season for all salmon species, except coho, begins on September 9 and ends on October 31.

(5) Subarea E (Oregon-California border to Cape Vizcaino, California):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 15; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, including coho, begins on May 16 and ends on May 31.

(iii) The season for all salmon species, including coho, begins on July 16 and ends on September 30.

(6) Subarea F (Cape Vizcaino, California, to U.S.-Mexico border):

(i) The season for all salmon species, except coho, begins on May 1 and ends on May 15; during this season, only the gear specified in § 661.20(b)(2) may be used.

(ii) The season for all salmon species, including coho, begins on May 16 and ends on May 31.

(iii) The season for all salmon species, including coho, begins on July 1 and ends on September 30.

(b) *Gear restrictions.* (1) No person shall engage in commercial salmon fishing using other than troll fishing gear (as defined in § 661.3) in the Fishery Management Area; however, in subareas E and F troll fishing gear need not be affixed to the fishing vessel as specified in § 661.3.

(2) No person shall engage in commercial salmon fishing in the Fishery Management Area using other than single barbless hooks as defined in § 661.3; or bait hooks with whole natural bait attached as the primary bait; or hooks on artificial salmon plugs not less than five (5) inches long in the following areas during the following periods:

| Subarea | Season |
|---|---|
| A | May 1–31. |
| B | May 1–31. |
| C | May 1–31 and after Sept. 5 during season specified in § 661.20(a)(3)(iv). |
| D | May 1–31. |
| E | May 1–15. |
| F | May 1–15. |

Gear commonly known as "spoons," "wobblers," "dodgers," and flexible plastic lures, are not considered artificial salmon plugs, and must be equipped with barbless hooks during the seasons described above.

(3) No person shall engage in commercial salmon fishing using other than hooks with whole natural bait or salmon plugs not less than five (5) inches long from June 1 to June 15 in subarea C, from the date the commercial coho quota is reached to September 5 in subarea C, or from the date the commercial coho quota is reached to September 8 in that part of subarea D between Cape Blanco and Cape Sebastian. Gear commonly known as "spoons," "wobblers," "dodgers," and flexible plastic lures, are not considered salmon plugs and are prohibited during the times specified in this § 661.20(b)(3).

(c) *Length restrictions.* Minimum total lengths of salmon and minimum dressed, head-off lengths of salmon are as follows:

| Subareas | Species | Minimum total lengths (inches) | Minimum lengths for dressed, head-off salmon (inches) |
|---|---|---|---|
| A and B | Chinook | 28 | 21½ |
| | Coho | 16 | 12 |
| C and D | Chinook | 26 | 19½ |
| | Coho | 16 | 12 |
| E and F | Chinook | 26 | 19½ |
| | Coho | 22 | 16½ |
| All subareas | Species other than Chinook and Coho. | None | None |

(d) Steelhead. No person engaged in commercial salmon fishing shall take and retain, or possess any steelhead (*Salmo gairdneri*) within the Fishery Management Area.

(e) *Restriction on use of commercial troll fishing gear for recreational fishing.* No person while on a fishing vessel with troll fishing gear on board shall use any part of that troll fishing gear to engage in recreational fishing for salmon.

**§ 661.21 Recreational fishing.**

(a) *Open seasons and areas.* The Fishery Management Area is closed to recreational salmon fishing except as opened by this part or by superseding regulations. All seasons begin at 0001 hours and end at 2400 hours local time on the dates specified herein. Applicable quotas are specified in § 661.22(a)(1).

(1) Subarea A (U.S.-Canada border to Leadbetter Point, Washington):

(i) The season for all salmon species, except coho, begins on May 29 and ends on June 11.

(ii) The season for all salmon species, including coho, begins on June 12 and ends when the recreational coho quota is reached.

(2) Subarea B (Leadbetter Point, Washington, to Cape Falcon, Oregon): The season for all salmon species, including coho, begins on June 12 and ends when the recreational coho quota is reached.

(3) Subarea C (Cape Falcon, Oregon, to Cape Blanco, Oregon): The season for all salmon species, including coho, begins on June 12 and ends when the recreational coho quota is reached.

(4) Subarea D (Cape Blanco, Oregon, to the Oregon-California border):

(i) The season for all salmon species, including coho, begins on May 29 and ends when the recreational coho quota is reached.

(ii) The season for all salmon, except coho, continues from the date the recreational coho quota is reached and ends on October 31.

(5) Subareas E and F (California): The season for all salmon species, including coho, begins on February 13 and ends on November 14.

(b) *Gear restrictions.* (1) No person shall engage in recreational salmon fishing in the Fishery Management Area using other than recreational fishing gear (as defined in § 661.3), to which may be attached not more than one artificial lure or natural bait, with no more than four single or multiple hooks.

(2) No person shall use more than one rod and line for recreational salmon fishing in subareas A, B, C, and D; however, there is no limit to the number of rods and/or lines used for recreational salmon fishing in subareas E and F.

(3) No person engaged in recreational fishing for salmon in subareas E and F may use weights of more than four (4) pounds attached directly to the line.

(4) Recreational fishing gear (as defined in § 661.3) must be held by hand by the angler while the angler is playing a hooked fish and reducing it to possession.

(c) *Length restrictions.* Minimum total lengths of salmon are as follows:

MINIMUM TOTAL LENGTHS (INCHES)

| Subareas | Chinook | Coho | Other salmon |
|---|---|---|---|
| A and B | 24 | 16 | None. |
| C and D | [1]None | [1]None | None. |
| E and F | [2]22 | [2]22 | None. |

[1] In Subareas C and D, recreational anglers must retain the first two salmon taken.
[2] Except that one chinook or coho salmon per day may be less than 22 inches but not less than 20 inches.

(d) *Daily bag limits.* No person shall fish for, or take and retain, or possess more than two salmon per day while recreationally salmon fishing in the Fishery Management Area. In subareas C and D, the first two salmon taken must be retained.

**§ 661.22 Inseason adjustments.**

(a) *Automatic season closures based on quotas.* (1) Salmon harvest quotas are as follows:

COHO QUOTAS

| Subareas | Recreational | Commerical |
|---|---|---|
| A | 115,000 | 204,000 |
| B | [1] 100,000 | [1] 89,000 |
| C and D | [1] 114,000 | [1] 488,000 |
| E and F | [2] None | [2] None |

[1] These are quotas subject to adjustments based on inseason evaluations of private-hatchery contributions to the harvests or catches, to be made when 75% of any commercial or recreational quota is reached. *See* § 661.22(b)
[2] Coho salmon caught in subareas E and F will count towards the coho quota established for subareas C and D, but if those quotas are reached, only subareas C and D will close.

(2) When a quota for the commercial or the recreational fishery, or both, in any subarea or subareas of the Fishery Management Area is projected by the Regional Director to be reached on or by a certain date, the Secretary shall, by publishing a field order in the **Federal Register**, close the commercial or recreational fishery, or both, as of the date the quota will be reached in that subarea or subareas.

(b) *Adjustment of quotas.* (1) The estimated contributions of private hatchery coho to the quotas for subareas B, C, and D are:

| | Subarea B | Subareas C and D |
|---|---|---|
| Commercial | 10,000 | 139,000 |
| Recreational | 11,000 | 33,000 |

When 75% of any coho quota specified in § 661.22(a)(1) for subareas B, C, or D is reached, the Regional Director will review the estimated contributions of private hatchery coho, taking into account coded-wire tag data gathered during the season. If the contribution of private hatchery coho varies from the preseason estimates, the Secretary will modify the coho quotas for subareas B, C, and D accordingly by publishing a field order in the **Federal Register.**

(2) On or before the time that 75% of the commercial coho quota specified in § 661.22(a)(1) for subareas C and D is reached, the Regional Director will estimate the number of coho salmon that will be hooked and released during the open seasons specified in §§ 661.20(a)(3)(iv) and (a)(4)(iii) and (iv), and the Secretary will reduce the commercial coho quota for subareas C and D accordingly by publishing a field order in the **Federal Register.**

(c) *Availability of Data.* The Regional Director will compile in aggregate form all data and other information relevant to the actions described in this section and shall make them available for public review during normal office hours at the Northwest Regional Office, National Marine Fisheries Service, 7600 Sand Point Way N.E., Seattle, Washington 98115.

(d) *Effective dates.* (1) Any field order issued under this section is effective on the date specified in the field order or on the date the field order is filed for public inspection with the Office of the Federal Register, whichever is later.

(2) Any field order issued under this section will remain in effect until the expiration date stated in the order, or until rescinded or superseded; *Provided, That,* no such field order has any effect beyond the end of the calendar year in which issued, at which time provisions of this part that were superseded by such field order again become effective until subsequently modified or superseded.

(e) Nothing contained in this part limits the authority of the Secretary to issue emergency regulations under section 305(e) of the Magnuson Act, if the Secretary determines that an emergency involving the salmon resource exists. Such emergency regulations are effective upon filing for public inspection with the Office of the Federal Register.

**§ 661.23 Treaty Indian fishing.**

(a) *Makah Tribe.* Persons authorized by the Makah Tribe to exercise fishing rights under the Treaty with the Makah may fish for all salmon species only in ocean areas where that Tribe is entitled by Federal judicial determination to exercise its treaty fishing rights, including that portion of subarea A north of 48°07'36" N. latitude (Sand Point) from 0001 hours on May 1 to 2400 hours on October 31. Minimum size limits are 24 inches for chinook salmon and 16 inches for coho salmon.

(b) *Quileute, Hoh, and Quinault Tribes.*—(1) *Quileute and Hoh.* Persons authorized by the Quileute and Hoh Tribes to exercise fishing rights under the Treaty of Olympia may fish for all salmon species only in ocean areas where those Tribes are entitled by Federal judicial determination to exercise their treaty fishing rights, including that portion of subarea A south of 48°07'36" N. latitude (Sand Point) and north of 47°31'42" N. latitude (mouth of Queets River), from 0001 hours on May 1 to 2400 hours on September 7.

(2) *Quinault Tribe.* Persons authorized by the Quinault Tribe to exercise fishing rights under the Treaty of Olympia may fish for all salmon species only in ocean areas where that Tribe is entitled by Federal judicial determination to exercise its treaty fishing rights, including that portion of subarea A south of 47°40'06" N. latitude (Destruction Island) and north 46°53'03" N. latitude (Point Chehalis), from 0001 hours on May 1 to 2400 hours on September 7.

(3) *Closed areas.* Salmon fishing, by persons specified in this paragraph (b), in those areas of the FCZ within a six-mile radius from the center of the midpoints of the baselines closing the mouths of the Queets and Hoh Rivers is prohibited during any period when subarea A is closed to all non-Indian salmon fishing.

(4) *Minimum size limits.* Minimum total lengths of salmon for persons specified in this paragraph (b) are chinook—26 inches; and coho—16 inches.

(c) *Exceptions.* Unless otherwise specified by this section, persons specified in paragraphs (a) and (b) of this section are subject to the provisions of this part, the Magnuson Act, and any other regulations issued under the Magnuson Act, except that the restrictions contained in § 661.20 (b)(1), (d) and (e) and § 661.21 (b) and (d) do not apply.

(d) The Secretary will give due consideration in promulgating emergency regulations to the treaty fishing rights of Indian tribes with Federally adjudicated usual and accustomed fishing grounds in the area affected by such regulations.

**§ 661.24 Experimental fisheries.**

(a) The Pacific Council may recommend to the Regional Director that experimental fisheries for research purposes be allowed in the Fishery Management Area, as may be proposed by the Council, the Federal Government, State Governments, and treaty Indian tribes having usual and accustomed fishing grounds in the Fishery Management Area.

(b) The Regional Director shall not allow any experimental fishery recommended by the Council unless he determines that the purpose, design, and administration of the experimental fishery are consistent with the goals and objectives of the Council's fishery management plan, the national standards (Section 301(a) of the Magnuson Act), and other applicable law.

(c) Each vessel participating in any experimental fishery recommended by the Council and allowed by the Regional Director is subject to all provisions of this part, except those portions necessarily relating to the purpose and nature of the experimental fishery. These exceptions will be specified in a letter issued by the Regional Director to each vessel participating in the experimental fishery and that letter must be carried aboard each participating vessel.

**§ 661.25 Scientific research.**

Nothing in this part is intended to inhibit or prevent any scientific or oceanographic research in the fishery management area by a scientific research vessel. The Regional Director shall acknowledge any notification he might receive of any scientific or oceanographic research with respect to salmon being conducted by a scientific research vessel, by issuing to the operator or master of that vessel a letter of acknowledgement, containing information on the purpose and scope (locations and schedules) of the activities. The Regional Director shall transmit copies of such letter to the Council, and to State and Federal administrative and enforcement agencies, to ensure that all concerned parties are aware of the research activities.

[FR Doc. 82-13488 Filed 5-14-82; 4:26 pm]

BILLING CODE 3510-22-M

# Proposed Rules

Federal Register
Vol. 47, No. 96
Tuesday, May 18, 1982

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## OFFICE OF PERSONNEL MANAGEMENT

### 5 CFR Parts 213 and 752

### Schedule B Appointment Authority for Professional and Administrative Career Positions; Correction

Note.—This document originally appeared in the Federal Register of Monday, May 17, 1982. It is reprinted in this issue to meet requirements for publication on the Tuesday/Friday schedule assigned to the Office of Personnel Management.

**AGENCY:** Office of Personnel Management.

**ACTION:** Republication of proposed regulations; correction.

**SUMMARY:** On May 11, 1982, (47 FR 20264) the Office of Personnel Management published proposed regulations to amend 5 CFR Parts 213 and 752. Because the proposal as published contained invadvertent errors, the proposed regulations are republished in their entirety with corrections.

These proposed regulations establish a new appointing authority which agencies may use during a period when the Office of Personnel Management does not have a register of eligibles for use in filling professional and administrative career positions subject to the decree entered on November 19, 1981, by the United States District Court for the District of Columbia in the civil action known as *Luevano* v. *Devine* and numbered as No. 79–271. This new authority is applicable only when agencies must utilize external recruiting and hiring procedures to fill such positions. The proposed regulations also contain an amendment to extend adverse action protections to individuals appointed under the new authority.

**DATE:** Comments must be received on or before June 16, 1982.

**ADDRESS:** Written comments may be sent to Richard B. Post, Associate Director for Staffing, Office of Personnel Management, 1900 E Street, NW., Washington, D.C. 20415, or delivered to Room 6F08, 1900 E Street, NW., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:**

Part 213: William Bohling—(202) 632–6000.

Part 752: Cynthia Field—(202) 254–5517.

**SUPPLEMENTARY INFORMATION:** On November 19, 1981, the United States District Court for the District of Columbia entered a decree in the civil action known as *Luevano* v. *Devine* and numbered as No. 79–271. Defendants in that lawsuit included the Director of the United States Office of Personnel Management (OPM) and the heads of 45 other Federal departments, agencies, and establishments in the Legislative and Executive Branches of the United States Government. Pursuant to that decree, OPM must eliminate the use of the Professional and Administrative Career Examination (PACE) and registers of eligibles derived therefrom. At the present time, OPM has no equivalent register of eligible applicants for entry-level professional and career positions and, pending further notice, will not establish such a register.

Because of substantial reductions in Federal governmental operations and spending, most agencies will not engage in significant outside hiring for the probable life of the decree. Instead, agencies generally will fill many vacancies that arise either by internal placement; by reinstatment of individuals with career status; or by interagency transfer to accommodate Federal employees who have been displaced by reduction in force, abolition of function, reogranization, or some other agency action taken either to achieve compliance with budgetary or personnel ceiling limitations or to accomplish desirable program changes. In filling vacancies, agencies will give precedence to individuals with priority placement rights and will make maximum use of available applicant sources such as (a) OPM Displaced Employee and VIPP lists and (b) agency repromotion and reemployment priority lists.

OPM recognizes, however, that agencies may experience vacancies in positions that were covered by the PACE on the effective date of the consent decree and that can be filled only through external hiring at the GS–5 and GS–7 entry levels. In the absence of OPM registers of eligible applicants for such positions, and in the event that agencies need to make external appointments to such positions, the agencies must have a special authority to do so. Thus, OPM, pusuant to its authority under Civil Service Rule VI, has determined that such entry-level professional and administrative career positions at the GS–5 and GS–7 grades should be excepted from the competitive service on a case-by-case, position-by-position basis when it is necessary to fill those positions through external hiring. Excepting these positions from the competitive service and placing them in Schedule B is appropriate because, given the elimination of PACE and the unavailability of alternative written tests and other merit selection procedures, it is impracticable to hold competitive examinations for the positions.

The Director of OPM finds that, on account of the urgent needs of several agencies to effect appointments to positions that were formerly covered by PACE, good cause exists for setting the comment period on this proposed rulemaking at 30 days.

### E.O. 12291, Federal Regulation

OPM has determined that this is not a major rule for the purposes of E.O. 12291, Federal Regulation, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

### Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it pertains solely to procedures for appointment of employees by Federal agencies.

### List of Subjects

*5 CFR Part 213*

Goverment employees.

*5 CFR Part 752*

Administrative practice and procedures, Government employees.

Office of Personnel Management.

**Donald J. Devine,**

*Director.*

Accordingly, OPM proposes to amend Title 5, Code of Federal Regulations, as follows:

## PART 213—EXCEPTED SERVICE

1. 5 CFR 213.3202 is amended by adding paragraph (1) to read as follows:

**§ 213.3202 Entire executive civil service.**

* * * * *

(1) Professional and administrative careeer (PAC) positions at the GS–5 or GS–7 grade level which are subject to the decree entered on November 19, 1981, by the United States District Court for the District of Columbia in the civil action known as *Luevano* v. *Devine* and numbered as No. 79–271, and which were not removed from coverage of the Professional and Administrative Career Examination (PACE) prior to the effective date of the consent decree. When a Federal agency needs to fill a PAC position that was not removed from PACE coverage before the consent decree became effective, and when no qualified applicant already in the competitive service is available for appointment thereto, and the agency has made maximum use of priority placement sources, then the agency may apply to OPM for authority to make a new appointment under this paragraph. Such appointments shall be made pursuant to such Schedule B authorities for PAC positions as shall be prescribed in the Federal Personnel Manual. An incumbent of a Schedule B PAC position may be appointed to a competitive position upon a demonstration by the agency that the employee has met qualifications on the basis of either an examination, review of the employee's performance, or such other means as may be prescribed for such position by civil service laws, rules, and regulations. Terms of service under this appointment authority shall be established by a delegation agreement to be executed for each position excepted from the competitive service pursuant to this authority.

## PART 752—ADVERSE ACTIONS

(2) 5 CFR 752.401(b) is amended by adding paragraph (4) to read as follows:

**§ 752.401 Coverage.**

* * * * *

(b) *Employees covered.* The following are covered by this subpart: * * *

(4) An employee who occupies a professional and administrative career (PAC) position in Schedule B of Part 213 of this title, provided that the employee has completed a trial period of one year after initial appointment in such a position.

**Authority:** 5 U.S.C. 3301, 3302; E.O. 10577.

[FR Doc. 82-13435 Filed 5-13-82; 4:06 pm]

BILLING CODE 6325-01-M

## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

### 7 CFR Part 1250

**[Docket No. ERPA-2]**

### Egg Research and Promotion Order; Recommended Decision and Opportunity To File Written Exceptions on Proposed Amendments

*Correction*

In FR Doc. 82–12633, appearing at page 20258, in the issue of Tuesday, May 11, 1982, make the following change:

On page 20259, in the first column, the 8th line from the top, should read "case each year thereafter up to the 10-cent".

BILLING CODE 1505-01-M

### Rural Electrification Administration

### 7 CFR Part 1701

### Appendix A—REA Bulletins; Proposed "File With" To REA Bulletins 320–1, 320–4 and 320–14

**AGENCY:** Rural Electrification Administration, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** REA proposes to amend Appendix A—REA Bulletins by issuing a "File With" to REA Bulletin 320–1, "Preloan Procedures for Rural Telephone Cooperatives", REA Bulletin 320–4, "Preloan Procedures for Telephone Loan Applicants", and REA Bulletin 320–14, "Loans for Telephone System Improvements and Extensions".

This "File With" will amend these bulletins and all bulletins inconsistent herewith concerning the financing of headquarters facilities, furniture and office equipment, vehicles and other work equipment, station apparatus and associated inside wiring. Except as otherwise determined by the Administrator, these items will be financed by the borrower from general funds or non REA loans. For these purposes, REA includes the Rural Telephone Bank and guarantees of loans.

The proposed "File With" will ensure that all REA telephone borrowers are treated equitably in the financing of facilities to furnish or improve telephone service in rural areas and will enable REA to make optimum use of available loan funds.

**DATE:** Public comments must be received by REA no later than: July 19, 1982.

**ADDRESS:** Submit written comments to Joel M. Babb, Chief, Loans, Management and Marketing Branch, Telecommunications Management Division, Room 2913-South Building, U.S. Department of Agriculture, Washington, D.C. 20250.

**FOR FURTHER INFORMATION CONTACT:** Henry I. Buchanan, Borrower Loans, Management and Marketing Specialist, Telecommunications Management Division, Room 2913-South Building, U.S. Department of Agriculture, Washington, D.C. 20250, telephone number (202) 382–8548. The Draft Impact Analysis describing the options considered in developing this proposed rule and the impact of implementing each option is available upon request from the above office.

**SUPPLEMENTARY INFORMATION:** Pursuant to the Rural Electrification Act, as amended (7 U.S.C. 901 et seq.), REA proposes to amend REA Bulletin 320–1, "Preloan Procedures for Rural Telephone Cooperatives", REA Bulletin 320–4, "Preloan Procedures for Telephone Loan Applicants" and REA Bulletin 320–14, "Loans for Telephone System Improvements and Extensions", by issuing a "File With" to the Bulletins. 7 CFR Part 1701, Appendix A—REA Bulletins, will be amended to include the proposed "File With" upon its issuance as a final rule. This proposed action has been issued in conformance with Executive Order 12291, Federal Regulation. The action will not (1) have an annual effect on the economy of $100 million or more; (2) result in a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies; or (3) result in significant adverse effects on competition, employment, investment or productivity and therefore has been determined to be "not major". This action is not subject to the Regulatory Flexibility Act or to OMB Circular A–95 review requirements. This program is listed in the Catalog of Federal Domestic Assistance as 10.851—Rural Telephone Loans and Loan Guarantees, and 10.852—Rural Telephone Bank Loans. All written submissions made pursuant to this action will be made available for public

inspection during regular business hours at the above address.

The text of the proposed "File With" is as follows: *Change in REA policy on financing certain telephone facilities:* REA has revised its policy concerning financing of the following items: Headquarters facilities, furniture and office equipment, vehicles and other work equipment, station apparatus and associated inside wiring.

Except as otherwise determined by the Administrator, these items will be financed by borrowers from general funds or non-REA loans. For these purposes, REA includes the Rural Telephone Bank and guarantees of loans.

**List of Subjects in 7 CFR Part 1701**

Administrative practice and procedure, Loan programs—communications, Telecommunications, Telephone.

Dated: May 3, 1982.

**Harold V. Hunter,**

*Administrator.*

[FR Doc. 82-13449 Filed 5-17-82; 8:45 am]

BILLING CODE 3410-15-M

## NUCLEAR REGULATORY COMMISSION

### 10 CFR Part 71

### General License For Shipment In Packages Approved for use by Another Person

**AGENCY:** Nuclear Regulatory Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Nuclear Regulatory Commission is considering amending its regulations concerning the transportation of radioactive material. Specifically, it is proposing to change recordkeeping requirements of the general license authorizing an NRC licensee to use a package that the Commission has previously evaluated and specifically authorized another licensee to use. Currently, as a condition of the general license, the general licensee must possess copies of all documents referred to in the Commission's specific authorization. This proposed amendment would require the general licensee to possess only those drawings and other documents relating to the use and maintenance of the packaging and to the actions to be taken prior to shipment.

**DATES:** Comment expires June 17, 1982. Comments received after June 17, 1982 will be considered if it is practical to do so, but assurance of consideration cannot be given except as to comments received on or before that date.

**ADDRESSES:** All interested persons who desire to submit written comments or suggestions for consideration in connection with the proposed amendment 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 comments on the proposed amendment may be examined at the Commission's Public Document Room at 1717 H Street NW., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Mr. Donovan A. Smith, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. Telephone: (301) 443-5825.

**SUPPLEMENTARY INFORMATION:** The Nuclear Regulatory Commission is considering amending its regulations to modify the recordkeeping requirements of the general license for shipment in packages specifically approved by the Commission or by a foreign national competent authority. The proposed amendment to § 71.12 pertains to the documents which users of the general license must possess. The amendment will have no effect on other NRC requirements in 10 CFR Part 71 "Packaging of Radioactive Material for Transport and Transportation of Radioactive Material under Certain Condition," for packaging and transportation of radioactive material.

**Background**

In 1970 the U.S. Atomic Energy Commission (AEC) amended its transportation regulations to provide a general license for the use of packages used to ship licensed material which the Commission had previously evaluated, found to meet the standards of Part 71, and specifically authorized another licensee to use. Prior to that amendment, a licensee was required to apply to the Commission and obtain specific authorization to use a package even though another licensee was already licensed to use it for the same radioactive material. The procedure prior to that amendment involved unnecessary paperwork by the Commission and its licensees without any increase in the safety of the shipments.

The general license procedures adopted in 1970 provided authority for any AEC licensee to use any package which had been specifically licensed by the AEC for this use if the general licensee (1) had a copy of the specific license and related documents authorizing use of the type of package, (2) complied with the terms and conditions of the specific license, and (3) notified the AEC of the specific licensee's name and license number and the model number of the packaging.

The general license published by AEC (now in § 71.12 of NRC regulations) has been effective in reducing paperwork; however, one of its requirements has caused questions about the documents which the general licensee must possess. The general licensee must have a copy of "* * * all documents referred to in the license, certificate, or other approval * * *"

The specific approval issued by the Commission refers to the entire application, as supplemented, which was submitted in requesting approval of the package. Applications include safety analyses to demonstrate that the package is adequate to meet the regulations in Part 71. These analyses include detailed information on, for example, codes and standards that were used during structural evaluations to determine material properties, design limits, and methods of combining loads and stresses. The analyses also include operating procedures for loading and unloading the package, preparation of an empty package for transport, and a maintenance program for packages. (Guidance to applicants for package approval is given in NRC Regulatory Guide 7.9, "Standard Format and Content of Part 71 Applications for Approval of Packaging of Type B, Large Quantity, and Fissile Radioactive Material.")

By letter dated March 10, 1980, the Foster Wheeler Energy Corporation filed a petition for rulemaking (Docket No. PRM 71-8) requesting that the Commission exempt persons licensed under 10 CFR Part 34 for industrial radiography from the requirement for the general licensee to have a copy of all the documents referred to in the specific approval. In considering this petition, the Commission has noted that although all the referenced documents may have been important in the package designer/manufacturer's demonstration of package adequacy, some of the documents may be of questionable value to subsequent users of the package under a general license. As the petitioner suggested, the requirement for the general licensee to possess "all" referenced documents may cause acquisition and retention of some documents which would not contribute to safety of shipments.

Upon consideration of the information that would contribute to safe shipment, it appears appropriate to modify § 71.12(b)(1)(i) so that the general

licensee will not be required to have "all" referenced documents, but will be required to have those drawings and other documents which relate to the use and maintenance of the packaging and to the actions to be taken prior to shipment. Additional guidance on the drawings and other documents which will be required to be kept by the general licensee is provided in sections 1, 7 and 8 of NRC Regulatory Guide 7.9.

The proposed amendment also would revise § 71.12(c) to clarify the requirement for the general licensee's possession of documents when using foreign-approved packaging. Presently, the general licensee must have "* * *the documents referenced * * *" in the certificate that was issued by the foreign national competent authority. The proposed amendment would require the general licensee to have "* * * the drawings and other documents referenced * * *" in the certificate. This addition of specific reference to drawings will make no change in the substance of § 71.12(c), but it will help to emphasize the importance of drawings in the use and maintenance of the packaging and in the actions to be taken prior to shipment.

**The Regulation**

The proposed amendment of § 71.12(b)(1)(i) would modify the requirement that the general licensee have all documents referred to in the Commission's specific approval of the package. As modified, the regulation would require that the general licensee have those drawings and other documents relating to use and maintenance of the packaging and to the actions to be taken prior to shipment.

The proposed amendment of § 71.12(c)(1) would clarify that the requirement for users of foreign-approved packages to possess documents relating to use and maintenance and preparation of the packages for use, includes an obligation to possess pertinent drawing.

**Paperwork Reduction Act Statement**

Upon issuance of a final amendment, the Office of Management and Budget will be notified of the reduction of a recordkeeping requirement contained in Part 71.

**Regulatory Flexibility Certification**

Since these amendments would reduce a present recordkeeping requirement, the Commission, in accordance with sec. 605(b) of the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), hereby certifies that this rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. Persons using the general license in § 71.12 will be required to possess fewer documents and thus will incur a reduction of approximately 50 percent in paperwork and recordkeeping costs.

**List of Subjects in 10 CFR Part 71**

Hazardous materials transportation, Nuclear materials, Packing and containers, Penalty, Reporting requirements.

## PART 71—PACKAGING OF RADIOACTIVE MATERIAL FOR TRANSPORTATION AND TRANSPORTATION OF RADIOACTIVE MATERIAL UNDER CERTAIN CONDITIONS

Pursuant to the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and section 553 of title 5 of the United States Code, notice is hereby given that adoption of the following amendment to 10 CFR Part 71 is contemplated.

1. The authority citation for 10 CFR Part 71 continues to read as follows:

**Authority:** Secs. 53, 57, 62, 63, 81, 161, 182, 183, 68 Stat. 930, 932, 933, 935, 948, 953, 954, as amended (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232 and 2233); secs. 201, 202 and 206, 88 Stat. 1242, as amended, 1244, and 1246 (42 U.S.C. 5841, 5842 and 5846).

Sections 71.4(r) and (s), 71.5a and 71.5b also issued under sec. 301, Pub. L. 96–295, 94 Stat. 789–790.

For the purposes of sec. 223, 68 Stat. 958, as amended, (42 U.S.C. 2273), §§ 71.3, 71.5(a) and (b), 71.31, 71.32, 71.33, 71.42(a) and (b), 71.52, 71.53, 71.54 and 71.55 are issued under sec. 161b, 68 Stat. 948, as amended, (42 U.S.C. 2201(b)); and §§ 71.5(b), 71.51(a), 71.61, 71.62 and 71.63 are issued under sec. 161o, 68 Stat. 950, as amended, (42 U.S.C. 2201(o)).

2. Section 71.12 is amended by revising paragraphs (b)(1)(i) and (c)(1) to read as follows:

**§ 71.12 General license for shipment in DOT specification containers, in packages approved for use by another person, and in packages approved by a foreign national competent authority.**

A general license is hereby issued by persons to holding a general or specific license issued pursuant to this chapter, to deliver licensed material to a carrier for transport provided the licensee has a quality assurance program whose description has been submitted to and approved by the Commission as satisfying the provisions of § 71.51.

* * * * *

(b) In a package for which a license, certificate of compliance or other approval has been issued by the Commission's Director of Nuclear Material Safety and Safeguards or the Atomic Energy Commission, provided that:

(1) The person using a package pursuant to the general license provided by this paragraph:

(i) Has a copy of the specific license, certificate of compliance, or other approval authorizing use of the package, and has the drawings and other documents referenced in the approval relating to the use and maintenance of the packaging and to the actions to be taken prior to shipment.

* * * * *

(c) In a package which meets the pertinent requirements in the 1967 regulations of the International Atomic Energy Agency and the use of which has been approved in a foreign national competent authority certificate which has been revalidated by the Department of Transportation: *Provided,* That the person using a package pursuant to the general license provided by the paragraph:

(1) Has and complies with the applicable certificate, the revalidation, and the drawings and other documents referenced in the certificate relating to the use and maintenance of the packaging and to the actions to be taken prior to shipment; and

* * * * *

Dated at Bethesda, Maryland, this 7th day of May 1982.

For the Nuclear Regulatory Commission.

**William J. Dircks,**

*Executive Director for Operations.*

[FR Doc. 82-13448 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

## CIVIL AERONAUTICS BOARD

**14 CFR Part 398**

**[PSDR-77; Docket No. 40620]**

### Guidelines for Individual Determinations of Essential Air Transportation

**AGENCY:** Civil Aeronautics Board.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The CAB proposes to clarify its policy on overflights of small communities by airlines providing essential air service there. Airlines would be prohibited from overflying an eligible point except when the overflight became necessary due to circumstances beyond the airline's control or when the eligible point's essential service was already being provided by other flights.

**DATES:** Comments by: July 16, 1982.

Comments and other relevant information received after this date will

be considered by the Board only to the extent practicable.

Requests to be put on the Service List: June 1, 1982.

The Docket Section prepares the Service List and sends it to each person listed on it, who then serves comments on others on the list.

**ADDRESSES:** Twenty copies of comments should be sent to Docket 40620, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428. Individuals may submit their views as consumers without filing multiple copies. Comments may be examined in Room 711, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. as soon as they are received.

**FOR FURTHER INFORMATION CONTACT:** Patrick V. Murphy, Jr., Chief, Essential Air Services Division, Bureau of Domestic Aviation, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428; (202) 673–5408; or David Schaffer, Office of the General Counsel, Rules & Legislation Division, Civil Aeronautics Board, 1825 Connecticut Avenue, NW., Washington, D.C. 20428; (202) 673–5442.

**SUPPLEMENTARY INFORMATION:** Under section 419 of the Federal Aviation Act, all communities that are eligible points are assured that they will continue to receive at least essential air transportation. Eligible points are communities that were listed on an air carrier's section 401 certificate on the date the Airline Deregulation Act of 1978 (Pub. L. 95–504) was enacted (October 24, 1978), and other communities that are designated eligible points by the Board under 14 CFR Part 270. Section 419(a)(2) requires the Board to set essential air service levels for eligible points that are served by not more than one certificated air carrier. The Board has established procedures and guidelines for setting these air service levels in 14 CFR Parts 325 and 398. For each eligible point covered by section 419(a)(2), it has issued an order setting forth the number of flights and seats that must be provided to that community and has named the carrier or carriers that it is relying on to provide that service. These carriers cannot terminate service at those points unless they have complied with the notice obligations of section 419(a)(3) or (b)(7) and 14 CFR Part 323, and another carrier has been designated to provide the essential service.

In the administration of the essential service program, questions and problems have arisen concerning the practice of some carriers of overflying an eligible point. Overflights may occur when no persons have given notice at the eligible point that they wish to board and no passengers on the plane seek to deplane there. In Order 81–12–103, involving service by Air Illinois at El Dorado/Camden, Arkansas and Natchez, Mississippi, the Board confronted this problem and decided that, with a few exceptions, overflights of eligible points do not qualify as essential air service. The conclusion was reached in the context of a proceeding to establish a final rate of compensation for Air Illinois' forced service at those communities. The question there was whether the Board could pay for the flights that had overflown the eligible points. The Board found, at page 2, that it was "not authorized under section 419 to pay compensation for such service." This proposal is to clarify the Board's position on the broader questions of whether, compensation issues aside, overflights would ever be permitted at points guaranteed essential air service under section 419 of the Act.

The Board tentatively concludes that as a general matter overflights of eligible points are not permitted and a policy statement is proposed below on this subject. This conclusion is based on both legal and policy grounds.

Section 419(f) of the Act sets the minimum level of essential service for all communities, except those in Alaska, as two round trips per day, five days per week or the level of service that existed in 1977, whichever is less. Section 102(a)(8) emphasizes the importance of maintaining "continuous scheduled airline service for small communities and for isolated areas." It is clear that Congress intended to ensure communities scheduled airline service on a regular basis, not merely on-demand service. Yet a practice of overflying a point would turn the scheduled service into an on-demand type of operation.

Predictability is an important factor in the success of local air service. Many people show up for a flight without having made a reservation, relying on the schedule that states that the flight is going to be there. They have a right to expect that the plane will board on schedule unless there is a good reason that prevents it.

A Board policy of permitting overflights may also damage the long-term potential of the air service market at eligible points. Carriers may be tempted to take advantage of such a policy and overfly a point not only when there are no passengers there, but also when there are too few to make the run profitable. Travelers, in turn, may lose faith in the reliability of their local air transportation and begin driving to their destination or to another airport. The dwindling number of passengers is likely to lead both to further deterioration in local air serivce and to increasing subsidy costs. These are the reasons for the proposed policy statement set forth below.

Although eligible points are broadly defined in the Act as including all communities that were listed on an airline's certificate in 1978, this notice is only concerned with overflights in essential air service (EAS) markets. These are the markets which the Board has decided that air service is essential for the eligible point. When the Board makes an essential air service determination for a point, it designates the hub or hubs to which the community is guaranteed air service. The route between the designated hub and the eligible point is the essential air service (EAS) market. The Board also establishes a number of seats and flights that the carrier must provide in the essential air service market. As long as the carrier provides the required number of flights and seats, it may overfly the eligible point on its additional flights. It also may, of course, overfly points in markets where the Board has not made an EAS determination. To the extent, however, that it does not provide the required number of flights or seats in the EAS market, either as a result of not providing the flights at all or by overflying the point, it is in violation of the Act and the Board's essential service guarantee for the point.

Where a carrier is not receiving compensation for serving the eligible point, it could also overfly that point when another carrier's flights were making up the shortfall in service caused by the overflight. If the carrier is receiving compensation, however, it could not rely on the service of another carrier as justification for overflying an eligible point unless it first received permission from the Board. When the Board pays a subsidy to a carrier it is buying an agreed-on amount of service. While changed circumstances, such as another carrier serving the point, may justify overflights or other changes in its service pattern, the carrier may not take it upon itself to make this change without consulting the Board.

There may be some situations where overflying an eligible point is justified. For instance, in bad weather it may be impossible for the aircraft to land. The test would be whether the situation was beyond the control of the carrier. If it were, then the overflight would be permitted.

The proposed policy statement also contains an exception for essential air

service in Alaska. Under an agreement with the Alaska Transportation Commission, authorized by section 419(f)(2) of the Act, the Board has decided that the essential service needs of some Alaskan communities will be met by on-demand service. For those communities, overflights would be permitted to the extent that the essential service determination of the particular eligible point would permit them.

There may be other situations not contemplated here where overflights would be justified. In such cases, the Board would consider granting an exemption from section 419(f) and a waiver of this rule to permit an on-demand type of operation.

The policy statement proposed here would apply to both subsidized and unsubsidized operations. As a practical matter, however, the problem is likely to arise only at points receiving subsidized service, because it is only at those points that traffic is likely to be so light that a carrier would wish to overfly.

**Initial Regulatory Flexibility Analysis**

Under the Regulatory Flexibility Act, Pub. L. 96–354, the Board concludes that this rule, if adopted, may have a significant economic impact on at least some small air carriers and small communities. It is not clear how many would be affected, because it cannot be established precisely how many small air carriers would overfly eligible points in the absence of this rule. Those small air carriers that would otherwise overfly would be adversely affected by their inability under this rule to do so. Small communities, on the other hand, would benefit from the increased reliability of their air service. The only alternative would be to permit overflights that could lead to a deterioration of air service at small communities.

The need, objective, and legal basis for this policy statement are described above. It would not add any reporting or recordkeeping requirements, or duplicate, overlap, or conflict with other Federal rules.

**List of Subjects in 14 CFR Part 398**

Air transportation, Essential air service.

## PART 398—GUIDELINES FOR INDIVIDUAL DETERMINATIONS OF ESSENTIAL AIR TRANSPORTATION

Accordingly, the Civil Aeronautics Board proposes to amend 14 CFR Part 398, *Guidelines for Individual Determinations of Essential Air Transportation*, as follows:

1. A new § 398.10 would be added to the Table of Contents, as follows:

Sec.

* * * * *

398.10 Overflights.

2. A new § 398.10 would be added, to read:

**§ 398.10 Overflights.**

The Board considers it a violation of section 419 of the Act and the air service guarantees provided to an eligible point under this part for an air carrier providing essential air transportation to an eligible point to overfly that eligible point, except under one of the following circumstances:

(a) The carrier is providing by its other flights the capacity required by the Board's essential air transportation determination for that point;

(b) The carrier is not compensated for serving that point and another carrier is providing by its flights the capacity required by the Board's essential air transportation determination for that point;

(c) Circumstances beyond its control prevent the air carrier from landing at the eligible point;

(d) The flight involved is not in a market where the Board has determined air transportation to be essential; or

(e) The eligible point involved is a point in Alaska for which the Board's essential air transportation determination permits the overflight.

(Secs. 204, 419, Pub. L. 85–726, as amended, 72 Stat. 743, 92 Stat. 1732, 49 U.S.C. 1324, 1389)

By the Civil Aeronautics Board.

**Phyllis T. Kaylor,**

*Secretary.*

[FR Doc. 82-13424 Filed 5-17-82; 8:45 am]

BILLING CODE 6320-01-M

## FEDERAL TRADE COMMISSION

### 16 CFR Part 13

**[File No. 812 3052]**

### National Association of Scuba Diving Schools, 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 a Long Beach, CA. corporation, in connection with the issuance or authorization of various seals of approval, among other things, to cease representing that any diving equipment or product bearing their seal or insignia meets an objective standard of safety or reliability unless such equipment has been competently and credibly tested. The order would bar any misrepresentations concerning the significance of any seal or insignia and would require the corporation to provide those who utilize the seals with a copy of the order and a letter explaining its provisions; discontinue doing business with any user of such seals who does not comply with the order's provisions; and institute a program of reasonable surveillance to ensure compliance with the order.

**DATE:** Comments must be received on or before July 19. 1982.

**ADDRESS:** Comments should be directed to: Office of the Secretary, Federal Trade Commission, 6th St. & Pa. Ave., NW., Washington, D.C. 20580.

**FOR FURTHER INFORMATION CONTACT:** Dean Hansell, Los Angeles, Regional Office, Federal Trade Commission, 11000 Wilshire Blvd., Los Angeles, CA 90024 (213) 824–7575.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and § 2.34 of the Commission's rules of practice (16 CFR 2.34), 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)).

**List of Subjects in 16 CFR Part 13**

Diving, Marine safety, Seals and insignias.

In the matter of National Association of Scuba Diving Schools, Inc., a corporation, File No. 812 3052 Agreement Containing Consent Order to Cease and Desist.

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the National Association of Scuba Diving Schools, Inc. ("NASDS"), a corporation, and it now appearing that NASDS (hereinafter sometimes referred to as "proposed respondent") is willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

It is hereby agreed by and between NASDS, by its duly authorized officers, and counsel for the Federal Trade Commission that:

1. Proposed respondent NASDS is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 641 West Willow Street, Long Beach, California 90806.

2. Proposed respondent admits all the jurisdictional facts set forth in the draft of complaint here attached.

3. Proposed 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;

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and

4. This agreement shall not become 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, together with the draft of complaint contemplated thereby, 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 proposed respondent, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. 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 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondent, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceedings 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 complaint and decision containing the agreed-to order to proposed respondent's address as stated in this agreement shall constitute service. Proposed respondent waives any right it may 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 the agreement may be used to vary or contradict the terms of the order.

6. Proposed respondent has read the proposed complaint and order contemplated hereby. It understands that once the order had been issued, it will be required to file one or more compliance reports showing that it has fully complied with the order. Proposed 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*

It is ordered that respondent National Association of Scuba Diving Schools, Inc., ("NASDS"), a corporation, and its successors and assigns, and respondent's officers, agents, representatives, and employees, jointly or severally, directly or through any corporation, subsidiary, division, or other device, in connection with the issuance or authorization of various seals of approval, emblems, shields, or other insignia in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such seal, emblem, shield, or other insignia, is attached to or affixed to or used in conjunction with any scuba diving or skin diving product, or any other product, as an assurance that such product meets an objective standard of safety or reliability or any other objective standard of quality or performance, unless such product has been competently, adequately and thoroughly tested in such a manner as reasonably to substantiate with competent and reliable evidence any such assurance and unless any connection between the tester and the product that might materially affect the weight and the credibility of the test and that is not reasonably expected by the public, such as the tester being the product's manufacturer, is fully disclosed on the seal.

2. Using or encouraging, authorizing, or allowing anyone else to use any such seal, emblem, shield, or other insignia that represents, directly or by implication, that any scuba diving or skin diving product or any other product meets an objective standard of safety or reliability or any other objective standard of quality or performance, unless such product has been competently, adequately and thoroughly tested in such a manner as reasonably to substantiate with competent and reliable evidence any such representation and unless any connection between the tester and the product that might materially affect the weight and the credibility of the test and that is not reasonably expected by the public, such as the tester being the product's manufacturer, is fully disclosed on the seal.

3. Misrepresenting, directly or by implication, the significance of any such seal, emblem, shield or other insignia.

*II*

It is further ordered that respondent shall provide all present and future persons, corporations, partnerships, or other entities who use any insignia of respondent with a copy of this Order and a letter informing such users that they can no longer use the respondent's insignia except in a manner consistent with the provisions of this Order. Respondent shall immediately stop doing business with any user of its insignia if that user acts in a manner inconsistent with the provisions of this Order; and respondent shall institute a program of reasonable surveillance of all users in order to ensure their compliance with this Order.

*III*

It is further ordered that respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent 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 that may affect compliance obligations arising out of the Order.

*IV*

It is further ordered that respondent shall within sixty (60) days after service upon it of this Order, file with the Commission a report in writing setting forth in detail the manner and form in which respondent has complied with this Order.

**Analysis of Proposed Consent Order To Aid Public Comment**

The Federal Trade Commission has accepted an agreement to a proposed consent order from the National Association of Scuba Diving Schools, 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.

The complaint accompanying the order alleges that respondent has used and has allowed others to use its seal of approval to promote the sale of scuba and skin diving products. The complaint further alleges that the seal of approval on a diving product represents to consumers that the product has been tested or certified for safety and quality by respondent. In fact, no such testing ever took place. The complaint charges that respondent has, therefore, committed an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act.

The proposed order prohibits respondent from representing that any seal used with a diving product is a sign that the product meets an objective standard of safety or reliability, unless such product has actually been tested. The proposed order also requires respondent to stop using or allowing other people to use any seal representing that a diving product meets an objective standard of safety and reliability, unless such product has actually been tested. Testing, under the order, must be done competently, thoroughly, and reliably so as to substantiate the representations made for the product, and any material

connection between the tester and the product must be disclosed. The proposed order also bars any misrepresentations about the significance of any seal or other insignia.

Finally, the proposed order requires respondent to provide all users of the seal with a copy of the order and demand that they stop using the seal in a manner inconsistent with the terms of the order. Respondent must also stop doing business with any person who uses the seal in a manner inconsistent with this order, and must begin a program of surveillance to ensure compliance with this order.

The settlement should provide greater assurance to consumers that any scuba or skin diving equipment bearing a seal of approval has passed appropriate tests to ensure that the claims made for the product are true.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

**Carol M. Thomas,**

*Secretary.*

[FR Doc. 82-13374 Filed 5-17-82; 8:45 am]

BILLING CODE 6750-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### 21 CFR Part 310

**[Docket No. 81N-0144]**

### Topically Applied Hormone-Containing Drug Products for Over-the-Counter Human Use; Correction

**AGENCY:** Food and Drug Administration.

**ACTION:** Advance notice of proposed rulemaking; correction.

**SUMMARY:** The Food and Drug Administration is correcting an advance notice of proposed rulemaking that would classify hormone-containing drug products for over-the-counter (OTC) human use as not generally recognized as safe and effective and as being misbranded.

**FOR FURTHER INFORMATION CONTACT:** William E. Gilbertson, Bureau of Drugs (HFD-510), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4960.

**SUPPLEMENTARY INFORMATION:** In FR Doc. 82-6 appearing in the issue for Tuesday, January 5, 1982, the following correction is made in the first column on page 13326: In the "Summary," in the sixth line, the word "oral" is removed.

Dated: May 12, 1982.

**William F. Randolph,**

*Acting Associate Commissioner for Regulatory Affairs.*

[FR Doc. 82-13364 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### 30 CFR Part 951

### Abandoned Mine Land Reclamation Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Crow Tribe submitted to OSM its proposed Abandoned Mine Land Reclamation Plan (Plan) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). OSM is seeking public comment on the adequacy of the Tribe's Plan.

**DATE:** Written comments on the Plan will be accepted until further notice.

**ADDRESSES:** Copies of the full text of the proposed Plan are available for review during regular business hours at the following locations:

State Office, Office of Surface Mining, Freden Building, 935 Pendell Boulevard, Mills, Wyoming 82644;

Office of Surface Mining, Administrative Record, Room 5315, 1100 "L" St., NW., Washington, D.C. 20236.

Written comments should be sent to: William Thomas, State Director, Office of Surface Mining, Freden Building, 935 Pendell Boulevard, Mills, Wyoming 82644.

The Administrative Record will be available for public review at the State Office, Freden Building, 935 Pendell Boulevard, Mills, Wyoming, during regular business hours.

**FOR FURTHER INFORMATION CONTACT:** William Thomas, State Director, Office of Surface Mining, Freden Building, 935 Pendell Boulevard, Mills, Wyoming 82644. Telephone 307/261-5550.

**SUPPLEMENTARY INFORMATION:** Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. 95-87, 30 U.S.C. 1201 et seq., establishes an abandoned mine land program for the purposes of reclaiming and restoring land 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 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.

Title IV provides that if the Secretary determines that a State or Tribe has developed and submitted a program for reclamation of abandoned mines and has the ability and necessary State or Tribal legislation to implement the provisions of Title IV, the Secretary may approve the State or Tribal program and grant to the State or Tribe exclusive responsibility and authority to implement the provisions of the approved program.

OSM received a proposed abandoned mine land reclamation plan from the Crow Tribe. The purpose of this submission is to determine both the intent and capability to assume responsibility for administering and conducting the provisions of SMCRA and OSM's Abandoned Mine Land Reclamation (AMLR) Program (30 CFR Chapter 7, Subchapter R) as published in the **Federal Register** (FR) on October 25, 1978, 44 FR 49932-49952.

This notice describes the nature of the proposed program and sets forth information concerning public participation in the Secretary's determination of whether or not the submitted plan may be approved. The public participation requirements for the consideration of a State or Tribal AMLR Plan are found in 30 CFR 884.13 and 884.14 (44 FR 49948). Additional information may be found under corresponding sections of the preamble to OSM's AMLR Program Final Rules (44 FR 49932-49940).

The receipt of the Crow Tribe's Plan submission is the first step in the process which will result in the establishment of a comprehensive program for the reclamation of abandoned mine lands on the Crow Tribe's Reservation.

By submitting a proposed Plan, the Crow Tribe has indicated that it wishes to be primarily responsible for this program. If the submission, as hereafter modified, is approved by the Secretary, the Crow Tribe will have primary responsibility for the reclamation of abandoned mine lands on the Crow Tribe Reservation. If the program is disapproved and the Tribe does not choose to revise the Plan, a Federal AMLR Program will be implemented and OMS will have primary responsibility for these activities.

Representatives of OSM's State office or of the Division of Abandoned Mine Land Reclamation will be available to meet at the request of members of the public to receive their advice and recommendations concerning the proposed Crow Tribe AMLR Plan. To arrange for such meetings contact the person listed above under "For Further Information Contact."

The Department intends to continue to discuss the Crow Tribe's proposed Plan with representatives of the Tribe throughout the review process. All contacts between OSM personnel and representatives of the Tribe will be conducted in accordance with OSM's guidelines on contacts with States published September 19, 1979 at 44 FR 54444.

Pursuant to 30 CFR 884.14, OSM will continue the period of review of the proposed Crow Tribe Plan until a decision is made by the Secretary of the Interior on his authority to approve the abandoned mine land reclamation program submissions of the Tribes.

The Office of Surface Mining has examined this proposed rulemaking under Section 1(b) of Executive Order No. 12291 (February 17, 1981) and has determined that, based on available quantitative data, it does not constitute a major rule. The reasons underlying this determination are as follows:

1. Approval will not have an effect on costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; and

2. Approval will not have adverse effects on competition, employment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This proposed rulemaking has been examined pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., and the Office of Surface Mining has determined that the rule will not have significant economic effects on a substantial number of small entities. The reason for this determination is that approval will not have demographic effects, direct costs, information collection and recordkeeping requirements, indirect costs, nonquantifiable costs, competitive effects, enforcement costs or aggregate effects on small entities.

The Office of Surface Mining has determined that the Crow Tribe Abandoned Mine Reclamation Plan will not have a significant effect on the quality of the human environment because the decision relates only to the policies, procedures and organization of the Tribe's Abandoned Mine Land Reclamation Program. Therefore, under the Department of Interior Manual 5162.3(A)(1), the Office's decision on the Crow Tribe's Plan is categorically excluded from the National Environmental Policy Act process. As a result no Environmental Assessment or Environmental Impact Statement has been prepared on this action. It should be noted that a programmatic EIS was prepared by OSM in conjunction with approval of the Pub. L. 95–87 Title IV abandoned mine land regulations. Moreover, an environmental analysis or an environmental impact statement will be prepared for the approval of the grants for the abandoned mine land reclamation projects under 30 CFR 886.

The Crow Tribe Reclamation Plan for Abandoned Mine Lands can be approved if:

1. The Secretary finds that the public has been given adequate notice and opportunity to comment, and the record does not reflect major unresolved controversies.

2. Views of other Federal agencies have been solicited and considered.

3. The Tribe has the legal authority, policies and administrative structure to carry out the Plan.

4. The Plan meets all the requirements of the OSM, AML Program provisions.

5. The Tribe has an approved Regulatory Program.

6. It is determined that the Plan is in compliance with all applicable State/Tribe and Federal laws and regulations.

The following constitutes a summary of the contents of the Crow Tribe's Reclamation Plan submission:

The Crow Tribe's Division of Natural Resources has been designated by the Chairman of the Crow Tribe to implement and enforce the Abandoned Mine Land Reclamation Program in accordance with SMCRA (Pub. L. 95–87). Contents of the Tribe's Plan submission include:

(a) Designation of authorized Tribal Agency to administer the program.

(b) Tribe's General Counsel's opinion that the designated Agency has the legal authority to operate the program in accordance with the requirements of Title IV of the SMCRA, 30 CFR Subchapter R and the Tribal Reclamation Plan.

(c) Description of the policies and procedures to be followed in conducting the program including:

(1) Goals and objectives;

(2) Project ranking and selection procedures;

(3) Coordination with other reclamation programs;

(4) Land acquisition, management and disposal;

(5) Reclamation on private land;

(6) Rights of Entry; and

(7) Public participation in the program.

(d) Description of the Administrative and Management structure to be used in the program including:

(1) Description of the organization of the designated agency and its relationship to other organizations that will participate in the program;

(2) Personnel staffing policies;

(3) Purchasing and procurement systems and policies; and

(4) Description of the accounting system including specific procedures for operation of the reclamation fund.

(e) Description of the public's participation in preparation of the Plan.

(f) A general description of activities to be conducted under the Reclamation Plan including:

(1) Known or suspected eligible lands and water requiring reclamation, including a map;

(2) General description of the problems identified and how the plan proposes to deal with them;

(3) General description of how the lands to be reclaimed and proposed reclamation relate to the surrounding lands and land uses:

(4) A table summarizing the quantities of land and water affected and an estimate of the quantities to be reclaimed during each year covered by the Plan; and

(5) General description of the social, economic and environmental conditions in the different geographic areas where reclamation is planned, including:

(i) The economic base;

(ii) Sociologic and demographic characteristics;

(iii) Significant aesthetic, historic or cultural, and recreational values;

(iv) Hydrology including water quality and quantity problems associated with past mining;

(v) Flora and fauna including endangered or threatened species and their habitat;

(vi) Underlying or adjacent coal beds and other minerals and projected methods of extraction; and

(vii) Anticipated benefits from reclamation.

**List of Subjects in 30 CFR Part 951**

Coal mining, Indian lands, Surface mining, Underground mining.

Dated: May 5, 1982

J. S. Griles,

*Acting Director, Office of Surface Mining.*

Dated: May 10, 1982.

Daniel N. Miller, Jr.,

*Assistant Secretary for Energy and Minerals.*

[FR Doc. 82-13425 Filed 5-17-82; 8:45 am]

BILLING CODE 4310-05-M

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 90

**[PR Docket No. 82-244; RM-3451; FCC 82-204]**

### Amendment of the Commission's Rules To Delete a Table Limiting the Effective Radiated Power of Stations at Elevations Exceeding 1,500 feet Above Sea Level in a Certain MHz Band in the Los Angeles Urbanized Area

**AGENCY:** Federal Communications Commission.

**ACTION:** Proposed rule.

**SUMMARY:** This document proposes to delete the Antenna Height vs. Effective Radiated Power Table which applies to systems operating in TV-shared bands in the Los Angeles area. A Petition for Reconsideration filed by the National Mobile Radio Association requested relief from interference resulting from implementation of the table. Deletion of the table could benefit some existing land mobile systems in Los Angeles, but at the sacrifice of channel re-use capability.

**DATE:** Comments are due by June 14, 1982 and replies by June 29, 1982.

**ADDRESS:** Federal Communications Commission, Washington, D.C. 20554.

**FOR FURTHER INFORMATION CONTACT:** Keith Plourd, Private Radio Bureau, Washington, D.C. 20554 (202) 632-6497.

**SUPPLEMENTARY INFORMATION:**

**List of Subjects in 47 CFR Part 90**

Administrative Practice and Procedure, Business and Industry, Industrial Radio Services, Land Transportation Radio Services, Private Land Mobile Radio Services, Public Safety Radio Services, Radiolocation Radio Service, Special Emergency Radio Service.

In the matter of Amendment of § 90.307(f) of the Commission's rules and regulations to delete a table limiting the effective radiated power of stations at elevations exceeding 1500 feet ASL in the band 470–512 MHz in the Los Angeles Urbanized Area, PR Docket No. 82-244, RM-3451, FCC 82-204. *Notice of Proposed Rulemaking.*

Adopted: April 29, 1982.

Released: May 7, 1982.

**Summary**

1. In this Notice of Proposed Rulemaking, the Commission proposes to delete a rule which applies to private land mobile radio systems in the band 470–512 MHz. The rule (See 47 CFR 90.307(f)) contains a table limiting the effective radiated power of radio systems in Los Angeles, according to antenna height above mean sea level (AMSL). This rule decreases the permitted effective radiated power of base and repeater stations as antenna height AMSL is increased above 1500 feet. The action to delete the table responds to a Petition for Reconsideration filed by the National Mobile Radio Association (NMRA).

**Background**

2. The rule containing the above-referenced table was adopted on December 10, 1974, during proceedings in Docket No. 20109 (See 49 FCC 2d 1300), which sought to promote frequency re-use by limiting the effective radiated powers of stations sited at high elevations. These stations, because of the unusually high sites available in the Los Angeles urbanized area, have "virtually line-of-sight paths into much of the Los Angeles metropolitan area." (49 FCC 2d 1303, at paragraph 10.) Recognizing that the siting of these stations was a hindrance to channel re-use, the Commission adopted the table limiting base and repeater stations' effective radiated power (ERP), in order to prevent destructive interference to co-channel stations spaced a minimum of 40 miles apart. (See 47 CFR 90.313.) Systems which exceeded the new ERP limits at the time were given until January 1, 1980, to comply with the table. Prior to this compliance date, NMRA (then, the California Mobile Radio Association, or CMRA) petitioned the Commission to delete the table (RM-3451). The Commission denied the requested relief on October 21, 1980, in a Memorandum Opinion and Order. (See 83 FCC 2d 141.) On December 2, 1980, NMRA petitioned for reconsideration of this decision. Since that time, the Private Radio Bureau, under delegated authority, has stayed the effectiveness of the table at the request of NMRA pending Commission action on NMRA's Petition for Reconsideration, which supplied new information.

3. The Petition for Reconsideration (Petition) pointed to an increased potential for interference due to reduced powers, NMAR submitted an engineering statement to support that contention. The Petition further stated that re-use is not possible, anyway, because the transmitters on which many licensees operate cover much of the same portions of the Los Angeles basin, due to the close spacing permitted between co-channel transmitters. NMRA stated that because re-use is not feasible, given the present siting of stations in this band in Los Angles, the table should be deleted to alleviate the interference problem.

4. In the engineering statement submitted on behalf of NMRA, the Petitioner purported to show how reducing the effective radiated power of community repeaters which simultaneously serve the Los Angeles basin would result in greater likelihood that mobile units would not hear co-channel communications as they monitor the frequency before transmitting. (See 47 CFR 90.403(e).) In addition, the study noted that the R-6602 [1] curves used to set up the table were not appropriate for that purpose, since the curves are not applicable to abrupt changes in geography, as is the case in Los Angeles. As a consequence, the radiated patterns, which differs from patterns in other cities, conflict greatly with the requirement for mobile units to operate within 30 miles of their associated base or repeater station. The abrupt changes in topography in Los Angeles distort the signal strength contours in comparison to what we would expect from analysis using R-6602 curves. This would result from "terrian roughness" factors in Los Angeles which exceed those upon which R-6602 was based. Thus, in many cases, signals cannot be received in areas close to the transmitter, while they simultaneously come in strong in locations much more than 30 miles away.

5. In addition to NMRA's submissions, there is also material before us which maintains that restricting the power of existing systems will result in "dead spots" in system coverage—particularly in local governmental systems—and will require substantial expenditures by these entities, if they are to assure communications throughout the entire geographic area for which they are responsible.

6. It is clear that conversion of present systems may increase the costs to local

[1] See FCC Report No. R-6602 September 7, 1966, entitled "Development of VHF and UHF Propagation Curves for TV and FM Broadcasting," reprinted May 1974.

government entities. We do not view the interference within the Los Angeles area argument as particularly persuasive, however, as a basis for deletion of the Table. On the other hand there is an issue as to whether there can be feasible geographic re-use of these channels. Additionally, the Commission has undertaken a study [2] of the land mobile interference problems in Southern California including potential ducting interference effects between Los Angeles and San Diego. We will, therefore, tentatively propose the deletion of the Table in order to expedite action, should our study of ducting demonstrate this is desirable. We are doing this because of the time that has already elapsed since this petition was submitted. However, we emphasize that a final decision on this matter will not be made until the results of this study and the comments are thoroughly analyzed.

7. Accordingly, we propose to delete § 90.307(f) in its entirety, and to delete the Antenna Height vs. Power table which is reproduced on "Figure 'A,' Power Reduction Graphs, 50 dB Protection," contained in § 90.311 of our rules. (See 47 CFR 90.311.) These amendments are set out in the Appendix below.

8. We encourage all interested parties to respond to this Notice since such information as they may provide often forms the basis for further Commission action. For purposes of this non-restricted notice and comment rule-making proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a Notice of Proposed Rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting of until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Secretary for inclusion in the public file. Any person who initiates an oral *ex parte* presentation addressing matters not fully covered in any previously filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state by docket number the proceeding to which it relates. See generally, § 1.1231 of the Commission's rules, 47 CFR 1.1231.

9. Authority for issuance of this notice is contained in sections 4(i) and 303(r) of the Communications Act of 1934 as amended, 47 U.S.C. 154(i) and 303(r). Pursuant to applicable procedures set forth in § 1.415 of the Commission's rules, interested persons may file comments on or before June 14, 1982, and reply comments on or before June 29, 1982. Timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order. A summary of the Commission's procedures governing *ex parte* contacts in informal rulemakings is available from the Commission's Consumer Assistance Office, Federal Communications Commission, Washington, D.C. 20554, (202) 632–7000.

10. In accordance with the provisions of § 1.419 of the Commission's rules, an original and five copies of all statements, briefs or comments filed shall be furnished to the Commission. Responses will be available for public inspection during business hours in the Commission's Public Reference Room in its headquarters in Washington, D.C.

11. The commission has determined that sections 603 and 604 of the Regulatory Flexibility act of 1980 (Pub. L. 96–354) do not apply to this rule-making proceeding. These rules which propose to relieve an existing burden on small entities will not if promulgated, have a significant economic impact on a substantial number of small entities because the rule is confined to operations in the Los Angeles metropolitan area. Further, the proposed amendment, if adopted, imposes no new recordkeeping, reporting or other requirement upon license applicants or holders. Accordingly, the Commission certifies that sections 603 and 604 of the Regulatory Flexibility Act do not apply to these proceedings.

12. For further information concerning this rulemaking proceeding, contact Keith Plourd (202) 632–6497.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303)

Federal Communications Commission,

**William J. Tricarico,**

*Secretary*

**Appendix**

## PART 90—PRIVATE LAND MOBILE RADIO SERVICES

The Commission proposes to amend 47 CFR, Part 90, as follows:

### § 90.307 [Amended]

1. Amend §90.307, *Protection criteria,* by removing paragraph (f) and the reference to paragraph (f) in paragraph (b).

### § 90.309 [Amended]

2. Amend § 90.309, *Frequencies,* by removing Footnote 2 on Figure 'A', Power Reduction Graphs, 50 dB Protection," as indicated on the following page.

BILLING CODE 6712-01-M

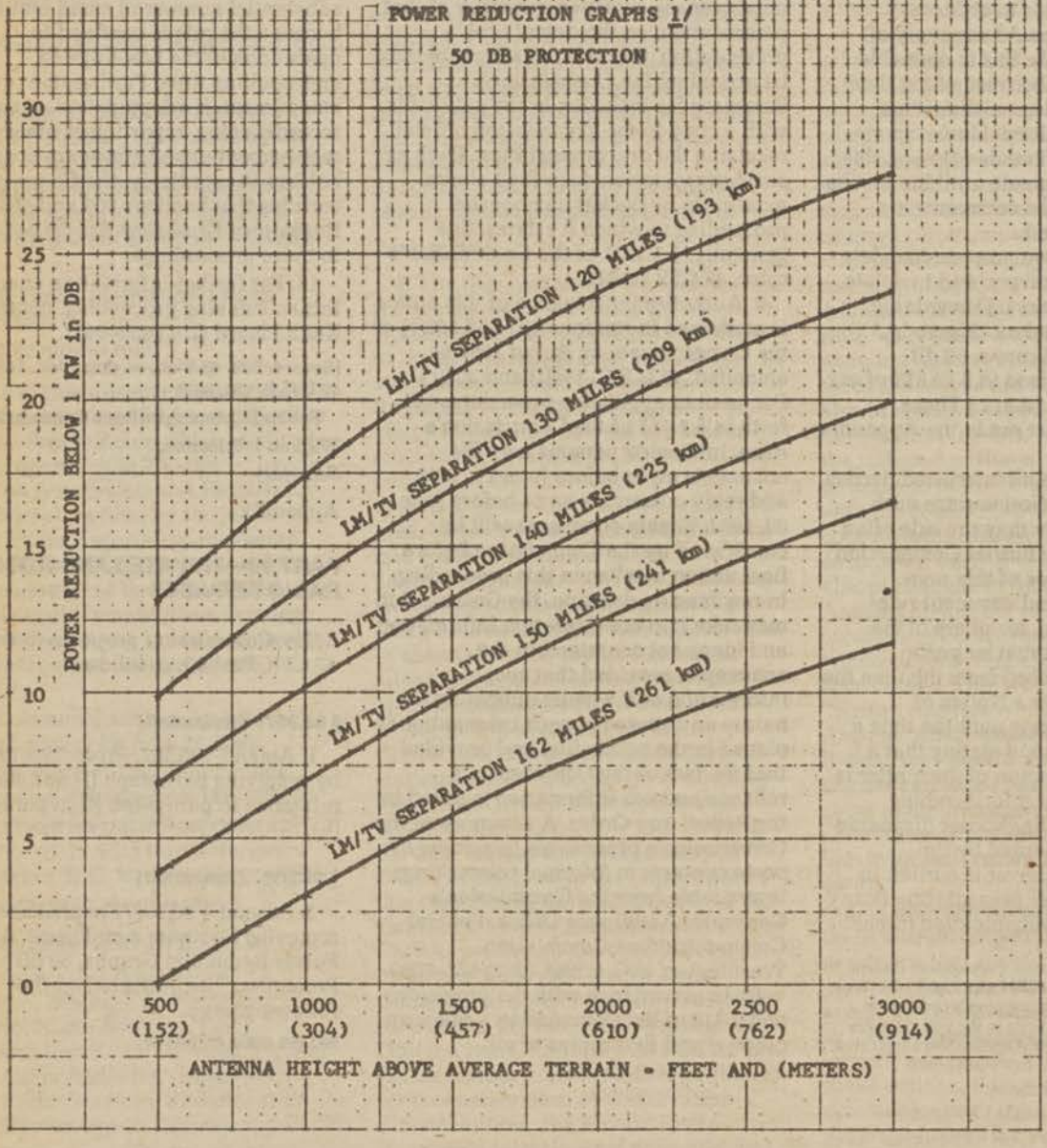
[2] This Southern California Propagation Project was begun in September 1981 as a result of a large number of compliants concerning interference between co-channel stations in the private radio service located in the Los Angeles/San Diego area.

1/ *Directions for using this graph:*
1. Determine antenna height above average terrain.
2. Locate this value on the antenna height axis.
3. Determine the separation between the LM antenna site and the nearest protected co-channel TV station.
4. Draw a vertical line to intersect the LM/TV separation curve at the distance determined in step 3 above. For distances not shown on the graph, use linear interpolation.
5. From the intersection of the LM/TV separation curve draw a horizontal line to the power reduction scale.
6. The power reduction in dB determines the reduction below 1 kW that must be achieved.
7. See Table H for dB/power equivalents.

FIGURE "A"

POWER REDUCTION GRAPHS 1/

50 DB PROTECTION




[FR Doc. 82-13339 Filed 5-17-82; 8:45 am]
BILLING CODE 6712-01-C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 642

# Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: The Assistant Administrator for Fisheries has initially approved the Fishery management Plan for Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic. NOAA announces that copies of the fishery management plan are available, issues this proposed rulemaking to implement the plan, and requests comments on the plan and implementing regulations. The plan and proposed implementing regulations: (1) Provide management measures to minimize conflicts between user groups; (2) establish optimum yields for king and Spanish mackerel and cobia and quotas for king and Spanish mackerel; (3) establish size limits for Spanish mackerel and cobia, (4) provide for observers on vessels harvesting king and Spanish mackerel with purse seines; and (5) establish a minimum mesh size for gill nets used to harvest king mackerel. The intended effect of these regulations is to reduce user-group conflicts and prevent overfishing of the king and Spanish mackerel and cobia stocks.

DATES: Written comments must be received on or before July 2, 1982.

ADDRESSES: Comments and requests for copies of this fishery management plan or the regulatory impact review should be sent to: Mr. Jack T. Brawner, Acting Regional Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, st. Petersburg, Florida 33702.

FOR FURTHER INFORMATION CONTACT: Mr. Harold B. Allen, 813–893–3141.

SUPPLEMENTARY INFORMATION: The Assistant Administrator for Fisheries initially approved the Fishery Management Plan for Coastal Migratory Pelagic Resources of the Gulf of Mexico and the South Atlantic (FMP) on April 1, 1982, under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). These proposed regulations implement the FMP, which was prepared jointly by the Gulf of Mexico and South Atlantic Fishery Management Councils (Councils).

The FMP manages the coastal pelagic fishery throughout the fishery conservation zone (FCZ) off the southern Atlantic coastal States from the Virginia-North Carolina border south and through the Gulf of Mexico. The FMP covers Spanish mackerel, king mackerel, cobia, dolphin, bluefish, little tunny and cero mackerel. The last four are minor species in the fishery that are caught incidentally to the directed fishing effort for king and Spanish mackerel and cobia; only data collection requirements of the FMP apply to these minor species. Bluefish are exempt from data collection requirements in the Atlantic because the Mid-Atlantic Fishery Management Council intends to develop a plan for bluefish.

Historically, the majority of the coastal pelagic fishery is conducted from the Virginia-North Carolina border south and in the Gulf of Mexico. Minor commercial catches of Spanish and king mackerel are taken north to the mid-Atlantic States and Chesapeake Bay. However, because these catches always have been less than two percent of the southern catches, they were not used in calculating maximum sustainable yield (MSY). For this reason, regulations would not apply to these areas.

## Background

The coastal migratory pelagic (mackerel) fishery of the Gulf of Mexico and south Atlantic is of importance to recreational and commercial fishermen, the businesses directly serving them, and the regional economies. The MSY of the migratory pelagic management unit in the Gulf and south Atlantic is 65 milion pounds. This estimate includes stocks of king mackerel, Spanish mackerel, and cobia.

The recreational fishery occurs both inshore (within three miles of shore) and offshore for Spanish and king mackerel. Recreational surveys indicated that in 1975, anglers caught 33.1 million pounds and in 1979, 15 million pounds. The poor nature of recreational catch statistics makes it difficult to say whether catches have been declining over time. However, expenditures related to recreational fishing have been constantly increasing over time; in 1980, the value of sales related to the management unit was an estimated $103 million with an associated 2,840 person-years of employment.

The commercial fishery for king mackerel is conducted offshore, while the Spanish mackerel fishery occurs in both zones. Commercial landings of king mackerel peaked at 10.5 million pounds in 1974, and Spanish mackerel commercial landings peaked at 18.0 million pounds in 1976. The value of the commercial fishery increased steadily; in 1980, the dockside value of the king and Spanish mackerel fisheries was $8.5 million and its contribution to the Gross National Product exceeded $20 million.

The increasing level of effort in both fisheries may have contributed to a decline in the relative abundance of stocks of both mackerel species. Cobia stocks in particular are overfished. In addition, intense conflicts exist between recreational and commercial users of the mackerel stocks, and between commercial users employing different gears.

## Quotas

The Councils established the optimum yield (OY) for king mackerel at 37 million pounds annually. This amount is equal to the best available estimate of MSY and it is expected to balance the risk of overfishing against the chance of failure to maximize utilization of the resource. The total allowable catch is set at OY and is divided into allocations of 28 million pounds for the recreational fishery and 9 million pounds for the commercial fishery. The commercial allocation is further divided between hook-and-line fishermen (3,877,200 pounds) and net fishermen (5,122,800 pounds). Division of the annual quota for king mackerel will prevent one or more groups from taking such a large portion of the harvest that other users are unable to engage in their traditional fishery. The fishery will be closed for a user group, including the recreational fishery, when its allocation has been harvested.

The OY for Spanish mackerel is also set at MSY, which is 27 million pounds annually, with no qotas by user group. This permits some increase in the present catch and allows optimization of economic and social benefits to users. The fishery will be closed when OY is harvested. For both species, catches will be counted against the quotas for the fishing year in which they are harvested, not when they are sold.

The OY for cobia is determined to be the available amount of cobia at a size equal to or greater than a 33-inch fork length, measured from the tip of the head to the center of the tail. This OY will reduce the possibility of recruitment overfishing, stabilize catch at or near MSY, and increase yield and average size of fish. No other catch limitation is set for cobia.

It is anticipated that domestic fishermen will harvest the OYs of king and Spanish mackerel and cobia; therefore, the total allowable level of

foreign fishing is specified as zero for these species.

**Size limits**

To reduce the potential for overfishing by commercial and recreational fishermen, a size limit of 12 inches is proposed for Spanish mackerel. This will discourage harvest of Spanish mackerel below the size required for optimum biological yield.

A catch allowance for undersized fish will be allowed equal to five percent of the total catch by weight of Spanish mackerel on board. This allowance will provide for any incidental catch and yet will discourage marketing of small fish. The size limit for cobia is 33 inches. There is no size limit for king mackerel.

**Gear limitations**

A minimum mesh size of 4¾ inches is proposed for king mackerel gill nets. This measaure will eliminate the harvest of small, less valuable fish and will increase the potential yield from the fishery. The use of gill nets for the harvest of king mackerel is extremely controversial and has resulted in intense conflicts between netters and commercial hook-and-liners and recreational fishermen. Commercial hook-and-liners and sport fishermen perceive this management measure as necessary to prevent overfishing of the resource by users of gill nets. The proposed minimum mesh size is consistent with Florida law; presently all gill netting of mackerel takes place in waters off the cost of the State of Florida.

**Fishing group conflicts**

Procedures are proposed in the FMP to resolve conflicts when they occur between recreational and commercial fishermen and between commercial hook-and-line fishermen and commercial net fishermen. Upon determining that a conflict exists, the Secretary of Commerce (Secretary), after consultation with the Councils, may implement by regulatory amendment such FMP measures as (1) separation of user groups by fishing time and area; (2) prohibition of specific gear; (3) establishment of bag limits for recreational fishermen and trip limits for commercial fishermen; and (4) establishment of a size limit for king mackerel.

In addition, specific measures are proposed for field order action to resolve recurring conflicts between king mackerel gillnet fishermen and hook-and-line fishermen in the FCZ off the southern coast of Florida between 27°00.6′ N. latitute and 27° 50′ N. latitude. These measures include establishment of an area within which the use of gill nets or hook-and-line gear may be restricted, and the establishment of two other areas between 27° 10′ N. latitude and 27° 50′ N. latitude where the use of gear may be alternated or fishing for king mackerel may be prohibited. These measures can be implemented by the Secretary only after consultation with the South Atlantic Fishery Management Council, appropriate law enforcement agencies, the State of Florida agency with fishery management responsibility, and any other persons that the Secretary deems appropriate.

**Purse Seines**

There presently are no prohibitions against harvesting king and Spanish mackerel with purse seines in the FCZ. However, certain State possession and landing laws have effectively prohibited use of this gear, both in State waters and the FCZ. Implementation of the FMP is expected to affect the validity of these laws as applied to FCZ-harvested fish, and to affect their enforceability in State waters.

Purse seines are very efficient and highly controversial gear. Both Councils and most users of the resource, including purse-seine operators, believe unrestricted purse seining will result in overfishing and in adverse socioeconomic impacts on all users of the mackerel stocks. Since data for evaluating the effect of this gear are inadequate, the Councils have restricted the quantity of mackerel that may be harvested with purse seines (400,000 pounds of king mackerel and 300,000 pounds of Spanish mackerel in the Gulf of Mexico and the same amounts in the Atlantic). Also, the Councils require that all vessels fishing purse seines have observers on board. This will facilitate collecting information on catch per unit of effort and size selectiveness of this gear. Harvest restrictions will protect the resource while these data are collected and appropriate management measures are developed for the control of purse seines.

**Statistical Reporting**

Better information on landings is needed for effective management of the pelagic fishery. Currently, statistics on commercial landings are based only on data obtained through dealers and processors. Obtaining complete, detailed biological, social, and economic data from each user would be prohibitively expensive. Therefore, NMFS is developing a mandatory reporting system that utilizes sampling methods whenever a sample will provide adequate information. The Center Director, Southeast Fisheries Center, National Marine Fisheries Service, will determine the number of individuals selected, the reporting interval, and the duration of reporting, based on specific management needs.

Because this system has not been completely developed and the forms are not yet prepared, the proposed regulations reserve the section that provides for data reporting. It is anticipated that the mandatory reporting system will be proposed as soon as sampling procedures and reporting forms are developed and approved. The forms will be submitted to the Office of Management and Budget for clearance under section 3507 of the Paperwork Reduction Act, Pub. L. 96–511.

**Classification**

The Assistant Administrator for Fisheries, NOAA, has determined that the plan complies with the national standards, other provisions of the Magnuson Act, and other applicable law.

The adoption and implementation of the FMP is a major Federal action that will have a significant impact on the quality of the human environment. Under the National Environmental Policy Act and NOAA Directive 02–10, a draft environmental impact statement was filed with the Environmental Protection Agency. The notice of availability was published on February 5, 1980 (45 FR 7831).

The Administrator, NOAA, has determined that these proposed regulations are not major under Executive Order 12291. A Regulatory Impact Review (RIR) has been prepared that analyzes the expected benefits and costs of the regulatory action. The review provides the basis for the Administrator's determination. The FMP's management measures are designed to maintain current landings and productivity of each user group, while preventing overfishing of the king and Spanish mackerel and cobia stocks.

The RIR indicates that the proposed regulations will result in benefits to fishermen and the economy that are greater than the associated Federal costs to manage the fishery on a continuing basis. Benefits that will accrue from implementation of the proposed measures come from the prevention of overfishing. The benefit, in terms of pounds of fish, is the difference between the OY specified in the plan and the amount caught after overfishing occurs; in monetary terms, the benefit is the difference between the contribution to the Gross National Product (GNP) by OY and the contribution to GNP associated with the catch after

overfishing occurs. The expected benefits range from $5.6 million to $27.9 million annually over the next five years. Empirical data indicate that the level of fishing effort by commercial and recreational fishermen is increasing rapidly and mackerel stocks and catch will decline if effort increases. The FMP and implementing regulations will not increase the Federal paperwork burden as defined by the Paperwork Reduction Act, because the data collection system will not be implemented at this this time. Section 642.24(b) of the implementing regulations requires that owners or operators of purse seine vessels fishing for king and Spanish mackerel report their catch for each trip by telephone. Since there are fewer than 10 vessels in this fleet, this information is to be gathered from fewer than ten persons, so no "collection of information" is involved under the Paperwork Reduction Act.

These regulations will have a significant impact on a substantial number of small entities, under the Regulatory Flexibility Act. An initial regulatory flexibility analysis has been prepared in compliance with the Regulatory Flexibility Act and has been combined with the RIR summarized above.

The Coastal Zone Management offices from each State having an approved program under the Coastal Zone Management Act and whose territorial waters are adjacent to the management area have reviewed the FMP. These offices have determined the FMP to be consistent with their coastal zone management programs. The States of Georgia and Texas do not have approved programs.

**List of Subjects in 50 CFR Part 642**

Fish; Fisheries.

Dated: May 12, 1982.

Robert K. Crowell,

*Deputy Executive Director, National Marine Fisheries Service.*

50 CFR is amended by adding a new Part 642 to read as follows:

## PART 642—COASTAL MIGRATORY PELAGIC RESOURCES OF THE GULF OF MEXICO AND SOUTH ATLANTIC

**Subpart A—General Provisions**

Sec.

642.1 Purpose and scope.
642.2 Definitions.
642.3 Relation to other laws.
642.4 Permits and fees.
642.5 Recordkeeping and reporting requirements [Reserved].
642.6 Vessel identification [Reserved].
642.7 Prohibitions.
642.8 Facilitation of enforcement.
642.9 Penalties.

**Subpart B—Management Measures**

642.20 Seasons.
642.21 Quotas.
642.22 Closures.
642.23 Size restrictions.
642.24 Vessel, gear, equipment limitations.
642.25 Specifically authorized activities.
642.26 Area, time limitations.

Authority: 16 U.S.C. 1801 et seq.

### Subpart A—General Provisions

#### § 642.1 Purpose and scope.

(a) The purpose of this Part is to implement the Fishery Management Plan for Coastal Migratory Pelagic Resources developed by the Gulf of Mexico and South Atlantic Fishery Management Councils under the Magnuson Act.

(b) This Part regulates fishing for coastal migratory pelagic fish by fishing vessels of the United States within the fishery conservation zone off the Atlantic coastal States south of the Virginia-North Carolina border and in the Gulf of Mexico.

#### § 642.2 Definitions.

In addition to the definitions in the Magnuson Act, and unless the context requires otherwise, the terms used in this Part have the following meanings:

*Authorized Officer* means:

(a) Any commissioned, warrant, or petty officer of the U.S. Coast Guard;

(b) Any certified enforcement officer or special agent of NMFS;

(c) Any officer designated by the head of any Federal or State agency which has entered into an agreement with the Secretary and the Commandant of the U.S. Coast Guard to enforce the provisions of the Magnuson Act; or

(d) Any U.S. Coast Guard personnel accompanying and acting under the direction of any person described in paragraph (a) of this definition.

*Center Director* means the Center Director, Southeast Fisheries Center, NMFS, 75 Virginia Beach Drive, Miami, Florida 33149; telephone 305–361–5761.

*Coastal migratory pelagic fish* means the following species:

King mackeral—*Scomberomorus cavalla*
Spanish mackerel—*Scomberomorus maculatus*
Cero mackeral—*Scombermorus regalis*
Cobia—*Rachycentron canadum*
Little tunny—*Euthynnus alletteratus*
Dolphin—*Coryphaena hippurus*
Bluefish—*Pomatomus saltatrix* (Gulf of Mexico only)

*Commerical fisherman* means a person who sells any part of his catch.

*Dealer* means the person who first receives or purchases fish directly from a commercial fisherman.

*Fishery conservation zone* (FCZ) means that area adjacent to the territorial sea of the constituent States of the United States which, except where modified to accommodate international boundaries, encompassed all waters from the seaward boundary of each of the coastal States to a line on which each point is 200 nautical miles from the baseline from which the territorial sea of the United States is measured.

*Fishing* means any activity, other than scientific research conducted by a scientific research vessel, which involves:

(a) The catching, taking, or harvesting of fish;

(b) The attempted catching, taking, or harvesting of fish;

(c) Any other activity which can reasonably be expected to result in the catching, taking, or harvesting of fish; or

(d) Any operations at sea in support of, or in preparation for, any activity described in paragraph (a), (b), or (c) of this definition.

*Fishing vessel* means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for:

(a) Fishing; or

(b) Aiding or assisting one or more vesels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

*Fork length* means the distance from the tip of the head to the center of the tail (caudal fin).

*Magnuson Act* means the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*)

*NMFS* means the National Marine Fisheries Service.

*Operator*, with respect to any vessel, means the master or other individual on board and in charge of that vessel.

*Owner*, with respect to any vessel, means:

(a) Any person who owns that vessel in whole or in part;

(b) Any charterer of the vessel, whether bareboat, time or voyage; or

(c) Any person who acts in the capacity of a charterer, including, but not limited to, parties to a management agreement, operating agreement, or other similar arrangement that bestows control over the destination, function, or operation of the vessel; and

(d) Any agent designated as such by any person described in paragraphs (a), (b), or (c) of this definition.

*Person* means any individual (whether or not a citizen of the United States), corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government.

*Processor* means a person who processes fish products for commercial use or consumption.

*Regional Director* means the Regional Director, Southeast Region, NMFS, Duval Building, 9450 Koger Boulevard, St. Petersburg, Florida 33702; telephone, 813–893–3141, or a designee.

*Secretary means the Secretary of Commerce or a designee.*

*U.S. fish processor* means a facility located within the United States for, and vessels of the United States used for or equipped for, the processing of fish for commercial use or consumption.

*U.S.-harvested fish* means fish caught, taken or harvested by vessels of the United States within any foreign or domestic fishery regulated under the Magnuson Act.

*Vessel of the United States* means:

(a) A vessel documented or numbered by the U.S. Coast Guard under United States law; or

(b) A vessel under five net tons that is registered under the laws of any State.

**§ 642.3 Relation to other laws.**

(a) Persons affected by these regulations should be aware that other Federal and State statutes and regulations may apply to their activities.

(b) Certain responsibilities relating to data collection and enforcement may be performed by authorized State personnel under a cooperative agreement entered into by the State, the U.S. Coast Guard, and the Secretary.

(c) These regulations apply within the boundaries of any national park, monument, or marine sanctuary in the Gulf of Mexico and south Atlantic FCZ.

**§ 642.4 Permits and fees.**

No permits or fees are required for domestic recreational or commercial fishing vessels engaged in fishing in the coastal migratory pelagic fishery.

**§ 642.5 Recordkeeping and reporting requirements. [Reserved]**

**§ 642.6 Vessel identification [Reserved].**

**§ 642.7 Prohibitions.**

It is unlawful for any person to:

(a) Fail to comply immediately with enforcement and boarding procedures specified in § 642.8;

(b) Fish for king or Spanish mackerel in violation of any area closures or season closures as specified in § 642.22 or § 642.26;

(c) Possess in the FCZ Spanish mackerel under the minimum size limit specified in § 642.23(a)(1), except for the catch allowance specified in § 642.23(a)(2);

(d) Possess in the FCZ cobia under the minimum size limit specified in § 642.23(b);

(e) Fish for king mackerel using gill nets with a minimum mesh size less than that specified in § 642.24(a)(1), except for a catch allowance as specified in § 642.24(a)(2);

(f) Fish for king or Spanish mackerel using a purse seine, except in compliance with § 642.24(b);

(g) Possess, have custody or control of, ship, transport, offer for sale, sell, purchase, import, land, or export any fish or parts thereof taken or retained in violation of the Magnuson Act, this Part, or any other regulation under the Magnuson Act;

(h) Refuse to permit an Authorized Office to board a fishing vessel subject to such person's control for purposes of conducting any search or inspection in connection with the enforcement of the Magnuson Act, this Part, or any other regulation or permit issued under the Magnuson Act;

(i) Forcibly assault, resist, oppose, impede, intimidate, threaten, or interfere with any Authorized Officer in the conduct of any search or inspection described in paragraph (h) of this section;

(j) Resist a lawful arrest for any act prohibited by this Part;

(k) Interfere with, delay, or prevent by any means the apprehension or arrest of another person, knowing that such other person has committed any act prohibited by this Part;

(l) Transfer directly or indirectly, or attempt to so transfer, any U.S.-harvested pelagic fish to any foreign fishing vessel, while such vessel is in the FCZ, unless the foreign fishing vessel has been issued a permit under Section 204 of the Magnuson Act which authorizes the receipt by such vessel of U.S.-harvested pelagic fish; or

(m) Violate any other provision of this Part, the Magnuson Act, or any regulation or permit issued under the Magnuson Act.

**§ 642.8 Facilitation of enforcement.**

(a) *General.* The owner or operator of any fishing vessel subject to this Part shall immediately comply with instructions issued by an Authorized Officer to facilitate safe boarding and inspection of the vessel, its gear, equipment, logbook, and catch for purposes of enforcing the Magnuson Act and this Part.

(b) *Signals.* Upon being approached by a U.S. Coast Guard cutter or aircraft, or other vessel or aircraft authorized to enforce the Magnuson Act, the operator of a fishing vessel shall be alert for signals conveying enforcement instructions. The following signals extracted from the International Code of Signals are among those which may be used:

(1) "L" means "You should stop your vessel instantly,"

(2) "SQ3" means "You should stop or heave to; I am going to board you," and

(3) "AA AA AA etc." is the call to an unknown station, to which the signaled vessel should respond by illuminating any vessel identification.

(c) *Boarding.* A vessel signaled to stop or heave to for boarding shall:

(1) Stop immediately and lay to or maneuver in such a way as to permit the Authorized Officer and his party to come aboard;

(2) Provide a safe ladder for the Authorized Officer and his party if necessary;

(3) When necessary to facilitate the boarding, provide a man rope, safety line, and illumination for the ladder; and

(4) Take such other actions as necessary to ensure the safety of the Authorized Officer and his party and to facilitate the boarding.

**§ 642.9 Penalties.**

Any person or fishing vessel found to be in violation of this Part is subject to the civil and criminal penalty provisions and forfeiture provisions of the Magnuson Act, and to 50 CFR Parts 620 (Citations) and 621 (Civil Procedures) and other applicable law.

## Subpart B—Management Measures

**§ 642.20 Seasons.**

The fishing year for all species of coastal migratory pelagic fish begins on July 1 and ends on June 30.

**§ 642.21 Quotas.**

(a) *Hook-and-line and net fishing.*—(1) *King mackerel.* The total allowable catch for king mackerel is 37 million pounds per year.

(i) Annual quotas are 28 million pounds for the recreational fishery and 9 million pounds for the commercial fishery. A fish is counted against the commercial quota if it is sold.

(ii) The commercial quota is further divided between hook-and-line fishing and net fishing as follows:

Hook and Line: 3,877,200 pounds
Net: 5,122,800 pounds

(2) *Spanish mackerel.* The total allowable catch for Spanish mackerel is 27 million pounds per year.

(b) *Purse seine fishing*—(1) *King mackerel.* The harvest of king mackerel by purse seines is limited to 400,000 pounds in the Atlantic and 400,000 pounds in the Gulf of Mexico per year. King mackerel harvested by purse seines are included in the net quota under paragraph (a)(1)(ii) of this section.

(2) *Spanish mackerel.* The harvest of Spanish mackerel by purse seines is limited to 300,000 pounds in the Atlantic and 300,000 pounds in the gulf of Mexico per year. Spanish mackerel harvested by purse seines are included in the total allowable catch under paragraph (a)(2) of this section.

(3) *Geographic boundary.* The boundary between the Gulf of Mexico and the Atlantic Ocean begins at the intersection of the outer boundary of the FCZ and the 83° W. longitude, proceeds north to 24°35′ N. latitude (Dry Tortugas), east to Marquesas Key, then through the Florida Keys to the mainland.

**§ 642.22 Closures.**

(a) The Secretary, by publication of a notice in the **Federal Register**, shall close the king or Spanish mackerel fishery for a particular gear type or user group when the quota is reached for that gear type or user group under § 642.21(a)(1) or (b).

(b) The Secretary, by publication of a notice in the **Federal Register**, shall close the king or Spanish mackerel fishery when the total allowable catch for the fishery under § 642.21(a) (1) or (2) has been harvested.

**§ 642.23 Size restrictions.**

(a) *Spanish mackerel*—(1) *Minimum size.* The minimum size limit for possession of Spanish mackerel in the FCZ is 12 inches (fork length) for both the recreational and commercial fisheries, except for the incidental catch allowance under paragraph (a)(2) of this section.

(2) *Catch allowance.* A catch of Spanish mackerel under the 12-inch fork length is allowed equal to five percent of the total catch by weight of Spanish mackerel on board.

(b) *Cobia.* The minimum size limit for the possession of cobia in the FCZ is 33 inches (fork length).

**§ 642.24 Vessel, gear, equipment limitations.**

(a) *Gill nets*—(1) *Minimum size.* The minimum mesh size for king mackerel gill nets is 4¾ inches (stretched mesh).

(2) *Catch allowance.* A catch of king mackerel is allowed equal to ten percent of the total catch by weight of Spanish mackerel on board a vessel using gill nets with a minimum mesh size smaller than that specified in paragraph (a)(1) above.

(b) *Purse seines.* Owners or operators of purse seine vessels fishing for king and Spanish mackerel shall:

(1) Send a letter of intent to fish for king or Spanish mackerel to the Regional Director, at least three months in advance of beginning fishing each fishing year;

(2) Notify the Center Director by telephone, in advance of each trip, of the expected landing port, dock, and date;

(3) Report to the Center Director, by telephone, the quantity of landings, by species, for each trip as soon as practical after landing, and not later than 15 hours after unloading;

(4) Upon request by NMFS, accommodate observers for scientific and statistical purposes; and

(5) Provide for embarkment and disembarkment of observers as determined by the Center Director.

**§ 642.25 Specifically authorized activities.**

The Secretary may authorize, for the acquisition of information and data, activities otherwise prohibited by these regulations.

**§ 642.26 Area, time limitations.**

(a) *Field orders.* Subject to the procedures and restrictions set forth in paragraphs (b) and (c) of this section, the Secretary may take any of the following actions by field order under the circumstances specified:

(1) If the Secretary determines that a conflict exists in the king mackerel fishery between hook-and-line and gillnet fishermen in an area of the FCA between 27°00.6′ N. latitude and 27°50′ N. latitude off the east coast of the State of Florida, the Secretary may:

(i) Prohibit use of gillnet gear to take king mackerel within the areas (depicted in Figure 1 and described in Table 1) encompassed by points 1, 2, 5, and 6; 2, 3, 4, and 5; or 1, 2, 3, 4, 5, and 6;

(ii) Prohibit use of hook-and-line gear to take king mackerel in the FCZ landward of a line between points 1 and 2, 2 and 3, or 1, 2, and 3;

(iii) In the first year a conflict arises, close the FCZ between 27°30′ N. latitude and 27°10′ N. latitude to the use of gill nets for taking king mackerel, and close the FCZ between 27°30′ N. latitude and 27°50′ N. latitude to the use of hook-and-line gear for taking king mackerel (In any succeeding year that a conflict develops, the Secretary may change the zone that is closed to each gear.); or

(iv) Alternate daily the use of each gear within the area between 27°10′ N. latitude and 27°50′ N. latitude as follows:

(A) On even days of the month, close the area to the use of gillnet gear to take king mackerel.

(B) On odd days of the month, close the area to the use of hook-and-line gear to take king mackerel.

(2) If a conflict described in paragraph (a)(1) of this section results in death or serious bodily injury or significant gear loss, the Secretary may close the fishery for king mackerel to all users in the FCZ between 27°10′ N. latitude and 27°50′ N. latitude.

(b) *Procedures.* The Secretary shall use the following procedures in determining whether a conflict exists for which a field order is appropriate:

(1) When the Secretary is advised by any person that a conflict exists, he will confirm the existence of such a conflict through information supplied him by NMFS, the U.S. Coast Guard, other appropriate law enforcement agencies, or personnel of the State of Florida agency with marine fishery management responsibility.

(2) The Secretary shall also confer with the Chairmen of the South Atlantic and Gulf of Mexico Fishery Management Councils (Councils), the State of Florida agency with marine fishery management responsibility, and such other persons as the Secretary deems appropriate.

(c) *Restrictions on field orders.*

(1) No field order may be implemented which results in exclusive access of any user group or gear type to the fishery during the time the field order is in effect.

(2) No field order may be effective for more than five days, except under the conditions set forth in paragraph (c)(4) of this section.

(3) When the Secretary submits to the **Federal Register** a field order for implementation under this section, he will immediately arrange for a fact-finding meeting in the area of the conflict, to be convened no later than 72 hours from the time of implementation of the field order.

(i) The following persons will be advised of such a meeting:

(A) The Chairmen of the Councils;

(B) The State of Florida agency with fishery management responsibility;

(C) Local media;

(D) Such user-group representatives or organizations as may be appropriate and practicable; and

(E) Other persons as deemed appropriate by the Secretary or as requested by the Chairmen of the Councils or the State of Florida agency.

(ii) The fact-finding meeting will be held for the purpose of evaluating the following:

(A) The existence of a conflict needing resolution by field order;

(B) The appropriate term of the field order, i.e., either greater or less than five days;

(C) Other possible solutions to the conflict besides Federal intervention; and

(D) Other relevant matters.

(4) If the Secretary determines, as a result of the fact-finding meeting, that the term of the field order should exceed five days, he may, after consultation with the Chairmen of the Councils and the State of Florida agency, extend such field order for a period not to exceed 30 days from the date of initial implementation. If the Secretary determines that it is necessary or appropriate for the term of such field order to extend beyond 30 days, he may extend it a second time, after consulting with the Chairman of the Council, for such period of time as necessary to resolve the conflict.

(5) The Secretary may rescind a field order if he finds, through application of the same procedures set forth in paragraph (b) of this section, that the conflict no longer exists.

**TABLE 1**

Point 1—Bethel Shoal light at 27°44.3′ N. latitude, 80°10.4′ W. longitude.

Point 2—A wreck 15 miles southwest of Fort Pierce Inlet at 27°23.5′ N. latitude, 80°03.7′ W. longitude.

Point 3—Market WR 16, five miles northeast of Jupiter Inlet at 27°00.6′ N. latitude, 80°02.0′ W. longitude.

Point 4—27°00.6′ N. latitude, 79°44.0′ W. longitude at approximately the 100 fm. depth due east of Point 3.

Point 5—27°23.5′ N. latitude, 79°54.0′ W. longitude at approximately the 100 fm. depth due east of Point 2; and

Point 6—27°44.3′ N. latitude, 79°53.5′ W. longitude at approximately the 100 fm. depth due east of Point 1.

BILLING CODE 3510-22-M

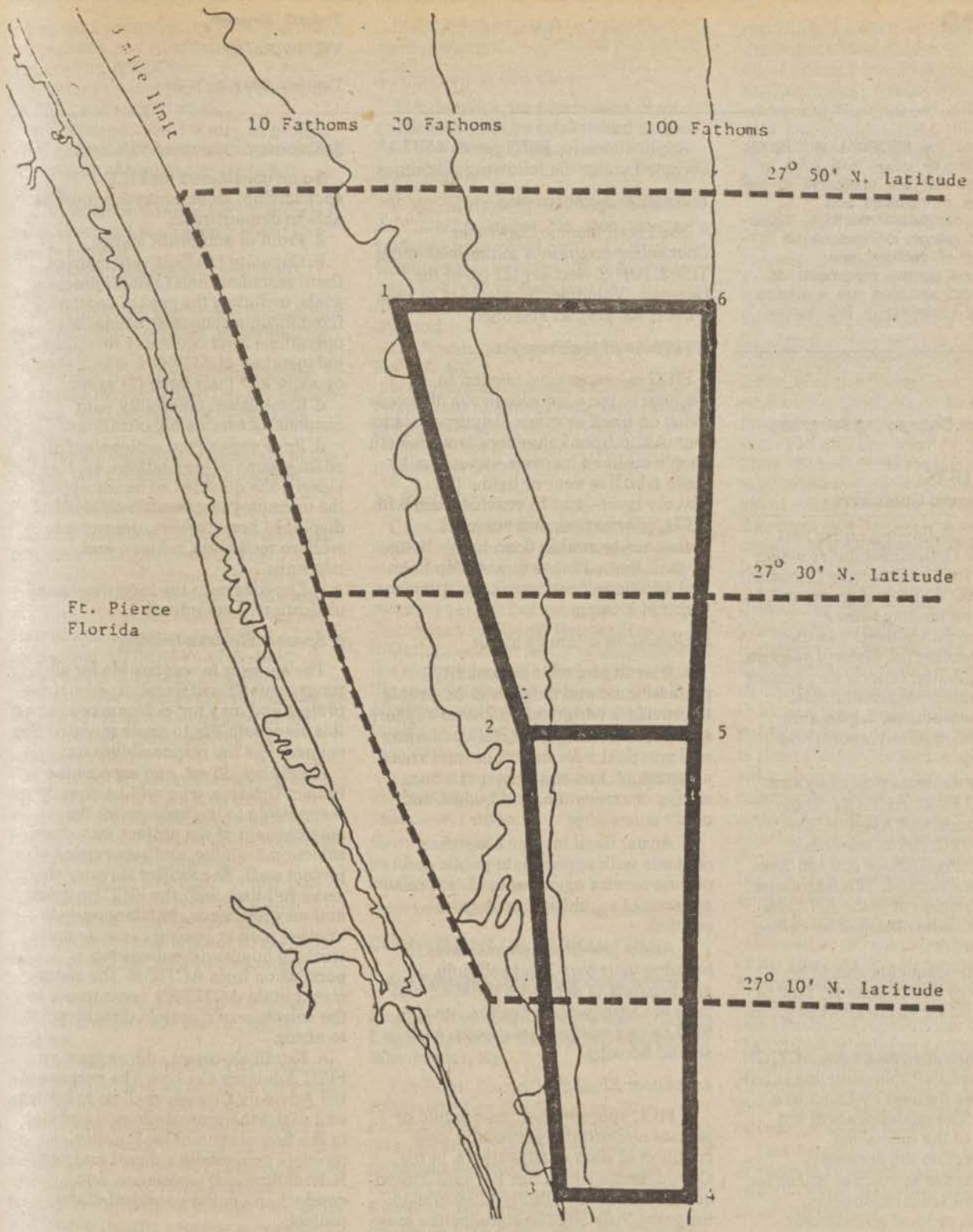



Figure 1. Area divisions under § 642.26

[FR Doc. 82-13446 Filed 5-17-82; 8:45 am]
BILLING CODE 3510-22-C

# Notices

Federal Register
Vol. 47, No. 96
Tuesday, May 18, 1982

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.

## ACTION

### Fixed Income Counseling Program: Guidelines

**AGENCY:** ACTION.

**ACTION:** Proposed Guidelines.

**SUMMARY:** The following notice sets forth proposed guidelines under which applications for Fixed Income Consumer Counseling (FICC) project grants will be accepted when funding is made available. The notice describes the program authorization, history, purpose, applicant eligibility, criteria for sponsor selection, sponsor responsibilities, application procedures, application deadlines, and required reports and recordkeeping.

**FOR FURTHER INFORMATION CONTACT:** John Herbert, FICC, ACTION, Room 1007, 806 Connecticut Avenue, NW., Washington, D.C. 20525, telephone number (202) 254–5205, or call toll-free (800) 424–8580, Ext. 234. The addresses and phone numbers of State ACTION offices may also be obtained by calling either number.

**DATE:** Written comments should be submitted on or before June 17, 1982 to John Herbert at the same address given above.

**SUPPLEMENTARY INFORMATION:** ACTION has determined that this guideline is not a major rule as defined by Executive Order 12291. The guidelines will not result in any of the following:

(1) Any effect on the economy;

(2) Any increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; or

(3) Any adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

Applications for FICC grants will be accepted under the following guidelines:

*1. Program Authorization*

The Fixed Income Consumer Counseling program is authorized under Title I, Part C, Section 122 (a) of the Domestic Volunteer Service Act of 1973 (Pub. L. 93–113), as amended.

*2. Purpose of the Program*

FICC is a program designed to respond to the economic needs of people living on fixed incomes. Its purpose is to recruit and train volunteers to work with people on fixed incomes—specifically those who live near or below the poverty level—and to provide them with skills, information, and personal assistance to enable them to live better on their limited income, and help them find additional resources to supplement their net income.

*3. Objectives of the Program*

a. Recruit and train community professionals and neighborhood people to provide a variety of volunteer support services, including financial counseling and practical information in such areas as nutrition, low-cost transportation, energy conservation, and budget and credit counseling;

b. Assist fixed income consumer contacts with appropriate public and private service agencies to obtain relief or services to which they may be entitled.

c. Assist low-income consumers in building their own local self-help mechansims to deal with inflation and promote energy conservation, such as food co-ops energy/fuel co-ops, and shared housing.

*4. Sponsor Eligibility*

A FICC sponsor shall be a public or private non-profit organization, or a coalition of such organizations, in the United States which has the authority to accept and the capability to administer the grant. Any eligible organization may apply for a grant. Applicants may also be solicited by FICC pursuant to its objective of achieving equitable program resource distribution. Solicited applications are not assured of selection or approval and may have to compete with other solicited and unsolicited applications.

*5. Criteria for Sponsor Selection*

To be considered for FICC sponsorship, an organization must be able to demonstrate:

a. Proof of non-profit status;

b. Capacity to effectively manage fiscal resources and to fulfill program goals, including the goal of continuing fixed income consumer counseling operations after becoming financially independent of ACTION, which should occur in less than three (3) years;

c. Established credibility with community service organizations;

d. Prior experience with potential client groups or populations, such as the elderly, the disabled or handicapped, the unemployed or underemployed, displaced homemakers, dependent welfare recipients, refuges, and migrants;

e. Experience in the recruitment and utilization of volunteers.

*6. Sponsor Responsibilities*

The sponsor is responsible for all programmatic and fiscal aspects of the project and may not delegate or contract this responsibility to another entity. The sponsor has the responsibility to:

a. Employ, direct, and support the Project Director, who will be directly responsible to the sponsor for the management of the project, including selection, training, and supervision of project staff. The Project Director shall serve full-time with the FICC program and may not serve simultaneously in another paid or unpaid capacity during working hours without written permission from ACTION. The sponsor must obtain ACTION's concurrence in the selection of a project director prior to hiring.

b. Establish, orient, and support an FICC Advisory Council. The purpose of the Advisory Council shall be to advise and assist the project sponsor and staff in the formulation of local policy, promote community support and non-federal financial assistance, and conduct an annual appraisal of the project;

c. Provide for the recruitment, training, assignment, supervision and evaluation of the volunteers;

d. Provide for appropriate recognition of the FICC volunteers and their activities;

e. Provide for maintenance of project records in accordance with generally

accepted accounting practice and the preparation and submission of reports required by ACTION;

f. Orient project staff and volunteers to FICC and its activities;

g. Arrange for the training of project staff and volunteers in both content and techniques of training in consumer affairs;

h. Provide or arrange for volunteer reimbursement for transportation in a timely manner;

i. Provide for staff and volunteer safety;

j. Comply with applicable regulations, policies and procedures prescribed by ACTION;

k. Ensure that appropriate liability insurance is maintained for owned, non-owned, or hired vehicles used in the project;

l. Provide for public awareness of the project and the volunteer activities.

*7. Application Procedures*

a. *Initial Award* FICC applicants will complete ACTION Form A–1017, *Application for Federal Assistance*, in accordance with instructions printed on the form. The requirements of Part IV thereof will be responded to by completing ACTION Form A–1034, entitled *Title I, Part C, Program Narrative*. An original and two copies of the above forms are to be sent to the ACTION state office serving the applicant's State.

(1) Subject to the availability of funds, FICC will award a grant to those applicants whose grant proposals indicate the best potential for achieving the purpose of the program.

(2) Grants are awarded for one-year periods and may be renewed for up to two additional one-year periods.

(3) Grant awards will not be made in excess of $40,000 for a twelve month period.

(4) A sponsor may receive a grant award for more than one ACTION program.

b. *Continuation Award.* The maximum project period will be for three (3) years, and shorter perods are often appropriate. Regardless of the length of the project period, the maximum funding period will be for one (1) year. After it is established by ACTION that the sponsor is fulfilling its current year goals and objectives, the sponsor may submit a request for a continuation award for the subsequent budget period. Only information not submitted in the original application or information changed substantively from that given in the initial application need be submitted in the continuation application to ACTION. The same forms used for the initial application will be used for continuations.

*8. Application Deadlines*

The deadline for submission of an application will be established by the ACTION state office.

*9. Reports*

a. *Fiscal Reports.* In accordance with ACTION Handbook No. 2650.2 and on a schedule prescribed by ACTION, Grantees will be required to submit:

(1) *Request for Advance or Reimbursement*—Standard Form SF–270, and

(2) *Financial Status Report*—ACTION Form A–451

b. *Performance Report.* Grantees will be required to submit quarterly the FICC program progress report, entitled:

*Title I, Part C, Project Progress Report*—ACTION Form A–1035.

*10. Records*

Grantees must retain all financial records, supporting documents, statistical records, and all other records pertinent to the grant for a period of three (3) years after submission of the final Financial Status Report. If any litigation, claim or audit is begun before the expiration of the three-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved.

Signed at Washington, D.C., this 16th day of April 1982.

**Thomas W. Pauken,**

*Director, ACTION.*

[FR Doc. 82–13388 Filed 5–17–82; 8:45 am]

BILLING CODE 6050–01–M

## DEPARTMENT OF AGRICULTURE

### Rural Electrification Administration

### Finding of No Significant Impact; East Kentucky Power Cooperative (EKP), Winchester, Ky.

The Rural Electrification Administration (REA) has made a Finding of No Significant Impact (FONSI) with respect to proposed financing assistance to East Kentucky Power Cooperative (EKP) of Winchester, Kentucky, for construction of the following 161 kV facilities (the Project) in Kentucky: The Powell County—Beattyville transmission line to extend 37 km (23 mi) from Stanton in Powell County to Beattyville in Lee County and the Powell County Substation.

REA determined that a Borrower's Environmental Report (BER) submitted by EKP provides adequate information regarding the environmental aspects of the Project. Based upon the BER and other information, REA prepared an Environmental Assessement (EA) addressing the impacts of the Project. REA concluded that the Project would not be a major Federal action significantly affecting the quality of the human environment.

REA determined that the Project: (1) Will have no effect on threatened or endangered species or wetlands. (2) Will have no significant adverse effect on floodplains or known cultural resources. While a few poles will be located in floodplains, they will not be incompatible with the ecological function of the floodplains. Several potential archeological sites along the transmission line right-of-way will be surveyed and approved by REA and the State Historic Preservation Officer prior to clearing and construction. (3) Will affect prime farmland. All reasonable measures will be taken to minimize the amount of floodplains and prime farmland affected. There is no practicable alternative to using the floodplains and prime farmland. Construction, operation and maintenance of the Project will not, in REA's judgment, result in any unacceptable environmental impacts.

Alternatives examined include the Project, no action, conservation, 69 kV in lieu of 161 kV facilities, other substation sites and line routes, and other construction materials and methods. After reviewing these alternatives, REA determined that the Project is an acceptable alternative because it will meet EKP's needs with minimal environmental impact.

The FONSI, EA and BER may be reviewed at or requested from the Office of the Director, Power Supply Division, Room 0230, South Building, Rural Electrification Administration, U.S. Department of Agriculture, Washington, D.C. 20250, telephone: (202) 382–1400, or at the office of East Kentucky Power Cooperative, P.O. Box 707, Lexington Road, Winchester, Kentucky 40391, telephone: (606) 744–4812.

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 11th day of May 1982.

**Harold V. Hunter,**

*Administrator, Rural Electrification Administration.*

[FR Doc. 82–13403 Filed 5–17–82; 8:45 am]

BILLING CODE 3410–15–M

## Soil Conservation Service

### Buncombe County Schools, Flood Prevention, Land Drainage and Critical Area Treatment, R.C. & D. Measure, North Carolina

**AGENCY:** Soil Conservation Service, USDA.

**ACTION:** Notice of finding of no significant impact.

**SUMMARY:** Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR Part 1500); and the Soil Conservation Service Guidelines (7 CFR Part 650), the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Buncombe County Schools Flood Prevention, Land Drainage and Critical Area Treatment, RC&D Measure, Buncombe County, North Carolina.

**FOR FURTHER INFORMATION CONTACT:** Mr. Coy A. Garrett, State Conservationist, Soil Conservation Service, Room 544, Federal Building, 310 New Bern Avenue, Raleigh, North Carolina 27611, Telephone (919) 755-4210.

**SUPPLEMENTARY INFORMATION:** The environmetal assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Mr. Coy A. Garrett, State Conservationist, has determined that the preparation and review of an environmental impact statement are not needed for this project.

The measure concerns a plan for the reduction of flooding on one acre. improve drainage on 3 acres and reduction of erosion on approximately 13.25 acres of critically eroding land. The planned works of improvement include necessary subsurface drainage, grassed waterways, diversions, drop inlets, pipes to convey surface water to satisfactory outlets and seeding eroding areas with adapted perennial vegetation.

The Notice of a Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various Federal, State, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment are on file and may be reviewed by contacting Mr. Coy A. Garrett.

No administrative action on implementation of the proposal will be taken June 17, 1982.

(Catalog of Federal Domestic Assistance Program No. 10.901, Resource Conservation and Development Program. Office of Management and Budget Circular A-95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects is applicable.)

Dated: May 10, 1982.

**Coy A. Garrett,**

*State Conservationist.*

[FR Doc. 82-13406 Filed 5-17-82; 8:45 am]

BILLING CODE 3410-16-M

## CIVIL AERONAUTICS BOARD

### Announcement of Proposed Collection of Information Under Provisions of the Paperwork Reduction Act (44 U.S.C. 35)

Agency clearance officer from whom a copy of the collection of information and supporting documents is available: Robin A. Caldwell (202) 673-5922.

*Extension*

Title of the collection of information: Part 375, "Navigation of Foreign Civil Aircraft within the United States."
Agency form number: None.
How often the collection of information must be filed: On occasion.
Who is asked or required to report: Foreign air carriers.
Estimate of number of annual responses: 53.
Estimate of number of annual hours needed to complete the collection of information: 13.

*Revision*

Title of the collection of information: "Registration or Amendments Under Part 297 of the Economic Regulations of the Civil Aeronautics Board."
Agency form number: 297A.
How often the collection of information must be filed: Nonrecurring.
Who is asked or required to report: Foreign indirect air carriers.
Estimate of number of annual responses: 50.
Estimate of number of annual hours needed to complete the collection of information: 150.

*Extension and Revision*

Title of the collection of information: "Report of Scheduled Operations of Commuter Air Carriers."
Agency form number: 298-C.
How often the collection of information must be filed: Quarterly.
Who is asked or required to report: Commuter air carriers.
Estimate of number of annual responses: 880.
Estimate of number of annual hours needed to complete the collection of information: 6,160.

*Revision*

Title of the collection of information: "Registration or Amendments Under Part 380 of the Economic Regulations of the Civil Aeronautics Board."
Agency form number: 300.
How often the collection of information must be filed: Nonrecurring.
Who is asked or required to report: Foreign charter operators.
Estimate of number of annual responses: 24.
Estimate of number of annual hours needed to complete the collection of information: 12.
None applicable under 3504(h) of Pub. L. 96-511.
OMB desk officer: Wayne Leiss (202) 395-7340.

Dated: May 12, 1982.

**Anthony F. Toronto,**

*Comptroller.*

[FR Doc. 82-13421 Filed 5-17-82; 8:45 am]

BILLING CODE 6320-01-M

## COMMISSION ON CIVIL RIGHTS

### New York Advisory Committee; Agenda and Open Meeting

Notice is hereby given, pursuant to the provisions of the Rules and Regulations of the U.S. Commission on Civil Rights, that a meeting of the New York Advisory Committee to the Commission will convene at 8:30 a.m. and will end at 5:00 p.m., on June 17, 1982, at the World Trade Center, Two World Trade Center, in the Conference Room on the 44th Floor, New York, New York. The purpose of this meeting will be to conduct a conference on the growth of racial, religious, ethnic bigotry and violence in the State of New York.

Persons desiring additional information or planning a presentation to the Committee, should contact the Chairperson, Robert Mangum, 420 East Twenty-third Street, New York, New York, 10010, (212) 420-3935 or the Eastern Regional Office, Jacob K. Javits Building, 26 Federal Plaza, Room 1639, New York, New York, (212) 264-0400.

The meeting will be conducted pursuant to the provisions of the Rules and Regulations of the Commission.

Dated at Washington, D.C., May 13, 1982.

John I. Binkley,

*Advisory Committee Management Officer.*

[FR Doc. 82-13396 Filed 5-17-82; 8:45 am]

BILLING CODE 6335-01-M

## DEPARTMENT OF COMMERCE

### Minority Business Development Agency

### Financial Assistance Application Announcement; San Francisco Region

The Minority Business Development Agency announces that it is seeking applications under its program to operate a BDC in the San Francisco Region for a twelve month period. The estimated total costs of the project are $170,000.

*Funding Instrument:* It is anticipated that the funding instruments as defined by the Federal Grant and Cooperative Agreement Act of 1977 will be Cooperative Agreements.

*Program Descriptions:* Executive Order 11625 authorizes MBDA to fund projects which will provide technical and management assistance to eligible minority clients in areas related to the establishment and operation of businesses. The proposed project is specifically designed to provide business information counseling, financial packaging assistance, and assistance in identifying and exploiting business opportunities and new/or expanding markets.

One Cooperative Agreement Under the Business Development Center (BDC) Program to operate a pilot project for a 12 month period beginning October 1, 1982 in the Tucson SMSA. This pilot project will operate at a cost not to exceed $170,000 and the project I.D. Number is 09-10-82012-01.

Closing Date: June 22, 1982.

An application kit is available upon written request.

The pre-application conference to assist all interested applicants will be held at the Federal Building, 230 North First Avenue, Room 1013, in Phoenix, Arizona, on May 25, 1982, at 10:00 A.M.

MBDA offers competitive Cooperative Agreements to all individuals, non-profit organizations, for-profit firms, local and state governments, federally recognized American-Indian Tribes and educational institutions to perform the functions of a BDC which are:

To provide management and technical assistance to qualified minority firms,

To develop and maintain an inventory of existing minority businesses and prospective entrepreneurs, and

To provide brokering service that will foster and promote new business ownership, business expansions, market opportunities and new capital sources.

Legal services are excluded.

Applicants shall be required to contribute at least 10% of the total program costs through non-federal funds. A fee for services for assistance provided clients will be charged. The fee for services will be 10% for firms with gross sales of $500,000 or less and 25% for the firms with gross sales of over $500,000. Cost sharing contributions can be in the form of cash contributions, fee for services, or in-kind contributions.

The program is subject to OMB Circular A-95 requirements.

Proposals are to be mailed to the following address:

Minority Business Development Agency, U.S. Department of Commerce, San Francisco Regional Office, 450 Golden Gate Avenue, Box 36114, San Francisco, California 94102

For further information contact Mr. Mikel R. Cook at 415/556-6733.

(11.800 Minority Business Development (Catalog of Federal Domestic Assistance))

Dated: May 5, 1982.

R. V. Romero,

*Regional Director.*

[FR Doc. 82-13373 Filed 5-17-82; 8:45 am]

BILLING CODE 3510-21-M

## National Oceanic and Atmospheric Administration

### Implementation of the Salmon and Steelhead Conservation and Enhancement Act of 1980; Public Meeting

**AGENCY:** National Marine Fisheries Service, NOAA Commerce.

**ACTION:** Notice.

**SUMMARY:** Notice of a public meeting to discuss implementation of the Salmon and Steelhead Conservation and Enhancement Act of 1980 (P. L. 96-561).

**DATE:** June 14, 1982. The meeting will commerce at 10:00 a.m. and is scheduled to continue not later than 5:00 p.m. The meeting will be open to interested members of the public; however space is limited.

**ADDRESS:** Hyatt Hotel, 17001 Pacific Highway South, Seattle, Washington 98118, (206) 244-6000.

**MEETING AGENDA:** *Organizational Matters*—Those present will discuss organizational procedures in accord with the requirements of P.L. 96-561 and the Federal Advisory Committee Act including staffing needs, office and meeting locations, and schedules. *Establishment of Operational Procedures*—In accord with the provisions of Public Law 96-561 guidelines will be developed and objectives established to achieve the goals established by Pub. L. 96-561. Involved will be overall objectives and budget requirements. *Other matters* may be brought up during the meeting.

**FOR FURTHER INFORMATION CONTACT:** H.A. Larkins, Regional Director, National Marine Fisheries Service, 7600 Sand Point Way NE., BIN C15700, Seattle, Washington 98115, Telephone: (206) 527-6150.

Dated: May 13, 1982.

Robert K. Crowell,

*Deputy Executive Director, National Marine Fisheries Service.*

[FR Doc. 82-13431 Filed 5-17-82; 8:45 am]

BILLING CODE 3510-22-M

### Emergency Striped Bass Study; Public Meeting

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

**ACTION:** Notice.

**SUMMARY:** The National Marine Fisheries Service and the U.S. Fish and Wildlife Service will hold a joint meeting to discuss progress on the Emergency Striped Bass Study as authorized by the amended Anadromous Fish Conservation Act, (Public Law 96-118).

**DATE:** The meeting will convene on Friday, June 25, 1982, at 1:00 p.m., and will adjourn at approximately 5:00 p.m. The meeting is open to the public; however, space is limited.

**ADDRESS:** National Marine Fisheries Service, Room 401, Page Building #2, 3300 Whitehaven Street, NW., Washington, D.C. 20235.

**FOR FURTHER INFORMATION CONTACT:** Richard H. Schaefer, State Federal Division, Office of Resource Conservation and Management, National Marine Fisheries Service, Washington, D.C. 20235, Telephone: (202) 634-7454.

Dated: May 12, 1982.

Robert K. Crowell,

*Deputy Executive Director, National Marine Fisheries Service.*

[FR Doc. 82-13432 Filed 5-17-82; 8:45 am]

BILLING CODE 3510-22-M

### New England and Mid-Atlantic Fishery Management Councils; Public Meetings

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

**ACTION:** Notice.

**SUMMARY:** The New England and Mid-Atlantic Fishery Management Councils were established by Section 302 of the Magnuson Fishery Conservation and Management Act (Pub. L. 94–265). These two councils will hold joint public meetings to discuss: Groundfish, Squid, Mackerel and Butterfish, Herring, Surf Clam and Ocean Quahog, Scallops, Bluefish, Lobster, Summer Flounder, Tilefish, Swordfish, and Billfish Fishery Management Plans; gear conflict amendment; joint ventures; Magnuson Act amendments, as well as other business pertaining to the Councils.

**DATES:** The public meetings will convene on Tuesday, June 15, 1982, at approximately 1 p.m., and will adjourn on Thursday, June 17, 1982, at approximately noon. The meetings may be lengthened or shortened or agenda items rearranged depending upon progress on the same.

**ADDRESS:** The meetings will take place at the Ramada Inn, Mystic, Connecticut.

**FOR FURTHER INFORMATION CONTACT:** New England Fishery Management Council, Suntaug Office Park, Five Broadway, Route One, Saugus, Massachusetts 01906, Telephone: (617–231–0422).

Dated: May 13, 1982.

**Jack L. Falls,**

*Chief, Administrative Support Staff, National Marine Fisheries Service.*

[FR Doc. 82–13434 Filed 5–17–82; 8:45 am]

BILLING CODE 3510–22–M

## Western Pacific Fishery Management Councils; Scientific and Statistical Committee; Public Meetings

**AGENCY:** National Marine Fisheries Service, NOAA, Commerce.

**ACTION:** Notice.

**SUMMARY:** The Western Pacific Fishery Management Council, established by Section 302 of the Magnuson Fishery Conservation and Management Act (Pub. L. 94–265), has established a Scientific and Statistical Committee, which will meet to discuss a five-year program plan, Scientific and Statistical Committee membership, as well as other committee business.

**DATES:** The public meetings will convene on Thursday, June 10, 1982, at approximately 9 a.m., and will adjourn on Friday, June 11, 1982, at approximately 4 p.m.

**ADDRESS:** The public meeting will take place at the National Marine Fisheries Service, Honolulu Laboratory, 2570 Dole Street, Honolulu, Hawaii.

**FOR FURTHER INFORMATION CONTACT:** Western Pacific Fishery Management Council, 1164 Bishop Street, Room 1608, Honolulu, Hawaii 96813, Telephone: (808/523–1358).

Dated: May 13, 1982.

**Jack L. Falls,**

*Chief, Administrative Support Staff, National Marine Fisheries Service.*

[FR Doc. 82–13433 Filed 5–17–82; 8:45 am]

BILLING CODE 3510–22–M

## DEPARTMENT OF DEFENSE

### Department of the Air Force

### Acceptance of Group Application Under Pub. L. 95–202 and DODD 1000.20

Under the provisions of Section 401 of Pub. L. 95–202 and DODD 1000.20, the DOD Civilian/Military Service Review Board has accepted an application on behalf of Civilian Personnel in the European Theater of Operations Assigned to the Secret Intelligence Element of the OSS. Persons with information or documentation pertinent to the determination of whether the service of this group was equivalent to active military service are encouraged to submit such information or documentation within 60 days to the DOD Civilian/Military Service Review Board, Secretary of the Air Force (SAF/MIPC), Washington, D.C. 20330. For further information contact Technical Sergeant Stephen J. Koegle, USAF, Telephone No. 694–5380.

**Winnibel F. Holmes,**

*Air Force Federal Register Liasion Officer.*

[FR Doc. 82–13391 Filed 5–17–82; 8:45 am]

BILLING CODE 3910–01–M

## DEPARTMENT OF EDUCATION

### Office of Bilingual Education and Minority Languages Affairs

### Transition Program for Refugee Children

**AGENCY:** Education Department.

**ACTION:** Application Notice for Fiscal Year 1982.

Applications are invited for grants under the Transition Program for Refugee Children.

Authority for this program is contained in section 412(d)(1) of the Immigration and Nationality Act, as amended by the Refugee Act of 1980 (Pub. L. 96–212).

(8 U.S.C. 1522(d))

Eligible applicants are State educational agencies.

This program supports educational activities designed to meet the special needs of eligible refugee children and to enhance their transition into American society.

*Closing date for transmittal of applications:* An application for a grant must be mailed or hand-delivered by July 23, 1982.

*Applications delivered by mail:* An application sent by mail must be addressed to Mr. James H. Lockhart, Chief of the Refugee Assistance Staff, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education (Room 508, Reporters Building), 400 Maryland Avenue SW., Washington, D.C. 20202.

An applicant must show proof of mailing consisting of one of the following:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commerical carrier.

(4) Any other of mailing acceptable to the U.S. Secretary of Education.

If an application is sent through the U.S. Postal Service, the Secretary does not accept either of the following as a proof of mailing:

(1) A private metered postmark, or

(2) A mail receipt that is not dated by the U.S. Postal Service.

An applicant should note that the U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

An applicant is encouraged to use registered or at least first class mail. Each late applicant will be notified that its application will not be considered.

Application delivered by hand: An application that is hand-delivered must be taken to the Refugee Assistance Staff, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education, Room 508, Reporters Building, 300 7th Street SW., Washington, D.C.

The Refugee Assistance Staff will accept a hand-delivered application between 8:00 p.m. and 4:30 p.m. (Washington, D.C. time) daily, except Saturdays, Sundays and Federal holidays.

An application that is hand-delivered will not be accepted after 4:30 p.m. on the closing date.

*Program information:* The Department has asked each State Educational Agency to conduct, on May 20, 1982, a count of refugee children eligible for assistance under the Transition Program

for Refugee Children. A grant is made to a State educational agency based on the number of eligible children enrolled in public and nonprofit private schools in the State, using the weighting factor announced in this notice. Using the same formala, the State educational agency awards subgrants to local educational agencies in its State that proposed to serve eligible children within their jurisdictions. As provided in 34 CFR 538.20, the State educational agency makes subgrants to local educational agencies within 60 days after the State receives the grant award funds. When a local educational agency does not apply to serve its eligible children, the State educational agency provides services directly to those children or arranges for provision of services to those children through subgrants, contracts, and cooperative agreements with other public and private nonprofit organizations, agencies, and institutions.

Awards under this program are to provide educational services to eligible children during the 1982–1983 school year.

*Weighting factors:* Section 538.31 of the program regulations authorizes the Secretary to announce the weighting factors to be used in distributing funds under this program. For the award of fiscal year 1982 funds, the Secretary uses the following formula for fund distribution:

| Recency of arrival in the United States (in years) | Weighting factors by school level | |
|---|---|---|
| | Elementary | Secondary |
| Less than 1 | 10 | 10 |
| 1 to 2 | 3 | 5 |
| 2 to 3 | 0 | 3 |
| 3 to 4 | 0 | 0 |
| More than 4 | 0 | 0 |

The adjustment is necessary to reflect the need for more educational services to refugee children who have been in this country for less than one year.

*Available funds:* It is expected that approximately $20 million will be available for grants to State educational agencies. These funds are a fiscal year 1982 appropriation with availability until September 30, 1982.

It is estimated that these funds will provide approximately $300 of assistance per eligible child. However, the approximate amount of funds available per eligible child may increase or decrease depending on the total number of eligible children that the States report.

These estimates, however, do not bind the U.S. Department of Education to specific numbers of grants or to the amount of any grant.

*Application forms:* Application forms and instructions will be mailed to all State educational agencies. Additional forms may be obtained by writing to the Refugee Assistance Staff, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education (Room 508, Reporters Building), 400 Maryland Avenue SW., Washington, D.C. 20202.

Applications must be prepared and submitted in accordance with the regulations, instructions, and forms included in the application package. The Secretary strongly urges that the narrative portion of the application not exceed four pages. The Secretary further urges that applicants not submit information that is not requested.

*Applicable regulations:* Regulations applicable to this program include the following:

(1) Regulations governing the Transition Program for Refugee Children (34 CFR Part 538) published on January 14, 1981 (46 FR 3378).

(2) Regulations governing the Refugee Resettlement Program (45 CFR Part 400) published on September 9, 1980 (45 FR 59818).

(3) Education Department General Administrative Regulations (EDGAR) (34 CFR Parts 76 and 77; formerly 45 CFR Parts 100b and 100c), except as otherwise provided in 34 CFR Part 538.

*Further information:* For further information contact Mr. James H. Lockhart, Chief of the Refugee Assistance Staff, Office of Bilingual Education and Minority Languages Affairs, U.S. Department of Education (Room 508, Reporters Building), 400 Maryland Avenue SW., Washington, D.C. Telephone (202) 472–3520.

(Catalog of Federal Domestic Assistance Number 84.146, Transition Program for Refugee Children)

(8 U.S.C. 1522(d))

Dated: May 11, 1982.

**T. H. Bell,**

*Secretary of Education.*

[FR Doc. 82-13405 Filed 5-17-82; 8:45 am]

BILLING CODE 4000-01-M

## DEPARTMENT OF ENERGY

## Federal Energy Regulatory Commission

**[Docket Nos. RP81-128-007, et al.]**

## Alabama-Tennessee Natural Gas Co., et al.; Filing of Pipeline Refund Reports and Refund Plans

April 30, 1982.

Take notice that the pipelines listed in the Appendix hereto have submitted to the Commission for filing proposed refund reports or refund plans. The date of filing, docket number, and type of filing are also shown on the Appendix.

Any person wishing to do so may submit comments in writing concerning the subject refund reports and plans. All such comments should be filed with or mailed to the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, on or before May 17, 1982. Copies of the respective filings are on file with the Commission and available for public inspection.

**Kenneth F. Plumb,**

*Secretary.*

APPENDIX

| Filing date | Company | Docket No. | Type filing |
|---|---|---|---|
| Apr. 14, 1982 | Alabama-Tennessee Natural Gas Company | RP81-128-007 | LFUT Report. |
| Apr. 15, 1982 | Northern Natural Gas Company | RP81-52-003 | Report. |
| Do | Western Gas Interstate Company | RP81-10-006 | Report. |
| Apr. 16, 1982 | Transwestern Pipeline Company | RP82-24-001 | LFUT Report. |
| Apr. 19, 1982 | Southern Natural Gas Company | RP81-105-014 | LFUT Report. |
| Do | Transcontinental Gas Pipe Line Corporation | RP77-108-021 | Report. |
| Apr. 22, 1982 | Transwestern Pipeline Company | RP82-24-002 | LFUT Report. |
| Apr. 26, 1982 | Arkansas Louisiana Gas Company | RP81-101-006 | LFUT Report. |
| Do | Florida Gas Transmission Company | RP81-7-005 | Compliance Report. |
| Do | Tennessee Gas Pipeline Company | RP81-44-004 | Report. |

[FR Doc. 82-13416 Filed 5-17-82; 8:45 am]

BILLING CODE 6717-01-M

**[Docket No. RE82-8-000]**

## Prince William Electric Coop.; Application for Exemption

April 26, 1982.

Take notice that Prince William Electric Cooperative (PWEC) filed an application on March 16, 1982 for exemption from certain requirements of Part 290 of the Commission's Regulations concerning collection and reporting of cost of service information under section 133 of the Public Utility Regulatory Policies Act, Order No. 48 (44 FR 58687, October 11, 1979). Exemption is sought from the requirement to file on

or before June 30, 1982, information on the costs of providing electric service as specified in §§ 290.301–290.308 inclusive, 290.404(a) as it applies to Rate Class PS6A, and 290.103(b). In the same filing, PWEC requested an extension of the June 30, 1982 filing date to June 30, 1983.

In its application for exemption PWEC states that it should not be required to file the specified data for the following reasons, in part:

A. The usage characteristics, cost characteristics and service classification characteristics of Prince William are such that compliance with the data gathering and filing requirements will not advance the purposes of PURPA.

Exemption of Prince William from these requirements will not impact adversely its obligations concerning consideration and determination of rate making and service standards specified in §§ 111–115 of PURPA.

Cost of compliance by Prince William is substantial and imposes an undue economic burden on Prince William.

B. Sample load meters were not installed and operating until December 1981.

Copies of the application for exemption are on file with the Commission and are available for public inspection. The Commission's regulations require that said utility also apply to any State regulatory authority having jurisdiction over it to have the application published in any official State publication in which electric rate change applications are usually noticed, and that the utility publish a summary of the application in newspapers of a general circulation in the affected jurisdiction.

Any person desiring to present written views, arguments, or other comments on the application for exemption should file such information with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, on or before July 2, 1982. Within that 45-day period such person must also serve a copy of such comments on:

Harry K. Bowman, Manager, Prince William Electric Cooperative, P.O. Box 1750, Manassas, Virginia 22110.

James V. Lane, Esq., Litten, Sipe & Miller, 250 East Market Street, Harrisonburg, Virginia 22801.

**Kenneth F. Plumb,**

*Secretary.*

[FR Doc. 82-13417 Filed 5-17-82; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. RP80-58-000]

## The State of Oklahoma and the Corporation Commision of the State of Oklahoma, Complainants v. Western Gas Interstate Company and Southern Union Gas Company, respondents; Informal Technical Conference and Notice Granting Petitions To Intervene

May 4, 1982.

Take notice that on June 9, 1982, an informal technical conference will be held at the A.P. Murrah Federal Building, 200 N.W. 5th Street, Room 911, Oklahoma City, Oklahoma, at 9:00 a.m. with respect to matters pending in the above proceeding.

The purpose of the conference is to discuss the complaint filed on December 4, 1979, as amended on September 4, 1981, by the State of Oklahoma and the Corporation Commission of the State of Oklahoma (Complainants) against Western Gas Interstate Company and Southern Union Gas Company (Respondents) in Docket No. RP80–58. Respondents filed an answer to this compliant on March 3, 1980.

After notice by publication in the **Federal Register** on February 7, 1980 (45 FR 8344), timely petitions to intervene were filed by Northern Natural Gas Company, Cities Service Gas Company, and by Texas County Irrigation and Water Resources Association and Beaver County Irrigation Association.

An untimely petition to intervene was filed by the Cimarron County Irrigation and Water Resources Association, the Oklahoma Panhandle Gas Users Association, the City of Boise City, and the City of Texhoma (Cimarron County, *et al.*) which demonstrates an interest in this proceeding that cannot be adequately protected or presented by any other party and is important to a resolution of the issues in this proceeding. Accordingly, good cause exists to permit the intervention of Cimarron County, *et al.*

Petitioners to intervene listed above are hereby granted intervention in this proceeding subject to the Commission's Rules and Regulations; *Provided, However,* That the participation of such intervenors shall be limited to matters affecting asserted rights and interests specifically set forth in their petitions to intervene; and *Provided, further,* That the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

In their complaint and request for joint hearings of December 4, 1979, Complainants requested an investigation which would assure the Commission that Respondents are presently operating in accordance with the law and the best management practices to assure service at lowest reasonable cost. Additionally, Complainants seek that the Commission determine what proper and legal actions could have been taken by respondents in 1974 to deal with supply problems, what the cost of acting properly at that time would have been, and what additional costs have been incurred if Respondents acted improperly.

In their answer of March 3, 1980, Respondents argued *inter alia,* that the instant complaint, on its face, is without merit and is merely an attempt to relitigate issues fully tried in Docket Nos. CP76–482, *et al.* Respondents submit that the subject compaint should be dismissed.

Respondents have agreed to make an oral presentation concerning the current operation of their facilities. The first order of business at this informal technical conference will be to allow Respondents to make the proposed report describing their present gas system operations. Following the Respondents' reports, each party will be afforded an opportunity to make a statement. Additionally, written statements will be accepted by Commission staff as informal Comments. Commission staff may file a report to the Commission following this informal teachnical conference.

The informal conference is open to the public; however, attendance or participation at the conference will not serve to make attendees parties to the proceeding.

Copies of this notice are being sent to all parties and will be published in the **Federal Register.**

For further information contact David G. Tishman or Russell B. Mamone, Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, D.C. 20426, Telephone No. (202) 357–8433.

**Kenneth F. Plumb,**

*Secretary.*

[FR Doc. 82-13418 Filed 5-17-82; 8:45 am]

BILLING CODE 6717-01-M

## FEDERAL MARITIME COMMISSION

### Agreements Filed

The Federal Maritime Commission hereby gives notice that the following agreements have been filed with the Commission for approval pursuant to section 15 of the Shipping Act, 1916, as amended (39 Stat. 733, 75 Stat. 763, 46 U.S.C. 814).

Interested parties may inspect and obtain a copy of each of the agreements and the justifications offered therefor at Washington Office of the Federal Maritime Commission, 1100 L Street NW., Room 10327; or may inspect the agreements at the Field Offices located at New York, N.Y.; New Orleans, Louisiana; San Francisco, California; Chicago, Illinois; and San Juan, Puerto Rico. Interested parties may submit comments on each agreement, including requests for hearing, to the Secretary, Federal Maritime Commission, Washington, D.C. 20573, on or before June 7, 1982. Comments should include facts and arguments concerning the approval, modification, or disapproval of the proposed agreement. Comments shall discuss with particularity allegations that the agreement is unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operates to the detriment of the commerce of the United States, or is contrary to the public interest, or is in violation of the Act.

A copy of any comments should also be forwarded to the party filing the agreements and the statement should indicate this has been done.

Agreement No. 161–39.

Filing Party: Howard A. Levy, Esquire, 17 Battery Place, Suite 727, New York, New York 10004.

Summary: Agreement No. 161–39 will modify the way conference expenses are apportioned among the members of the Gulf United Kingdom Freight Conference.

Agreement No. 3868–27.

Filing Party: Nathan J. Bayer, Esq., Freehill, Hogan & Mahar, 80 Pine Street, New York, New York 10005.

Summary: Agreement No. 3868–27 amends and restates the basic agreement of the Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference to provide numerous clarifications, additions and language changes to various items, including: transshipment services; authority to cancel rates; the collection and distribution of trade statistics; intermodal authority in Panama; credit rules; freight forwarder commissions; voting rights; membership; security deposit of members; arbitration; and, the conference name.

Agreement No. T–4026–1.

Filing Party: Mr. Randall V. Adams, Accounting/Traffic, Port of Palm Beach, P.O. Box 9935, Riviera Beach, Florida 33404.

Summary: Agreement No. T–4026–1, between the Port of Palm Beach (Port) and Johnson's Shipping Agency (JSA), modifies the basic agreement between the parties which provides for the lease by Port to JSA of certain warehouse and office space. The purpose of the modification is to provide for an additional one-year renewal period.

Agreement No. T–4043.

Filing Party: Mr. John J. Desmond, Manager, Port Operations, Cleveland-Cuyahoga County Port Authority, 101 Erieside Avenue, Cleveland, Ohio 44114.

Summary: Agreement No. T–4043 between the Cleveland-Cuyahoga County Port Authority, (Port) and Cleveland Stevedoring Company (CSC) provides for the preferential use by CSC, as a Terminal Operator, of Berths 24, West and East, 26 West, 28 North and 32 East, at the Port of Cleveland, Ohio. The term of the agreement is for one year. CSC shall pay to the Port all wharfage, dockage and heavy-lift charges, and assess and collect all terminal storage and wharf demurrage charges for the Port's account, with 33⅓ percent of terminal storage and wharf demurrage revenue being retained by CSC as compensation for administrative overhead and related expenses. Insurance, liability, repairs, cost for utilities are as provided for in the agreement.

Agreement No. 8090–22.

Filing Party: Marc J. Fink, Esquire, Billig, Sher & Jones, P.C., Suite 300, 2033 K Street NW., Washington, D.C. 20006.

Summary: Agreement No. 8090–22 modifies the basic agreement of the Mediterranean North Pacific Coast Freight Conference to bring its self-policing provisions into conformity with the Commission's rules governing self-policing (46 CFR, Part 528).

Agreement Nos. 10442–10449.

Filing Party: Joseph H. Dettmar, Esquire, Garvey, Schubert, Adams & Barer, 1000 Potomac Street NW., Washington, D.C. 20007.

Summary: Agreements Nos. 10442 through 10449 are nonexclusive equipment interchange agreements providing for the interchange of empty and loaded container equipment between Totem Ocean Trailer Express, Inc., and the following carriers in the trades listed below:

| Agreement No. | Carrier | Trade |
|---|---|---|
| 10442 | Japan Line | Far East. |
| 10443 | Hanjin Container Lines, Ltd. | Do. |
| 10444 | Johnson Scanstar | Europe. |
| 10445 | Showa Line Limited | Far East. |
| 10446 | Mitsui O.S.K. Lines, Ltd | Do. |
| 10447 | Westwood Shipping Lines | Europe. |
| 10448 | Nippon Yusen Kaisha Line | Far East. |
| 10449 | Kawasaki Kisen Kaisha, Limited (K-Line). | Do. |

Agreements Nos. 10450 and 10451.

Filing Party: John Evan Greenwood, Esquire, Kirlin, Campbell & Keating, One Twenty Broadway, New York, New York 10271.

Summary: Agreement No. 10450 will establish a new rate agreement in the Calcutta/U.S. Great Lakes trade and Agreement No. 10451 will establish a new rate agreement in the U.S. Great Lakes/India trade.

By Order of the Federal Maritime Commission.

Dated: May 12, 1982.

**Francis C. Hurney,**

*Secretary.*

[FR Doc. 82–13375 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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**[Independent Ocean Freight Forwarder License No. 1615–R]**

## Argus Shipping Co. (Andreas Schuemer, d.b.a.); Order of Revocation

On May 6, 1982, Argus Shipping Company (Andreas Schuemer, d.b.a.), 2300 East Higgins Road, Elk Grove Village, IL 60007 surrendered his Independent Ocean Freight Forwarder License No. 1615–R 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. 1 (Revised), § 10.01(e) dated November 12, 1981;

It is ordered, that Independent Ocean Freight Forwarder License No. 1615–R issued to Argus Shipping Company (Andreas Schuemer, d.b.a.) be revoked effective May 6, 1982, 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 Argus Shipping Company (Andreas Schuemer, d.b.a.).

**Albert J. Klingel, Jr.,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 82–13378 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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**[Independent Ocean Freight Forwarder License No. 40]**

## J. M. Altieri Inc., Order of Revocation

Section 44(c), Shipping Act, 1916, provides that no independent ocean freight forwarder license shall remain in force unless a valid bond is in effect and on file with the Commission. Rule 510.15(d) of Federal Maritime Commission General Order 4 further provides that a license shall be

automatically revoked for failure of a licensee to maintain a valid bond on file.

The bond issued in favor of J. M. Altieri Inc., 201–B Tetuan Street, San Juan, PR 00903, was cancelled effective May 6, 1982.

By letter dated April 9, 1982, J. M. Altieri Inc. was advised by the Federal Maritime Commission that Independent Ocean Freight Forwarder License No. 40 would be automatically revoked unless a valid surety bond was filed with the Commission.

J. M. Altieri Inc. has failed to furnish a valid bond.

By virtue of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order No. 1 (Revised), section 10.01(f) dated November 12, 1981;

Notice is hereby given, that Independent Ocean Freight Forwarder License No. 40 be and is hereby revoked effective May 6, 1982.

It is ordered, that Independent Ocean Freight Forwarder License No. 40 issued to J. M. Altieri Inc. be returned to the Commission for cancellation.

It is further ordered, that a copy of this Order be published in the **Federal Register** and served upon J. M. Altieri Inc.

**Albert J. Klingel, Jr.,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 82–13381 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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**[Independent Ocean Freight Forwarder License No. 501]**

## International Express Co., Inc.; Order of Revocation

On April 30, 1982, International Express Company, Inc., P.O. Box 2307, New Orleans, LA 70176 surrendered its Independent Ocean Freight Forwarder License No. 501 for revocation.

Therefore, by virute of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order No. 1 (Revised), section 10.01(e) dated November 12, 1981;

It is ordered, that Independent Ocean Freight Forwarder License No. 501 issued to International Express Company, Inc. be revoked effective April 30, 1982, 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 International Express Company, Inc.

**Albert J. Klingel, Jr.,**

*Director, Bureau of Certification and Licensing.*

[FR Doc. 82–13379 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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**[Independent Ocean Freight Forwarder License No. 2221]**

## J. R. Prescott & Co., Inc.; Order of Revocation

Section 44(c), Shipping Act, 1916, provides that no independent ocean freight forwarder license shall remain in force unless a valid bond is in effect and on file with the Commission. Rule 510.15(d) of Federal Maritime Commission General Order 4 further provides that a license shall be automatically revoked for failure of a licensee to maintain a valid bond on file.

The bond issued in favor of J. R. Prescott & Co., Inc., 722 W. Pine Hill, Pinehurst, TX 77362 was cancelled effective April 7, 1982.

By letter dated March 30, 1982, J. R. Prescott & Co., Inc. was advised by the Federal Maritime Commission that Independent Ocean Freight Forwarder License No. 2221 would be automatically revoked unless a valid surety bond was filed with the Commission.

J. R. Prescott & Co., Inc. has failed to furnish a valid bond.

By virtue of authority vested in me by the Federal Maritime Commission as set forth in Manual of Orders, Commission Order No. 1 (Revised), section 10.01(f) dated November 12, 1981;

Notice is hereby given, that Independent Ocean Freight Forwarder License No. 2221 be and is hereby revoked effective April 7, 1982.

It is ordered, that Independent Ocean Freight Forwarder License No. 2221 issued to J. R. Prescott & Co., Inc. be returned to the Commission for cancellation.

It is further ordered, that a copy of this Order be published in the **Federal Register** and served upon J. R. Prescott & Co., Inc.

**Albert J. Klingel, Jr.,**

*Director, Bureau of Certification & Licensing.*

[FR Doc. 82–13380 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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## Combi Line Joint Service; Cancellation

Agreement No. 9929–7

Filing party: Edward Schmeltzer, Esquire, Schmeltzer, Aptaker & Sheppard, P.C., 1800 Massachusetts Avenue, NW., Washington, D.C. 20036.

Summary: Agreement No. 9929, as amended, between Hapag-Lloyd, A.G. and Intercontinental Transport (ICT) B. V., provides for the joint service known as Combi Line. Agreement No. 9929–7 provides for the termination of the basic agreement to be effective April 30, 1982.

By Order of the Federal Maritime Commission.

Dated: May 12, 1982.

**Francis C. Hurney,**

*Secretary.*

[FR Doc. 82–13378 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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## 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 fowarders pursuant to section 44 (a) of the Shipping Act, 1916 (75 Stat. 522 and 46 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.

Aleksander Grochowski, dba Universal Shipping Service, 61 Cabot Street, Chicopee, MA 01013;

Marx Commercial Freight Forwarders, Inc., 127 Luquer Road, Port Washington, NY 11050, Officer: Alberto Cypriano Marques, President;

Takashi Uryu, d.b.a. Central Shipping Co., 433 Hegenberger Road, Suite 105H, Oakland, CA 94621;

Ocean-Air Forwarding, Incorporated, R.D. #1, Burgettstown, PA 15021, Officers: Richard E. Starck, President/Stockholder, Robert J. Starck, Vice President/Stockholder, Marguerite J. Starck, Stockholder, Jeffrey J. Starck, Stockholder, Jay J. Starck, Stockholder.

By the Federal Maritime Commission.

Dated: May 12, 1982.

**Francis C. Hurney,**

*Secretary.*

[FR Doc. 82–13377 Filed 5–17–82; 8:45 am]

BILLING CODE 6730–01–M

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# FEDERAL RESERVE SYSTEM

## Acquisition of Bank Shares by Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3(a)(3) of the Bank Holding Company Act (12 U.S.C.

1842(a)(3)) to acquire voting shares or assets of a bank. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application may be inspected at the offices of the Board of Governors, or at the Federal Reserve Bank indicated for that application. With respect to each application, interested persons may express their views in writing to the address indicated for that application. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

A. **Federal Reserve Bank of Richmond** (Lloyd W. Bostian, Jr., Vice President) 701 East Byrd Street, Richmond, Virginia 23261:

1. *Citizens Bancorp,* Riverdale, Maryland; to acquire 100 percent of the voting shares or assets of Kennedy Bank and Trust Company, Bethesda, Maryland. Comments on this application must be received not later than June 11, 1982.

B. **Federal Reserve Bank of Kansas City** (Thomas M. Hoenig, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198:

1. *Rifle Bank Agency, Inc.,* Rifle, Colorado; to acquire 100 percent of the voting shares of a proposed new bank, The First National Bank in Parachute, Parachute, Colorado. Comments on this application must be received not later than June 11, 1982.

C. **Federal Reserve Bank of St. Louis** (Delmer P. Weisz, Vice President) 411 Locust Street, St. Louis, Missouri 63166:

1. *Union Planters Corporation,* Memphis, Tennessee; to acquire 100 percent of the voting shares or assets of Bank of Eagleville, Eagleville, Tennessee. Comments on this application must be received not later than June 11, 1982.

Board of Governors of the Federal Reserve System, May 12, 1982.

**Dolores S. Smith,**

*Assistant Secretary of the Board.*

[FR Doc. 82-13397 Filed 5-17-82; 8:45 am]

BILLING CODE 6210-01-M

## Bank Holding Companies; Proposed de Novo Nonbank Activities

The bank holding companies listed in this notice have applied, pursuant to section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.4(b)(1) of the Board's Regulation Y (12 CFR 225.4(b)(1)), for permission to engage *de novo* (or continue to engage in an activity earlier commenced *de novo*), directly or indirectly, solely in the activities indicated, which have been determined by the Board of Governors to be closely related to banking.

With respect to each application, interested persons may express their views on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, or unsound banking practices." Any comment on an application that requests a hearing must include a statement of the reasons a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute, summarizing the evidence that would be presented at a hearing, and indicating how the party commenting would be aggrieved by approval of that proposal.

Each application may be inspected at the offices of the Board of Governors or at the Federal Reserve Bank indicated for that application. Comment and requests for hearings should identify clearly the specific application to which they relate, and should be submitted in writing and received by the appropriate Federal Reserve Bank not later than June 11, 1982.

A. **Federal Reserve Bank of San Francisco** (Harry W. Green, Vice President) 400 Sansome Street, San Francisco, California 94120:

1. *Seafirst Corporation,* Seattle, Washington (commerical finance activities; Texas): To engage through Seafirst Commerical Corporation in making or acquiring loans and other extensions of credit including commerical loans secured by a borrower's inventory, accounts receivable, capital equipment or other assets; servicing loans; and leasing personal property. These activities would be conducted through an office in Dallas, Texas, setving the State of Texas.

2. *U.S. Bancorp,* Portland, Oregon (consumer finance; Denver, Colorado): To engage, through its subsidiary, U.S. Bancorp Financial, Inc. ("Bancorp Financial"), doing business as Citizens Finance Company ("Citizens"), in the making, acquiring and servicing of loans and other extensions of credit either secured or unsecured for its own account or for the account of others, including the making of consumer installment loans, purchasing consumer installment and real estate sales finance contracts and evidences of debt and making consumer home equity loans secured by real estate, making industrial loans, and acting as insurance agent with the regard to credit life and disability insurance, solely in connection with extensions of credit by Bancorp Financial. This notification is for the relocation of an existing office at 12131 E. Iliff, Unit D, Aurora, Colorado, to 1776 Lincoln Building, 8th Floor, Lincoln Street, Denver, Colorado. The geographic area to be served would be the Denver SMSA.

Board of Governors of the Federal Reserve System, May 12, 1982.

**Dolores S. Smith,**

*Assistant Secretary of the Board.*

[FR Doc. 82-13399 Filed 5-17-82; 8:45 am]

BILLING CODE 6210-01-M

## Formation of Bank Holding Companies

The companies listed in this notice have applied for the Board's approval under section 3(a)(1) of the Bank Holding Company Act (12 U.S.C. 1842(a)(1) to become bank holding companies by acquiring voting shares and/or assets of a bank. The factors that are considered in acting on the applications are set forth in section 3(c) of the Act (12 U.S.C. 1842(c)).

Each application may be inspected at the offices of the Board of Governors, or the Federal Reserve Bank indicated for that application. With respect to each application, interested persons may express their views in writing to the address indicated for that application. Any comment on an application that requests a hearing must include a statement of why a written presentation would not suffice in lieu of a hearing, identifying specifically any questions of fact that are in dispute and summarizing the evidence that would be presented at a hearing.

A. **Federal Reserve Bank of Atlanta** (Robert E. Heck, Vice President) 104 Marietta Street, NW., Atlanta, Georgia 30303:

1. *First State Corporation,* Waynesboro, Mississippi; to become a bank holding company by acquiring 100 percent of the voting shares of First State Bank, Waynesboro, Mississippi. Comments on this application must be received not later than June 11, 1982.

B. **Federal Reserve Bank of Dallas** (Anthony J. Montelaro, Assistant Vice President) 925 South Akard Street, Dallas, Texas 75222:

1. *Great American Bancshares, Inc.,* Arlington, Texas; to become a bank holding company by acquiring 80 percent or more of the voting shares of

American Bank of Arlington, Arlington, Texas. Comments on this application must be received not later than June 12, 1982.

C. Federal Reserve Bank of San Francisco (Harry W. Green, Vice President) 400 Sansome Street, San Francisco, California 94120:

1. *AmBank Holding Company,* Phoenix, Arizona, to become a bank holding company by acquiring 99.3 percent of the voting shares of American Bank, Phoenix, Arizona. Comments on this application must be received not later than June 12, 1982.

2. *MBC Corp.,* Modesto, California; to become a bank holding company by acquiring 100 percent of the voting shares of Modesto Banking Company, Modesto, California. Comments on this application must be received not later than June 9, 1982.

3. *Professional Bancorp,* Santa Monica, California; to become a bank holding company by acquiring 100 percent of the voting shares of First Professional Bank of Los Angeles, Santa Monica, California. Comments on this application must be received not later than June 9, 1982.

4. *TriCo Bancshares,* Chico, California; to become a bank holding company by acquiring 100 percent of the voting shares of Tri-Counties Bank, Chico, California. Comments on this application must be received not later than June 11, 1982.

C. Secretary, Board of Governors of the Federal Reserve System, Washington, D.C. 20551:

1. *NBC Bancorporation, Inc.,* Newport, Minnesota; to become bank a holding company by acquiring 100 percent of the voting shares of National Bank of Commerce in Mankato, Mankato, Minnesota. Comments on this application must be received not later than June 11, 1982.

2. *Town & Country Bancshares, Inc.,* Newport, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Town and Country Bank-Maplewood, Maplewood, Minnesota. Comments on this application must be received not later than June 11, 1982.

Board of Governors of the Federal Reserve System, May 12, 1982.

**Dolores S. Smith,**

*Assistant Secretary of the Board.*

[FR Doc. 82-13398 Filed 5-17-82; 8:45 am]

BILLING CODE 6210-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

### Consumer Participation; Open Meetings

**AGENCY:** Food and Drug Administration.

**ACTION:** Notice.

**SUMMARY:** The Food and Drug Administration (FDA) is announcing the following consumer exchange meetings: Atlanta District Office, Chaired by John Turner, District Director.

**DATE:** Thursday, May 27, 1982, 10:30 a.m.

**ADDRESS:** Brighton Multipurpose Center, outside Birmingham, Alabama.

**FOR FURTHER INFORMATION CONTACT:** Janice Moton, Consumer Affairs Officer, Food and Drug Administration, 1182 W. Peachtree St. NW., Atlanta, GA 30309, 404-881-7355.

Cincinnati District Office, Chaired by James C. Simmons, District Director.

**DATE:** Wednesday, June 9, 1982, 1 p.m.

**ADDRESS:** Rm. 504, The Federal Bldg., 200 W. Second St., Dayton, OH 45402.

**FOR FURTHER INFORMATION CONTACT:** Ruth E. Weisheit, Consumer Affairs Officer, Food and Drug Administration, Rm. 463, 601 Rockwell Ave., Cleveland, OH 44114, 216-522-4844.

Cincinnati District Office, Chaired by James C. Simmons, District Director.

**DATE:** Thursday, June 10, 1982, 1:30 p.m.

**ADDRESS:** Rm. 5525A, Federal Bldg., 550 Main St., Cincinnati, OH 45202.

**FOR FURTHER INFORMATION CONTACT:** Ruth E. Weisheit, Consumer Affairs Officer, Food and Drug Administration, Rm. 463, 601 Rockwell Ave., Cleveland, OH. 44114, 216-522-4844.

Philadelphia District Office, Chaired by Loren Johnson, District Director.

**DATE:** Wednesday, June 16, 1982, 1 to 3 p.m.

**ADDRESS:** Wm. H. Green, Federal Bldg., Rm. 7306, 6th and Arch Sts., Philadelphia, PA 19106.

**FOR FURTHER INFORMATION CONTACT:** Theresa A. Young, Consumer Affairs Technician, Food and Drug Administration, 2d and Chestnut Sts., Philadelphia, PA 19106, 215-597-0837.

Chicago District Office, Chaired by Mary K. Ellis, District Director.

**DATE:** Tuesday, June 22, 1982, 1:30-3:30 p.m.

**ADDRESS:** Food and Drug Administration, Rm. 1204, 433 W. Van Buren, Chicago, IL 60607.

**FOR FURTHER INFORMATION CONTACT:** Darlene M. Bailey, Consumer Affairs Officer, Food and Drug Administration, 433 W. Van Buren, Chicago, IL 60607, 312-353-7126.

**SUPPLEMENTARY INFORMATION:** The purpose of these meetings is to encourage dialogue between consumers and FDA officials, to identify and set priorities for current and future health concerns, to enhance understanding and exchange information between local consumers and FDA's District Offices, and to contribute to the agency's policymaking decisions on vital issues.

Dated: May 13, 1982.

**William F. Randolph,**

*Acting Associate Commissioner for Regulatory Affairs.*

[FR Doc. 82-13472 Filed 5-17-82; 8:45 am]

BILLING CODE 4160-01-M

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**[Docket Nos. 79N-0339 and 79N-0340; DESI Nos. 8615, 9152, 9188, 50168, and 10210]**

### Certain Ophthalmic Combination Drugs Containing a Steriod and Anti-Infective(s) for Human Use; Drug Efficacy Study Implementation; Amendment

**AGENCY:** Food and Drug Administration (FDA).

**ACTION:** Notice.

**SUMMARY:** This notice amends two previous **Federal Register** notices concerning ophthalmic combination drug products containing a steroid and one or more anti-infective agents. This amendment requires revised labeling which more precisely states the conditions of use for which such drugs are safe and effective. The notice also states the rationale for regarding these drugs as safe and effective.

**DATES:** Amendments or supplements to approved applications (NDA's, ANDA's, or antibiotic forms) due on or before July 19, 1982. Revised labeling must be put into use on or before November 15, 1982.

**ADDRESSES:** Communications in resonse to this notice should be identified with the appropriate DESI number, directed to the attention of the appropriate office named below, and addressed to the Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

Supplements to full new drug applications (identify with NDA number); Division of Anti-Infective Drug Products (HFD-140), Rm. 12B-45, Bureau of Drugs.

Supplements to approved abbreviated new drug applications (identify with ANDA number): Division of Generic Drug Monographs (HFD-530), Bureau of Drugs.

Amendments to approved antibiotic forms (identify with form number): Antibiotic Drug Review Branch (HFD–535), Bureau of Drugs.

Request for opinion of the applicability of this notice to a specific product: Division of Drug Labeling Compliance (HFD–310), Bureau of Drugs.

Requests for a copy of the Health Reserach Group comments and/or FDA's response (identify with Docket Nos.): Dockets Management Branch (HFA–305), Rm. 4–65.

Other communications regarding this notice: Drug Efficacy Study Implementation Project Manager (HFD–501), Bureau of Drugs.

**FOR FURTHER INFORMATION CONTACT:** Douglas I. Ellsworth, Bureau of Drugs (HFD–32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–3650.

**SUPPLEMENTARY INFORMATION:** In two notices published in the **Federal Register** of August 29, 1980 (45 FR 57776 and 45 FR 57780), FDA announced its conclusion that certain ophthalmic combination drugs containing a steroid and one or more anti-infective agents are effective. The notices also set forth a general outline for labeling of the effective products as a condition for marketing and approval.

On December 4, 1980, the Health Research Group (HRG), 2000 P St. NW., Washington, D.C. 20036, wrote to the Commissioner of Food and Drugs concerning the agency's conclusion for this class of combinaton drug products. HRG asked that the decision be reconsidered, alleging that no adequate and well-controlled clinical trials are available to support the effectiveness of all ingredients in these combinations. Copies of HRG's letter and the FDA response have been placed in the docket of these proceedings. Copies are available from the Dockets Management Branch (address given above)

As a result of the HRG letter, the Bureau of Drugs reevaluated the August 29, 1980 notices and the record of this proceeding. Based upon this reevaluation, the Director of the Bureau has concluded (1) that the basic finding stated in those notices that these drug products are safe and effective should be reaffirmed, (2) that the rationale for concluding that these combination products are effective was not stated in the notices and should be stated clearly to avoid further confusion, and (3) that the labeling for these drug products, as described in the 1980 notices, should be revised to state more precisely the conditions of use for which these products are safe and effective.

**Background**

As noted in the August 29, 1980 notices, the ophthalmic steroid/anti-infective combination products covered by these notices were originally classified as possibly effective under the Drug Efficacy Study in a series of notices published in 1971 and 1972. Subsequently, the ophthalmic steroid/anti-infective combination drug products were exempted from the schedule established for completing the study (37 FR 26643). The products were exempted because of their potential effectiveness in the treatment of marginal keratitis secondary to staphylococcus blepharoconjunctivitis, vernal catarrh, and allergic conjunctivitis, and their frequent use postoperatively by ophthalmologists to reduce inflammatory reactions and prevent infection. The exemption was conditioned upon the commitment of manufacturers and distributors to conduct appropriate studies to establish which particular combinations and concentrations are effective for specific indications.

In response to the exemption notice, several manufacturers submitted plans for studies. The agency determined that the studies as planned were inadequate to demonstrate that all active ingredients contributed to the effectiveness of the fixed-combination drug products. Because the sponsors were unable to develop appropriate protocols and because of controversy over the role of thse combination products in ophthalmology, the matter was presented to FDA's Ophthalmic Drugs Advisory Committee at a public meeting held May 8, 1973. Discussion centered on the safety of these products and the design of meaningful studies. The committee concluded that the data available to it were insufficient to make a decision on any of the issues presented and appointed a subcommittee to obtain additional information.

The subcommittee then drafted a proposal for clinical studies. This proposal was sent to affected firms for comment, and on August 6, 1973, the Advisory Committee met in open session to discuss the proposal. In spite of extensive discussion and continued subcommittee deliberations, the Committee was unable to finalize a protocol.

Therefore, the subcommittee proposed that manufacturers and distributors prepare a single document containing all available data pertaining to each indication outlined in the exemption notice. The subcommittee believed that this data search might provide sufficient evidence of effectiveness in lieu of new clinical studies. On November 2, 1973, the full Advisory Committee adopted the proposal, and representatives of the pharmaceutical industry agreed to conduct the joint data search. On September 27, 1974, the industry task force submitted its data, which consisted of published studies (domestic and foreign with translations), unpublished studies, and domestic and foreign adverse reaction surveys.

These data then underwent thorough review by agency staff with input from the Advisory Committee and the Bureau of Drugs' Combination Drugs Committee, an internal staff committee established to evaluate products with respect to the agency's combination drug policy. The Advisory Committee reviewed the data and made recommendations at public meetings held November 4, 1974, November 3, 1975, August 2, 1976, and November 7, 1977, and the Combination Drugs Committee considered the matter at its meetings of August 27, 1977 and January 18, 1978.

With respect to safety, these reviews showed that the data from adverse reaction surveys and unpublished studies reveal a low number of adverse reactions, particularly when judged against the extensive use of these products. Adverse reaction rates, as estimated by the number of adverse reaction reports divided by the distribution of these drugs, were, if anything, lower for steroid/anti-infective combination products than for single-ingredient anti-infective ophthalmological products, possibly because of a therapeutic or prophylactic effect of the steroid component on sensitivity reactions to the anti-infective component. The safety data supported the conclusions that the most serious adverse reactions resulting from the combinations are those related to the steroid component (e.g., increase in intraocular pressure, scleral perforation, and exacerbation of certain infections), that these reactions are most commonly associated with long-term use, that they are best prevented by periodic examinations during treatment, and that the only incremental risk added by the anti-infective component is occasional sensitivity reactions.

With respect to effectiveness, the Advisory Committee recommended that the agency review five potential indications for these combination products: marginal keratitis secondary to *Staphylococcus aureus*, staphylococcal blepharoconjunctivitis, phylctenular keratoconjunctivitis, vernal catarrh, and allergic conjunctivitis

secondary to infection. These indications and their supporting evidence resulted from the Advisory Committee review and industry data search conducted in 1973 and 1974. The Bureau of Drugs' staff and its Combination Drugs Committee reviewed the submitted information and concluded that there were not at least two adequate and well-controlled trials demonstrating that both the steroid component and the anti-infective component contribute to the effectiveness of the combination in these conditions. There are studies showing that the combination is more effective than the antibiotic component alone. However, of two studies designed to show whether the combination is more effective than the steroid component alone, one failed to show any such advantage and the other suggested only a marginal advantage of the combination, namely in providing more rapid resolution of symptoms. The Combination Drugs Committee thus concluded that the effectiveness of these combinations in the above conditions can be attributed to the steroid component alone.

The Combination Drugs Committee also noted, however, that these steroid-responsive conditions can be accompanied by bacterial infection or risk of infection, that bacterial overgrowth in the eye is catastrophic although fortunately rare, that animal studies using techniques to make the eye more susceptible to infection demonstrate that steroids can reduce resistance to infection and anti-infective agents can counteract this effect, and that it is medically reasonable to include both ingredients in a single preparation so that one drug does not wash out the other. For these reasons, the Committee recommended that steroid/anti-infective combination products should remain available under appropriate labeling and that the requirement for adequate and well-controlled trials to demonstrate the contribution of each ingredient should be waived.

This recommendation was discussed with the Advisory Committee at its meeting of November 7, 1977. The Advisory Committee believed that the specific indications noted previously were appropriate although it acknowledged that adequate and well-controlled trials showing that the anti-infective component contributes to the therapeutic effect in the routine management of these conditions are not available. After considerable discussion the Advisory Committee recommended a more general labeling indication for consideration by the Combination Drugs Committee: "For use in the treatment of ocular inflammation where concurrent use of anti-infectives and steroids are indicated."

This indication was considered by the Bureau staff and by the Combination Drugs Committee on January 18, 1978. The conclusion was announced in the 1980 notices that ophthalmic steroid/anti-infective combination products are considered safe and effective under a slightly modified general indication as follows: "A steroid/anti-infective combination is indicated in ocular inflammation when concurrent use of an antimicrobial is judged necessary." The notices also set forth class labeling that contained specific contraindications, warnings, and precautions. It is this decision and labeling statement that was challenged by the Health Research Group.

### Decision and Rationale

The Director of the Bureau of Drugs has reviewed the record of this proceeding. On the basis of this review, the Director reaffirms that these combination products are safe and effective if properly labeled and that they meet the agency's policy with respect to combination drug products. The rationale for this conclusion was not published in the 1980 notices, nor is it adequately and completely articulated in the minutes of agency or advisory committee meetings. Furthermore, the Director finds that the labeling indication published in the 1980 notices is vague and does not adequately describe the conditions for which these products are considered safe and effective. Accordingly, the Director is announcing the rationale that supports the conclusion that these combination products are safe and effective and is also announcing a requirement for revised labeling.

The Director concludes that the available data indicate that the effectiveness of combination steroid/anti-infective products in ophthalmologic inflammatory conditions is, in most cases, due to the steroid component. If the anti-infective component contributes to the effectiveness of the combination in the treatment of these conditions, e.g., staphylococcal blepharoconjunctivitis or marginal keratitis, this alleged effect is sufficiently small or unpredictable that it has proven difficult to document in adequate and well-controlled trials. In some cases, however, steroid-responsive inflammatory conditions in the eye may be accompanied by frank bacterial infection or the risk of such infection. In such cases the safety of treatment with the steroid is increased by concomitant administration of an effective anti-infective agent to either treat or prevent accompanying bacterial infection.

The addition of an anti-infective component to an ophthalmic steroid preparation is thus done to enhance the safety of the product when bacterial infection is present or possible. Such addition of an ingredient to enhance the safety of a product is permitted under FDA's combination policy (21 CFR 300.50(a)(1)).

While clinical trials to demonstrate the contribution of each active ingredient are ordinarily required for combination drugs, clinical trials to prove the increased safety of the combination in the presence of bacterial infection are not feasible for both technical and ethical reasons. An extremely large trial would be necessary to determine the incidence of eye infections in patients undergoing treatment with steroids because such infections are relatively rare. It would also be ethically impossible to obtain a valid control group of patients with eye infections treated with steroids alone because of the risk of serious damage to the eye. For these reasons clincial trials to prove the increased safety of the combination in such circumstances are not deemed feasible or necessary.

### Labeling

While the labeling indication in the 1980 notices implied this rationale, the Director concludes that modification of that indication is necessary to reflect more accurately the appropriate indication. Furthermore, because the anti-infective component is added to treat or prevent specific infections, the labeling should state those common eye pathogens that are generally sensitive to the particular anti-infective drug and those that are not. Accordingly, a requirement for revised labeling for combination steroid/anti-infective drug products is included in this notice.

Manufacturers and distributors of the following drug products, which were evaluated as effective in the 1980 notices, are required to revise their labeling in accordance with this amendment (antibiotic form numbers are stated as NDA numbers below):

### DESI 8615

1. NDA 50–169; Cortisporin Ophthalmic Suspension containing neomycin sulfate, polymyxin B sulfate, and hydrocortisone; Burroughs Wellcome & Co., Inc., 3030 Cornwallis Rd., Research Triangle Park, NC 22709.

2. NDA 50–202; Chloromycetin Hydrocortisone Ophthalmic Suspension containing chloramphenicol and

hydrocortisone acetate; Parke-Davis, Division of Warner-Lambert Co., Morris Plains, NJ 07950.

3. NDA 50–272; Achromycin Ophthalmic Ointment with Hydrocortisone containing tetracycline hydrochloride and hydrocortisone; Lederle Laboratories Division, American Cyanamid Co., Pearl River, NY 10965.

4. NDA 50–362; Metimyd with Neomycin Ophthalmic Ointment containing neomycin sulfate, prednisolone acetate, and sodium suflacetamide; Schering Corp., Galloping Hill Rd., Kenilworth, NJ 07033.

5. NDA 60–310; Neomycin Sulfate with Hydrocortisone Acetate Ophthalmic Ointment; Biocraft Laboratories, Inc., 92 Route 42, East Patterson, NJ 07407.

6. NDA 60–452; Isopto P-H-N Ophthalmic Suspension containing neomycin sulfate, polymyxin B sulfate, and hydrocortisone acetate; Alcon Laboratories, Inc., 2601 South Freeway, Fort Worth, TX 76134.

7. NDA 60–464; Neo-Deltef Eye Drops containing neomycin sulfate and prednisolone; The Upjohn Co., 7171 Portage Rd. Kalamazoo, MI 49001.

8. NDA 60–788; Di-Hydrin Ophthalmic Solution containing neomycin sulfate, polymyxin B sulfate, and hydrocortisone; Broemmel Pharmaceuticals, 1235 Sutter St., San Francisco, CA 94109.

9. NDA 60–790; Neo-Polycin HC Ophthalmic Ointment containing bacitracin, neomycin sulfate, polymyxin B sulfate, and hydrocortisone acetate; Pitman-Moore Co., Division of the Dow Chemical Co., 55 West Sheffield, Englewood, NJ 07631.

10. NDA 60–925; Florinef-S Ophthalmic Ointment and Suspension containing neomycin sulfate, gramicidin, and fludrocortisone acetate; E. R. Squibb & Sons, Inc., P.O. Box 4000, Princeton, NJ 08540.

11. NDA 61–045; Neosone Ophthalmic Ointment containing neomycin sulfate and cortisone acetate; The Upjohn Co.

12. NDA 61–075; Hydrocortisone-Neomycin Ophthalmic Ointment containing neomycin sulfate and hydrocortisone acetate; Day-Baldwin, Inc., 1460 Chestnut Ave., Hillside, NJ 07205.

13. NDA 61–107; Neomycin Sulfate with Hydrocortisone Acetate Ophthalmic Ointment; Kasco Laboratories, Inc., Cantiaque Rd., P.O. Box 73, Hicksville, NY 11802.

**DESI 9152**

1. NDA 61–016; Terra-Cortril Ophthalmic Suspension containing oxytetracycline hydrochloride and hydrocortisone acetate; Pfizer Laboratories, Division of Charles Pfizer & Co., Inc., 235 East 42d St., New York, NY 10017.

**DESI 9188**

1. NDA 50–322; Neo-Decadron Ophthalmic Solution containing dexamethasone sodium phosphate and neomycin sulfate; Merck Sharp & Dohme, Division Merck & Co., Inc., West Point, PA 19486.

2. NDA 50–324; Neo-Decadron Ophthalmic Ointment containing dexamethasone sodium phosphate and neomycin sulfate; Merck Sharp & Dohme.

3. NDA 50–378; Neo-Hydeltrasol Ophthalmic Ointment containing prednisolone sodium phosphate and neomycin sulfate; Merck Sharp & Dohme.

4. NDA 50–379; Neo-Hydeltrasol Ophthalmic Solution containing prednisolone sodium phosphate and neomycin; Merck Sharp & Dohme.

5. NDA 60–188; Cor-Oticin Ophthalmic Suspension containing hydrocortisone acetate and neomycin sulfate; Maurry Biological Co., Inc., 6109 South Western Ave., Los Angeles, CA 90047.

6. NDA 60–442; Neo-Aristocort Ophthalmic Ointment containing triamcinolone acetonide and neomycin sulfate; Lederle Laboratories.

7. NDA 60–610; Neo-Cortef Ophthalmic Ointment containing hydrocortisone acetate and neomycin sulfate; The Upjohn Co.

8. NDA 60–612; Neo-Cortef Eye Drops containing hydrocortisone acetate and neomycin sulfate; The Upjohn Co.

9. NDA 60–645; Neo-Medrol Ophthalmic Ointment containing methylprednisolone and neomycin sulfate; The Upjohn Co.

10. NDA 61–037; Neo-Delta-Cortef Ophthalmic Ointment containing hydrocortisone acetate and neomycin sulfate; The Upjohn Co.

11. NDA 61–039; Neo-Delta-Cortef Ophthalmic Ointment containing prednisolone acetate and neomycin sulfate; The Upjohn Co.

**DESI 10210**

1. NDA 10–210; Metimyd Ophthalmic Susension, each milliliter containing 5 mg prednisolone acetate and 100 mg sodium sulfacetamide; Schering Corp.

The following drug products were listed in one notice (45 FR 57776) as lacking substantial evidence of effectiveness because they contained less than 10,000 units of polymyxin B. The notice provided that if the manufacturers reformulated these products to contain no less than 10,000 units of polymyxin B, the products would be regarded as effective when labeled as described in thie notice. These products have since been reformulated and the reformulated products are regarded as effective. Manuafacturers and distributors of these reformulated products are also required to revise their labeling in accordance with this amendment.

**DESI 8615**

1. NDA 50–081; Predmycin-P Liquifilm Ophthalmic Suspension containing neomycin sulfate, polymyxin B sulfate, and prednisolone acetate; Allergan Pharmaceuticals, 1000 South Grand Ave., Santa Ana, CA 92705.

2. NDA 50–201; Ophthocort Ophthalmic Ointment containing chloramphenicol, polymyxin B sulfate, and hydrocortisone acetate; Parke-Davis.

3. NDA 60–731; Bacitracin-Polymyxin-Neomycin with Hydrocortisone Ophthalmic Ointment containing zinc bacitracin, neomycin sulfate, polymyxin B sulfate, and hydrocortisone acetate; Kasco Laboratories, Inc.

**DESI 50168**

1. NDA 50–416; Cortisporin Ointment containing polymyxin B sulfate, zinc bacitracin, neomycin sulfate, and hydrocortisone; Burroughs Wellcome & Co.

Manufacturers or distributors of the following drug products, which were not listed in either of the 1980 notices, are also required to revise their labeling in accordance with this amendment:

1. NDA 50–023; Maxitrol Suspension containing neomycin sulfate, ploymyxin B sulfate, and dexamethasone, Alcon Laboratories, Inc.

2. NDA 50–065; Maxitrol Ointment containing neomycin sulfate, ploymyxin B sulfate, and dexamethasone; Alcon Laboratories, Inc.

3. NDA 61–188; Chloroptic-P Ointment containing chloramphenicol and prednisolone; Allergan Pharmaceuticals.

4. ANDA 87–547; Isoptocetapred containing prednisolone acetate and sodium sulfacetamide; Alcon Laboratories, Inc.

All Steroid/anti-infective combination drug products recommended for ophthalmic use that are the subject of an approved new drug application or are eligible for certification or release, whether or not listed above, are subject to this notice. All manufacturers and distributors are required to revise the labeling of such products in accordance with this amendment.

## CONDITIONS FOR MARKETING AND APPROVAL

The conditions for marketing and approval stated in the August 29, 1980 notices are amended to read as follows:

### I. Steroid/Anti-Infective Combination Drug Products for Ophthalmic Use Containing One or More Antibiotic Components

(Subject to Section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357)) (see 45 FR 57776) (DESI Nos. 8615, 9152, 9188, and 50168).

Batches of such drugs with labeling not in accordance with the "Labeling Requirement" listed below will no longer be acceptable for certification or release after November 15, 1982.

### II. The Combination of 5 mg Prednisolone Acetate and 100 mg Sodium Sulfacetamide for Ophthalmic Use

(Subject to Section 505 of the Act (21 U.S.C. 355)) (see 45 FR 57780) (DESI 10210).

Such drugs are regarded as new drugs (21 U.S.C. 321(p)). Supplemental new drug applications are required to revise the labeling in and to update previously approved applications providing for such drugs. An approved new drug application is a requirement for marketing such drug products.

In addition to the product specifically named above, this notice applies to any drug product that is not the subject of an approved new drug application and is identical to the product named above. It may also be applicable, under 21 CFR 310.6, to a similar or related drug product that is not the subject of an approved new drug application. It is the responsibility of every drug manufacturer or distributor to review this notice to determine whether it covers any drug product that the person manufactures or distributes. Such person may request an opinion of the applicability of this notice to a specific drug product by writing to the Division of Drug Labeling Compliance (address given above).

A. *Effectiveness classification.* The Food and Drug Administration has reviewed all available evidence and concludes that the drug product is effective for the indication described in the "Labeling Requirement" listed below.

B. *Conditions for approval and marketing.* The Food and Drug Administration is prepared to approve abbreviated new drug applications and abbreviated supplements to previously approved new drug applications under conditions described herein.

1. *Form of drug.* The drug product contains 5 mg prednisolone acetate and 100 mg sodium sulfacetamide, and is in a form suitable for ophthalmic administration.

2. *Labeling conditions.* a. The label bears the statement, "Caution: Federal law prohibits dispensing without prescription."

b. The drug is labeled to comply with all requirements of the act and regulations, and the labeling bears adequate information for safe and effective use of the drug. The labeling conforms to the "Labeling Requirement" listed below.

3. *Marketing status.* a. Marketing of such drug products that are now the subject of an approved or effective new drug application may be continued provided that, on or before July 19, 1982, the holder of the application has submitted (i) a supplement for revised labeling as needed to be in accord with the labeling conditions described in this notice, and complete container labeling if current container labeling has not been submitted, and (ii) a supplement to provide updating information with respect to items 6 (components), 7 (composition), and 8 (methods, facilities, and controls) of new drug application form FD–356H (21 CFR 314.1(c)) to the extent required in abbreviated application (21 CFR 314.1(f)), if such information has not previously been submitted. Revised labeling in accord with the labeling conditions described in this notice must be put into use on or before November 15, 1982. The revised labeling may be put into use before approval of the supplemental new drug applications, as provided for in 21 CFR 314.8(d) and (e).

b. Approval of an abbreviated new drug application (21 CFR 314.1(f)) must be obtained before marketing such products. An abbreviated application will be acceptable only for the formulation containing 5 mg prednisolone acetate and 100 mg sodium sulfacetamide. Any new combination requires a full new drug application and appropriate studies. Marketing before approval of a new drug application will subject such products, and those persons who caused the products to be marketed, to regulatory action.

### III. Labeling Requirement

A. The indication is as follows:

For steroid-responsive inflammatory ocular conditions for which a corticosteroid is indicated and where bacterial infection or a risk of bacterial ocular infection exists.

Ocular steroids are indicated in inflammatory conditions of the palpebral and bulbar conjunctiva, cornea, and anterior segment of the globe where the inherent risk of steroid use in certain infective conjunctivitides is accepted to obtain a diminution in edema and inflammation. They are also indicated in chronic anterior uveitis and corneal injury from chemical radiation, thermal burns, or penetration of foreign bodies.

The use of a combination drug with an anti-infective component is indicated where the risk of infection is high or where there is an expectation that potentially dangerous numbers of bacteria will be present in the eye.

The particular anti-infective drug(s) in this product is [are] active against the following common bacterial eye pathogens: [*insert appropriate organisms from the list in the Appendix to this notice*].

The product does not provide adequate coverage against: [*insert appropriate organisms from the list in the Appendix to this notice*].

B. If the combination contains neomycin sulfate, the WARNINGS section of the labeling must contain an appropriate statement concerning the potential of neomycin sulfate to cause cutaneous sensitization.

(Federal Food, Drug, and Cosmetic Act (secs. 502, 505, 507, 52 Stat. 1050–1053, 59 Stat. 463 as amended (21 U.S.C. 352, 355, 357) and under the authority delegated to the Director of the Bureau of Drugs (21 CFR 5.70)))

Dated: May 5, 1982.

**J. Richard Crout,**

*Director, Bureau of Drugs.*

### Appendix

Organisms To Be Included in Labeling, as Appropriate.

(If a manufacturer wishes to claim that its particular anti-infective component is active against an organism(s) not covered in the following list, the manufacturer must submit current susceptibility data supporting the inclusion of the additional organism(s) and receive FDA approval before including the organism(s) in the labeling).

I. Neomycin sulfate

Active against:

*Staphylococcus aureus*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species

Does not provide adequate coverage against:

*Pseudomonas aeruginosa*
*Serratia marcescens*
Streptococci, including *Streptococcus pneumoniae*

II. Neomycin sulfate, polymyxin B sulfate.

Active against:

*Staphylococcus aureus*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
*Pseudomonas aeruginosa*

Does not provide adequate coverage against:
*Serratia marcescens*
Streptococci, including *Streptococcus pneumoniae*
III. Neomycin sulfate, sodium sulfacetamide.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumoniae*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
Does not provide adequate coverage against:
*Pseudomonas aeruginosa*
*Serratia marcescens*
IV. Neomycin sulfate, bacitracin, polymyxin B sulfate.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumoniae*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
*Pseudomonas aeruginosa*
Does not provide adequate coverage against:
*Serratia marcescens*
V. Neomycin sulfate, gramicidin.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumoniae*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
Does not provide adequate coverage against:
*Pseudomonas aeruginosa*
*Serratia marcescens*
VI. Tetracycline hydrochloride/oxytetracycline hydrochloride.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumoniae*
*Escherichia coli*
*Neisseria* species
Does not provide adequate coverage against:
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Pseudomonas aeruginosa*
*Serratia marcescens*
VII. Chloramphenicol.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumoniae*
*Escherichia coli*
*Haemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
Does not provide adequate coverage against:
*Pseudomonas aeruginosa*
*Serratia marcescens*
VIII. Sodium sulfacetamide
Active against:
*Staphylococcus aureus*
Streptococci including *Streptococcus pneumonia*
*Escherichia coli*
Does not provide adequate coverage against:
*Hemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
*Serratia marcescens*
IX. Chloramphenicol, Polymyxin B.
Active against:
*Staphylococcus aureus*
Streptococci, including *Streptococcus pneumonia*
*Escherichia coli*
*Hemophilus influenzae*
*Klebsiella/Enterobacter* species
*Neisseria* species
*Pseudomonas aeruginosa*
Does not provide adequate coverage against:
*Serratia marcescens*

[FR Doc. 82-13279 Filed 5-14-82; 8:45 am]
BILLING CODE 4160-01-M

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**[Docket No. 81N-0395; DESI Nos. 5914 and 6514]**

## Four Prescription Products Offered for Relief of Symptons of Cough, Cold, or Allergy, Withdrawal of Approval

**AGENCY:** Food and Drug Administration.

**ACTION:** Notice.

**SUMMARY:** This notice withdraws approval of the new drug applications for four prescription products offered for relief of symptoms of cough, cold, or allergy. Approval is withdrawn because these combination drug products lack substantial evidence of effectiveness for their labeled indications. The products contain certain expectorants that have not been shown to be effective.

**EFFECTIVE DATE:** May 28, 1982.

**ADDRESS:** Requests for opinion of the applicability of this notice to a specific product should be identified with Docket No. 81N-0395 and directed to the Division of Drug Labeling Compliance (HFD-310), Bureau of Drugs, Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857.

**FOR FURTHER INFORMATION CONTACT:** David T. Read, Bureau of Drugs (HFD-32), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-3650.

**SUPPLEMENTARY INFORMATION:** In a notice published in the **Federal Register** of March 19, 1982 (47 FR 11973), the Director of the Bureau of Drugs revoked the temporary exemption for the drug products described below which permitted these products to remain on the market beyond the time limit scheduled for the implementation of the Drug Efficacy Study. The March 19, 1982 notice also reclassified the products to lacking substantial evidence of effectiveness and offered an opportunity for a hearing on a proposal to withdraw approval of the new drug applications for the products. No data was submitted to show the effectiveness of these combination products, and they contain certain expectorants that have not been shown to be effective.

Because neither the holders of the following new drug applications nor any other interested person requested a hearing, approval of these applications is now being withdrawn. Failure to file an appearance and request a hearing constitutes a waiver of the opportunity for a hearing.

1. NDA 5-914: As it pertains to PBZ Expectorant with Ephedrine (formerly "Pyribenzamine Expectorant with Ephedrine"), containing tripelennamine citrate, ephedrine sulfate, and ammonium chloride; Ciba Pharmaceutical Co., 556 Morris Ave. Summit, NJ 07901 (DESI 5914).

2. NDA 6-303: As it pertains to Thephorin Expectorant containing phenindamine tartrate, codeine phosphate, papaverine hydrochloride, ammonium chloride, and chloroform; Roche Laboratories, Division Hoffmann-La Roche, Inc., Roche Park, 340 Kingsland St. Nutley, NJ 07110 (DESI 6514).

3. NDA 6-529: Coditrate Syrup containing hydrocodone bitartrate and potassium guaiacolsulfonate; The Central Pharmaceutical Co., 116-128 E. Third St., Seymour, IN 47274 (DESI 6514). Other components listed in a February 9, 1973 **Federal Register** notice (38 FR 4006) are no longer contained as active ingredients. Chloroform has been removed from the formulation.

4. NDA 9-248: Clistin Expectorant containing carbinoxamine maleate, ammonium chloride, sodium citrate, potassium guaiacolsulfonate, and benzyl alcohol; McNeil Laboratories, Inc., 500 Office Center Dr., Ft. Washington, PA 19034 (DESI 6514). Chloroform has been removed from the formulation.

Any drug product that is identical, related, or similar to the drug products named above and is not the subject of an approved new drug application is covered by the new drug applications reviewed and is subject to this notice (21 CFR 310.6). This notice is not applicable to over-the-counter products (21 CFR 310.6(f)). Any person who wishes to determine whether a specific product is covered by this notice should write to the Division of Drug Labeling Compliance (address given above).

Based on new information on the drug products and the evidence available when the applications were approved, the Director of the Bureau of Drugs, under the Federal Food, Drug, and Cosmetic Act (sec. 505, 52 Stat. 1052-1053, as amended (21 U.S.C. 355)), and under the authority delegated to him (21 CFR 5.82), finds that there is a lack of substantial evidence that the drug

products will have the effect they purport or are represented to have under the conditions of use prescribed, recommended, or suggested in their labeling.

Therefore, pursuant to the foregoing finding, approval of those parts of new drug applications 5–914 and 6–303 pertaining to the drug products named above, and approval of new drug applications 6–529 and 9–248, and all amendments and supplements thereto are withdrawn effective May 28, 1982.

Shipment in interstate commerce of the above products, or any identical, related, or similar product that is not the subject of an approved new drug application will then be unlawful.

Dated: May 7, 1982.

**J. Richard Crout,**

*Director, Bureau of Drugs.*

[FR Doc. 82–13281 Filed 5–17–82; 8:45 am]

BILLING CODE 4160–01–M

## Public Health Service
## Centers for Disease Control

### Occupational Safety and Health Field Research Projects

**AGENCY:** National Institute for Occupational Safety and Health (NIOSH) Centers for Disease Control, PHS, HHS.

**ACTION:** Notice of Research Projects to be Initiated.

**SUMMARY:** This notice announces the field research projects involving the collection of information from the public which are planned for initiation by NIOSH during Fiscal Year 1982.

This notice does not constitute a request for proposal.

**FOR FURTHER INFORMATION CONTACT:** Mr. Melvin L. Myers, Director, Office of Program Planning and Evaluation; NIOSH, 1600 Clifton Road, NE., Atlanta, Georgia; Telephone: (404) 329–3158 or FTS 236–3158.

**SUPPLEMENTARY INFORMATION:** The NIOSH field research projects described below will be conducted under the authority of Section 20 of the Occupational Safety and Health Act (29 U.S.C. 669) and in accordance with the provisions of Part 85a of Title 42, Code of Federal Regulations. The protocol for the conduct of these types of projects has been reviewed by the Office of Management and Budget and determined to be in compliance with the Paperwork Reduction Act. The list of the projects includes the title and (a) purpose of each project, (b) the frequency with which the information will be collected, (c) an indication of types of workers from whom information will be sought, (d) the estimated number of responses and (e) the estimated burden in reporting hours.

1. *Case-Control Study of Painters and Workers in the Allied Trades.*

(a) The purpose of this study is to determine the possible adverse health effects of occupational exposure to paints, coatings and associated substances, (b) single time, (c) construction and maintenance painters in the allied trades, (d) 1000 respondents, (e) 20 minute person hour burden per response.

2. *Reproductive History Study of Women Exposed to Polychlorinated Biphenyls in the Workplace.*

(a) The purpose of this study is to determine the possible adverse health effects in women occupationally exposed to polychlorinated biphenyls, (b) single time, (c) women working with polychlorinated biphenyls, (d) 800 respondents, (e) 30 minute person burden per response.

Six weeks before beginning field work on any of the projects, NIOSH will publish a separate notice in the **Federal Register** giving specific information on the project.

Dated: May 10, 1982.

**J. Donald Millar,**

*Director, National Institute for Occupational Safety and Health.*

[FR Doc. 82–13390 Filed 5–17–82; 8:45 am]

BILLING CODE 4160–19–M

## National Institutes of Health

### Sickle Cell Disease Advisory Committee; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the Sickle Cell Disease Advisory Committee, National Heart, Lung, and Blood Institute, June 25, 1982. The meeting will be held at the Ramada Inn, Bethesda, 8400 Wisconsin Avenue, Bethesda, Maryland 20814, 5th Floor, Skyview Room. The entire meeting will be open to the public from 9:00 a.m. to 5:00 p.m., to discuss recommendations on the implementation and evaluation of the Sickle Cell Disease Program. Attendance by the public will be limited to space available.

Ms. Terry Bellicha, Chief, Public Inquiries and Reports Branch, NHLBI, NIH, Building 31, Room 4A21, (301) 496–4236, will provide summaries of the meeting and roster of the Committee members. Clarice D. Reid, M.D., Chief, Sickle Cell Disease Branch, DBDR, NHLBI, Federal Building, Room 504, (301) 496–6931, will furnish substantive program information.

Dated: May 11, 1982.

**Betty J. Beveridge,**

*NIH Committee Management Officer.*

(Catalog of Federal Domestic Assistance Program No. 13.839, Blood Diseases and Resources Research, National Institutes of Health)

NIH programs are not covered by OMB Circular A–95 because they fit the description of "programs not considered appropriate" in Section 8(b)(4) and (5) of that Circular.

[FR Doc. 82–13384 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

## Public Health Service

### National Toxicology Program Board of Scientific Counselors; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the National Toxicology Program Board of Scientific Counselors, U.S. Public Health Service, in the Conference Center, Building 101, South Campus, National Institute of Environmental Health Sciences, Research Triangle Park, North Carolina, on June 16, 1982.

The meeting will be open to the public from 9:00 a.m. until adjournment for the purpose of completing peer reviews on draft technical reports of toxicology and carcinogenesis bioassays from the National Toxicology Program (NTP). Reviews will be conducted by the Technical Reports Review Subcommittee of the Board in conjunction with an *ad hoc* panel of experts.

Draft technical reports on the following chemicals (and routes of administration) will be peer reviewed June 16.

| Chemical | Route |
|---|---|
| L-Ascorbic Acid | Feed. |
| Benzyl Acetate | Gavage. |
| Diallyphthalate | Gavage. |
| Melamine | Feed. |
| 4,4'-Methylenedianiline dihydrochloride | Water. |
| Trichloroethylene | Gavage. |

The Executive Secretary, Dr. Larry G. Hart, Office of the Director, National Toxicology Program, P.O. Box 12233, Research Triangle Park, North Carolina 27709, telephone (919) 541–3971, FTS 629–3971, will furnish summary minutes of the reviews, rosters of subcommittee and panel members, and other meeting information.

Dated: May 5, 1982.

**David P. Rall,**

*Director, National Toxicology Program.*

[FR Doc. 82–13382 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

### National Toxicology Program; Availability of Cancer Bioassay Reports of C.I. Acid Red 14, Guar Gum, and Tara Gum

The HHS' National Toxicology Program today announces the availability of Technical Reports on carcinogenesis bioassays of C.I. Acid Red 14, a high volume dye; guar gum, a widely-used food additive; and tara gum, a plant product. Under the conditions of these bioassays none of these chemicals were carcinogenic

C.I. Acid Red 14 did not cause cancer in rats or mice of either sex in this 103-week feeding study. C.I. Acid Red 14 is used to color fabrics (such as nylon, silk, and wool) and other materials, including acetate, aluminum, cellulose, leather, paper and wood. C.I. Acid Red 14 was used in cosmetics and externally-applied drugs until 1966 when approval was withdrawn. An estimated 51,000 pounds were produced in 1978 in the United States.

Guar gum, which is used in foods, cosmetics, pharmaceuticals, and manufactured products, did not cause cancer in rats or mice of either sex in this 103-week feeding study. Guar gum is used in beverages; breakfast cereals; cheese, ice cream, and other milk and imitation dairy products; pie fillings; processed meats and vegetables; salad dressings; sauces; and soups. It is also used in the manufacture of agricultural sprays, caulking materials, dyes, enamels, inks, textiles, and porcelain.

A second plant product, tara gum, did not cause cancer in rats or mice of either sex during a 104-week feeding study.

Copies of these Technical Reports—*Carcinogenesis Bioassay of C.I. Acid Red 14* (T.R. 220), *Carcinogenesis Bioassay of Guar Gum* (T.R. 229), and *Carcinogenesis Bioassay of Tara Gum* (T.R. 224)—are available without charge by writing to the NTP Public Information Office, MD B2–04, P.O. Box 12233, Research Triangle Park, NC 27709. Telephone: (919) 541–3991, FTS 629–3991.

Dated: May 4, 1982.

**David P. Rall,**

*Director, National Toxicology Program.*

[FR Doc. 82–13383 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

## National Institutes of Health

### National Advisory Allergy and Infectious Diseases Council; Meeting

Notice is hereby given of changes in the meeting dates and times of the "closed" and "open" portions of the National Advisory Allergy and Infectious Diseases Council, National Institute of Allergy and Infectious Diseases, which was published in the Federal Register on April 26, 1982 (47 FR 17865).

The open session which was previously scheduled for Friday, May 28, 1982, from 8:30 a.m. to 9:30 a.m. has been rescheduled for Thursday, May 27, 1982. The meeting in Conference Room 10, Building 31C, Bethesda, Maryland, 20205, will be open to the public from approximately 8:30 a.m. until 9:30 a.m. and again from 2:00 p.m. until adjournment on Thursday, May 27, 1982.

The closed portions of the meeting will be from 9:30 a.m. until approximately 12:30 p.m. on Thursday, May 27, 1982, and from 8:30 a.m. until adjournment on Friday, May 28. In addition, because of a heavy workload, a closed session of the Allergy and Immunology Subcommittee has been scheduled for Wednesday, May 26, 1982, from 7:00 p.m. to 10:00 p.m. at the Holiday Inn, 8100 Wisconsin Avenue, Bethesda, Maryland 20814.

Dated: May 11, 1982.

NIH programs are not covered by OMB Circular A–95 because they fit the description of "programs not considered appropriate" in Sections 8(b) (4) and (5) of that Circular.

**Betty J. Beveridge,**

*Committee Management Officer, National Institutes of Health.*

(Catalog of Federal Domestic Assistance Program Nos. 13.855, Pharmacological Sciences; 13.856, Mirobiology and Infectious Diseases Research, National Institutes of Health)

[FR Doc. 82–13386 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

### President's Cancer Panel; Meeting

Pursuant to Pub. L. 92–463, notice is hereby given of the meeting of the President's Cancer Panel, June 22, 1982, UCLA Jonsson Comprehensive Cancer Center, Louis Factor Health Sciences Building, A–Floor Auditorium, Los Angeles, California 90024. The entire meeting will be open to the public from 9:00 a.m. to adjournment. Agenda items include reports by the Director, National Cancer Institute, and the Chairman, President's Cancer Panel; and discussions to obtain information on grants supported by the National Cancer Institute from scientists of the universities in the Los Angeles area. Attendance by the public will be limited to space available.

Mrs. Winifred Lumsden, Committee Management Officer, National Cancer Institute, Building 31, Room 10A06, National Institutes of Health, Bethesda, Maryland 20205 (301/496–5708) will provide summaries of the meeting and rosters of Panel members, upon request.

Dr. Elliott Stonehill, Executive Secretary, President's Cancer Panel, National Cancer Institute, Building 31, Room 11A35, National Institutes of Health, Bethesda, Maryland 20205 (301/496–1148) will furnish substantive program information.

Dated: May 11, 1982.

**Betty J. Beveridge,**

*Committee Management Officer, National Institutes of Health.*

[FR Doc. 82–13387 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

### Workshop on Implications of Recent Beta-Blocker Trials for Post-MI Patients

Notice is hereby given of the Workshop on Implications of Recent Beta-Blocker Trials for Post-MI Patients, sponsored by the National Heart, Lung, and Blood Institute, May 25–26, 1982, at the National Institutes of Health, Building 31, C Wing, Conference Room 10, 9000 Rockville Pike, Bethesda, Maryland 20205.

This workshop will be open to the public on May 25, 1982, from 8:30 a.m. to 4:50 p.m., and on May 26, 1982, from 8:30 a.m. to 3:30 p.m. Attendance will be limited to space available.

The workshop is meeting to review and document the state of knowledge regarding the effects of beta-blocking agents in post-MI patients; generate recommendation for future research on beta-blocking agents, including additional analysis of existing data, further basic science research, and new clinical trials; and address questions regarding the implications of recent beta-blocker trials for public health, clinical practice, and scientific research.

For detailed program information and agenda conctact: Mr. Larry Blaser, Chief of the Research Reporting Section, National Heart, Lung, and Blood Institute, Building 31, Room 4A21A, National Institutes of Health, Bethesda, Maryland 20205, phone (301) 496–4236.

Dated: May 11, 1982.

**Betty J. Beveridge,**

*Committee Management Officer, National Institutes of Health.*

[FR Doc. 82–13385 Filed 5–17–82; 8:45 am]

BILLING CODE 4140–01–M

## DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

### Office of the Assistant Secretary for Housing—Federal Housing Commissioner

[Docket No. N-82-1128]

### Withdrawal of Prior Notice Regarding Real Estate Settlement Procedures Act

The Secretary of HUD has various duties and functions under the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.) ("RESPA"), including the authority to prescribe such rules and regulations, to make such interpretations, and to grant such reasonable exemptions for classes of transactions, as may be necessary to achieve the purposes of the Act (RESPA, section 19, 12 U.S.C. 2617).

Section 8 of RESPA (12 U.S.C. 2607) prohibits the giving or acceptance by any person of "any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of real estate settlement service involving a federally related mortgage loan shall be referred to any person."

Under interpretive regulations issued by the Secretary in 1976, "an agreement or understanding for the referral of settlement business need not be verbalized but may be established by a practice, pattern or course of conduct pursuant to which the payor and recipient of the thing of value understand that the payment is in return for the referral of business. A payment that is made repeatedly and *is connected in any way with the volume or value of the business referred to by the payor* is presumptively pursuant to an agreement or understanding" (24 CFR 3500.14(c) (emphasis added)).

Appendix B to 24 CFR Part 3500 sets forth "illustrations" to "provide additional guidance" regarding the application of Section 8. Example 10 hypothesizes the performance of title services for a broker who is a part owner of the title agent, along with other brokers. The title agent pays "annual dividends to its owners * * * based on the relative amount of business each of its owners refers to" the title agent. The illustration held that because the "dividends" were based on the amount of business referred, a violation of Section 8 was present. The illustration stated further that if the amount of stock or other ownership interest held by the broker varied in proportion to the amount of business referred or expected to be referred, or if the title agent retained funds for subsequent distribution to the broker "where such funds were generally in proportion to" the amount of business referred, Section 8 violations also would be present.

On July 24, 1980, the Department published a notice in the Federal Register (45 FR 49360), labelled an "interpretive rule," which set forth an interpretation of Section 8 which appeared to expand its coverage beyond that indicated by the Department's prior regulations (which were not amended). The notice stated that it was being issued in reponse to "numerous inquiries * * * received from the public regarding the application of Section 8 * * * to practices relating to a form of corporate organization known as 'controlled business,' " described as "an arrangement whereby a person in a position to refer settlement business (typically a real estate broker, mortgage lender, attorney, etc.) has an ownership interest in a settlement service provider, refers business to that provider and shares in the profits of that provider through direct or indirect distribution."

The notice went on to state that the Department "has concluded that the existence of the 'controlled business' relationship *may be* a violation of Section 8" (emphasis added) because the Department "interprets this section as applying, notwithstanding (1) that the person referring the business has an ownership interest in the provider of the service, or (2) that the payment of the 'fee, kickback or thing of value' is characterized as a return on capital invested."

On its face, the above "interpretation" stated in the July 1980 notice is fully consistent with the Department's existing regulations cited above, since both factors cited in the "interpretation" were present also in Example 10 of Appendix B. The "interpretation" pointedly did not address the critical element which in fact would have indicated an extension of earlier interpretations, viz., whether, or under what circumstances, a return on capital invested which did *not* vary in proportion to volume or value of business referred could be found indicative of the presence of an "agreement or understanding * * * that business * * * shall be referred to" the firm in which capital is invested. While remaining silent on this essential point, and notwithstanding its plain indefiniteness, the notice appeared to be intended to indicate, and in fact was generally perceived as indicating, that the mere fact of a controlled business relationship between two firms, and the referral of settlement services business by one to the other, constituted a Section 8 violation. (This perception of the notice's intent was not diminished by the notice's statement that it was "not to be construed as marking the initiation of a change in policy.")

The Department's notice has received severe criticism, principally because of its intended effect of deterring economic arrangements through reference to a criminal statute without stating any more clearly than has been stated previously whether, or why, the statute was applicable. Other economic interests, particularly title insurers, who favor the prohibition of controlled business relationships have supported the deterring effect of the "interpretive rule" even while acknowledging that Congress did not consciously address the desirability of controlled business relationships in settlement services industries when enacting Section 8 or subsequently.

Because the Department's notice published July 24, 1980, neither stated clearly whether or in what respects it conveyed an "interpretation" different from that previously conveyed nor why it should be perceived as doing so, and because of the unfortunate confusion it has created regarding coverage of a criminal statute, the Department hereby gives notice that its prior notice denominated as an "interpretive rule" is not to be considered authoritative and is withdrawn.

Dated: May 12, 1982.

**Philip Abrams,**

*General Deputy Assistant Secretary for Housing—Deputy Federal Housing Commissioner.*

[FR Doc. 82-13712 Filed 5-17-82; 11:22 am]

BILLING CODE 4210-27-M

## DEPARTMENT OF THE INTERIOR

### Policy for Use of the Federal Portion of the Land and Water Conservation Fund

*Correction*

In FR Doc. 82-12393 appearing on page 19784 in the issue of Friday, May 7, 1982; on page 19785, first column, sixth line from the bottom, "objections" should read "objectives".

BILLING CODE 1505-01-M

## Bureau of Land Management

### Proposed Livestock Grazing Management for the Sierra Planning Unit, Folsom Resource Area, Bakersfield District, Calif,. Availability of Draft Environmental Impact Statement

Pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969, the Bureau of Land Management has prepared a draft environmental impact statment concerning a proposed grazing management program for the Sierra Planning Unit in parts of ten counties in central California. The proposed action allocates 10,216 AUMs to livestock and 5,877 AUMs to deer. The alternatives analyzed include no domestic livestock grazing, no action (continue with 9,674 AUMs to livestock), livestock maximization (16,093 AUMs to livestock), and watershed/wildlife maximization (5,111 AUMs to livestock).

Comments on this draft environmental impact statement are being solicited from public agencies and interested individuals and entities. The Bureau of Land Management invities written comments on the statement to be submitted by July 5, 1982 to the Area Manager, Folsom Resource Area, Bureau of Land Management, 63 Natoma Street, Folsom, CA 95630.

A limited number of copies of this document are available upon request at the Folsom Resource Area (916) 985–4474 and the California State Office, Bureau of Land Management, 2800 Cottage Way, Sacramento, California 95825, Telephone (916) 484–4541.

In addition to the above offices, copies of this EIS are available for public reading and review at:

Division of Rangeland Management, Bureau of Land Management, Premier Building, Room 909–H, 1725 I Street, NW., Washington, D.C. 20006.

Bakersfield District Office, Bureau of Land Management, Federal Building, Room 304, 800 Truxton Street, Bakersfield, CA 93301.

Dated: May 7, 1982.

**Ronald D. Hofman,**

*Associate State Director.*

[FR Doc. 82–13392 Filed 5–17–82; 8:45 am]

BILLING CODE 4310–84–M

## Bureau Forms Submitted for Review

**AGENCY:** Bureau of Land Management, Interior.

**ACTION:** Notice of Forms Being Submitted to Office of Management and Budget for Review.

**SUMMARY:** The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed information collection requirement and related forms and explanatory material may be obtained by contacting the Bureau's clearance officer at the number listed below. Comments and suggestions should be made directly to the Bureau clearance officer and the Office of Management and Budget reviewing official, Mr. William T. Adams, at (202) 395–7340.

Title: 43 CFR Part 2200, Exchanges, General.

Bureau Form Number: 1004–0056.

Frequency: Intermittent.

Description of Respondents: General Public, state and local governments, other Federal agencies.

Annual Responses: 115.

Annual Burden Hours: 345.

Bureau clearance officer (alternate): Linda Gibbs (202) 653–8853.

**James M. Parker,**

*Acting Director.*

May 13, 1982.

[FR Doc. 82–13404 Filed 5–17–82; 8:45 am]

BILLING CODE 4310–84–M

## National Park Service

### Cape Cod National Seashore Advisory Commission; Meeting

Notice is hereby given in accordance with the Federal Advisory Committee Act (Pub. L. 92–463, 86 Stat. 770 (5 U.S.C. App. 1 § 10), that a meeting of the Cape Code National Seashore Advisory Commission will be held at 1:30 p.m. on Friday, June 4, 1982, at the Headquarters Building, Cape Code National Seashore.

The Commission was established pursuant to Pub. L. 91–383 to meet and consult with the Secretary of the Interior on general policies and specific matters relating to the development of Cape Cod National Seashore.

The members of the Advisory Commission are as follows:

Dexter M. Keezer, Truro
Francis R. King, Wellfleet
Nathan Malchman, Provincetown
Barbara S. Mayo, Provincetown
Joshua A. Nickerson, Chatham
David F. Ryder, Chatham
Sherrill B. Smith, Jr., Orleans
Clifford H. White, Wrentham
Elizabeth F. Worthing, Eastham
Paul F. Nace, Jr., Woods Hole

At the meeting at 1:30 p.m. the Commission will consider the following: Renewal of Certificates of Suspension of Condemnation for commercial properties and the Comprehensive Design for Coast Guard and Nauset Light Beaches.

The afternoon meeting will be preceded by a field trip at 10:00 a.m. to the various commerical properties currently operating under certificates of suspension of condemnation. Interested members of the public may join in the field trip, which will begin at Park Headquarters, but must provide their own transportation.

The meeting is open to the public. It is expected that 15 persons will be able to attend the afternoon session in addition to the Commission members.

Interested persons may make oral/written presentations to the Commission or file written statements. Such requests should be made to the official listed below at least seven days prior to the meeting.

Further information concerning this meeting may be obtained from Herbert Olsen, Superintendent, Cape Cod National Seashore, South Wellfleet, MA 02663, telephone (617) 349–3785. Minutes of the meeting will be available for public information and copying four weeks after the meeting at the Office of the Superintendent, Cape Cod National Seashore, South Wellfleet, Massachusetts.

**Herbert Olsen,**

*Superintendent, Cape Cod National Seashore.*

May 4, 1982.

[FR Doc. 82–13408 Filed 5–17–82; 8:45 am]

BILLING CODE 4310–70–M

### National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before May 12, 1982. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, U.S. Department of the Interior, Washington, D.C. 20243. Written comments should be submitted by June 2, 1982.

**Carol D. Shull,**

*Acting Keeper of the National Register.*

**MASSACHUSETTS**

*Essex County*

Andover, *Bradlee School (Town of Andover Multiple Resource Area)* 147 Andover St.

[FR Doc. 82–13409 Filed 5–17–82; 8:45 am]

BILLING CODE 4310–70–M

## National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before May 7, 1982. Pursuant to § 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, U.S. Department of the Interior, Washington, D.C. 20243. Written comments should be submitted by June 2, 1982.

Carol D. Shull,

*Acting Keeper of the National Register.*

**ARIZONA**

*Pima County*

Tucson, *Cannon, Dr. William Austin, House (Prof. Andrew Ellicott Douglass Residence)*, 1189 E. Speedway
Tucson, *Smith, Professor George E. P., House*, 1195 E. Speedway

**COLORADO**

*Boulder County*

Boulder, *Williams, Wilbur, House*, 1434 Baseline Rd.

*Denver County*

Denver, *Chappell, Delos Allen, House (5DV320)*, 1555 Race St.
Denver, *Dow-Rosenzweig House*, 1129 E. 17th Ave.
Denver, *St. Joseph's Roman Catholic Church of Denver*, 600 Galapago
Denver, *Stearns House*, 1030 Logan St.
Denver, *Union Warehouse*, 1514 17th St.
Denver, *West Colfax Historic District*, 1389, 1390, 1435, 1444, and 1471 Stuart St.
Denver, *Zang Barn and Stable-Rocky Mountain Hotel*, 2263 and 2301 7th St.

*El Paso County*

Colorado Springs, *City Hall of Colorado City*, 2902 W. Colorado Ave.
Colorado Springs, *St. Mary's Catholic Church*, 26 W. Kiowa St.

*Logan County*

Sterling, *First United Presbyterian Church (First Presbyterian Church)*, 130 S. 4th St.
Sterling, *I and M Building*, 223 Main St.
Sterling, *St. Anthony's Roman Catholic Church*, 329 S. 3rd St.
Sterling, *Union Pacific Depot*, 210 N. Front St.

*Mesa County*

Clifton, *Clifton Community Center and Church*, F and Main St.

*Montrose County*

Montrose, *Denver and Rio Grande Depot*, 20 N. Rio Grande Ave.
Montrose, *Montrose City Hall*, 433 S. 1st St.

*Morgan County*

Brush, *All Saints Church of Eben Ezer*, 120 Hospital Rd.

*Pueblo County*

Pueblo, *Galligan House*, 501 Colorado Ave.
Pueblo, *Gast Mansion*, 1801 Greenwood St.

**CONNECTICUT**

*Fairfield County*

Bridgeport, *Division Street Historic District*, Roughly bounded by State St., Iranistan, Black Rock and West Aves.

**DELAWARE**

*Kent County*

Milford vicinity, *Archeological Site No. 7K-F-4 and 23.*

**FLORIDA**

*Pinellas County*

Bay Pines, *Bay Pines Site (8Pi64)*, VA Medical Center

**IDAHO**

*Bannock County*

Pocatello, *Pocatello Historic District*, Roughly bounded by RR tracks, W. Fremont, W. Bonneville and Garfield Sts.

**ILLINOIS**

*Adams County*

Quincy, *Newcomb, Richard F., House*, 1601 Maine St.

*Coles County*

Oakland, *Rutherford, Dr. Hiram, House and Office*, 14 S. Pike St.

*Cook County*

Brookfield, *Grossdale Station*, 8820½ Brookfield Ave.
Chicago Heights, *Bloom Township High School*, 10th St., Dixie Hwy. and Chicago Heights St.
Chicago, *Railway Exchange Building*, 80 E. Jackson Blvd. and 224 S. Michigan Ave.
Chicago, *Warner, Seth, House*, 631 N. Central Ave.

*DuPage County*

West Chicago vicinity, *McAuley School District No. 27*, Roosevelt Rd.

*Jersey County*

Chautauqua, *New Piasa Chautauqua Historic District*, Off McAdams Pkwy.

*Kane County*

Aurora, *Hotel Aurora*, 2 N. Stolp Ave.

*Kankakee County*

Kankakee, *Swannell, Charles E., House*, 901 S. Chicago

*Lake County*

Libertyville, *Lewis Lloyd, House*, 153 Little St. Mary's Rd.

*McHenry County*

McHenry, *Count's House*, 3803 Waukegan

*Monroe County*

Waterloo, *Moore, Capt. James Farmstead*, S. Church St.

*Randolph County*

Sparta, *Sparta Historic District*, S. St. Louis, W. 3rd and S. James Sts.

*Rock Island County*

Rock Island, *Rock Island Lines Passenger Station*, 3029 5th Ave.

*Sangamon County*

Springfield, *Boult, H. P., House*, 1123 S. 2nd St.

*Whiteside County*

Tampico, *Main Street Historic District*, S. Main St.

**KENTUCKY**

*Fayette County*

Lexington vicinity, *McCann, Benjamin, House (Castlelawn)*, Old Richmond Pike
Lexington vicinity, *McCann, Neal, House*, 5364 Toods Rd.

**MASSACHUSETTS**

*Bristol County*

New Bedford, *Clark's Point Light (Lighthouses of Massachusetts TR)*, Wharf Rd.

**MISSOURI**

*Howard County*

Franklin vicinity, *Cedar Grove*, W of Franklin

**NEW HAMPSHIRE**

*Grafton County*

Grafton, *Ruggles Mine*, Off U.S. 4

**NEW JERSEY**

*Camden County*

Collingswood, *Collingswood Theatre*, 843 Haddon Ave.

*Monmouth County*

Allentown, *Allentown Historic District*, N. and S. Main Sts.

*Monmouth County*

Red Bank, *Reckless, Anthony, Estate*, 164 Broad St.

**NEW YORK**

*Bronx County*

Bronx, *House at 175 Belden Street*

*Bronx County*

Bronx, *Park Plaza Apartments*, 1005 Jerome Ave.

*Broome County*

Windsor, *Houtchkiss, Jedediah, House*, 10 Chestnut St.

*Chenango County*

South Otselic, *Newton Homestead*, Ridge Rd.

*Columbia County*

Valatie, *Wild's Mill Complex*, U.S. 9 and NY 203

*Delaware County*

Delhi, *Murray Hill*, Murray Hill Rd.

*Dutchess County*

Dover Plains, *Tabor-Wing House*, NY 22 and Cemetery Rd.

*Kings County*

Brooklyn, *68th Police Precinct Station House and Stable,* 4302 4th Ave.
Brooklyn, *Cronyn, William B., House,* 271 9th St.
Brooklyn, *Gage and Tollner Restaurant,* 372 Fulton St.

*Montgomery County*

Nelliston, *Ehle House Site (Site No. A057-48-0001)*

*New York County*

New York, *Baker, George F., Jr. and Sr. Residences,* 67, 69, and 75 E. 93rd St.
New York, *Church Missions House,* 281 Park Ave., S.
New York, *Houses at 146—156 East 89th Street*
New York, *Houses at 26, 28, and 30 Jones Street*
New York, *Knox Building,* 452 5th Ave.
New York, *Lamb's Club,* 128 W. 44th St.
New York, *Lanier, James F. D., Residence,* 123 E. 35th.
New York, *New York Presbyterian Church,* 151 W. 128th St.

*Onondaga County*

Elbridge, *Elbridge Hydraulic Industry Archeological District (A067-49-0001-DO1)*

*Richmond County*

Staten Island, *Brighton Heights Reformed Church,* 320 St. Mark's Pl.

*Ulster County*

Bruynswick vicinity, *Reformed Church of Shawangunk Complex,* Hoagerburgh Rd.
Gardiner vicinity, *Tuthilltown Gristmill,* Albany Post Rd.

*Westchester County*

Rye City, *Kanapp, Timothy, House and Milton Cemetery,* 265 Rye Beach Ave. and Milton Rd.
Tarrytown, *Foster Memorial A.M.E. Zion Church,* 90 Wildey St.

[FR Doc. 82-13410 Filed 5-17-82; 8:45 am]
BILLING CODE 4310-70-M

## INTERSTATE COMMERCE COMMISSION

### Long-and-Short-Haul Application for Relief (Formerly Fourth Section Application)

May 13, 1982.

This application for long-and-short-haul relief has been filed with the I.C.C.

Protests are due at the I.C.C. within 15 days from the date of publication of the notice.

No. 43965, Southwestern Freight Bureau, Agent (No. B-156), carload rates on cottonseed hulls between stations in Southwestern Territory, including Mississippi River Crossings Memphis, TN and South; also between points in Southwestern Territory, on the one hand, and stations in Illinois and Western Trunk Line Territories, on the other hand, and only for account of the SP and/or SSW, in Supplement 254 to its tariff ICC SWFB 4450, effective June 6, 1982. Grounds for relief—Rate Relationships.

By the Commission.

**Agatha L. Mergenovich,**

*Secretary.*

[FR Doc. 82-13371 Filed 5-17-82; 8:45 am]
BILLING CODE 7035-01-M

### Motor Carriers; Finance Applications; Decision Notice

As indicated by the findings below, the Commission has approved the following applications filed under 49 U.S.C. 10924, 10926, 10931 and 10932.

*We find:*

Each transaction is exempt from section 11343 (formerly section 5) of the Interstate Commerce Act, and complies with the appropriate transfer rules.

This decision is neither a major Federal action significantly affecting the quality of the human environment nor a major regulatory action under the Energy Policy and Conservation Act of 1975.

Petitions seeking reconsideration must be filed within 20 days from the date of this publication. Replies must be filed within 20 days after the final date for filing petitions for reconsiderations; any interested person may file and serve a reply upon the parties to the proceeding. Petitions which do not comply with the relevant transfer rules at 49 CFR 1132.4 may be rejected.

If petitions for reconsideration are not timely filed, and applicants satisfy the conditions, if any, which have been imposed, the application is granted and they will receive an effective notice. The notice will indicate that consummation of the transfer will be presumed to occur on the 20th day following service of the notice, unless either applicant has advised the Commission that the transfer will not be consummated or that an extension of time for consummation is needed. The notice will also recite the compliance requirements which must be met before the transferee may commence operations.

Applicants must comply with any conditions set forth in the following decision-notices within 30 days after publication, or within any approved extension period. Otherwise, the decision-notice shall have no further effect.

It is ordered:

The following applications are approved, subject to the conditions stated in the publication, and further subject to the administrative requirements state in the effective notice to be issued hereafter.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

MC-FC-79534. By decision of May 4, 1982, issued under 49 U.S.C. 10931 or 10932 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to ATS Transport, Inc. of Certificate of Registration No. MC-99038 (Sub-No. 1 issued June 16, 1965, to Olson Express, INC. evidensing a right to engage in transportation in interstate commerce transporting property from and to Lorain, OH; also household goods, office furniture and fixtures to and from any point in Lorain County, OH, corresponding in scope to Ohio Certificate No. 3367-I dated April 7, 1958 issued by Public Utilities Commission of Ohio subject to the following conditions: a copy of State Order approving the transfer of the corresponding State rights must be furnished when it is available. Applicant's representative is: John L. Alden, 1396 W. Fifth Ave., Columbus, OH 43212.

**Note.**—A directly related application seeking a conversion of the Certificate of Registration in MC-99038 (Sub-No. 1) into a Certificate of Public Convenience and Necessity has been filed in MC-153051 (Sub-No. 1), published in this same **Federal Register** issue.

MC-FC-79692. By decision of May 13, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to AFFILIATED VAN LINES, INC. of Lawton, OK, of Certificate and Permit Nos. MC-141364 (Sub-Nos. 5 and 6) issued to OFFILIATED VAN LINERS; INC., of Lawton, OK, which has recently changed its name to AFFILIATED TRANSPORTATION SYSTEMS, INC., the authority to be transferred authorizes the transportation of (1) *household goods,* as defined by the Commission, between points in AL, AZ, AR, CA, CO, CT, DE, FL, GA, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NH, NJ, NY, NC, OH, OK, PA, RI, SC, TN, TX, VT, VA, WV, DC, WY, and MN; (2) *textile mill products,* between points in the U.S., under continuing contract(s) with Haggar Company, of Dallas, TX; and (3) *new furniture, mirrors, and furniture parts,* crated, (a) between Oklahoma City, OK, Trumann, AR, Toccoa, GA, and Selma, AL, (b) from Oklahoma City, OK, and Trumann, AR, to points in NE, CO, NM, KS, OK, TX, MN, IA, MO, AR, WI, IL, CA, AZ, ND, and SD, (c) from Toccoa, GA, Selma, Al, and Trumann, AR, to points in ME, NH, VT, MA, CT, and RI, and (d) from Trumann, AR, to points in NC, LA, MS, MI, IN, KY, TN, AL, VA, FL,

GA, MD, NJ, and DE. Representative: Charles J. Kimball, 665 Capitol Life Center, Denver, CO 80203.

Note.—Transferee is not a carrier but is affiliated with the transferor.

MC–FC–79724. By decision of May 4, 1982, issued under 49 U.S.C. 10926, 10931 or 10932 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to L.A.S.V. Transportation, Ltd., of Los Angeles, CA, of Certificate No. MC–99972 (Sub-No. 3) issued October 31, 1966, and Certificates of Registration Nos. MC–99972 (Sub-No. 3) issued October 31, 1966, and Certificates of Registration Nos. MC–99972 (Sub-No. 2) issued April 30, 1964, and MC–99972 (Sub-No. 4) issued October 31, 1966, to 20th Century Trucking Company, of Los Angeles, CA, corresponding in scope to state certificate No. 61192 dated December 13, 1960, and No. 61815 dated April 11, 1961, issued by the Public Utilities Commission of the State of California, authorizing the transportation in Sub-No. 2 of general *commodities* with named exceptions between all points and places within Los Angeles and Los Angeles Basin Territory, between all points and places within the San Diego Territory and between Los Angeles and Los Angeles Basin Territory, on the one hand, and the San Diego Territory on the other hand, including all points and places on, along and within 5 miles laterally of U.S. Highways Nos. 101 and 101 Alternate in Sub-No. 3; *general commodities* with baned exceptions, between points in the Los Angeles, CA, Commercial Zone, on the one hand, and, on the other, steamship docks and piers at Los Angeles and Long Beach Harbors, CA, in line haul service, and in Sub-No. 4 *general commodities* with named exceptions, between all points and places within the Los Angeles Basin Area, between all points in said Los Angeles Basin Area, on the one hand, and, on the other, the City of Santa Barbara, between all points in said Los Angeles Basin Area, on the one hand, and, on the other, all points in the San Diego Territory, and between the Los Angeles Basin area, on the one hand, and, on the other, all points on U.S. Highway 101 and U.S. Highway 101–A between the city of Santa Barbara and the San Diego Territory, inclusive, including all points laterally within five miles of said highways subject to the following conditions: transferee shall file the following with this Commission's Office of Proceedings (either prior to or concurrently with the consummation of this transfer): (i) a certified copy of the State certificate as reissued to transferee, or—if the State Commission does not reissue the certificate—a certified copy of the State order approving the transfer of the underlying intrastate rights; and (ii) a written notice confirming the date of consummation of that intrastate transaction. Representative: James J. Keller, 1625 W. Olympic Blvd., Suite 810, Los Angeles, CA 90015, phone (213) 388–0489.

Note.—TA lease is not sought. Transferee is not a carrier.

MC–FC–79761. By decision of May 10, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to BIG BEAR SERVICES, INC., Waterloo, Ontario, Canada, of Cetificate No. MC–146559 (Sub-No.2F) and Permit No. MC–149379, issued to LARAMEE LEASING & TRUCKING LIMITED, also of Waterloo, Ontario, Canada, which authorize the transportation of (1) *glass*, from the facilities of LOF Glass, Inc., and LOF Co. at or near Laurinburg, NC, and Toledo, OH, to ports of entry on the international boundary line between the U.S. and Canada; and (2) *lumber and lumber products*, between ports of entry on the international boundary line between the U.S. and Canada, on the one hand, and, on the other, points in the U.S. (except AK and HI), under continuing contract(s) with Sinclair Lumber Company, of Laurinburg, NC. Representative: John C. Scherbarth, 30200 Telegraph Road, Suite 467, Birmingham, MI 48010, (313) 644–4433.

Note.—TA has not been filed. Transferee is not a carrier, but is affiliated with transferor.

MC–FC–79763. By decision of May 4, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to DAN BROWN TRUCKING, INC., of Greybull, WY, of Certificate Nos. MC–107452 (Sub-No.14) MC–107452 (Sub-No. 15X) issued August 5, 1981, and September 30, 1981, respectively, to R. D. BROWN d.b.a. DAN BROWN TRUCKING of Greybull, WY, authorizing the transporation, over irregular routes, of *coal; salt; sand, cement, barite, bentonite, salt, drilling mud and fertilizer; drilling mud and energy development products; farm products and materials, equipment, and supplies; clay, concrete, glass or stone products; mercer commodities and equipment, materials and supplies; mercer commodities, cement, chemicals and related products, materials, equipment and supplies*, generally between points in central and western United States.

MC–FC–79770. By decision of May 3, 1982, issued under 49 U.S.C. 10926 and transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to LOMA, INC., d.b.a. ABE LIMO–BUS SERVICE, of Allentown, PA, of Cetificate No. MC–150253 (Sub-No.1) issued to FRED MATTERN, d.b.a. ABE LIMO–BUS SERVICE, of Allentown, PA, authorizing *passengers and their baggage*, in the same vehicle with passengers, in door to door non-scheduled service, in special and charter operations, between points in Lehigh and Northampton Counties, PA, on the one hand, and, on the other, (1) New York, NY, restricted to passengers having an immediate prior or subsequent movement by air or water, and (2) Atlantic City, NJ, restricted to no more than eleven (11) passengers in any one vehicle. Representative: Francis W. Day, 323 Maple Ave., Southampton, PA 18966.

Note.—TA lease is not sought. Transferee is not a carrier.

MC–FC–79771. By decision of May 4, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 U.S.C. 1132, Review Board Number 3 approved the transfer to Red Carpet Executive Charter Service, Inc., of Pensacola, FL, of Certificate No. MC–158106 issued to Red Carpet Charter Service, Inc., of Pensacola, FL, authorizing the transportation of passengers and their baggage in the same vehicle with passengers, in round-trip, charter operations, beginning and ending at points in Escambia County, FL, and extending to points in Alabama, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and the District of Columbia. Representative: K. Edward Wolcott, 235 Peachtree Street NE., Suite 1200, Atlanta, GA 30303.

Note.—Transferee holds no authority from this Commission. TA has not been sought.

MC–FC–79772. By decision of May 4, 1982, issued under 49 U.S.C. 1093 and the transfer rules at 49 CFR 1132, Review Board Number 3 approved the transfer to Gary D. Kilgore, d.b.a. G&J Freight, at Clovis, CA of Certificate of Registration No. MC–121620 issued to G&J Freight, Inc., of Fresno, CA, authorizing: named commodities, including iron and steel, roofing and building materials, waste paper, lumber, brick, petroleum and machinery, between described points in CA, as corresponding to Certificate No. MC–52512 issued by the California Public Utilities Commission. Condition: This proceeding may not be consummated until the Commission receives a copy of the State order approving transfer of the underlying intrastate rights. Representative: Michael S. Rubin, 256

Montgomery St., Fifth Fl., San Francisco, CA 94104.

Note.—TA lease is not sought. Transferee is not a carrier.

MC–FC–79774. By decision of May 4, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 U.S.C. 1132, Review Board Number 3 approved the transfer to LEO R. FALARDEAU, d.b.a. E.M. HEFLER MOVERS, of Lowell, MA, of Certificate No. MC–42218, issued to RALPH B. WILKINS, d.b.a. E.M. HEFLER, also of Lowell, MA, which authorizes the transportation of *household goods*, between Lowell, MA, on the one hand, and, on the other, points in Connecticut, Maine, New Hampshire, Rhode Island, and Vermont. Representative: Charles B. Mead, 173 Chelmsford Street, Chelmsford, MA 01824.

Note.—Transferee is not a carrier.

MC–FC–79775. By decision of May 5, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 U.S.C. 1132, Review Board Number 3 approved the transfer to T&L LEASE SERVICE, INC. of Certificate No. MC–151855 (Sub-No. 1) issued to AUTOMOTIVE EXPRESS, INC. authorizing the transportation of (1) *automotive parts*, between points in AR, IL, IA, LA, MO, NC, NY, OH, OK, PA, and TN on the one hand, and, on the other, points in TX, and (2) *petroleum products*, between points in Jefferson County, TX, on the one hand, and, on the other, points in IA, IL, IN, MO, NC, OH, OK and TN. Representative: Jeannie Fryar, 427 East South Street, Alvin, TX 77511.

Note.—(1) Transferee is a carrier. (2) An application for temporary authority has been filed. (3) A directly related conversion application has been filed in MC–96875 and published in the same Federal Register.

MC–FC–79779. By decision of 5/4/82 issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR Part 1132, Review Board Number 3 approved the transfer to HORWITH TRUCKS, INC. of Permit No. MC–125499 (Sub-No. 4)X isued to LV COMPANY, INC. authorizing the transportation of (1) *building materials* and *supplies*, between points in the United States, under continuing contract(s) with Eastern Industries of Wescoesville, PA and (2) *commodities in bulk*, between points in the United States under continuing contract(s), with the Bylite Corporation of Wilkes-Barre, PA. Representative: Francis W. Doyle, 323 Maple Avenue, Southampton, PA.

Note.—Transferee is a carrier.

MC–FC–797844. By decision of May 6, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR Part 1132, Review Board Number 3 approved the transfer to *Nancy Transportation, Inc.* of Certificate No. MC–47686 issued February 21, 1941, to *Kimball's Motor Dispatch, Inc.* authorizing the transportation of general commodities, except those of unusual value, commodities in bulk, dangerous explosives, and those requiring special equipment between Williamstown, MA and New York, NY over a described regular route serving all intermediate points and Sharon, Tacanic, Lakeville and Salisbur, CT, Millerton, Amenice and Millbrock, NY, and those in Berkshire County, MA and points in NY and NJ within 20 miles of New York, NY, as off-route points; and (2) worsted yarn over irregular-routes from Pittsfield, MA to Philadelphia, PA. Representative is: L. William Higley, Esq., Roberts & Heneghan, 1015 Locust, Suite 700, St. Louis, MO 63101.

MC–FC–79788. By decision of May 6, 1982, issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR Part 1132, Review Board Number 3 approved the transfer to CONTINENTAL CARRIERS, INC., of Millbrook, AL, of Certificate No. MC–143458 (Sub-No. 2), issued to L.T. MADDOX, d.b.a. PRONTO TRUCKIN', also of Millbrook, AL, which authorizes the transportation of *animal hides*, from points in GA, TN, SC, FL, and AL, to points in CA, restricted to the transportation of traffic originating at the named origins. Representative: L. N. Hubbard, P.O. Box 892, 2911 Main Street, Millbrook, AL 36054.

Note.—Transferee is not a carrier, but is affiliated with Continental Express, Inc., a property broker under MC–152986.

MC–FC–79791. By decision of May 6, 1982 issued under 49 U.S.C. 10926 and the transfer rules at 49 CFR Part 1132, Review Board Number 3 approved the transfer to COBALT CORPORATION (To Be Renamed East Texas Motor Freight Lines, Inc.) of Certificate No. MC–41432 and all issued to subs thereunder EAST TEXAS MOTOR FREIGHT LINES, INC. authorizing the transportation of specified and general commodities between points in the United States. Representative: David G. MacDonald, 1000 Sixteenth St. NW., Suite 502, Solar Bldg., Washington, DC 20036.TA Lease is not sought. Transferee is not a carrier.

## Decision-Notice

The following applications, filed on or after July 3, 1980, seek approval to consolidate, purchase, merge, lease operating rights and properties, or acquire control of motor carriers pursuant to 49 U.S.C. 11343 or 11344. Also, applications directly related to these motor finance applications (such as conversions, gateway eliminations, and securities issuances) may be involved.

The applications are governed by Special Rule 240 of the Commission's Rules of Practice (49 CFR 1100.240). See Ex Parte 55 (Sub-No. 44), *Rules Governing Applications Filed by Motor Carriers Under 49 U.S.C 11344 and 11349*, 363 I.C.C. 740 (1981). These rules provide among other things, that opposition to the granting of an application must be filed with the Commission in the form of verified statements within 45 days after the date of notice of filing of the application is published in the Federal Register. Failure seasonably to oppose will be construed as a waiver of opposition and participation in the proceeding. If the protest includes a request for oral hearing, the request shall meet the requirements of Rule 242 of the special rules and shall include the certification required.

Persons wishing to oppose an application must follow the rules under 49 CFR 1100.241. 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, in accordance with 49 CFR 1100.241(d).

*Amendments to the request for authority will not be accepted after the date of this publication.* However, the Commission may modify the operating authority involved in the application to conform to the Commission's policy of simplifying grants of operating authority.

*We find*, with the exception of those applications involving impediments (e.g., jurisdicational problems, unresolved fitness questions, questions involving possible unlawful control, or improper divisions of operating rights) that each applicant has demonstrated, in accordance with the applicable provisions of 49 U.S.C. 11301, 11302, 11343, 11344, and 11349, and with the Commission's rules and regulations, that the proposed transaction should be authorized as stated below. Except where specifically noted this decision is neither a major Federal action significantly affecting the quality of the human environment nor does it appear to qualify as a major regulatory action under the Energy Policy and Conservation Act of 1975.

In the absence of legally sufficient protests as to the finance application *or* to any application directly related thereto filed within 45 days of publication (or, if the application later becomes unopposed), appropriate authority will be issued to each applicant (unless the application

involves impediments) upon compliance with certain requirements which will be set forth in a notification of effectiveness of this decision-notice. To the extent that the authority sought below may duplicate an applicant's existing authority, the duplication shall not be construed as conferring more than a single operating right.

Applicant(s) must comply with all conditions set forth in the grant or grants of authority within the time period specified in the notice of effectiveness of this decision-notice, or the application of a non-complying applicant shall stand denied.

Dated: May 11, 1982.

By the Commission, Review Board Number 3, Members Krock, Joyce and Dowell.

MC 153051 (Sub-1), filed December 31, 1981. Applicant ATS TRANSPORT, INC.—CONVERSION, 34439 Mills Rd., North Ridgeville, OH 44039. Representative: John L. Alden, 1396 W. Fifth Ave., Columbus, OH 43212. To operate as a *common carrier*, over irregular routes, transporting: general commodities (except Class A and B explosives) between Lorain, OH, on the one hand, and, on the other, points in OH.

Note.—The purpose of this application is to convert the Certificate of Registration in MC-99038 (Sub-No. 1) into a Certificate of Public Convenience and Necessity. This proceeding is a matter directly related to a proceeding pursuant to 49 U.S.C. 10931 or 10932 in MC-FC-79534 published in this same Federal Register issue.

Agatha L. Mergenovich,

*Secretary.*

[FR Doc. 82-13372 Filed 5-17-82; 8:45 am]

BILLING CODE 7035-01-M

## Motor Carriers; Permanent Authority Decisions; Decision-Notice

The following applications, filed on or after February 9, 1981, are governed by Special Rule of the Commission's Rules of Practice, see 49 CFR 1100.251. Special Rule 251 was published in the Federal Register of December 31, 1980, at 45 FR 86771. 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 1100.252. A copy of any application, including all supporting evidence, can be obtained from applicant's representative upon request and payment to applicant's representative 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 a public need for the proposed operations and that it 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. This presumption shall not be deemed to exist where the application is opposed. 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 opposition in the form of verified statements filed on or before 45 days from date of publication, (or, if the application later becomes unopposed) appropriate authorizing documents will be issued to applicants with regulated operations (except those with duly noted problems) and will remain in full effect only as long as the applicant maintains appropriate compliance. The unopposed applications involving new entrants will be subject to the issuance of an effective notice setting forth the compliance requirements which must be satisfied before the authority will be issued. Once this compliance is met, the authority will be issued.

Within 60 days after publication an applicant may file a verified statement in rebuttal to any statement in opposition.

To the extent that any of the authority granted may duplicate an applicant's other authority, the duplication shall be construed as conferring only a single operating right.

Note.—All applications are for authority to operate as a motor common carrier in interstate or foreign commerce over irregular routes, unless noted otherwise. Applications for motor contract carrier authority are those where service is for a named shipper "under contract".

Please direct status inquiries to the Ombudsman's Office, (202) 275-7326.

### Volume No. OP2-92

Decided: May 5, 1982.

By the Commission Review Board No. 1, Members Parker, Chandler, and Fortier.

MC 1222 (Sub-56), filed April 19, 1982. Applicant: THE REINHARDT TRANSFER COMPANY, 1410 Tenth Street, Portsmouth, OH 45662. Representative: Robert H. Kinker, 314 West Main Street, P.O. Box 464, Frankfort, KY 40602, (502) 223-8244. Transporting *metal and metal products*, between points in Campbell County, KY, on the one hand, and, on the other, points in AR.

Note.—Applicant intends to tack with regular route authority in No. MC-1222.

MC 11592 (Sub-35), filed April 19, 1982. Applicant: BEST REFRIGERATED EXPRESS, INC., P.O. Box 7365, Omaha, NE 68107. Representative: Rick A. Rude, Suite 611, 1730 Rhode Island Ave., NW., Washington, DC 20036, 202-223-5900. Transporting *food and related products*, between points in Cache County, UT, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 16513 (Sub-34), filed April 19, 1982. Applicant: REISCH TRUCKING & TRANSPORTATION CO., INC., 1301 Union Ave., Pennsauken, NJ 08110. Representative: Russell R. Sage, P.O. Box 11278, Alexandria, VA 22312, 703-750-1112. Transporting *general commodities* (except classes A and B explosives, household goods and commodities in bulk), between points in the U.S. (except AK and HI), under continuing contract(s) with Phelps Dodge Corporation and its subsidiary companies, of New York, NY.

MC 24583 (Sub-50), filed April 22, 1982. Applicant: FRED STEWARD COMPANY, P.O. Box 665, Magnolia, AR 71753. Representative: James M. Duckett, 221 W. 2nd, Suite 411, Little Rock, AR 72201, 501-375-3022. Transporting *chemicals and related products*, between points in the U.S. (except AK and HI), under continuing contract(s) with T & T Chemical Company, of El Dorado, AR.

MC 107012 (Sub-762), filed April 16, 1982. Applicant: NORTH AMERICAN VAN LINES, INC., 5001 U.S. Hwy 30, West, P.O. Box 988, Fort Wayne, IN 46801. Representative: Bruce W. Boyarko, (Same as applicant), (219) 429-2224. Transporting *general commodities* (except classes A and B explosives, household goods and commodities in bulk), between points in the U.S., under continuing contract(s) with K-Mart Corporation, of Troy, MI.

MC 111432 (Sub-24), filed April 20, 1982. Applicant: FRANK J. SIBR & SONS, INC., 2122 York Rd., Suite 100, Oak Brook, IL 60521. Representative: Douglas G. Brown, 913 South Sixth St., Springfield, IL 62703, 217-753-3925. Transporting *chemicals*, between points in the U.S., under continuing contract(s) with Thompson-Hayward Chemical Company, of Kansas City, KS.

MC 124813 (Sub-240), filed April 19, 1982. Applicant: UMTHUN TRUCKING CO., 910 South Jackson Street, Eagle Grove, IA 50533. Representative: William L. Fairbank, 2400 Financial Center, Des Moines, IA 50309, (515) 282–3525. Transporting *general commodities* (except classes A and B explosives and household goods), between points in the U.S. (except AK and HI).

MC 134813 (Sub-18), filed April 29, 1982. Applicant: WESTERN CARTAGE, INC., P.O. Box 964, Pryor, OK 74361. Representative: G. Timothy Armstrong, 200 N. Choctaw, P.O. Box 1124, El Reno, OK 73036, 405–262–1322. Transporting *general commodities* (except classes A and B explosives and household goods), between points in the U.S. (except AK and HI), under continuing contract(s) with Midwest Carbide Corporation, of Keokuk, IA.

MC 144572 (Sub-65), filed April 13, 1982. Applicant: MONFORT TRANSPORTATION COMPANY, P.O. Box G, Greeley, CO 80632. Representative: Steven K. Kuhlmann, 2600 Petro-Lewis Tower, 717 17th St., Denver, CO 80202, 303–892–6700. Transporting *general commodities* (except classes A and B explosives and household goods, and commodities in bulk), between points in the U.S. (except AK and HI).

MC 146343 (Sub-16), filed April 29, 1982. Applicant: SOUTHERN EXPRESS CORPORATION, 505 South Ocean Blvd., Pompano Beach, FL 33062. Representative: Joseph Badway, 2 Sawyer Dr., Coventry, RI 02816, 401–822–0878. Transporting *general commodities* (except classes A and B explosives and household goods and commodities in bulk) between points in the U.S. (except AK and HI), under continuing contract(s) with American Wire & Cable Company, of Olmsted Falls, OH.

MC 146813 (Sub-9), filed April 14, 1982. Applicant: A.M. DELIVERY, INC., 21454 Cold Springs Lane, Diamond Bar, CA 91765. Representative: Milton W. Flack, 8484 Wilshire Blvd. Suite 840, Beverly Hills, CA 90211, 213–655–3573. Transporting (1) *metal products,* between points in the U.S. (except AK and HI), under continuing contract(s) with Technibilt Corporation, Division of Whitar Corporation, of Burbank, CA, (2) *food and related products,* between points in the U.S. (except AK and HI), under continuing contract(s) with Wilsey Foods, Inc., of Los Angeles, CA, (3) *such commodities* as are dealt in or used by hospitals, nursing homes, pharmacies, drug stores, and health and medical centers, between points in the U.S. (except AK and HI), under continuing contract(s) with American McGaw, Division of American Hospital Supply Corporation, of Santa Ana, CA, and American Pharmaseal, Division of American Hospital Supply Corporation, of Glendale, CA, and (4) *chemicals and related products,* between points in the U.S. (except AK and HI), under continuing contract(s) with Calusa Chemical Company, of Santa Fe Springs, CA.

MC 147313 (Sub-3), filed April 1, 1982 Applicant: JOHN PFROMMER, INC., P.O. Box 307, Douglassville, PA 19518. Representative: Theodore Polydoroff, Suite 301, 1307 Dolley Madison Blvd., McLean, VA 22101, (703) 893–4924. Transporting *commodities in bulk, ores and minerals, clay, concrete, glass or stone products, petroleum, natural gas and their products, coal and coal products, waste or scrap materials not identified by industry producing, metal products, building materials, machinery, chemicals and related products,* between points in the U.S., (except AK and HI). Condition: To the extent any certificate issued in this proceeding embraces the transportation of liquefied petroleum gas, it shall be limited to a period of 5 years from its date of issuance.

Note.—Applicant requests cancellation of its Permit No. MC–147313 (Sub-No. 1) X served May 28, 1981, concurrently with the issuance of the authority sought.

MC 148263 (Sub-1), filed April 20, 1982 Applicant: FLEETWOOD TRUCKING COMPANY, Route #1, Spalding, MI 49826. Representative: Edward Malinzak, 900 Old Kent Bldg., Grand Rapids, MI 49503, 616–459–6121. Transporting *general commodities* (except classes A and B explosives, household goods and commodities in bulk), between points in MI, on the one hand, and, on the other, points in the United States on and east of a line beginning at the mouth of the Mississippi River, and extending along the Mississippi River to its junction with the western boundary of Itasca County, MN, then northward along the western boundaries of Itasca and Koochiching Counties, MN, to the International Boundary line between the United States and Canada, under continuing contract(s) with (a) Menominee Box & Lumber Co., Inc., of Menominee, MI, (b) Ryan Wood Resources, of Marinette, WI, (c) Escanaba Lumber Co., Inc., of Escanaba, MI and (d) P–S Manufacturing Co., Inc., of Spalding, MI.

MC 153553 (Sub-2), filed April 9, 1982 Applicant: ROCKINGHAM CARRIAGE SERVICE, INC., Route 1 Bypass (P.O. Box 1349), Portsmouth, NH 03801. Representative: Robert G. Parks, 20 Walnut Street, Suite 101, Wellesley Hills, MA 02181, (617) 235–5571. Transporting *trucks, truck chassis and tractors,* between points in the U.S., under continuing contract(s) with Iveco Truck of North America, Inc., of Blue Bell, PA.

MC 153992 (Sub-1), filed April 21, 1982 Applicant: C & C TRUCKING, 108 Coburn Dr., Chattanooga, TN 37414. Representative: J. Greg Hardeman, 618 United American Bank Bldg., Nashville, TN 37219, 615–244–8100. Transporting *food and related products,* (a) between points in Hamilton County, TN, on the one hand, and, on the other, points in TX, TN and AR, and (b) between points in TX and IL, on the one hand, and, on the other, points in AR, AL, GA, FL, LA, IL, MO, MS, NC, SC, TN and TX.

MC 154103 (Sub-7), filed April 20, 1982. Applicant: MID-SOUTH FREIGHT, INC., 28 Industrial Park Dr., P.O. Box 446, Hendersonville TN 37075. Representative: Joe F. Powell (same address as applicant), 615–822–6140. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk) between points in AL, FL, GA, IN, KY, MI, MS, NC, OH, SC, TN, and WV, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 157112 (Sub-1), filed April 20, 1982. Applicant: SIMONICH TRUCKING, 3455 15th Ave. South, Great Falls, MT 59405. Representative: F. B. Simonich (same address as applicant), 406–761–0699. Transporting *alcoholic beverages,* between points in CA, WA and OR, on the one hand, and, on the other, points in MT, under continuing contract(s) with Gusto Distributing Company dba Bruce Watkins Distributing Company, of Great Falls, MT.

MC 158133, filed April 29, 1982. Applicant: CONTRACT TRANSPORTATION SERVICE, INC., 1711 South 2nd St., Piscataway, NJ 08854. Representative: Robert B. Pepper, 168 Woodbridge Ave., Highland Park, NJ 08904, 201–572–5551. Transporting *building materials and supplies and chemicals and related products* between points in the U.S. (except AK and HI), under continuing contract(s) with Vanguard Vinyl Siding, Inc., of Manville, NJ.

MC 159732 (Sub-1), filed April 1, 1982. Applicant: WITHERS TRANSFER AND STORAGE OF CORAL GABLES, INC., 357 Almeria Ave., Coral Gables, FL 33134. Representative: Wayne E. Withers, Jr. (same address as applicant), (305) 444–7116. Transporting *household goods, furniture and fixtures, wall*

*coverings, floor coverings, building materials, hotel furnishings, residential supplies, objects of arts and antiques,* between points in FL, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 160483, filed April 20, 1982. Applicant: JOE C. VALLELONGA, d.b.a. VALLELONGA TRUCKING, Hazelwood Dr., Seville, OH 44273. Representative: Edward P. Bocko, P.O. Box 496, Mineral Ridge, OH 44440, (216) 652–2789. Transporting (1) *textile mill products,* between points in AL, CA, IL, IN, KY, MD, MO, OH, SC, TX, UT, VA, NJ, MI, NC, CO, FL, PA, MS, LA, TN and GA and (2) *such commodities* as are dealt in or used by manufacturers of toys, games, sporting goods, and children's furniture, between points in AZ, CA, CO, FL, GA, KS, MI, MD, OH, PA and TX.

MC 161362 filed April 5, 1982. Applicant: CONTROL DATA CORPORATION, 8100 34th Ave. So., P.O. Box 42–A, Minneapolis, MN 55440. Representative: James L. Nelson, 1821 University Ave., Suite 163 North, St. Paul, MN 55104, 612–646–6677. As a *broker,* in arranging for the transportation of *household* goods, between points in the U.S. (exluding AK, but including HI). Condition: The holder of the license issued in this proceeding shall provide a copy of publication OCP–100 to its customers before any contract is executed.

MC 161512 filed April 15, 1982. Applicant: RICHARD HUSKEY AND HARLEY SMITH, d.b.a. GRAPEVINE EXPRESS, R.R. 1, Box 143, Granville, IL 61326. Representative: Irwin D. Rozner 134 North LaSalle St., Chicago, IL 60602, (312) 782–6937. Transporting *beverages* between points in IL, on the one hand, and, on the other, and points in CA, WI, IN, KY, OH, MO, and NY.

MC 161622, filed April 22, 1982. Applicant: G 8 L TRUCKING, Commercial Quarters Industrial Park, Onalaska, WI 54650. Representative: Edward H. Instenes, P.O. Box 676, Winona, MN 55987, (507) 454–3914. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in IL, IA, MN, and WI.

MC 161732, filed April 29, 1982. Applicant: R. & I. TRUCKING, INC., 9727 Glandon St., Bellflower, CA 90706. Representative: William J. Monheim, P.O. Box 1756, Whittier, CA 90609, 213–945–2745. Transporting *such commodities* as are dealt in or used by housing products manufacturers, between points in Orange County, CA, on the one hand, and, on the other, points in AZ, CO, ID, MT, NV, MN, OR, TX, UT, WA, and WY.

MC 161733, filed April 29, 1982. Applicant: CARLOS DE LA TORRE LEASING, 2093 Vancouver Ave., Monterey Park, CA 91754. Representative: Carlos De La Torre, 141 West Avenue 34, Los Angeles, CA 90031, 213–227–8377. Transporting *furniture parts,* between points in the U.S., under continuing contract(s) with American Caster Corporation, of Los Angeles, CA.

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Decided: May 6, 1982.

By the Commission, Review Board No. 1, Members Parker, Chandler, and Fortier. (Member Fortier not participating.)

MC 117373 (Sub-5), filed April 26, 1982. Applicant: NU–WAY TRUCKING, INC., P.O. Box 1129, Rosebud, MO 63091. Representative: Phillip N. Engle (same address as applicant), 314–764–2185. Transporting *such commodities* as are dealt in and used by manufacturers and distributors of electrical equipment, between points in the U.S. (except AK and HI), under continuing contract(s) with A.B. Chance Co., of Washington, MO.

MC 123663 (Sub-4), filed April 23, 1982. Applicant: Trout Run Transport, Inc., 2736 Dove St., Williamsport, PA 17701. Representative: George E. Campbell, 985 Old Eagle School Road, Suite 501, Wayne, PA 19312, (215) 293–9220. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in PA, NY, NJ, OH, MD, NH, VT, VA, and DE, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 123922 (Sub-24), filed April 19, 1982. Applicant: AMTRUK TRANSPORT, INC., P.O. Box 4327, Bergen Station, Jersey City, NJ 07304. Representative: Eric Meierhoefer, Suite 1000, 1029 Vermont Avenue NW., Washington, DC 20005, 202–347–9332. Transporting *general commodities* (except classes A and B explosives and household goods), between points in the U.S. (except AK and HI), under continuing contract(s) with (a) BASF Wyandotte Corporation, of Parsippany, NJ, and (b) Badische Corporation, of Williamsburg, VA.

MC 128333 (Sub-10), filed April 23, 1982. Applicant: LES CALKINS TRUCKING, INC., 19501 North Highway 99, Acampo, CA 95220. Representative: Alan F. Wohlstetter, 1700 K Street NW., Washington, D.C. 20006, (202) 833–8884. Transporting (1) *clay, concrete, glass or stone products* and (2) *coal and coal products* between points in AZ, CA, CO, ID, MT, NY, NM, OR, UT, WA, and WY.

MC 135653 (Sub-14), filed April 23, 1982. Applicant: SPECIAL SERVICE TRANSPORTATION, INC., 1100 W. Smith, Medina, OH 44256. Representative: Michael Spurlock, 275 E. State Street, Columbus OH 43215 (614) 228–8575. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in Ohio, on the one hand, and, on the other, points in PA, NJ, MA, CT, MD, NY, IN, IL, MI, WI, VA, NC, KY, TN, WV, RI, and OH.

MC 138432 (Sub-30), filed April 27, 1982. Applicant: GARLAND GEHRKE TRUCKING, INC., 1800 N. Jefferson St., Lincoln, IL 62656. Representative: James R. Madler, 120 W. Madison St., Chicago, IL 60602, (312) 726–6525. Transporting *glass and building materials,* between points in the U.S. (except AK and HI).

MC 142603 (Sub-67), filed April 23, 1982. Applicant: CONTRACT CARRIERS OF AMERICA, INC., P.O. Box 179, Springfield, MA 01101. Representative: Barbara J. Withers (same address as applicant), (413) 732–6283. Transporting *general commodities* (except classes A and B explosives, commodities in bulk, and household goods), between Westfield and Chester, MA, and Niagara Falls NY, on the one hand, and, on the other, points in the U.S. (except AK and HI), under continuing contract(s) with General Abrasive Division of Dresser Industries, Inc., of Niagara Falls, NY.

MC 148632 (Sub-10), filed April 23, 1982. Applicant: DIXON MOTOR FREIGHT, INC., 2620 Old Egg Harbor Road, Lindenwold, NJ 08021. Representative: Gary V. Dixon (same address as applicant), (609) 767–5885. Transporting *food and related products,* between FL, GA, IL, IN, MI, NJ, OH, PA and TX.

MC 150783 (Sub-23), filed April 26, 1982. Applicant: SCHEDULED TRUCKWAYS, INC. P.O. Box 757, Rogers, AR 72756. Representative: James H. Berry, P.O. Box 32, Wesley, AR 72773, (501) 456–2453. Transporting *furniture and fixtures,* between points in Mississippi County, AR, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 152822 (Sub-3), filed April 23, 1982. Applicant: PAWNEE MOTOR SERVICE, INC., 5101 St. Charles Road, Bellwood, IL 60104. Representative: Jerome Miceli (same address as applicant), (312) 544–2300. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in

IL, PA, MI, IL, OH, IN, WI, IA, MO, and KY.

MC 161033, filed April 26,1982. Applicant: CARDINAL CONTAINER, INC., 500 Nordhoff Pl., Englewood, NJ. Representative: Jack L. Schiller, 123–60 83rd Ave., Kew Gardens, NY 11415, (212) 263–2078. Transporting *general commodities* (except clases A and B explosives, household goods, and commodities in bulk) between points in the U.S. (except AK and HI), under continuing contract(s) with E. Holzer, of Englewood Cliffs, NJ, and Fueur Leather Corp., of New York, NY.

MC 161483, filed April 13,1982. Applicant: A & A TRANSFER, INC., 4235 Sideburn Road, Fairfax, BA 22030. Representative: Robert J. Gallagher, 1000 Connecticut Avenue NW., Suite 1200 Washington, D.C. 20036, (202) 785–0024. Transporting *household goods, telephone equipment, and electrical equipment*, between points in MD, VA, and DC, on the one hand, and, on the other, points in NY, NJ, PA, MD, DE, VA, NC, WV, and DC.

MC 161542, filed April 16,1982. Applicant: WIDMAN TRUCKING & EXCAVATING, INC., Rt. 2, Box 316, Godfrey, IL 62039. Representative: Michael W. O'Hara, 300 Reisch Bldg., Springfield, IL 62701, (217) 544–5468. Transporting *machinery*, between points in the U.S. (except AK and HI), under continuing contract(s) with Owens Illinois Incorporated Machine Manufacturers, of Godfrey, IL.

MC 161652, filed April 23, 1982. Applicant: CARGO TRANSPORTERS, INC., North Oxford Street, Claremont, NC 28610. Representative: Tony A. Pope (same address as applicant), (704) 459–9222. Transporting *general commodities* (except classes A and B explosives, household goods and commodities in bulk) between points in NC, SC, and VA, (2) between points in NC, SC, and VA, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 161663, filed April 26,1982. Applicant: R. W. SANDERS, d.b.a. R. W. SANDERS ENTERPRISE, 508 East Main Street, Bellevue, OH 44811. Representative: Roger D. Paul, P.O. Box 157, Bellevue, OH 44811, (419) 483–2141. Transporting *farm products, metal products, machinery, and waste or scrap materials not identified by industry producing*, between points in OH, PA, and IL, on the one hand, and, on the other, points in CO and CA, under continuing contract(s) with Oakley Industries, Inc., of Englewood, CO, and Paramount Truck Body & Equipment Co., of Long Beach, CA.

MC 161683, filed April 26, 1982. Applicant: ROBERT D. HUFFMAN, d.b.a. HUFFMAN TRANSPORTATION CO., 640 19th Street S.E., P.O. Box 269, Mason City, IA 50401. Representative: William L. Fairbank, 2400 Financial Center, Des Moines, IA, (515) 282–3525. Transporting *passengers and their baggage in the same vehicle with passengers*, in special and charter operations, beginning and ending at points in Winnebago, Worth, Mitchell, Hancock, Cerro Gordo, Floyd, and Franklin Counties, IA, and extending to points in the U.S. (except AK and HI).

MC 161702, filed April 26, 1982. Applicant: BACON TOUR SERVICE, INC., 28 Highbank Road, S. Dennis, MA 02660. Representative: Donald Bacon (same address as above), (617) 394–5739. To operate, as a *broker* at Dennis, MA, in interstate or foreign commerce, to arrange for the transportation, by motor vehicle, of passengers and their baggage, between points in the U.S.

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Decided: May 10, 1982.

By the Commission, Review Board No. 3, Members Krock, Joyce, and Dowell.

MC 79658 (Sub-19), filed April 30, 1982. Applicant: ATLAS VAN LINES, INC., 1212 St. George Rd., P.O. Box 509, Evansville, IN 47711. Representative: Robert C. Mills (same address as applicant), 812–424–2222. Transporting *used household goods and office furniture*, between points in the U.S. (except AK and HI), under continuing contract(s) with Southern Pacific Company and Southern Pacific Transportation Company of San Francisco, CA.

MC 123898 (Sub-1), filed April 30, 1982. Applicant: MORIN'S & SONS, INC., 188 Warren Avenue, Portland, ME 04103. Representative: William D. Pinansky, 477 Congress St., Portland, ME 04101, (207) 774–2645. Transporting *coarse concrete aggregate*, in bulk, between points in the U.S., under continuing contract(s) with Blue Rock Industries, Inc., of Westbrook, ME.

MC 128618 (Sub-2), filed April 30, 1982. Applicant: MARTINO TRUCKING, INC., Railroad St., Rochester, PA 15074. Representative: John A. Vuono, 2310 Grant Bldg., Pittsburgh, PA 15219, (412) 471–1800. Transporting *metal products* between points in Beaver County, PA, on the one hand, and, on the other, points in OH.

MC 129219 (Sub-35), filed April 30, 1982. Applicant: C M D TRANSPORTATION, INC., 12340 SE Dumold Rd., Clackamas, OR 97045. Representative: Richard C. Shearer, P.O. Box 1970, Lake Oswego, OR 97034, (503) 655–7118. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in AZ, CA, CO, ID, MT, NM, NV, OR, TX, UT, WA, and WY.

MC 130998 (Sub-1), filed April 30, 1982. Applicant: TRIPP ASSOCIATES, LTD., 99 Pleasant St., Northampton, MA 01060. Representative: James M. Burns, 1383 Main St., Suite 413, Springfield, MA 01103, (413) 781–8205. To operate as a *broker* at Northampton, MA, arranging for the transportation of *passengers and their baggage*, in the same vehicle with passengers, in special and charter operations, between points in the U.S.

MC 135399 (Sub-24), filed May 3, 1982. Applicant: HASKINS TRUCKING, INC., 1208 F.M. 1845, P.O. Drawer 7729, Longview, TX 75602. Representative: A. William Brackett, 623 S. Henderson, 2nd Floor, Fort Worth, TX 76104, (817) 332–4415. Transporting *metal products, machinery*, and *commodities which because of their size and weight require the use of special handling or equipment*, between points in the U.S., under continuing contract(s) with Morrow Crane Company, of Salem, OR.

MC 140409 (Sub-9), filed April 29, 1982. Applicant: CIRCLE B TRANSPORTATION CORPORATION OF NORTH DAKOTA, P.O. Box 207, Wheat Ridge, CO 80034. Representative: Michael R. Werner, 241 Cedar Lane, Teaneck, NJ 07666, (201) 836–1144. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the U.S. (except AK and HI), under continuing contract(s) with Lykes Bros. Steamship Co., Inc., of New Orleans, LA. Condition: The person or persons who appear to be engaged in common control of another regulated carrier must either file an application under 49 U.S.C. § 11343(a) or submit an affidavit indicating why such approval is unnecessary to the Secretary's office. In order to expedite issuance of any authority, please submit a copy of the affidavit or proof of filing the application(s) for common control to Team 5, Room 6370.

MC 143179 (Sub-29), filed April 26, 1982. Applicant: CNM CONTRACT CARRIERS, INC., P.O. Box 1017, Omaha, NE 68101. Representative: Foster L. Kent (same address as applicant), 712–323–9124. Transporting (1) *general commodities* (except classes A and B explosives, household goods and commodities in bulk), between points in the U.S. (except AK and HI), under continuing contract(s) with TG&Y Stores Co. of Oklahoma City, and (2) *rubber*

*and plastic products,* between points in the U.S. (except AK and HI), under continuing contract(s) with Poly Foam, Inc. of Lester Prarie, MN.

MC 151009 (Sub-4), filed April 28, 1982. Applicant: ATLANTA CARRIERS, INC., 1260 Southern Rd., Morrow, GA 30260. Representative: Jeffrey W. Kohlman, 3390 Peachtree Rd., NE, Suite 520, Atlanta, GA 30326, (404) 262–7855. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in GA, on the one hand, and, on the other, those points in the U.S. in and east of TX, OK, KS, NE, IA, and MN.

MC 151518, filed April 29, 1982. Applicant: JOHN V. DONVITO, 1001 Eynon St., Scranton, PA 18504. Representative: Joseph A. Keating Jr., 121 Main St., Taylor, PA 18517, 717–344–8030. Transporting *food and related products* (1) between points in Lackawanna and Luzerne Counties, PA and Onondaga and Broome Counties, NY on the one hand, and on the other, New York, NY and points in Albany County, NY, Essex and Hudson Counties, NJ, Baltimore County, MD and New Castle County, DE, and (2) between Lackawanna County, PA, on the one hand, and, on the other, points in Onondaga and Broome Counties, NY.

MC 153419 (Sub-1), filed April 29, 1982. Applicant: THOMAS D. COX, 2105 Hamilton St., Murphysboro, IL 62966. Representative: Michael W. O'Hara, 300 Reisch Bldg., Springfield, IL 62701, (217) 544–5468. Transporting (1) *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), under continuing contract(s) with Bemis Company, Inc., of Minneapolis, MN, and (2) *food and related products,* under continuing contract(s) with Rend Lake Beverages, Inc., of Carbondale, IL, between points in the U.S. (except AK and HI).

MC 153958, filed April 20, 1982. Applicant: CALGARY GOOSENECK SERVICE LTD., 936 Abbeydale Dr., N.E., Calgary, Alberta Canada T2A 6H2 Representative: Charles E. Johnson, P.O. Box 2056, Bismarck, ND 58502, 701–223–5300. Transporting *mercer commodities in foreign commerce* between ports of entry on international boundary line between the United States and Canada at points in WA, ID, MT, and ND, on the one hand, and, on the other, points in the U.S. (including AK but excluding HI).

MC 157049 (Sub-3), filed April 30, 1982. Applicant: AMATO MOTORS, INC., 977 West Cermak Rd., Chicago, IL 60608. Representative: Anthony E. Young, 29 South LaSalle St., Chicago, IL 60603, 312–782–8880. Transporting *such commodities* as are dealt or used by manufacturers and distributors of clothing, between points in the U.S. under continuing contract(s) with Wells Lamont Corp. of Niles, IL.

MC 157099, filed April 29, 1982. Applicant: HUGO'S SERVICES, INC, P.O. Box 3158, Shiremanstown, PA 17011. Representative: Edward N. Button, 635 Oak Hill Avenue, Hagerstown, MD 21740, (301) 739–4860. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between Baltimore, MD, points in PA, and DC, on the one hand, and, on the other, points in PA.

MC 158419 (Sub-8), filed May 3, 1982. Applicant: ON TIME FREIGHT SYSTEMS, INC., P.O. Box 7212, Omaha, NE 68107. Representative: Steven K. Kuhlmann, 717—17th St., Ste. 2600, Denver, CO. 80202, (303) 892–6700. Transporting *food and related products,* between points in CO, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 158939, filed April 29, 1982. Applicant: H. L. KELLY TRUCKING, P.O. Box 935, Great Bend, KS 67530. Representative: Eugene W. Hiatt, 207 Casson Bldg., 603 Topeka Blvd., Topeka, KS 66603, 913–232–7263. Transporting *oil field machinery,* between points in KS, AZ, CA, CO, LA, MT, NE, NM, OK, TX, and WY.

MC 159138, filed April 30, 1982. Applicant: LELLAND J. CREEL, d.b.a. PORT CITY DRAYAGE CO., 115 Bluewood Dr., Biloxie, MS 39532. Representative: James M. Parrish, P.O. Box 1365, Marietta, GA 30061, 404–428–6143. Transporting *general commodities* (except classes A and B explosives, and hazardous materials), between Gulfport, MS on the one hand, and, on the other, points in AL, FL, GA, KY, LA, MS, and TN, under continuing contract(s) with Care Shipping Co., Inc. of New Orleans, LA.

MC 159379, filed April 30, 1982. Applicant: DAVID J. VAILLANCOURT and WAYNE KRUM, d.b.a. NORTHEAST TRANSPORT, 398 Pinebrook Rd., Lincoln Park, NJ 07035. Representative: Richard G. Lepley, 1150 Connecticut Ave., NW., Suite 400, Washington, DC 20036, 202–452–6800. Transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the U.S., under continuing contract(s) with The Green Fan Company, a division of Ecolaire, Inc., of Beacon, NY.

MC 161599, filed April 20, 1982. Applicant: THE TOURING MACHINE, INC., 1206 Longford Rd., Lutherville, MD 21093. Representative: Jerianne Pugh, 212 Melanchton Ave., Lutherville, MD 21093, 301–252–3342. As a *broker at Lutherville, MD,* in arranging for the transportation of *passengers and their baggage* in the same vehicle with passengers, in special and charter operations, beginning and ending at Lutherville, MD, and extending to points in the U.S. (except AK and HI).

MC 161688, filed April 27, 1982. Applicant: MEDLEY BUS COMPANY, Route 1, Box 389–B, Hamlet, NC 28345. Representative: Bronson Medley (same address as applicant), 919–276–1122. Transporting *passengers and their baggage* in the same vehicle with passengers in special and charter operations, between points in Richmond and Scotland Counties, NC, on the one hand, and, on the other, points in the U.S. (except AK and HI).

MC 161749, filed April 30, 1982. Applicant: P & F TRUCKING, INC., P.O. Box 897, 1125 National Rd., Hebron, OH 43025. Representative: Charles H. McCreary, 100 East Broad St., Columbus, OH 43215, (614) 227–2300. Transporting *solvents and hazardous waste materials,* between points in Licking County, OH, on the one hand, and, on the other, points in MI, PA, WV, IN, TN, KY, MD, TX, and MO, under continuing contract(s) with Safety-Kleen Corp., of Hebron, OH.

MC 161759, filed April 30, 1982. Applicant: NIPPON TRANSPORTATION SERVICE, 3408 Wisconsin Ave. NW., Washington, DC 20016. Representative: Noble & Roberts, 4801 Massachusetts Ave. NW., Washington, DC 20016, (202) 966–4440. To operate as a *broker* in Washington, DC arranging for the transportation of *passengers and their baggage,* in the same vehicle with passengers, in charter operations, beginning and ending at DC and extending to points in the U.S.

MC 161799, filed May 3, 1982. Applicant: DAVE R. GRANT HAY, INC., 910 W. 24th St., Ogden, UT 84401. Representative: Bruce W. Shand, Ste. 280, 311 S. State St., Salt Lake City, UT 84111, (801) 531–1300. Transporting *machinery,* between points in the U.S. (except AK and HI), under continuing contract(s) with Masonry Equipment & Supply Co., Inc., dba MESCO, of North Salt Lake, UT.

Agatha L. Mergenovich,

*Secretary.*

[FR Doc. 82-13369 Filed 5-17-82; 8:45 am]

BILLING CODE 7035-01-M

## Motor Carriers; Permanent Authority Decisions; Decision-Notice

The following applications, filed on or after February 9, 1981, are governed by Special Rule of the Commission's Rules of Practice, see 49 CFR 1100.251. Special Rule 251 was published in the **Federal Register** on December 31, 1980, at 45 FR 86771. 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 1100.252. Applications may be protested *only* on the grounds that applicant is not fit, willing, and able to provide the transportation service or to comply with the appropriate statutes and Commission regulations. A copy of any application, including all supporting evidence, can be obtained from applicant's representative upon request and payment to applicant's representative 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 a public need for the proposed operations and that it 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. This presumption shall not be deemed to exist where the application is opposed. 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 opposition in the form of verified statements filed on or before 45 days from date of publication (or, if the application later become unopposed), appropriate authorizing documents will be issued to applicants with regulated operations (except those with duly noted problems) and will remain in full effect only as long as the applicant maintains appropriate compliance. The unopposed applications involving new entrants will be subject to the issuance of an effective notice setting forth the compliance requirements which must be satisfied before the authority will be issued. Once this compliance is met, the authority will be issued.

Within 60 days after publication an applicant may file a verified statement in rebuttal to any statement in opposition.

To the extent that any of the authority granted may duplicate an applicant's other authority, the duplication shall be construed as conferring only a single operating right.

**Note.**—All applications are for authority to operate as a motor common carrier in interstate or foreign commerce over irregular routes, unless noted otherwise. Applications for motor contract carrier authority are those where service is for a named shipper "under contract". Please direct status inquiries to the Ombudsman's Office, (202) 275–7326.

### Volume No. OP2–91

Decided: May 5, 1982.

By the Commission, Review Board No. 1, Members Parker, Chandler, and Fortier.

MC 147433 (Sub-8), filed March 30, 1982. Applicant: LONG LEASING CORP., P.O. Box 587, East Jordan, MI 49727. Representative: William B. Elmer, P.O. Box 801, Traverse City, MI 49684, 616–941–5313. Transporting (1) 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. (except AK and HI), and (2) *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S. (except AK and HI).

MC 148562 (Sub-2), filed April 19, 1982. Applicant: UNIVERSITY CORP., P.O. Box 2339, Columbus, OH 43204. Representative: David A. Turano, 100 E. Board St., Columbus, OH 43215, (614) 228–1541. As a *broker of general commodities* (except household goods) between points in the U.S. (except AK and HI).

MC 156502 (Sub-1), filed April 9, 1982. Applicant: McGREGOR CARTAGE COMPANY, INC., 6845 Dix Ave., Detroit, MI 48209. Representative: Ron McDougald (same address as applicant), 313–849–1310. As a *broker* of *general commodities* (except household goods), between points in the U.S. (except AK and HI).

MC 159473 (Sub-1), filed April 19, 1982. Applicant: MOON–LITE EXPRESS, INC., 133 Lincoln St., Jersey City, NJ 07307. Representative: Harold L. Reckson, 33–28–Halsey Rd., Fair Lawn, NJ 07410, 201–791–2270. Transporting *shipments weighing 100 pounds or less*, if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S. (except AK and HI).

MC 161463, filed April 12, 1982. Applicant: FRED L. GROVES, P.O. Box 255, Elmwood, NE 68349. Representative: Max H. Johnston, P.O. Box 6597, Lincoln, NE 68506, 402–488–4841. Transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizers, and other soil conditioners* by the owner of the motor vehicle in such vehicle, between points in the U.S. (except AK and HI).

MC 161532, filed April 16, 1982. Applicant: SHARON BADEN, d.b.a. IMPORTER'S FORWARDING COMPANY, INC., 909 Western Ave., Seattle, WA 98104. Representative: Sharon Baden (same address as applicant), (206) 624–3936. As a *broker* of *general commodities* (except household goods), between points in the U.S., (except AK and HI).

### Volume No. OP2–93

Decided: May 6, 1982.

By the Commission, Review Board No. 1, Members Parker, Chandler, and Fortier. (Member Fortier not participating.)

MC 15643 (Sub-13), filed April 27, 1982. Applicant: FOUR WINDS VAN LINES, INC., 7035 Convoy Court, San Diego, CA 92138. Representative: Robert J. Gallagher, 1000 Connecticut Ave., NW, Suite 1200, Washington, DC 20036, 202–785–0024. Transporting *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S. (except AK and HI).

MC 35153 (Sub-5), filed April 26, 1982. Applicant: RUPP-SOUTHERN TIER FREIGHT LINES, INC., P.O. Box 489, Rt. 221 East, Middletown, NY 10940. Representative: Michael R. Werner, 241 Cedar Lane, Teaneck, NJ 07666, (201) 836–1144. As a *broker of general commodities* (except household goods), between points in the U.S.

MC 145773 (Sub-18), filed April 26, 1982. Applicant: KIRK BROS. TRANSPORTATION, INC., 800 Vandemark Road, Sidney, OH 45365. Representative: A. Charles Tell, 100 E. Broad St., Columbus, OH 43215, (614) 228–1541. 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. (except AK and HI).

MC 161533, filed April 16, 1982. Applicant: J. K. SPARKS TKG., 4172 Rigel Ave., Lompoc, CA 93436. Representative: Jeffery K. Sparks (same address as applicant), (805) 733–1555. (1) 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., (except AK and HI), (2) transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizers, and other soil conditioners* by the owner of the motor vehicle in such vehicle, between points in the U.S. (except AK and HI).

MC 161592, filed April 23, 1982. Applicant: PRESTIGE MESSENGER SERVICE, INC., 3808 Cedar Brook Pl., Baltimore, MD 21236. Representative: Steven L. Weiman, Suite 200, 444 N. Frederic Ave. Gaithersburg, MD 20877 (301)–840–8565. Transporting *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S. (except AK and HI).

MC 161682, filed April 26, 1982. Applicant: RALPH F. TOMLINSON, d.b.a. R. F. TOMLINSON TRUCKING, 3692 W. 8800 N., Plesant Grove, UT 84062. Representative: Irene Warr, 311 S. State St. Ste. 280, Salt Lake City, UT 84111, (801) 531–1300. Transporting *food and other edible products and by-products intended for human consumption (except alcholic beverages and drugs), agricultural limestone and fertilizers, and other soil conditioners* by owner of the motor vehicle in such vehicle, between points in the U.S., (except AK and HI).

MC 161763, filed April 30, 1982. Applicant: TRANSPORT BROKERS INTERNATIONAL, INC., 7420 North Main St., Columbia, SC 29203. Representative: George Douglas Massengale, Jr., 112 Avery Lane, Columbia, SC 29210, 803–735–1500. As a *broker* of *general commodities* (household goods), between points in the U.S. (except AK and HI).

**Volume No. OP4–166**

Decided: May 12, 1982.

By the Commission, Review Board No. 2, Members Carleton, Fisher, and Williams. (Member Fisher not participating.)

MC 161736, filed April 29, 1982. Applicant: UNION PACIFIC FREIGHT SERVICES COMPANY, 1416 Dodge St., Omaha, NE 68179. Representative: Forrest N. Krutter (same address as applicant), (402)–271–4750. As a *broker of general commodities* (except household goods), between points in the U.S. (except HI).

MC 161806, filed May 3, 1982. Applicant: STANLEY M. SHIPP, d.b.a. SHIPP TRANSPORT, 404 W Cochita, Hobbs, NM 88240. Representative: Stanley M. Shipp (same address as applicant), (505) 392–4782. Transporting, for or on behalf of the United States Government, *general commodities* (except used household goods, hazardous of secret materials, and sensitive weapons and munitions), between points in Lea and Eddy Counties, NM, on the one hand, and, on the other, points in NM, TX, OK, CO, UT and AZ.

MC 161816, filed May 3, 1982. Applicant: CRAWLEY L. ELLIS, 1727 Brewester Rd., Jacksonville, FL 32207. Representative: Elbert Brown, Jr., P.O. Box 1378, Altamonte Springs, FL 32701, (305) 869–5936. Transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizers, and other soil conditioners* by the owner of the motor vehicle in such vehicle, between points in FL and GA.

MC 161826, filed May 4, 1982. Applicant: BEN DEAN, d.b.a. BEN DEAN TRUCKING, 10602 LaVernia Rd., Adkins, TX 78101. Representative: William E. Collier, 6107 Callaghan Rd., San Antonio, TX 78228, (512) 680–2050. Transporting *food and other edible products and byproducts intended for human consumption* (except alcoholic beverages and drugs), *agricultural limestone and fertilizer, and other soil conditioners* by the owner of the motor vehicle in such vehicle, between points in the U.S.

**Volume No. OP5–105**

Decided: May 10, 1982.

By the Commission, Review Board No. 3, Members Krock, Joyce, and Dowell.

MC 159639 (Sub-2), filed April 27, 1982. Applicant: FLA-TEX, INC., P.O. Box 631, Pharr, TX 78588. Representative: David Thompson (same address as applicant), 512–787–5951. (1) 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. (except AK and HI), and (2) Transporting *shipments weighing 100 pounds or less* if transported in a motor vehicle in which no one package exceeds 100 pounds, between points in the U.S. (except AK and HI).

MC 161699, filed April 27, 1982. Applicant: ZEPHYR CONTAINER LINE, 110 West Ocean Blvd., Ste. 618, Long Beach, CA 90802. Representative: William Eric Reinka (same address as applicant), 213–432–7431. As a *broker of general commodities* (except household goods), between points in the U.S. (except AK and HI).

**Agatha L. Mergenovich,**

*Secretary.*

[FR Doc. 82–13370 Filed 5–17–82; 8:45 am]

BILLING CODE 7035–01–M

## Motor Carriers; Released Rates Application

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice. Released Rates Application No. MC–1525.

**SUMMARY:** Clipper Exxpress Company, a freight forwarder, seeks authority to establish released rates in its own tariff on Freight, All Kinds. The proposed rates will apply on those shipments containing comodities released to a value not exceeding $5 per pound, subject to a maximum valuation of $200,000 per shipment. When the shipping papers on such shipments fail to show a released value, they will be considered as being released to a value not exceeding $5 per pound. When the value is shown as exceeding $5 per pound but not exceeding $20 per pound, the shipment will be subject to an additional charge of $100. When a shipment is subject to a value exceeding $20 per pound, these tariff rates will not apply.

**ADDRESSES:** Anyone seeking copies of this application should contact the party listed below, who represents Clipper Exxpress: Mr. Owen B. Katzman, Vorys, Sater, Seymour and Pease, Suite 1111, 1828 L Street, N.W., Washington, D.C. 20036,Tel. (202) 822–8200.

**FOR FURTHER INFORMATION CONTACT:** Mr. Max Pieper, Bureau of Traffic, Interstate Commerce Commission, Washington, D.C. 20423, Tel. (202) 275–0781.

**SUPPLEMENTARY INFORMATION:** Relief is sought from 49 U.S.C. 10730.

**Agatha L. Mergenvich,**

*Secretary.*

[FR Doc. 82–13365 Filed 5–17–82; 8:45 am]

BILLING CODE 7035–01–M

[Ex Parte No. 387 (Sub-128)]

## Chicago and North Western Transportation Co. Exemption for Contract Tariff ICC-CNW-0118

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of provisional exemption.

**SUMMARY:** Petitioner is granted a provisional exemption under 49 U.S.C. 10505 from the notice requirements of 49 U.S.C. 10713(e). The contract tariff may become effective on one day's notice. This exemption may be revoked if protests are filed within 15 days of publication in the **Federal Register.**

**FOR FURTHER INFORMATION CONTACT:** Douglas Galloway, (202) 275-7278.

**SUPPLEMENTARY INFORMATION:** The Chicago and North Western Transportation Company (CNW) filed a petition on March 26, 1982, seeking an exemption under 49 U.S.C. 10505 from the statutory notice provisions of 49 U.S.C. 10713(e). Petitioner requests that we permit contract tariff ICC-CNW-0118 to become effective on one day's notice.

The tariff issued on April 20, 1982 and scheduled to become effective on statutory notice on May 25, 1982. It provides for the transportation of industrial sand at reduced rates.

Under 49 U.S.C. 10713(e), contracts must be filed on not less than 30 days' notice. There is no provision for waiving this requirement. Cf. former section 10762(d)(1). However, the Commission has granted relief under our section 10505 exemption authority in exceptional situations.

The petition shall be granted. Due to a longer than anticipated negotiation period, an advance effective date is necessary to fulfil the total delivered tonnage package. Until the transportation portion of the dated package is effective, the contracting shipper will suffer economic harm not anticipated. We find this to be the type of circumstances which warrants a provisional exemption.

Petitioner's contract tariff ICC-CMW-0118 may become effective on one day's notice. We will apply the following conditions which have been imposed in similar exemption proceedings:

Although the Commission permits the amended contract to become effective on one day's notice, this fact neither shall be construed to mean that this is a Commission approved contract for purposes of 49 U.S.C. 10713(g) nor shall it serve to deprive the Commission of jurisdiction to institute a proceeding on its own initiative or on complaint, or review this contract and to disapprove it.

Subject to compliance with these conditions, under 49 U.S.C. 10505(a) we find that the 30 day notice requirement in these instances is not necessary to carry out the transportation policy of 49 U.S.C. 10101a and is not needed to protect shippers from abuse of market power. Further, we will consider revoking this exemption under 49 U.S.C. 10505(c) if protests are filed within 15 days of publication in the **Federal Register.**

This action will not significantly affect the quality of the human environment or conservation of energy resources.

(49 U.S.C. 10505)

Dated: May 11, 1982.

By the Commission, Division 2, Commissioners Gresham, Gilliam, and Taylor. Commissioner Gresham did not participate.

**Agatha L. Mergenovich,**

*Secretary.*

[FR Doc. 82-13366 Filed 5-17-82; 8:45 am]

BILLING CODE 7035-01-M

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[Ex Parte No. 387 (Sub-129)]

## Seaboard Coast Line Railroad Company, Exemption for Contract Tariff ICC-SCL-C-0024

**AGENCY:** Interstate Commerce Commission.

**ACTION:** Notice of provisional exemption.

**SUMMARY:** Petitioner is granted a provisional exemption under 49 U.S.C. 10505 from the notice requirements of 49 U.S.C. 10713(e). The contract tariff to be filed may become effective on one day's notice. This exemption may be revoked if protests are filed within 15 days of publication in the **Federal Register.**

**FOR FURTHER INFORMATION CONTACT:** Douglas Galloway, (202) 275-7278.

**SUPPLEMENTARY INFORMATION:** Seaboard Coast Line Railroad Company (SCL) filed a petition on April 26, 1982, seeking an exemption under 49 U.S.C. 10505 from the statutory notice provisions of 49 U.S.C. 10713(e). Petitioner requests that we permit contract tariff ICC-SCL-C-0024 to become effective on one day's notice. The tariff provides for the transportation of nitrogen fertilizer solution.

Under 49 U.S.C. 10713(e), contracts must be filed on not less than 30 day's notice. There is no provision for waiving this requirement. Cf. former section 10762(d)(1). However, the Commission has granted relief under our section 10505 exemption authority in exceptional situations. Advancement of the effective date would permit shipper to meet greater than anticipated demand for its product and avoid diversion of carrier's traffic to other modes. We find this to be the type of exceptional circumstance which warrants a provisional exemption.

Petitioner's contract ICC-SCL-C-0024 may become effective on one day's notice. We will apply the following conditions which have been imposed in similar exemption proceedings:

Although the Commission permits the contract to become effective on one day's notice, this fact neither shall be construed to mean that this is a Commission approved contract for purposes of 49 U.S.C. 10713(g) nor shall it serve to deprive the Commission of justification to institute a proceeding on its own initiative or on complaint, to review this contract and to disapprove it.

Subject to compliance with these conditions, under 49 U.S.C. 10505(a) we find that the 30 days notice requirement in these instances is not necessary to carry out the transportation policy of 49 U.S.C. 10101a and is not needed to protect shippers from abuse of market power. Further, we will consider revoking this exemption under 49 U.S.C. 10505(c) if protests are filed within 15 days of publication in the **Federal Register.**

This action will not significantly affect the quality of the human environment or conservation of engery resources.

(49 U.S.C. 10505)

Dated: May 11, 1982.

By the Commission, Division 1, Commissioners Sterrett, Gilliam, and Andre.

**Agatha L. Mergenovich,**

*Secretary.*

[FR Doc. 82-13367 Filed 5-17-82; 8:45 am]

BILLING CODE 7035-01-M

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[Ex Parte No. 387 (Sub-132)]

## Western Pacific Exemption for Contract Tariff ICC WP-C-0019

**AGENCY:** Interstate Commerce Commision.

**ACTION:** Notice of provisional exemption.

**SUMMARY:** Petitioner is granted a provisional exemption under 49 U.S.C. 10505 from the notice requirements of 49 U.S.C. 10713(e). The contract tariff to be filed may become effective on one day's notice. This exemption may be revoked if protests are filed within 15 days of publication in the **Federal Register.**

**FOR FURTHER INFORMATION CONTACT:** John J. Sado, (202) 275-7277.

**SUPPLEMENTARY INFORMATION:** The Western Pacific Railroad Company (WP) filed a petition on May 3, 1982, seeking an exemption under 49 U.S.C.

10505 from the statutory notice provisions of 49 U.S.C. 10713(e). It requests that we permit its contract ICC–WP–C–0019 filed on April 29, 1982 to become effective on one day's notice. The contract involves the movement of copper and copper products. The shipper filed a letter in support of the petition.

Under 49 U.S.C. 10713(e), contracts must be filed on not less than 30 days' notice. There is no provision for waiving this requirement. However, the Commission has granted relief under our section 10505 exemption authority in exceptional situations.

The petition shall be granted. The shipper is in a weak financial posture created by a downturn in the copper market and denial of an exemption would cause a slowdown of production at its Nevada facility. Moreover, any curtailment of shipments from the shipper would adversely affect the carrier equipment utilization. We find this to be the type of exceptional circumstance which warrants a provisional exemption.

Petitioner's contract ICC–WP–C–0019 may become effective on one day's notice. We will apply the following conditions which have been imposed in similar exemption proceedings:

If the Commission permits the contract to become effective on one day's notice, this fact neither shall be construed to mean that this is a Commission approved contract for purposes of 49 U.S.C. 10713(g) nor shall it serve to deprive the Commission of jurisdiction to institute a proceeding on its own initiative or on complaint, to review this contract and to disapprove it.

Subject to compliance with these conditions, under 49 U.S.C. 10505(a) we find that the 30-day notice requirement in this instance is not necessary to carry out the transportation policy of 49 U.S.C. 10101(a) and is not needed to protect shippers from abuse of market power. Further, we will consider revoking this exemption under 49 U.S.C. 10505(c) if protests are filed within 15 days of publication in the **Federal Register.**

This action wili not significantly affect either the quality of the human environment or conservation of energy resources.

(49 U.S.C. 10505)

Dated: May 11, 1982.

By the Commission, Division 2, Commissioners Gresham, Gilliam, and Taylor. Commissioner Gresham did not participate.

**Agatha L. Mergenovich,**

*Secretary.*

[FR Doc. 82–13366 Filed 5–17–82; 8:45 am]

BILLING CODE 7035–01–M

## DEPARTMENT OF JUSTICE

### National Institute of Justice

### The Order-Maintenance Function of Police Departments; Notice of Solicitation

The National Institute of Justice plans to initiate a program to stimulate examination of the order-maintenance function of police in the belief that this information can improve overall police department performance. As a means of improving our understanding of the order-maintenance function, the National Institute of Justice intends to support a multi-year program involving field experiments that will measure the effect of police order-maintenance activities on crime, law enforcement, and police service delivery. The solicitation request proposals that will assist in identifying an intermediary organization that, in turn, will act cooperatively with the National Institute in identifying and assisting interested and capable police departments in developing projects intended for implementation within their own communities and designed for careful measurement of effect.

The solicitation, entitled "The Order-Maintenance Function of Police Departments", asks for the submission of preliminary proposals rather than concept papers. The selection of the recipient of the award will be determined by a peer review panel process in accordance with the criteria set forth in the solicitation. In order to be considered, all papers must be postmarked no later than July 23, 1982. One award, not to exceed $350,000, will be made. The time period for the project should be between 18–24 months. To maximize competition for this award, both profit-making and non-profit organizations are eligible.

Copies of the solicitation may be obtained by sending a mailing label to: Solicitation Request, "The Order-Maintenance Function of Police Departments", National Criminal Justice Reference Service, Box 6000, Rockville, Maryland 20850.

Further information regarding the solicitation can be obtained by contacting William E. Saulsbury, Office of Research Programs, National Institute of Justice, 633 Indiana Avenue, NW., Washington, D.C. 20531 (202/724–2953).

Dated: May 11, 1982.

Approved:

**James L. Underwood,**

*Acting Director, National Institute of Justice.*

[FR Doc. 82–13393 Filed 5–17–82; 8:45 am]

BILLING CODE 4410–18–M

### Evaluation of Victim Assistance Service Delivery Programs; Notice of Solicitation

The National Institute of Justice announces a competitive research cooperative agreement program to evaluate victim assistance service delivery programs. The purpose of this evaluation award is to evaluate the relative effectiveness of crisis intervention components.

The solicitation asks for the submission of full final proposals. In order to be considered, all papers must be submitted no later than June 18, 1982. This cooperative agreement is planned for award in September, 1982 with funding support not to exceed $300,000 for 18 months. To maximize competition for the award, both profit-making and non-profit organizations are eligible to apply; however, a fee will not be paid.

Further information and copies of the solicitation can be obtained by contacting Jan Hulla at the Office of Program Evaluation, NIJ, 633 Indiana Avenue, NW., Washington, D.C. 20531, or phone 202/724–2953.

Dated: May 11, 1982.

**James L. Underwood,**

*Acting Director, National Institute of Justice.*

[FR Doc. 82–13394 Filed 5–17–82; 8:45 am]

BILLING CODE 4410–18–M

## DEPARTMENT OF LABOR

### Employment and Training Administration

### 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 adjustment assistance issued during the period May 3, 1982–May 7, 1982.

In order for an affirmatiave 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 or 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 the 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–12,306; Schreck Industries, Inc, Strongsville, OH*
*TA–W–12,487; United Technologies Corp., Automotive Group, Components Div., Metal & Plastic Products Section, Morganton, NC*
*TA–W–12,420; Tonia Fashions, Inc., Weehawken, NJ*
*TA–W–12,230; Lear Siegler, Inc., Bogen Div., Paramus, NJ*
*TA–W–12,138; Lapeer Metal Products Co., Lapeer, MI*
*TA–W–11,978; Blue Ridge Shoe Co., Aulander, NC*
*TA–W–12,057; 3M Co., Chattanooga, TN*
*TA–W–12,564; Carole Curtis, Inc., New York, NY*
*TA–W–12,284; Electro-Voice, Inc., Sevierville, TN*
*TA–W–12,490; Allen-Bradley Co., Electronic Div., Milwaukee, WI*
*TA–W–11,927; Allen Manufacturing Co., Bloomfield, CT*
*TA–W–11,769; Westinghouse Electric Corp., Large Power Transformer Div., Muncie, IN*
*TA–W–12,493; Angela Manufacturing Co., Inc., Windber, PA*
*TA–W–12,237; Winer Industries, Inc., Paterson, NJ*
*TA–W–12,344; Rondalco Industries, Inc., New York, NY*
*TA–W–11,688; Marion Power Shovel, Marion, OH*
*TA–W–11,355; Freddi-Gail, Inc., Hoboken, NJ*

In the following cases the investigation revealed that criterion (3) has not been met. Increased imports did not contribute importantly to workers separations at the firm.

*TA–W–11,848; Seal-O-Matic Corp., Newark, NJ*
*TA–W–11,709; General Electric Co., Cleveland Equipment Plant, Cleveland, OH*
*TA–W–11,682; Christopher Dyeing & Finishing Co., Inc., Paterson, NJ*
*TA–W–11,942; Viner Brothers, Inc., Bangor, ME*
*TA–W–11,943; Viner Brothers, Inc., Belfast, ME*
*TA–W–11,944; Viner Brothers Inc., Presque Isle, ME*
*TA–W–11,613; Surgical Sponge Div., Humboldt Products Corp., Columbus, MS*
*TA–W–11,626; Surgical Sponge Div., Ultratek Disposables Co., Columbus, MS*

In the following case the investigation revealed that criterion (3) had not met the reason specified.

*TA–W–12,065; Swiss Time Impertra Corp., New York, NY*

The workers did not produce an article within the meaning of the Trade Act of 1974.

*TA–W–11,980; Lawrence Maid Footwear, Inc., Lawrence, MA*

The investigation revealed that criterion (2) has not been met. Sales or production, or both, did not decrease as required for certification.

**Affirmative Determinations**

TA–W–12,084; Carroll Shoe Co., Summersville, W. VA.

A certification was issued in response to a petition received on January 12, 1981 covering all workers separated on or after January 1, 1981.

TA–W–12,260; Milwaukee Glove Co., Marinette, WI.

A certification was issued in response to a petition received on February 6, 1981 covering all workers separated on or after January 20, 1980.

TA–W–12,203; Microdot Manufacturing, Inc., Detroit Diamond Div., Wyandotte, MI

A certification was issued in response to a petition received on January 28, 1981 covering all workers separated on or after January 26, 1980.

TA–W–12,697; Microdot Manufacturing, Inc., Everlock, TN and Portland, TN

A certification was issued in response to a petition received on May 12, 1981 covering all workers separated on or after May 8, 1980.

TA–W–12,590; Sprague Electric Co., Grafton, WI.

A certification was issued in response to a petition received on April 2, 1981 covering all workers separated on or after March 30, 1980 and before September 18, 1981.

TA–W–12,494; Bobbie Brooks Corp., Bobbie Brooks Div., Cleveland Cutting Center, Cleveland, OH.

A certification was issued in response to a petition received on March 16, 1981 covering all workers separated on or after March 12, 1980 and before January 17, 1981.

TA–W–11,891; I. S. Sutton & Sons, Inc., Newark, N.J.

A certification was issued in response to a petition received on December 8, 1980 covering all workers separated on or after December 1, 1979 and before January 9, 1982.

TA–W–12,063; Nandy Knits, Inc., Greenvale, NY.

All workers who became totally or partially separated on or after December 30, 1979 and before March 31, 1981 are certified eligible to apply for adjustment assistance.

TA–W–12,063A; Nandy Knits, Inc., New York, N.Y.

All workers who became totally or partially separated on or after December 30, 1979 and before March 31, 1981 are certified eligible to apply for adjustment assistance.

I hereby certify that the aforementioned determinations were issued during the period May 3, 1982–May 7, 1982. Copies of these determinations are available for inspection in Room 10,332, U.S. Department of Labor, 601 D Street NW., Washington, D.C. 20213 during normal business hours or will be mailed to persons who write to the above address.

Dated: May 11, 1982.

**Marvin M. Fooks,**

*Director, Office of Trade Adjustment Assistance.*

[FR Doc. 82–13453 Filed 5–17–82; 8:45 am]
BILLING CODE 4510–30–M

## Office of Inspector General

### Report on Computer Matching Project Involving Beneficiaries of Office of Worker's Compensation Programs

The Office of the Inspector General (OIG), pursuant to its Authority Under Pub. L. 95–452 (Inspector General Act of 1978) has initiated a program of computer matching.

**Description of Matches**

One of the responsibilities of the Inspector General under the Act is to prevent and detect fraud and abuse in the programs and operations of the Department of Labor while keeping the Congress fully and currently informed about problems and deficiencies relating to the administration of such programs and operations and the need for and progress of corrective actions. Computer matching is the most efficient and also the least intrusive means of determining the propriety of program claimants receiving benefits.

The Office of Workers' Compensation Programs (OWCP) of the Department of Labor administers the Federal Employees' Compensation (FECA) and Coal Mine Workers' Compensation (Black Lung) Programs. The FECA and Black Lung Programs provide monthly compensation payments plus medical benefits to disabled workers. This

matching effort will compare the records of FECA and Black Lung claimants to records of beneficiaries of organizations and programs outside of DOL. The organizations and programs involved in the match with the DOL programs are: (1) Office of Personnel Management's Central Personnel Data File of active Federal employees and Federal Annuity Payroll File of retirees and survivors, (2) Tennessee Valley Authority's Current Employee File and Retirement System Retiree Payroll, (3) Veterans Administration's Compensation and Pension Programs, (4) Social Security Administration's Supplemental Security Income and Medicare Programs, (5) Health Programs of the United Mine Workers of America Health and Retirement Funds, (6) Department of Defense's Civilian Health and Medical Programs for the Uniformed Services, (7) Office of Inspector General, Department of Agriculture (OIG/USDA) records which are the result of the match of District of Columbia Food Stamp participants with income source records.

Although scheduled as a one-time match, recommendations for continuing and/or periodic matching, based on the results of this match may be made to source agencies.

**Procedures of the Matching Program**

*Step 1. Acquisition of Data Files*

OWCP will provide OIG/DOL the following files through March 1982: (1) Black Lung (Medical) Provider File, (2) Black Lung Benefit (Compensation) Payments, (3) FECA Case Management File, (4) and the FECA Automated Compensation Payments System. In addition, OWCP will provide Black Lung and FECA records of medical bill payments made during the period October 1, 1978 through March 1982.

OPM, VA, TVA, SSA, UMW, DOD, and OIG/USDA will provide records of program beneficiaries to OIG/DOL.

*Step 2. Computer Processing*

The OIG/DOL will prepare, on magnetic tape, extracts from OWCP files, selecting only those data elements which are relevant to the actual match process or to the determination of the propriety of the payments. Compensation match will be conducted using software developed by the General Accounting Office (GAO) for the conduct of matching programs. GAO has provided software for the mechanical match, but will not be involved in any other way. Medical match procedures will be designed, developed and processed by the OIG/DOL.

*Step 3. Analysis of the Results*

An initial manual review of the output data will be conducted to determine its significance. If required, additional computer processing will be performed to futher refine the data. The data will be evaluated to determine the appropriate verification procedures. Follow-up procedures will be determined by the nature of the findings. Investigation(s) may be conducted as part of the verification process or to develop criminal cases.

Consideration of the costs and benefits of additional actions will be a part of a continual evaluation process. Follow-up will be the responsibility of OIG/DOL, except that OIG/USDA will be responsible for follow-up of the Food Stam match. Assistance from other agencies may be required in the review of case files.

**Description of Records to be Matched**

The Office of Workers' Compensation Programs (OWCP) files as published in the Federal Register are:

DOL/ESA–6, Black Lung Benefit Claim File, 42 FR 187, pg. 49658 on September 27, 1977;

DOL/ESA–7, Black Lung Benefit Payments File, 46 FR 30 pg. 12356 on February 13, 1981;

DOL/ESA–8, Black Lung Claimant Information File, 46 FR 30, pg. 12357 on February 13, 1981;

DOL/ESA–9, Black Lung Medical Treatment Records File, 42 FR 187 pg. 49659 on September 27, 1977;

DOL/ESA–11, Black Lung Service Payments File, 46 FR 30, pg. 12357 on February 13, 1981;

DOL/ESA–13, Federal Employees' Compensation Act File, 46 FR 30 pg. 12357–12318 on February 13, 1981;

OWCP records are obtained by OIG/DOL under authority of the provision of the Privacy Act specified in Title 5, U.S. Code, Section 552a (b) (1).

*Office of Personnel Management Files*

OPM/GOVT–1, General Personnel Records system, 45 FR 229, pg. 78415–78419 on November 25, 1980.

OPM/Central–1, Civil Service Retirement and Insurance Records 45 FR 229, pg. 78398–78397 on November 25, 1980.

*Tennessee Valley Authority Files*

TVA 2–Personnel Files, 46 FR 249 pg. 62993–62994 on December 29, 1981

TVA 26–Retirement Systems Records, 46 FR 249 pg. 62993–62994 on December 29, 1981

*Veterans Administration File*

VA Compensation, Pension, Education and Rehabilitation System 42 FR 187 on September 27, 1977, amended in 47 FR 364 on January 5, 1982.

*Department of Health and Human Service, Social Security Administration File.*

Supplemental Security Income Records, HHS, SSA, OURV, 47 FR 5, pg. 1032–1034 on January 8, 1982.

*Department of Health and Human Services, Health Care Financing Administration Files.*

System Notice 09–70–0501, Carrier Medicare Claims Records, HHS, HCFA, BPO, 46 FR 138, July 20, 1981, pg. 37332–37333;

System Notice 09–70–0502, Health Insurance Master Record, HHS, HCFA, BPO, 46 FR 138, July 20, 1981, pg. 37333–37335;

System Notice 09–70–0530, Intermediary Medicare Claims Records, HHS, HCFA, BPO, 46 FR 138, July 20, 1981, pg. 37335–37336;

The United Mine Workers of America Health and Retirement Funds will provided provide data on medical program beneficiaries.

*Department of Defense File*

DOCHA–07, Medical Claim History files, 46 FR 114, pg. 31317–31318 on June 15, 1981.

*Department of Agriculture, Office of Inspector General File*

USDA/OIG, Audit Information System, 44 FR 18, pg. 1174 on January 25, 1979.

**Starting and Ending Dates of the Project**

The first match should begin approximately in late May and the final match during June 1982. Follow-up procedures may extend through the end of calendar year 1982.

**Privacy Protection and Data Security**

The personal privacy of individuals identified on tapes is protected by strict compliance with the Privacy Act (Public Law 93–579) and OMB Circular A–108. Information from matching programs is used ony for official purposes and "raw hits" are not released to the press or to the public.

All automated data sets will be password protected, and only those who need to know will be given access to the data sets or the passwords. All paper listings of data will be stored in a room which will be locked when not occupied.

### Disposal of Records

Source records do not become part of the OIG/DOL's system of records and will be returned to the program and/or destroyed within 6 months after the completion of the match. Output records become a part of OIG/DOL's system of records and will be disposed of in accordance with records disposition authority approved by the Archivist of the United States.

Signed at Washington, D.C. on the 12th day of May 1982.

**Robert E. Magee**

*Deputy Inspector General.*

[FR Doc. 82-13452 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-21-M

## Mine Safety and Health Administration

**[Docket No. M-81-256-C]**

### CF&I Steel Corp.; Petition for Modification of Application of Mandatory Safety Standard

CF&I Steel Corporation, P.O. Box 316, Pueblo, Colorado 81002 has filed a petition to modify the application of 30 CFR 75.1714-2(e)(3) (Self-rescue devices; use and location) to its Bokoshe Mine located in LeFlore County, Oklahoma. The petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that self-contained self-rescuers (SCSRs) be stored within 25 feet of miners or carried by the miners on all mantrips into and out of the mine.

2. Because of the weight and bulk of the SCSRs, petitioner states that carrying the SCSRs, would be awkward and could cause an accident during conveyor belt mantrips at the mine. Also, vibration on the belt could be detrimental to the SCSRs.

3. As an alternative method, petitioner proposes to store the SCSRs at 1400 foot intervals along the belt conveyor used for mantrips.

4. Petitioner will require that all miners be equipped with 60 minute filter-type self-rescuers which they would wear on mantrips into the mine and at all times until returning to the surface.

5. For these reasons, petitioner requests a modification of the standard.

### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13455 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

## Summary of Decisions Granting in Whole or in Part Petitions for Modification

**AGENCY:** Mine Safety and Health Administration (MSHA), Labor.

**ACTION:** Notice of affirmative decisions issued by the Administrators for Coal Mine Safety and Health and Metal and Nonmetal Mine Safety and Health on petitions for modification of the application of mandatory safety standards.

**SUMMARY:** Under Section 101(c) of the Federal Mine Safety and Health Act of 1977, the Secretary of Labor may modify the application of a mandatory safety standard to a mine if the Secretary determines either or both of the following: that an alternative method exists at the petitioner's mine that will guarantee no less protection for the miners affected than that provided by the standard, or that the application of the standard to the petitioner's mine will result in a diminution of safety to the affected miners.

Summaries of petitions received by the Secretary appear periodically in the **Federal Register.** Final decisions on these petitions are based upon the petitioner's statement, comments and information submitted by interested persons and a field investigation of the conditions at the petitioner's mine. The Secretary has granted or partially granted the requests for modification submitted by the petitioners listed below. In some instances the decisions are conditioned upon the petitioner's compliance with stipulations stated in the decision.

**FOR FURTHER INFORMATION CONTACT:** The petitions and copies of the final decisions are available for examination by the public in the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

AFFIRMATIVE DECISIONS ON PETITIONS FOR MODIFICATION

| Docket No. | FR Notice | Petitioner | Regulation affected | Summary of findings |
|---|---|---|---|---|
| M-79-15-M | 44 FR 43356 | Johns Manville Sales Corp. | 30 CFR 55.13-20 | Petitioners' proposal to clean employees clothing with compressed air using specific safeguards considered acceptable alternative method of compliance. Granted with conditions. |
| M-80-77-M | 45 FR 57791 | Domtar Industries, Inc. | 30 CFR 57.21-24(a) | Allowing miners to remain underground with specified safety precautions when the main fan stops considered acceptable alternative method. Granted with conditions. |
| M-80-81-M | 45 FR 53610 | Domtar Industries, Inc. | 30 CFR 57.21-46 | Crosscuts at intervals greater than 100 feet at specified areas considered acceptable alternative method of compliance. Granted with conditions. |
| M-80-88-M | 45 FR 45734 | Domtar Industries, Inc. | 30 CFR 57.21-95 | Use of nonpermissible explosives or blasting faces and benches in the underground mine, with specified safeguards and precautions considered acceptable alternative method. Granted with conditions. |
| M-80-89-M | 45 FR 170 | Domtar Industries, Inc. | 30 CFR 57.21-98 | Petitioner's proposal to blast without the use of stemming materials in the boreholes coupled with specified safeguards and procedures considered acceptable alternative method. Granted with conditions. |
| M-80-29-C | 45 FR 10479 | United States Steel Corp. | 30 CFR 75.326 | Installation of second belt conveyor system in intake to transport miners and supplies considered acceptable alternative methods. Granted with conditions. |
| M-80-50-C | 45 FR 28006 | Solar Fuel Co. | 30 CFR 77.100(b)(2) | Petitioner's proposal to establish a single certification process for certified persons considered acceptable alternative method. Granted with conditions. |
| M-81-10-C | 46 FR 17929 | Peabody Coal Co. | 30 CFR 75.305 | Proposed installation of an air monitoring station at the first South Seals considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-121-C | 46 FR 49232 | Jim Walter Resources, Inc. | 30 CFR 75.1400 | Petitioner's proposal to inspect tiled surface every two or four weeks using a platform suspended by a personnel hoist equipped with specific safeguards considered acceptable alternative method of compliance. Granted with conditions. |

AFFIRMATIVE DECISIONS ON PETITIONS FOR MODIFICATION—Continued

| Docket No. | FR Notice | Petitioner | Regulation affected | Summary of findings |
|---|---|---|---|---|
| M-81-123-C | 46 FR 38167 | G.M. & W. Coal Co., Inc | 30 CFR 75.155(b)(2) | Operation of automatic hoist system as a conventional electric hoist when mechanical or electrical problems cancel the automatic control considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-133-C | 46 FR 42942 | Ranger Fuel Corp. | 30 CFR 49.6(a)(1) | Equipping the mine rescue stations with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-137-C | 46 FR 38612 | Jones & Laughlin Steel Corp. | 30 CFR 75.305 | Proposal to establish specified air monitoring stations and record results of examinations on a date board at each location considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-139-C | 46 FR 42941 | Jewell Ridge Coal Corp. | 30 CFR 49.6(a)(1) | Equipping the mine rescue station with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-147-C | 46 FR 41233 | Beckley Coal Mining Company | 30 CFR 49.6(a)(1) | Equipping the mine rescue station with nine self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-149-C | 46 FR 41234 | Southern Ohio Coal Corp. | 30 CFR 49.6(a)(1) | Equipping the mine rescue station with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-151-C | 46 FR 41234 | Consolidation Coal Company | 30 CFR 75.305 | Proposal to establish specified air monitoring stations and record results of examininations on a date board at each location considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-153-C | 46 FR 41233 | Badger Coal Co. | 30 CFR 49.6(a)(1) | Equipping the mine rescue station with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-155-C | 46 FR 42943 | Ranger Fuel Co. | 30 CFR 75.1807 | Petitioner's proposed form to be used in lieu of form required by the standard considered acceptable alternative method. Granted with conditions. |
| M-81-165-C | 46 FR 42941 | Elkay Mining Co. | 30 CFR 49.6(a)(1) | Equipping the mine rescue stations with six self-contained oxygen breathing apparatus with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method compliance. Granted with conditions. |
| M-81-166-C | 46 FR 43910 | Gateway Coal Co. | 30 CFR 75.1700 | Proposed plan to plug and mine through abandoned oil and gas wells considered acceptable alternative methods to leaving coal barriers around the wells. Granted with conditions. |
| M-81-170-C | 46 FR 49234 | North American Coal Corp. | 30 CFR 49.6(a)(4) | Maintaining an agreement with National Mine Service Company to refill and recharge all emergency oxygen equipment which is compatible with petitioner's equipment and located within one hour ground travel time from the mine considered acceptable alternative method. Granted with conditions. |
| M-81-178-C | 46 FR 49231 | Consolidation Coal Company | 30 CFR 75.312 | Establishing seven air checkpoints at designated locations to take weekly methane readings considered acceptable alternative to rehabilitation of deteriorated entries. Granted with conditions. |
| M-81-179-C | 46 FR 49231 | Consolidation Coal Co. | 30 CFR 75.305 | Proposal to establish and maintain specified air monitoring stations considered acceptpable alternative method. Granted with conditions. |
| M-81-185-C | 46 FR 49232 | Eastover Mining Co. | 30 CFR 49.6(a)(1) | Equipping the mine rescuuce stations with six self-contained oxygen breathing apparatus and maintaining agreements with fully equipped backup teams located within 2 hours ground travel time from the mines considered acceptable alternative method. Granted with conditions. |
| M-81-187-C | 46 FR 52446 | Peabody Coal Co. | 30 CFR 75.1710 | Installation of cabs or canopies on shuttle cars and roof bolting machines in specified low mining heights would result in a diminution of safety. Granted in part with conditions. |
| M-81-188-C | 46 FR 56074 | D.C. Coal Company | 30 CFR 75.301 | Proposed airflow reduction in petitioner's mine which would maintain a safe and healthful atmosphere considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-189-C | 46 FR 53810 | R.C. & R. Coal Co. | 30 CFR 75.301 | Proposed airflow reduction in petitioner's mine, which would maintain a safe and healthful atmosphere, considered acceptable alternative methods of compilance. Graned with conditions. |
| M-81-199-C | 46 FR 53806 | Consolidation Coal Co. | 30 CFR 75.305 | Proposal to establish and maintain seven air monitoring stations at specific locations and record the results in a date book considered acceptable alternative method. Granted with conditions. |
| M-81-203-C | 46 FR 53808 | Amherst Coal Co. | 30 CFR 49.6(a)(1) | Equipping the mine rescue stations with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-205-C | 46 FR 52447 | United States Steel Corp. | 30 CFR 75.1707 | Requirement that an intake escapeway be installed and maintained separate from belt and trolley haulage system continuous from the surface to each working section would result in a diminution of safety. Granted with conditions. |
| M-81-210-C | 46 FR 58384 | Jones & Laughlin Steel Corp. | 30 CFR 49.6(a)(1) | Equipping the mine rescue stations with six self-contained oxygen breathing apparatus and maintaining an agreement with a fully equipped backup team located no more than 2 hours ground travel time from the mine considered acceptable alternative method. Granted with conditions. |
| M-81-216-C | 46 FR 62199 | BSb Coal Co., Inc. | 30 CFR 75.1710 | Installations of cabs or canopies on the mine's shuttle cars in specified low mining heights would result in a diminutions of safety. Granted with conditions. |
| M-81-219-C | 46 FR 56073 | Consolidation Coal Co. | 30 CFR 75.305 | Proposal to establish specified air monitoring stations and record results of examinations on a date board at each location considered acceptable alternative method of compliance. Granted with conditions. |
| M-81-220-C | 46 FR 56075 | Thacker Brothers Mining Co. | 30 CFR 75.1710 | Installation of cabs or canopies on the mine's cutting machine in specified low mining heights would result in a diminution of safety. Granted in part with conditions. |
| M-81-237-C | 47 FR 5493 | G.M. & W. Coal Co., Inc. | 30 CFR 75.155(b)(2) | Petitioner's proposal regarding training and qualifications of hoisting engineers considered acceptable alternative method. Granted with conditions. |

[FR Doc. 82-13454 Filed 5-17-82; 8:45 am]
BILLING CODE 4510-43-M

[Docket No. M-82-41-C]

## Consolidation Coal Co.; Petition for Modification of Application of Mandatory Safety Standard

Consolidation Coal Company, Consol Plaza, Pittsburgh, Pennsylvania 15241 has filed a petition to modify the application of 30 CFR 75.1403-9 (criteria-shelter holes) to its Loveridge Mine (I.D. No. 46-01433) located in Marion County, West Virginia. This petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. Petitioner seeks a modification of the standard as it applies to track haulage from the loaded track switch for the rotary dump to the Flat Run Portal and one other area of the mine.

2. The track haulage was developed prior to 1970 and roof deterioration has occurred in some crosscuts requiring the installation of additional roof support, such as posts and cribs. Cribs and ventilation stoppings were constructed near the edge of crosscuts to provide long range roof control along the haulage. Permanent stoppings were installed near the track, on initial development. Removal of these cribs and stoppings would adversely affect roof conditions along the mainline haulage and expose miners to unnecessary and dangerous conditions.

3. Certain sections of the haulage have been graded to various depths and the top was taken down to facilitate level haulage. As a result, the access to certain crosscuts is as high as eight feet above track level. Shooting shelter holes in the rock rib will create unstable ribs resulting in a hazard to the miners.

4. As an alternative method, petitioner proposes that:

a. Luminous signs, stating that persons are not to enter those areas on foot, unless the person controlling haulage traffic has been notified, will be posted at the inby and outby ends and at the junctions which enter the affected area;

b. All designated shelter holes in the affected areas will be marked with luminous signs or reflectors;

c. Work crews assigned to these haulage entries will notify the person controlling haulage traffic of the locations where work is to be performed. Upon arrival at the work site, workers will locate a shelter hole or crosscut where they can take refuge when haulage equipment is passing;

d. The person controlling haulage traffic will notify all locomotive operators of the location of work crews in the affected area;

e. When workers are required to perform work along these haulage tracks, signs will be posted indicating "persons working" at the inby and outby ends and all equipment will travel at a slow rate of speed through the area;

f. The above provisions will be posted at all entrances to the haulage road; and

g. Crosscuts used as shelter holes on all existing haulage will be maintained four feet wide to the depth of the stopping in the crosscut.

4. Petitioner states that the proposed alternative method will provide the same degree of safety for the miners affected as that afforded by the standard.

### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 11, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13456 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

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[Docket No. M-82-31-C]

## Plateau Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Plateau Mining Company, P.O. Drawer PMC, Price, Utah 84501 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its No. 2 Mine (I.D. No. 42-00171) located in Emery County, Utah. The petition was filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that return aircourses be examined in their entirety on a weekly basis.

2. Petitioner seeks a modification of the standard for that part of the main return which passes through the area of second mining, along the No. 1 stopehole beltline of 2nd South Star Point. Petitioner states that application of the standard to this area during and after second mining will result in a diminution of safety for persons required to perform the weekly examinations because the entire area was developed under a spot bolting plan and roof control in the timber areas would be impossible to maintain after second mining was completed. This would expose miners to the hazards of potential roof falls.

3. As an alternative method, petitioner proposes to examine the return entry as long as it existed outby the second mining area up to the existing pillar line, monitoring the bleeder entry from old works. The fireboss would enter the main fan from the surface and monitor air flow through the gob area to the main return. This method of monitoring air vacuums and air quality on each side of the gob would provide miners with the same degree of safety as walking the return in its entirety.

4. For these reasons, petitioner requests a modification of the standard.

### Request for Comments

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13458 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

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[Docket No. M-82-45-C]

## Quarto Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

Quarto Mining Company, Powhatan Point, Ohio 43942 has filed a petition to modify the application of 30 CFR 75.305 (weekly examinations for hazardous conditions) to its Powhatan No. 7 Mine (I.D. No. 33-02624) located in Monroe County, Ohio. The petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a certified person make weekly examinations for hazardous conditions, including tests for methane, in the return aircourses.

2. Petitioner states that application of the standard would result in a diminution of safety for the miners affected because overriding pressure from the previous longwall panel has caused the roof to settle and the bottoms to heave along the return aircourse. This has reduced the height of this entry to 23 inches or less and has made the return aircourse too hazardous to travel.

The entry is already cribbed and planked to the maximum practicable extent. No effective rehabilitation can be performed and no additional cribs or other roof supports can be set. Rehabilitation attempts would expose miners to extremenly hazardous conditions.

3. As an alternative method, petitioner proposes to establish and maintain specified air monitoring stations at both ends of the return aircourse. Daily air and methane readings will be made by a certified person and the results recorded on a fireboss dateboard at each location.

4. Petitioner states that the proposed alternative method will provide the same degree of safety for the miners affected as that afforded by the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13457 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

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**[Docket No. M-82-14-M]**

## St. Cloud Mining Co.; Petition for Modification of Application of Mandatory Safety Standard

St. Cloud Mining Company, P.O. Box 11398, Albuquerque, New Mexico 87112 has filed a petition to modify the application of 30 CFR 57.18-13 (communications system) to its St. Cloud Mine (I.D. No. 29-01869) located in Sierra County New Mexico. The petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that a suitable communication system be provided at the mine to obtain assistance in the event of an emergency.

2. Because of the remote location of the mine, no commercial telephone service is available, and because of the rugged topography, no effective or useful radio communications system (citizens band, radio phone, or FM) have worked.

3. To insure the safety of the employees and use the best possible communications system available, petitioner has established an office at the closest available point to the mine (about 10 miles) and installed a telephone. At the mine site, a fully equipped ambulance is present, and other company-owned vehicles for relaying messages or alerting officials to a mine emergency are always available.

4. Petitioner states that the procedure outlined above will provide the same degree of safety for the miners affected as that afforded by the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13457 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

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**[Docket No. M-82-10-M]**

## Union Carbide Corp.; Petition for Modification of Application of Mandatory Safety Standard

Union Carbide Corporation, Bishop, California 93514 has filed a petition to modify the application of 30 CFR 57.11-59 (hoists) to its Pine Creek Mine (I.D. No. 04-00899) located in Inyo County, California. The petition is filed under Section 101(c) of the Federal Mine Safety and Health Act of 1977.

A summary of the petitioner's statements follows:

1. The petition concerns the requirement that underground hoist operators be provided with a respirable atmosphere completely independent of the mine atmosphere, i.e., an independent ventilation system that shall convert, without contamination, to an approved and properly maintained 2-hour self-contained breathing apparatus.

2. Petitioner states that application of the standard would result in a diminution of safety for the miners affected because existing data strongly indicate against any one person wearing such equipment unless in the company of other personnel similarly equipped. A person can collapse and die in a respirable environment while wearing a self-contained breathing apparatus if it malfunctions and no one is present to render assistance.

3. As an alternative method, petitioner proposes use of the following system at each hoist installation: a full face mask with purge button, a 30 foot section of hose with Hanson fittings, a reduction gauge, two man outlet, and a pressure relief valve. A 300 cubic foot compressed air cylinder is located with this equipment in each hoistroom and allows for approximately 24 hours of breathing noncontaminated air. Each location has a 45 cu. ft. portable tank of compressed air complete with gauges and snap-on connections adaptable to the face mask that will provide for safe exit from the hoistroom to the surface or fresh air base.

4. Petitioner states that the method outlined above will provide the same degree of safety for the miners affected as that afforded by the standard.

**Request for Comments**

Persons interested in this petition may furnish written comments. These comments must be filed with the Office of Standards, Regulations and Variances, Mine Safety and Health Administration, Room 627, 4015 Wilson Boulevard, Arlington, Virginia 22203. All comments must be postmarked or received in that office on or before June 17, 1982. Copies of the petition are available for inspection at that address.

Dated: May 10, 1982.

**Patricia W. Silvey,**

*Acting Director, Office of Standards, Regulations and Variances.*

[FR Doc. 82-13460 filed 5-17-82; 8:45 am]

BILLING CODE 4510-43-M

## Occupational Safety and Health Administration

### Maryland State Standards; Notice of Approval

1. *Background.* Part 1953 of Title 29, Code of Federal Regulations, prescribes procedures under section 18 of the Occupation Safety and Health Act of 1970 (hereinafter called the Act) by which the Regional Administrator for Occupational Safety and Health (hereinafter called the Regional Administrator) under a delegation of authority from the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter called the Assistant Secretary) (29 CFR 1953.4) will review and approve standards promulgated pursuant to a State plan which has been approved in accordance with section 18(c) of the Act and 29 CFR Part 1902. On July 5, 1973, notice was published in the **Federal Register** (38 FR 17834) of the approval of the Maryland State plan and the adoption of Subpart O to Part 1952 containing the decision.

The Maryland State plan provides for the adoption of Federal standards as State standards by reference or after comments and/or public hearings. Section 1952.210 of Subpart O sets forth the State's schedule for the adoption of Federal standards. By letters of June 26, 1981 and November 5, 1981 from Commissioner Harvey A. Epstein, Maryland Division of Labor and Industry to David H. Rhone, Regional Administrator and incorporated as part of the plan, the State submitted State standards comparable to: (1) Amendments to 29 CFR 1926.500(g) and .502(p), pertaining to guarding of low-pitched roof perimeters during the performance of built-up roofing work, as published in the **Federal Register** dated November 14, 1980 (45 FR 75624–75631); (2) 29 CFR Part 1910, Subpart S, pertaining to electrical standards, as published in the **Federal Register** dated January 16, 1981 (46 FR 4055–4076); (3) amendments and corrections to 29 CFR 1910.217, pertaining to mechanical power presses, as published in the **Federal Register** dated February 18, 1980 (45 FR 8593–8594); and (4) amendments to 29 CFR 1910.35, 1910.37, 1910.38, 1910.107–.109, 1910.155–.165(b), Appendix to 29 CFR Part 1910, Subpart E and Appendices A through E to 29 CFR Part 1910, Subpart L, all pertaining to fire protection, means of egress and hazardous materials, as published in the **Federal Register** dated September 12, 1980 (45 FR 60703–60727). These standards, which are contained in COMAR 09.12.31 Maryland Occupational Safety and Health Act, were promulgated after public comment pursuant to Article 89, Sections 30 (a), (i), (l) and (m), annotated Code of Maryland.

2. *Decision.* Having reviewed the State submission in comparison with the Federal standards it has been determined that the State standards are identical to the Federal standards and accordingly should be approved.

3. *Location of the supplement for inspection and copying.* A copy of the standards supplement, along with the approved plan, may be inspected and copied during normal business hours at the following locations: Office of the Commissioner of Labor and Industry, 203 East Baltimore Street, Baltimore, Maryland 21202; Office of the Regional Administrator—OSHA, 3535 Market Street, 2100 Gateway Building, Philadelphia, Pennsylvania 19104; and the Office of State Programs, Room N3613, Third Street and Constitution Avenue, NW., Washington, D.C. 20210.

4. *Public Participation.* Under 29 CFR 1953.2(c), the Assistant Secretary may prescribe alternative procedures to expedite the review process or for the other good cause which may be consistent with applicable laws. The Assistant Secretary finds that good cause exists for not publishing the supplement to the Maryland State plan as a proposed change and making the Regional Administrator's approval effective upon publication for the following reasons:

1. The standards are identical to the Federal standards which were promulgated in accordance with Federal law including meeting requirements for public participation.

2. The standards were adopted in accordance with the porcedural requirements of State law and further participation would be unnecessary.

This decision is effective May 18, 1982.

(Sec. 18, Pub. L. 91–596, 84 Stat. 1608 (29 U.S.C. 667))

Signed at Philadelphia, Pennsylvania this 10th day of December, 1981.

**David H. Rhone,**

*Regional Administrator.*

[FR Doc. 82–13461 Filed 5–17–82; 8:45 am]

BILLING CODE 4510–26–M

### Federal Advisory Council on Occupational Safety and Health; Postponement of Meeting

Notice is hereby given that the meeting of the Federal Advisory Council on Occupational Safety and Health, scheduled for May 20, 1982 (47 FR 18694; April 30, 1982), is postponed until a later date.

All communications regarding this Advisory Council should be addressed to Mr. John E. Plummer, Director, Office of Federal Agency Programs, Department of Labor, OSHA, Bicentennial Building, 600 E Street, NW., Suite 500, Washington, D.C. 20210, telephone (202) 376–3005.

Signed at Washington, D.C., this 13th day of May 1982.

**Thorne G. Auchter,**

*Assistant Secretary.*

[FR Doc. 82–13451 Filed 5–17–82; 8:45 am]

BILLING CODE 4510–26–M

## Office of Pension and Welfare Benefit Programs

### Proposed Amendments to Prohibited Transaction Exemption 81–7 for Certain Transactions Involving Mortgage Pool Investment Trusts

**AGENCY:** Office of Pension and Welfare Benefit Programs, Labor.

**ACTION:** Notice of Proposed Amendments to Class Exemption 81–7.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of proposed amendments to Prohibited Transaction Exemption 81–7. Prohibited Transaction Exemption 81–7 exempts from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and from certain taxes imposed by the Internal Revenue Code of 1954 (the Code) certain transactions 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 under certain circumstances by employee benefit plans (investing plans). In addition to making certain technical changes in the class exemption, the proposed amendments would expand the coverage of the class exemption to include: (1) Pools consisting of loans secured by second mortgages or second deeds of trust; and (2) forward delivery commitments by investing plans to purchase pool certificates under certain circumstances. The proposed amendments, if adopted, would affect participants and beneficiaries of employee benefit plans investing in such certificates, the sponsors and trustees of such mortgage pools, and other persons engaging in the described transactions.

**DATES:** Written comments and requests for a public hearing must be received by

the Department on or before June 17, 1982.

**EFFECTIVE DATE:** It is proposed to make these amendments effective January 1, 1975.

**ADDRESSES:** All written comments and requests for a hearing (preferably at least three copies) should be sent to: Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216, *Attention:* Mortgage Pools. Applications pertaining to the exemptive relief proposed herein (Applications D-2789 and D-3060) and 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, Frances Perkins Building, Room N4677, 200 Constitution Avenue, NW., Washington, D.C.

**FOR FURTHER INFORMATION CONTACT:** Carol Gold of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, U.S. Department of Labor, (202) 523-8971, or William J. Flanagan of the Plan Benefits Security Division, Office of the Solicitor, U.S. Department of Labor, (202) 523-8610. (These are not toll-free numbers.)

**SUPPLEMENTARY INFORMATION:** On January 23, 1981, the Department granted Prohibited Transaction Exemption 81-7 (PTE 81-7) for certain transactions involving plan investments in mortgage pool investment trusts. (46 FR 7520.) [1] As defined in section III (B) of PTE 81-7, a mortgage pool is 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 (3) undistributed cash. Generally, the loans comprising the pool corpus have been either originated by the sponsor of the pool or purchased by the pool sponsor from other sources. These mortgage loans are collected by the pool sponsor and transferred in trust to a trustee which is independent of the pool sponsor. The pool trustee then transfers to the pool sponsor certificates representing fractional undivided beneficial interests in the pooled mortgages. The certificates are then sold by the pool sponsor (or by an underwriting syndicate) to investors including employee benefit plans. The principal and interest payments made by individual mortgagors are passed through the mortgage pool in the form of fixed monthly payments to certificateholders, with the pool sponsor retaining a fixed percentage of the interest as a servicing fee. The rights and obligations of the pool sponsor and pool trustee are set forth in a binding pooling and servicing agreement which governs the organization and maintenance of the mortgage pool.[2]

It should be noted that the Act contains no *per se* prohibition against plan investments in mortgage pool certificates or any other mortgage-related investment. Sections 406 and 407 of the Act, however, do generally prohibit transactions between a plan and a party in interest (including a fiduciary) with respect to such plan. Where the sponsor, trustee or insurer of a mortgage pool are not parties in interest with respect to a plan, the Act will not prohibit plan investments in such pool so long as the plan fiduciaries have exercised their fiduciary authority in accordance with the standards established in section 404 of the Act. Where, however, one or more of the entities involved in the organization and maintenance of a mortgage pool are parties in interest with respect to a plan, the Act may prohibit investments by such plan in the pool in the absence of an administrative or statutory exemption.

Prohibited Transaction Exemption 81-7 was granted to provide generalized relief from such prohibitions for transactions involving mortgage pools when the pool sponsor, trustee or insurer are parties in interest with respect to an investing plan. Section I(A)-(D) of the exemption provides relief for several different types of transactions under certain conditions specified for each type of transaction.[3] Section I(A) provides relief from the prohibitions of sections 406(a) and 407 of the Act [4] for the direct or indirect sale, exchange or transfer of certificates between a plan and the pool sponsor, and for the continued holding of such certificates by the plan. Section I(B) provides relief from the prohibitions of section 406(b)(1) and (2) of the Act for the direct or indirect sale, exchange or transfer of certificates between a plan and the pool sponsor when the pool sponsor, trustee or insurer is a fiduciary with respect to the plan assets invested in such certificates. Among the conditions applicable to this relief are that the sale, exchange or transfer be approved by an independent fiduciary, that the plan pays no more for the certificates than would be paid in an arm's-length transaction with an unrelated party,[5] and that a plan cannot purchase more than 25% of the amount of the issue of certificates. Section I(C) provides conditional relief from the restrictions of sections 406(a) and (b), and 407 of the Act for all transactions in connection with the servicing and operation of mortgage pools.[6] Section I(D) provides relief from the restrictions of sections 406(a) and 407 of the Act for any transactions to which such restrictions would otherwise apply

[1] The Department originally proposed class exemptive relief for transactions involving mortgage pools (45 FR 29937, May 6, 1980) on the basis of individual exemption applications filed by the Bank of America National Trust and Savings Association (D-1448), the Crocker National Bank (D-1449), the Wells Fargo Bank, National Association (D-1357) and PMI Mortgage Corporation (D-1447). These applicants, although not originally requesting class relief, indicated that transactions entered with regard to each of their pools were similar to those entered with regard to pools formed by other institutions within the mortgage pool industry. Because of this, the Department decided to treat these four individual applications as the basis upon which to propose class exemptive relief. The exemptive relief proposed and eventually adopted is not, therefore, limited to transactions involving pools formed by the four applicants, but rather is available for any transaction involving a mortgage pool which meets the conditions contained in the exemption.

In response to the May 6, 1980 proposal, the Department received a large number of comments and, pursuant to requests by the commentators, held a hearing on the proposal on September 9, 1980. These comments, the transcript of the hearing, and the original exemption applications are available for public inspection in the Public Documents Room of the Pension and Welfare Benefit Programs, U.S. Department of Labor, Frances Perkins Building, Room N4677, 200 Constitution Avenue, N.W., Washington, D.C.

[2] For a more detailed explanation of the form and operation of mortgage pools, see the preamble to the proposed mortgage pool class exemption, 45 FR 29937, 29938-41 (May 6, 1980).

[3] For the sake of convenience, the entire text of PTE 81-7, including the proposed amendments, is reprinted at the end of this notice.

[4] Pursuant to Reorganization Plan No. 4 of 1974 (43 FR 47713, October 17, 1978), the authority of the Secretary of the Treasury to grant exemptions of the type herein proposed was transferred to the Secretary of Labor. As a result, PTE 81-7 contains relief both from sections 406 and 407 of the Act and from the parallel provisions of the Internal Revenue Code of 1954. References in this discussion to sections of the Act should be understood to encompass references to the relevant provisions of the Code.

[5] As originally printed (46 FR 7520, 7526), this condition, contained in section I(B)(1)(b) of the exemption, stated that a plan would have to pay more than an arm's-length price for the certificates. This misprint was corrected by notice in the Federal Register on February 13, 1981 (46 FR 12363), and the corrected version is reprinted in this notice today.

[6] The preamble to the final class exemption indicated that PTE 81-7 would give relief from both section 406(a) and section 406(b) of the Act for transactions in connection with the servicing and operation of a mortgage pool. 46 FR 7520, 7522. However, the reference to section 406(b) was inadvertently omitted from the text of section I(C) of the final exemption. This oversight has been corrected in the version of PTE 81-7 reprinted today, as proposed to be amended.

merely because a person is deemed to be party in interest with respect 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. Section II of PTE 81–7 contains conditions applicable to all of the transactions covered by section I. These conditions are designed to assure a minimum level of protection for investing plans, and include, among others, a condition tht the pool have a trustee which is not an affiliate of the pool sponsor unless such sponsor is a governmental or quasi-governmental entity. Finally, section III contains definitions of terms used in the class exemption. It was th eDepartment's intention that these definitions be broad enough to provide relief to a wide spectrum of entities involved in the mortgage pool industry.

Since the adoption of PTE 81–7, it has come to the Department's attention that further relief in additional areas may be justified under the class exemption. One such area relates to pools comprised of notes secured by second mortgages or second deeds of trust. The other area deals with forward delivery commitments by plans to purchase certificates. The Department's proposals with regard to each of these areas are discussed below.

*A. Pools of Second Mortgages or Second Deeds of Trust*

Section III(B) of PTE 81–7 states:

> 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.

46 FR 7520, 7527. The definition of the term "mortgage pool" in the proposal had been similarly restricted to first mortgages or first deeds of trust. 45 FR 29937, 29946. In response to the proposal, the Department received two comments which requested that the Department expand this definition to include junior lien loans. Although these commentators provided some information about the quality of investments in junior lien loans, the preamble to the final class exemption stated:

> 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 necessry 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.

46 FR 7520, 7525.

Since the publication of PTE 81–7, the Department has received additional information regarding pools of loans secured by second mortgages and second deeds of trust. This information has come in the form of two applications for individual exemptions filed on behalf of Transamerica Financial Corporation (D–2789) and Merrill Lynch MBS Inc. (D–3060). These applications indicate that there is a uniformity of structure and function among pools of second mortgage loans similar to that which exists for pools of first mortgage loans. As a result, the Department has decided to treat these applications as the basis upon which to propose class exemptive relief for pools of loans secured by second mortgages or second deeds of trust. The relief provided in this proposed amendment to PTE 81–7 would not, therefore, be limited to transactions involving pools formed by the applicants. Rather, the relief woud be available for any transaction involving a pool which meets the terms of the amendment and the other conditions of the class exemption.

Both applications indicate that pools of second mortgage loans are organized and maintained in the same way as pools of first mortgage loans. Both applications request exemptive relief which is the same as that provided in PTE 81–7, only applicable also to second mortgage pools. The potential prohibited transactions identified by the applicants are precisely those examined in detail in the preamble to the proposed class exemption. See 45 FR 29937, 29941–44.

The applicants represent that the provision of exemptive relief for pools of loans secured by second mortgages or second deeds of trust is administratively feasible; in the interest of investing plans, their participants and beneficiaries; and protective of the rights of participants and beneficiaries of such plans. The applicants state that, as in the case of pools of first mortgage loans, second mortgage pool certificates provide plans with a steady flow of income as well as a sound method by which to diversify plan investments. The applicants indicate that second lien loans provide a higher rate of return over a shorter period of time. Statistics provided by the applicants indicate that the default rate on second lien notes is comparable to that on first lien loans.

The applicants further represent that second mortgage pools share the same structural safeguards present in the pools exempted under PTE 81–7. Chief among these is the fact that each pool is administered by trustees independent of the pool sponsor for the sole benefit of the certificateholders. In addition, the operation of each pool is governed by a binding pooling and servicing agreement which, among other things, operates to prevent the pool sponsor from retaining unreasonable fees. Further, the applicants indicate that the sponsor of each pool will maintain a system for insuring against reductions in pass–through payments due to loan defaults.

The applicants also note that second mortgage pools will be subject to the same general conditions applicable to first mortgage pools under PTE 81–7. The applicants state that, due to the similarities between pools of first and second lien notes, the conditions already built into the class exemption should be sufficient protection for plan participants and beneficiaries.

On the basis of these facts and representations, the Department is proposing to amend section III(B)(2)(a) to include interest bearing obligations secured by either first or second mortgages or deeds of trust on single-family residential property.

*B. Forward Purchase Commitments*

As proposed and granted, PTE 81–7 provides relief, under certain circumstances, for the sale of certificates between a plan and a party in interest with respect to such plan. During its consideration of PTE 81–7, the Department received one comment and some hearing testimony referring to the possibility that an investor could make a "forward delivery commitment"[7] for pool certificates. Although not specifically requested to provide exemptive relief for forward purchase commitments, the Department

[7] Information received by the Department indicates that the terms "forward delivery commitment," "forward placement" and "delayed delivery" all refer to the same type of transaction involving pool certificates. For the sake of convenience, the Department has chosen to use the term "forward delivery commitment" to refer to this transaction.

addressed this area in the preamble to the final class exemption, noting:

> 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 . . . 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 18741, April 28, 1975].

46 FR 7520, 7525–26.

Since the publication of PTE 81–7, the Department has received additional information regarding the use of forward delivery commitments and their importance in the mortgage pool industry. Although the Department has not received any requests for exemptive relief pursuant to ERISA Proc. 75–1, the Department believes that the information it has received forms a sufficient basis upon which to propose exemptive relief.[8] This information and its ramifications are discussed below.

1. *Contracts for Forward Delivery Commitments.* The information received by the Department indicates that forward delivery commitments may play a central role in the formation of some mortgage pools and the marketing of some pool certificates. In the preamble to the proposed mortgage pool class exemption, the Department described in detail the manner in which a mortgage pool is established. 45 FR 29937, 29938–39. Basically, as described in that preamble, a mortgage pool is formed when the pool sponsor chooses loans from among those it has made or bought, and transfers those loans in trust to an independent trustee. The pool trustee in turn transfers to the pool sponsor certificates representing fractional, undivided beneficial ownership interests in the pooled loans. The pool sponsor, either through a broker or directly, then places certificates with prospective investors.

The additional information recently received by the Department indicates that the pool sponsor, before collecting loans for inclusion in a pool, seeks to assure that the certificates of a subsequently formed pool will be marketable. This concern is especially acute during periods of fluctuating interest rates, since, when interest rates rise, such fluctuations could force pool sponsors to sell at a discount certificates from a pool of previously-made loans having interest rates lower than current market levels. It appears that pool sponsors, in order to avoid such situations, will seek agreements from prospective investors whereby such investors commit themselves to purchase a specific amount of certificates possessing a specified pass-through interest rate and evidencing interests in a pool possessing certain characteristics. Such agreements are called forward delivery commitments (or forward delivery commitment contracts), and are of two types. First, a mandatory forward delivery commitment obligates both parties to perform or risk default. In other words, the pool sponsor is obligated to deliver by a specified date certificates possessing certain agreed upon characteristics. At the same time, the investor is obligated to accept delivery of a specified amount of such certificates provided the certificates meet the negotiated criteria. The second type are optional (or standby) forward delivery commitments which provide that performance by either the pool sponsor or the investor (or possibly both) is optional. One example of an optional forward delivery commitment contract would occur when the pool sponsor is not required to deliver certificates, but if he does, the investor must accept delivery if the certificates meet the agreed upon criteria.

It appears that, in some cases, the investor making a forward delivery commitment will receive a so-called "commitment fee" from the pool sponsor. Typically, this fee (usually equal to one basis point) is paid with the understanding that it will be either refunded to the pool sponsor or used against the price of the certificates upon delivery. In this respect, this fee operates like an earnest money deposit. Other than this fee, it does not appear that any other funds change hands when the investor gives a commitment. The investor is not obligated to pay until delivery is tendered.

The information received by the Department indicates that forward delivery commitment contracts are concluded on an over-the-counter basis in a bid and offer market through the use of a broker. It appears that there are between seven and ten brokers currently in this market. The forward market appears to be fairly deep, especially for certificates guaranteed by the Government National Mortgage Corporation, and daily "quotes" of current transaction rates are readily available.

Based on the information submitted to the Department, it appears that the activities of the mortgage pool industry may be substantially facilitated through the use of forward delivery commitments. This is especially true in situations where the pool sponsor would be reluctant to make mortgage loans for inclusion in a pool until such pool sponsor has received forward delivery commitments for a substantial portion of the certificates of a prospective pool. It has been suggested that the Department's discussion of forward delivery commitments in the preamble to PTE 81–7, quoted above, has discouraged pension plans from entering the forward market and thereby limited plan participation in the mortgage pool market in general. It was not the Department's intention to limit the range of prudent plan investment options. Rather, the Department hoped that identifying areas in which the original applicants and commentators had failed to supply sufficient information would cause other individuals to submit additional facts in this area. The information received by the Department seems to fill the need identified in the preamble to PTE 81–7, and based upon that information, the Department is proposing to amend PTE 81–7 to provide the exemptive relief discussed below.

2. *Proposed Exemptive Relief.* PTE 81–7 provides relief for a broad range of transactions related to mortgage pools, including the sale of certificates to plans. As noted above, section I(A) of PTE 81–7 exempts from the prohibitions of section 406(a) of the Act the direct or indirect sale of certificates between a plan and a pool sponsor when the pool sponsor, pool trustee or pool insurer is a party in interest with respect to the plan. Section I(B) provides relief for such sales when the pool sponsor, pool trustee or pool insurer is a fiduciary with respect to the plan assets being invested in pool certificates. The information received by the Department indicates that, in most cases, a forward delivery commitment contract is a commercially reasonable adjunct to the sale of pool certificates. As a result, in order to make more meaningful the relief provided in sections I(A) and I(B) of PTE 81–7, the Department believes it is appropriate to provide relief for forward delivery commitments involving mortgage pool certificates.

In order to provide this relief, the Department is proposing to add two paragraphs to section III of PTE 81–7,

[8] Section 3.01 of ERISA Proc. 75–1 provides that the Secretary of Labor may initiate an exemption proceeding on his own motion. 40 FR 18471.

which contains definitions of terms used in the class exemption. Proposed paragraph G states that, for the purposes of this exemption, the term "sale" shall include a forward delivery commitment by an investing plan provided certain conditions are met. The first proviso of this proposed paragraph states that the relief provided by section I(A) of the exemption would be available only if the terms of the forward delivery commitment are no less favorable to the plan then they would be in an arm's length transaction with an unrelated party. The second proviso of this proposed paragraph relates to section I(B), and states that the relief provided in section I(B) from the restrictions of section 406(b) of the Act would be available only if three conditions are met. First, the forward delivery commitment must be approved by a fiduciary independent of the pool sponsor, trustee or insurer who has authority to manage and control those plan assets being committed for investment in such certificates. This provision is designed to mirror the condition contained in section I(B)(1)(a) of the class exemption and to assure oversight by an independent fiduciary both at the time the commitment is made and when the sale is finally executed. Second, the forward delivery commitment shall not be an option or standby commitment unless performance is optional on the part of the investing plan. The information received by the Department indicates that the market for optional forward delivery commitments is thin, and, thus, the structural market safeguards relied upon, in part, in PTE 81–7 would not be present. Third, at the time the plan is called upon to perform pursuant to its commitment, and the sale of certificates is executed, all of the conditions of section I(B) of the exemption must be met. This condition is designed to address the situation in which a plan properly entered a forward delivery contract but subsequently cannot honor its commitment without engaging in a prohibited transaction.

Proposed paragraph H defines the term "forward delivery commitment" and "forward delivery commitment contract". The proposal states that these terms would mean a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date, which is more than thirty calendar days after the contract's trade date. These terms would include both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional (also called standby) contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party). Proposed paragraph H is patterned after the common usage of this term in the mortgage pool industry.[9]

*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, 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 require, among other things, that a fiduciary discharge his duties respecting the plan solely in the interests of the 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 an 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 and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan; and

(3) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and 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.

**Written Comments and Hearing Request**

All interested persons are invited to submit written comments or requests for a hearing on the proposed exemption 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.

**Proposed Exemption**

On the basis of the facts and representations set forth in the applications, and other information available to the Department, the Department is considering amending, to read as set forth below, Prohibited Transaction Exemption 81–7 (46 FR 7520) 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

[9] The information received by the Department indicates that the mortgage pool industry distinguishes between forward delivery commitments on the one hand and future contacts in pass-through certificates on the other. It appears that the distinction (other than differing regulatory frameworks) lies in the fact that an investor making a forward delivery commitment is primarily interested in the delivery of specific certificates. Investors in the future market are less concerned with delivery, seeking instead a certain investment yield rather than an identifiable certificate. By utilizing the industry definition of the term "forward delivery commitment," the Department intends that PTE 81–7 will not cover future transactions in pass-through certificates. The Department is, however, presently considering an application filed by the Futures Industry Association for various advisory opinions and exemptions with regard to plan investments in commodity futures contracts.

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 or 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 certificates;

(b) The plan pays no 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 (b) 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 sections 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 mortgage, 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 occurrance 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 purpose of this exemption the term "sponsor" or "pool sponsor" means:

(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 either first or second 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" mean 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.

G. For the purposes of this exemption, the term "sale" includes a forward delivery commitment (as defined in paragraph H, below) by an investing plan, provided

(1) For the purposes of section I(A), the terms of the forward delivery commitment contract are no less favorable to the plan than they would be in an arm's length transaction with an unrelated party; and

(2) For the purposes of section I(B)

(a) The forward delivery commitment has been expressly approved by a fiduciary independent of the pool

sponsor, trustee or insurer who has authority to manage and control those plan assets being commited for investment in such certificates;

(b) The commitment shall not be an optional or standby commitment unless performance is optional on the part of the investing plan; and

(c) At the time of delivery, all of the conditions of section I(B) of this exemption are met.

H. For the purposes of this exemption, the terms "forward delivery commitment," and "forward delivery commitment contract" means a contract for the purchase or sale of one or more certificates to be delivered at an agreed future settlement date, which is more than thirty calendar days after the contract's trade date. The terms includes both mandatory contracts (which contemplate obligatory delivery and acceptance of the certificates) and optional contracts (which give one party the right but not the obligation to deliver certificates to, or demand delivery of certificates from, the other party).

Signed at Washington, D.C. this 13th day of May 1982.

**Jeffrey N. Clayton,**

*Administrator, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

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**[Prohibited Transaction Exemption 82-87; Exemption Applications D-1937 and D-2004]**

## Class Exemption for Transactions Involving Certain Residential Mortgage Financing Arrangements

**AGENCY:** Office of Pension and Welfare Benefit Programs, Labor.

**ACTION:** Grant of class exemption.

**SUMMARY:** This document contains a final exemption from certain of the prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code). The exemption involves the issuance of commitments for the provision of mortgage financing to purchasers of residential dwelling units, the receipt of a fee in exchange for the issuance of such commitment, the making or purchase of loans or participation interests therein pursuant to such commitments, and the direct making, purchase, sale, exchange or transfer of mortgage loans or participation interests therein by employee benefit plans, if the conditions specified in the exemption are met. The exemption affects participants and beneficiaries of employee benefit plans involved in such transactions, certain employers who contribute to such plans and other persons who engage in the described transactions. In the absence of this exemption, certain purchase and sale transactions between the plan and parties in interest and certain extensions of credit transactions between the plan and other parties in interest would be prohibited by the Act and the Code.

**EFFECTIVE DATE:** January 1, 1975. (Certain conditions, as specified herein, are applicable effective June 17, 1982.)

**FOR FURTHER INFORMATION CONTACT:** Paul R. Antsen, Office of Fiduciary Standards, Pension and Welfare Benefit Programs, U.S. Department of Labor, 200 Constitution Avenue NW., Room C-4526, Washington, D.C. 20216 (202)523-6915. This is not a toll free number.

**SUPPLEMENTARY INFORMATION:** On December 3, 1981, notice was published in the **Federal Register** (46 FR 58773; republished December 4, 1981, 46 FR 59335) 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 from certain 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] The proposed exemption was based on applications filed by the National Coordinating Committee for Multiemployer Plans (NCCMP) (D-1937) and by the National Association of Home Builders (NAHB) (D-2004) (collectively referred to as the applicants) 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). In addition, other applications for both class and individual exemptions for transactions of the type covered by this exemption have been filed with the Department.[2]

The notice set forth a summary of facts and representations contained in the applications of the NCCMP and the NAHB, 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.

The Department received 90 public comments with regard to the proposed class exemption. Upon consideration of all the 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.

### Description of the Proposal

Part I of the proposed class exemption provided conditional relief prospectively and retroactively to January 1, 1975, for transactions involving the issuance of commitments by employee benefit plans to purchasers of new single family dwelling units, the receipt of a fee in exchange for the issuance of such commitment and the actual making or purchase of the mortgage loan by the plan pursuant to such commitment. Part II of the proposal contained the general conditions applicable to the transactions listed in Part I. Conditions A and B addressed the nature and scope of the commitment and required that the commitment be consistent with customary practices in the residential financing industry. Condition C provided that the commitment be made on behalf of the plan by an "established financial institution" which was not subject to a controlling influence over its management or policies by an entity related to the plan.[3] Condition D provided that the financing for the purchase of the residential dwelling unit must have been provided through an "established financial institution" (1) based on criteria which were consistent with customary practices in the residential mortgage industry, and (2) which commonly made mortgage loans on similar terms and conditions from its own funds. Condition E outlined the requirements for the loan which included an arm's length standard, that the loan be consistent with customary practices in the residential mortgage industry and that it be secured by a duly recorded first lien on the unit. Condition F limited those individuals who could exercise authority or render investment advice so as to make them a fiduciary with respect to the commitment decision. Condition G restricted those eligible parties in interest for whom the plan could provide mortgage financing. condition H outlined the requirements to be followed should a plan decide to service those loans which it acquired under this exemption. Condition I contained recordkeeping requirements

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[1] Hereafter, references to provisions of the Act shall include references to parallel provisions of the Code.

[2] Carpenters Pension Trust Fund of Detroit and Vicinity, D-2421, Carpenters Pension Fund of Illinois, D-2674, and the United States League of Savings Associations (D-2875). The Department gave due consideration to these applications in considering the scope of this final exemption.

[3] The Department specifically sought public comment on viable alternatives for this aspect of the proposed exemption.

required by the department in providing certain types of exemptive relief. Part III of the proposal contained definitions of the terms affiliate, established financial institution, and residential dwelling unit.

General Discussion

The two original applications for class exemptions which formed the basis for the proposal described general types of transactions which appeared to the Department to be customary for the residential mortgage industry. As a result of the comments filed with the Department pursuant to the proposal, as well as a review of other applications for class and individual exemptions, the Department has become aware of other transactions customarily involved in residential mortgage financing which, subject to applicable conditions, are also covered in this exemption. Therefore, as stated above, and as further described below, the class exemption as here granted is significantly broader in scope in several respects than originally proposed.

In the Department's view, the class exemption, as granted, not only provides certainty to plan fiduciaries as to the application of the Act's prohibited transactions provisions to many transactions which are customary in residential mortgage financing, it is also designed to accommodate changes in the mortgage marketplace as they occur, without the necessity of amendments to the exemption. This flexibility results from the definition of a "recognized mortgage loan" contained in the final exemption. Pursuant to this definition, generally, the exemption will apply to covered transactions involving mortgages which are eligible for purchase by the Government National Mortgage Association (GNMA), Federal Home Loan Mortgage Corporation (FHLMC), the Federal National Mortgage Association (FNMA) (collectively the Agencies). As new residential financing arrangements are introduced in the marketplace for which the Agencies establish acquisition programs and underwriting standards, the exemption will automatically apply to such arrangements. It is the existence of these recognized programs and ascertainable underwriting standards that contributed to the Department's conclusion that a broadened exemption would be consistent with the requirements of section 408(a) of the Act.

The Department wishes to specifically point out that the granting of this exemption should not, in any way, be construed as encouraging or endorsing plan investments in residential mortgages. Rather, it is the Department's objective to adequately respond to the applications for exemption submitted for transactions of the subject type and, in so doing, to remove, where the applicable statutory findings can be made, barriers that may exist to such plan investments. Decisions regarding specific plan investments or an investment course of action must, of course, be made by appropriate plan fiduciaries and must be consistent with the Act's fiduciary standards including the prudence standard contained in section 404(a)(B). The Department wishes to emphasize, for example, that any mortgage loan (or program of mortgage loans) which is acquired by an employee benefit plan, must be considered as a plan investment or investment course of action. Because the investment would be selected (if at all) in preference to other investment alternatives, it would generally not be prudent if the investment or investment course of action provided the plan with less return, in comparison to the risk involved, than comparable investments or investment courses of action available to the plan; or, alternatively, involved a greater risk to the security of plan assets than such other investment or investment course of action offering similar return.[4]

As proposed, and as granted, the exemption provides both prospective and retroactive relief. Unlike the proposal, however, certain conditions are applicable only prospectively (see detailed discussion below). The Department wishes to specifically note that no exemption is provided either prospectively or retroactively, from the prohibitions of section 406(b) of the Act. Thus, for example, if a plan acquires mortgages (even if the mortgages are "recognized mortgage loans") in a transaction which violates section 406(b) of the Act, this exemption will not apply to exempt plan fiduciaries from such violations.

Finally, the Department notes that section 3.04 of ERISA Procedure 75–1 provides that an application for an individual exemption will not ordinarily be considered separately if a class exemption which would encompass the transaction has either been the subject of an exemption proceeding or is under consideration. Nevertheless, the Department recognizes that there may be circumstances involving the general types of transactions which are the subject of this class exemption that deserve separate consideration. Accordingly, the Department will determine, on a case-by-case basis, whether to consider such applications on their merits.

Disucssion of the Comments

*A. Transactions*

1. *Plan Acquisition of Mortgage Loans.* Pursuant to the applicants' request, the transactions covered by the proposed class exemption were limited to plan acquisitions of whole mortgage loans on new residential units pursuant to a commitment. Many commentators noted that limiting purchases to those made pursuant to a commitment unduly restricted a plan's investment flexibility, profit opportunity and liquidity. Plans were represented as frequently purchasing mortgage loans on an over-the-counter or immediate purchase basis. Commenting in light of its own pending exemption, the United States League of Savings Associations (USLSA) urged the Department to expand the existing proposal arguing that both the interests of housing and pension plan participants would be best served by a more comprehensive exemption. On the basis of these comments the Department has concluded that it would be appropriate to expand the exemption to cover direct acquisitions as well as those made pursuant to a prior commitment.

2. *Acquisition of Participation Interests.* Several commentators also suggested that the principles and protections embodied in the exemption would be equally applicable to plan acquisitions of loan participations. A loan participation was described as an agreement involving the ownership in common of mortgage loans by two or more investors. A typical transaction was represented as one where an orginating lender retains a small interest and sells the remainder to an institutional investor. The originating lender would hold equitable title in the underlying mortgage(s) and "service" the mortgages for all interest holders by, e.g., passing through periodic payments of principal and interest on a pro rata basis and sharing in any losses on the same basis. These agreements are similar to the larger scale selling of certificate interests in a pool of loans. The department has previously provided relief for these "mortgage backed security" arrangements; [5] however, that exemption did not provide relief for the purchase of a participation interest in individual loans. According to one commentator, participation interests are generally structured as investment

[4] Department of Labor Advisory Opinion 81–12A, January 15, 1981.

[5] Prohibited Transaction Exemption 81–7 (PTE 81–7) (46 FR 7520, January 23, 1981.)

contracts rather than the grantor trusts used in PTE 81-7. It was represented that while on the smaller scale, this activity accounts annually for a substantial level of investment in the secondary market financing of residential mortgage loans. In support of this form of investment the commentator argued that the purchase of a participation interest could result in greater protection for an investing plan since the risks are shared with the originating lender who generally retains an interest in the loan(s) sold.[6] In addition, the class application filed by the USLSA requested relief for the acquisition of participation interests by plans both for over-the-counter transactions and pursuant to a prior commitment.

The Department believes that the process under which plan decisions are made along with the protections inherent in any continuing arrangement are crucial elements in evaluating whether the statutory criteria for granting administrative relief have been satisfied. Based on the description of these arrangements provided by the USLSA, among others, which indicates that the role of an seller/servicer may generally be restricted to essentially mechanical functions and because the exemption requires that any plan decision to acquire a participation interest be made by an independent fiduciary the Department is able to expand the exemption to include both the commitment to purchase and the direct purchase of a participation interest in mortgage loans.

3. *Pooling of Assets by Plans.* Section 404(a)(1)(C) of the Act requires a plan to diversify the investments of the plan so as to minimize the risk of large losses. One commentator suggested that many smaller plans interested in investing in mortgage loans believe they are precluded from doing so because of the amount of plan assets needed to purchase either a participation interest or a whole mortgage.

In its application the NAHB requested consideration be given to the creation of nonprofit corporations established by regional, state or local home building associations (HBAs) affiliated with NAHB to assist plans in pooling financial resources for mortgage investment. In the proposed exemption, the Department responded that the inclusion of relief for such HBA arrangements was not necessary in order to achieve the purposes for which the exemption was requested. the Department noted the availability of section 408(b)(2) of the Act and interpreting regulations (29 CFR 2550.408b-2) which provided, if certain conditions were satisfied, an exemption from the provisions of section 406(a) of the Act. The Department agrees that the pooling of funds, in certain situations, may be a suitable form of investment; however, it will not advocate any specific format for such pooling. The Department believes the exemption, as modified to include acquisition of participation interests, should adequately address these concerns.

4. *Sales of Mortgage Loans or Participation Interests.* One commentator noted that the proposal failed to include as a separate covered transaction the sale of a mortgage loan held by a plan. While noting that pension plans are likely to retain mortgage investments until their maturity, the commentator suggested that their sale may be desirable from time to time. Therefore, the Department was urged to revise the list of transactions to include the sale of mortgage loan or participation interest investments. The Department has adopted this comment and modified the final exemption accordingly.

5. *Servicing of Mortgage Loans or Participation Interests.* Several commentators urged the Department to expand the exemption to include relief for the provision of services incidental to the purchase of a mortgage. As explained by the applicants and discussed in the comments, plans would purchase morgage loans from a financial institution and retain that institution, or a similar financial institution to "service" the loan by collecting and remitting to the plan the installment payments made by the borrower. In the event of a default this entity would be responsible for protecting the plan's interests under any foreclosure proceeding including rights available under any Federal or private insurance or guaranty program. This servicing is a separate contractual arrangement between the parties distinct from the purchasing of the mortgage loan. Where this servicing arrangement satisfies the conditions of section 408(b)(2) of the Act and applicable regulations, no additional administrative relief would appear to be necessary or appropriate.

*B. Conditions*

1. *Established Financial Institution.* For purposes of the exemption the term "established financial institution" was defined as an investment manager described in section 3(38) of the Act with respect to the plan, or a savings and loan association subject to regulation by the Federal Home Loan Bank Board, which, in the normal course of its business, engages in trnasactions described in this exemption.

As stated in the proposal, the Department viewed the existence of an independent decision maker ("established financial institution") as a significant factor in its ability to propose exemptive relief. In recognition of the fact that the condition requiring that the commitment decision be made by such an independent fiduciary had not been a part of the original application requests and the applicants' contention that the condition was not essential, the Department invited specific comments regarding this condition. Several commentators urged the Department to delete the condition as unnecessary or proposed a variety of alternatives to this independent fiduciary. Other commentators suggested that, as proposed, the exemption was not protective enough and urged the Department adopt additional safeguards to ensure that the investment decisions were made in the best interests of plan participants and beneficiaries.

In the context of a request for relief for such a large and varied class of persons, the Department has determined that the suggested approaches either did not afford adequate protection or would result in an arbitrary approach that would depreive plans of desirable flexibility in establishing a mortgage investment program which best suits their individual needs. After considering the range of alternatives presented, the Department is unable to conclude that any of the suggested alternatives is appropriate, in the context of a class exemption, to provide the protections which would enable the Department to make the findings necessary to grant exemptive relief.

The Department has determined, based in large part, on the additional protections which are inherent in the adoption of the "recognized mortgage loan" standard in the final exemption, that the potential for abuse has been minimized so that additional protections beyond those proposed need not be included in this condition. The

[6] The Depository Institution Deregulation and Monetary Control Act of 1980 Public Law 96-221; 94 Stat. 132, 12 U.S.C. 1724 *et seq.* resulted in the removal of the mandatory retention requirement by the originating lender from the Federal Savings and Loan Insurance Corporation regulations (12 CFR 563.9-1 withdrawn 45 FR 76095 Nov. 10, 1980). However, it is represented as a practical matter, that originating lenders generally still retain a limited (5 percent) ownership in participation interests which they create. This retention of 5 percent is required should they seek to sell such participation interest to FHLMC (Section 3.102 FHLMC Sellers Guide for Conventional Mortgages) or FNMA (FNMA Form 637, Appendix F, FNMA Conventional Home Mortgage Selling Contract Supplement).

Department has determined to retain the role of an independent fiduciary in the decision making process as proposed. The categories of entities who may serve in such capacity, however, have been broadened.

As indicated in the summary of the proposed exemption above, the involvement of an "established financial institution" was required both with respect to the commitment decision and the financing or loan origination process. Many commentators expressed concerns regarding the Department's application of the term in both conditions.

Condition C of the proposed exemption provided that the decision to issue the commitment must be made on behalf of the plan by an "established financial institution" which would not be subject to influence by parties related to the plan. Several comments suggested that the residential financing industry contains a wide range of institutions, currently active in the mortgage market, with the knowledge and experience to make commitment type decisions which were not included in the proposed definition. Several of the commentators urged the Department to expand the list of "established financial institutions" and suggested what they considered to be appropriate additions.

Rather than expand a listing of specifically eligible institutions, the Department has decided to delete the term "established financial institution" from the final exemption and develop a new term to describe those persons eligible to make commitment decisions on behalf of employee benefit plans. The term "qualified real estate manager," as described below, provides a more flexible standard of eligibility—that of acceptance in the marketplace.

Several comments expressed concern whether the independent fiduciary envisioned by Condition C of the proposed exemption would be able to maintain sufficient independence. Clearly, what the Department seeks to prevent is the existence of influence which may affect the exercise of the fiduciary's best judgment. This, in the Department's view, is an inherently factual matter based on the facts and circumstances of the particular relationship existing at that time. The Department believes that all the conditions contained in the final exemption, taken together, provide an adequate basis for granting the exemption.

Other commentators posed a related concern by noting that trustees of a plan often provide certain guidelines or investment policies to those making investment decisions on behalf of a plan. The Department believes, that a fiduciary may appropriately follow certain guidelines and not be considered to be under the controlling influence of the plan trustee. However, a fiduciary is not entitled to blindly rely upon guidelines or investment policies established by other plan fiduciaries. The Department considers that under section 404(a)(1)(B) of the Act, a fiduciary has a duty not to act in accordance with a delegation of plan investment duties to the extent that such fiduciary either knows or should know that the delegation involves a breach of fiduciary responsibility.

Condition D of the proposed exemption required that financing be provided through an "established financial institution" which selects the recipient and originates the loan based on criteria that are consistent with "customary practices" and which "* * * commonly makes mortgage loans on similar terms and conditions from its own funds." The comments suggested that the requirements of the condition served to bar potential providers of this service which in the commentator's view were otherwise qualified. In addition, the comments noted that the "from its own funds" requirement eliminated a major segment of the mortgage investment community from providing such loan origination services when these business enterprises have been recognized as possessing the requisite knowledge and expertise to perform this role. The Department had not intended, by the terms of this condition to unduly limit the categories of parties eligible to provide this service to plans. The record, however, reflects the need to modify the definition describing those entities eligible to provide loan origination services to plans. The Department has determined to delete the term "established financial institution" from this condition and adopt a new definition of an "established mortgage lender" which recognizes the role of parties such as mortgage bankers and the full range of depository institutions which have traditionally provided this service.

Several comments suggested the Department adopt a general definition relating to institutional experience in the mortgage market followed by a comprehensive listing of those institutions which presently originate mortgage loans. Other comments suggested that the secondary market itself contained recognized criteria for loan origination services. The Department has determined it more appropriate to adopt a standard which incorporates the existing approval processes of those agencies with a congressional mandate to operate in the residential housing market.

The first category under the new definition incorporates those standards developed for lenders who originate loans which qualify for participation in any mortgage insurance program under the National Housing Act.[7] The Department of Housing and Urban Development (HUD) has established a procedure for the approval of such originators.[8] The second category involves lenders who originate conventional loans where qualification procedures have been developed by FNMA [9] and FHLMC.[10] At the request of several commentators the Department has included in its definition of those eligible to provide origination services a third category—state housing finance agencies (HFAs). According to the commentators, HFAs are currently expanding their traditional programs to deal directly with the public as mortgage lenders. The commentators have represented that HFAs have the size and staff capacity to manage all mortgage purchase operations of pension plans. It has also been suggested that in some regions of the country, HFAs may be one of the primary mortgage lenders. Therefore, the Department has included these entities in its definition of an "established mortgage lender."

One commentator raised the question whether the discretion exercised by an originator in qualifying a buyer would be construed by the Department as fiduciary conduct. Section 3(21) of the Act provides in relevant part, "* * * a person is a fiduciary with respect to a plan to the extent (1) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets * * *" In the Department's view the decision to invest plan assets in residential mortgage financing is a fiduciary decision. Once the decision is made either to issue a commitment on particular terms, or invest directly in certain morgage loans, the Department is of the view that the specific actions of qualifying a buyer consistent with those terms would generally not constitute fiduciary conduct.

2. *Mortgage Loans and the Requirement of "Customary Practices".* Condition E of the proposed exemption

[7] Public Law 479, 73rd Congress, 48 Stat. 1246, 12 U.S.C. 1701 *et seq.*

[8] 24 CFR 203.1 *et seq.*

[9] FNMA Conventional Home Mortgage Selling Contract Supplement, Sections 201–204.

[10] FHLMC Sellers Guide for Conventional Mortgages, Part 1, section 208.

required, among other things, that the mortgage loan to be acquired be "consistent with customary practices in the residential mortgage industry." This condition was included to indicate the Department's concern that mortgage loans to be acquired by a plan be of investment quality and marketable to insure some measure of safety and liquidity. As discussed above, the Department's position regarding prudence in investment does not seek to restrict the range of investment options available to a plan. However, where the subject investments would violate the prohibited transactions rules of the Act, the Department has an obligation to consider those investments in light of the statutory criteria for granting administrative relief.

Several commentators pointed out that the economic climate of recent years has had a significant impact on the residential mortgage market. The impact appeared to have been most evident in the mortgage instruments used in financing. The result has been the creation of a number of "alternative mortgage instruments" (AMIs). These AMIs have achieved varying degrees of recognition; however, as indicated by the comments, in many cases this acceptability could not be equated to a "customary practice in the residential mortgage industry."

The Department has determined that the language "customary practices in the residential financing industry," does not establish an adequate standard against which plan fiduciaries may judge, with the necessary degree of certainty, compliance with this condition of the exemption. In developing a more objective standard, the Department has adopted the suggestion of some commentators and modified the condition by requiring that those mortgage loans to be acquired under this exemption must be eligible, through an established program, for purchase by one of the Agencies. Therefore, Condition E of the proposed exemption, has been modified to reflect the "recognized loan" standard.

Adopting the "recognized mortgage loan" standard also enables the Department to address another concern raised in several comments relating to Condition E of the proposed exemption. By limiting the allowable security to first liens on a residential unit, investments in junior or second liens were precluded. Several commentators suggested that properly underwritten, fully amortizing second mortgage liens can offer investors a combination of safety, high yield and short maturities which could allow for a further diversification of pension fund portfolios. Another commentator argued that, in enacting the Depository Institution Deregulation and Monetary Control Act of 1980, Congress recognized that the loan-to-value ratio rather than lien position provides the security for real estate investment by removing the first lien requirement for residential real estate lending. To the extent that nationwide programs are operated by the Agencies for the purchase of mortgage loans secured by junior or second liens, such liens would satisfy the "recognized mortgage loan" requirement.

The third requirement of Condition E required that the terms of the mortgage loan be at least as favorable to the plan as the terms of a loan involving unrelated parties. No comment was received regarding this issue, accordingly the Department has incorporated this language in the final exemption.

3. *Joint Commitment and Origination Services.* Condition F of the proposed exemption provided that certain parties who had previously been involved with the building or development of a unit, the construction financing for such unit or would be involved with the provision of loan origination services would not be eligible to exercise discretionary authority or control or provide commitment advice to a plan. Several comments suggested that this condition was not necessary, given the protections provided through the other conditions and the fact that the proposed exemption did not extend to section 406(b) of the Act. Two commentators expressed concern that the effect of the condition was to mandate the involvement of two financial institutions which would disrupt the traditional practice of mortgage lenders providing both construction and permanent financing. The Department does see a potential for abuse where a financial institution involved with the construction financing would make decisions on behalf of a plan, for the provision of permanent financing.

The Department has not been pursuaded by the arguments of the commentators who urged that the condition be deleted. However, the arguments of the commentators that, as presently drafted, the condition would mandate the involvement of two financial institutions and thereby add significant costs to the investment process has been accepted. As modified, this condition would permit an originator to make the decision to purchase (whether directly or pursuant to a commitment), provided it was not at the time of the decision the owner of a mortgage loan or participation interest therein which is subsequently sold to the plan. The sequence of events where an originator makes "recognized mortgage loans" after a commitment has been made with the intent on selling them to the plan is consistent with the Department's understanding of the origination-purchase form of acquisition by a plan.

4. *Restrictions on Borrowers.* Condition G of the proposed exemption which limited the eligible party in interest (as defined in section 3(14) of the Act) borrowers was based on the relief requested by one of the original applicants. Three comments, including those of both the NCCMP and the NAHB, suggest that with the existing conditions present in the exemption, no additional safeguard is provided by retaining this condition. The commentators also note that the screening process necessary to prevent inadvertent loans to those parties in interest not eligible for loans would be an unnecessary added expense to the plan.

The Department accepts the arguments and has eliminated the condition from the final exemption.

5. *Loan Servicing by Plans.* Condition H of the proposed exemption provided that where plans serviced loans, as opposed to contracting with a professional servicing organization, such plans were required to establish written procedures that were consistent with customary industry practices. No comments were received on this condition; however, the Department has reconsidered the necessity for a condition of this type in light of the other protections contained in this exemption and has determined to delete the condition from the final exemption. Plans which choose to service loans which they have made or purchased must obviously do so in accordance with the general fiduciary duty requirement of prudence found in section 404(a)(1)(B) of the Act. However, the procedures suggested in this condition deserve consideration in making a determination about the appropriate procedures to adopt.

6. *Retroactivity.* At the request of the applicants, the proposed exemption provided retroactive relief based on the representation that the transactions involved were customary for the residential mortgage financing industry. The comments noted that residential mortgage lending programs may be structured in a variety of ways and that it would not have been unreasonable for some plans to have made commitment decisions themselves and retained an independent financial entity only to originate the mortgage loans. The

Department acknowledges that certain of the conditions—namely the requirements of an independent fiduciary decision and recordkeeping—may not have been reasonably anticipated to plans seeking to avail themselves of the exemption retroactively even though the past transactions were engaged in for the benefit of the plans and their participants and beneficiaries. Accordingly, these conditions have been made prospective only. This approach is consistant with the approach taken by the Department in other class exemptions involving similar issues.

*C. Definitions*

1. *Residential Dwelling Unit or Unit.* The "transactions" section of the proposed exemption limited the type of unit eligible for purchase to "new" units. All comments which discussed this issue opposed the limitation as one which unjustifiably restricted pension fund investment flexibility. One commentator pointed out that "new" unit sales accounted for only one-third of all homes sold nationwide during a recent three-year period. To provide the broadest possible range of investment options, the Department has determined that the final exemption should not contain any limitation to "new" housing.

According to many comments, the phrase "single family residential dwelling unit," without further clarification, may create confusion. One commentator noted that long standing mortgage lending practices, including government guaranty and secondary market programs, have resognized loans on "two to four unit structures" as an extension of the "single family" loan. The commentators note the Department acknowledged this definition in PTE 81–7. The Department has accepted these comments and utilized the PTE 81–7 definition of "non-farm property comprising one to four dwelling units" in the final exemption.

Two of the commentators urged the express incorporation of manufactured housing [11] as a unit eligible for purchase under the final exemption. The comments further stated that mortgages secured by such housing were eligible for purchase in the secondary market by GNMA, FNMA and FHLMC under their single family purchase programs. Based on the positions taken by the Agencies, the Department has decided to include the specific reference in the definition. However, the Department notes that the type of manufactured housing loan to be acquired by a plan must also meet the exemption condition of a "recognized mortgage loan."

The proposal identified condominiums as one form of multiple family housing expressly included in the definition. Several commentators suggested the inclusion of two other types of multiple family housing units—cooperatives and rental units. Cooperative housing for purposes of this exemption would be financing for individual unit purchases as opposed to project financing under a blanket mortgage for the land and its improvements. Unit financing is not secured by a mortgage on the unit, but rather by a lien on the share or membership interest associated with that unit and rights under the proprietary lease which governs occupancy. The commentators noted that this form of housing has gained market acceptance in the major metropolitan areas throughout the country. The Department has included this form of ownership interest in the definition because in many ways it provides a parallel form of individual ownership in multiple unit properties to that of condominiums. However, other conditions of this exemption may affect the purchase of a cooperative housing unit. As discussed above, to be eligible for acquisition by a pension plan a mortgage loan must be a "recognized mortgage loan." While the Department understands that cooperatives are eligible for purchase by FNMA, to date no established program is in operation—a prerequisite to meeting the requirements of a "recognized mortgage loan." Therefore, the Department's inclusion of cooperatives in the definition of a "residential dwelling unit" is an example of the Department's intent to make this class exemption one which will evolve with the recognized marketplace.

Those commentators which urged the Department to further expand its definition of eligible housing units to include multiple unit rental structures noted the market for this type of housing and the fact that purchase programs exist which could provide the nationally recognized standard for such loans. Investment in the mortgages of such housing units differ both in magnitude and complexity from the one to four unit structures contemplated by this exemption. After considering the issue, the Department has determined it would not be appropriate to include multiple unit rental housing in this exemption.

The definition of a "residential dwelling unit" also contained a reference to planned unit developments and included a requirement which limited the "* * * use of the *property* to residential purposes * * *" (emphasis added). Two commentators noted that planned unit developments frequently contain varying amounts of commercial or retail space to provide convenience services. To eliminate the concern over the scope of the intended limitation, the exemption has been modified by substituting "unit" in place of "property" in the language of the definition.

The express language of the definition also imposed an "owner occupied" restriction on the units covered by the proposed exemption. The commentators suggested that the majority of units to be financed under this exemption would be owner occupied; however, such limitation may restrict investment opportunities. By permitting mortgages for some investor units, it was argued that a commitment would become more attractive to a developer, command higher commitment fees and subsequently more favorable interest rates in the event such mortgage loans are subsequently originated. One comment noted that borrowers may represent an intention to occupy and then, for a variety of reasons, be forced to rent the unit. This change in the character of the occupant, it was urged, should not void the exemption in whole or in part. The Department accepts the suggestion. Once a unit has satisfied the conditions for acquisition, a subsequent change in the character of the occupant would not void the applicability of the exemption. It was also noted that industry practices provides essentially the same underwriting standards for investor unit mortgages except that the maximum mortgage on investor units is limited to 80 percent of value whereas owner-occupied mortgages may go up to 95 percent of value. The Department has determined to permit investor owned units within the definition of a "residential dwelling unit" to the extent it satisfies recognized industry practices as outlined above.

**Description of Exemption**

Although the exemption retains the same basic format as the proposal, it has been largely restructured to reflect the substantial modifications discussed above.

Part I of the Exemption describes those categories of transactions to which the exemption applies. As discussed above, the acquisition transactions have been expanded to include the direct purchase of whole mortgages and the acquisition of participation interests in mortgages both

[11] Manufactured housing means a manufactured home as defined in section 603(b) of the National Manufactured Housing Construction and Safety Standards Act of 1974 (Pub. L. 93–383, 88 Stat. 700 as amended by Pub. L. 96–399, 94 Stat. 1641, 12 U.S.C. 5402(6)) and which is used as a residence.

directly and pursuant to a commitment. In addition, the exemption now covers sales, exchanges and transfers of such mortgage investments to parties in interest. These covered transactions are in addition to those originally proposed in the notice.

It should be noted, that the exemption provided for sales, exchanges or transfers under Section E of Part I, does not restricting such dispositions to mortgage investments acquired pursuant to this exemption. However, it does not permit the plan to dispose of less than its entire interest in the mortgage investment to or for the benefit of a party in interest.

Also, interested parties are reminded that no exemption is provided for transactions which constitute violations of section 406(b) of the Act. The record of this exemption suggests that plans may acquire participation interests from a "recognized mortgage lender" where that instituion retains a noncontrolling interest in the participation agreement and continues to serve the mortgage(s) underlying that agreement. However, the conditions of the exemption do not contemplate any situation in which the seller/servicer would become a fiduciary of the plan under section 3(21) of the Act. There may be situations in the operation of a participation agreement under which the seller/servicer does become a fiduciary by virtue of the authority it retains, e.g., with respect to the decisions regarding collection of mortgage lone payments. Violations of section 406(b) which result from such arrangements are not covered by this exemption.

Part II of the exemption contains the conditions which are to be met if the transactions described in Part I are to be exempt. Section A provides those conditions which are applicable retroactively to January 1, 1975, the effective date of the fiduciary responsibility provisions of the Act. Section B provides conditions which apply prospectively, beginning 30 days after the date of publication of this exemption. The delayed effective date is provided in order to give affected parties ample opportunity to adopt procedures necessary to implement these conditions.

Subsection (1) of section A sets out these conditions which are applicable, retroactively and prospectively, to all covered transactions.

Paragraph (a) provides that any mortgage investment acquired by a plan pursuant to the exemption must be a "recognized mortgage loan" for the purchase of a "residential dwelling unit." Both of these terms are defined in Part III of the exemption.

Paragraph (b) requires that a covered mortgage investment must be originated by an "established mortgage lender." This originator, who will qualify the borrower, must not be subject to a controlling influence regarding its management or policies by the plan, a contributing employer or group of contributing employers or participating employee organization.

Paragraphs (c) and (d) are substantially the same as appeared in the proposal. Paragraph (d), however, has been modified to reflect the expansion of categories of transactions covered by the exemption. In addition, this provision has been changed to reflect the possibility that plans may acquire mortgage investments from an entity, which purchases are technically from inventory, but which were originated pursuant to a prior commitment made on behalf of the plan.

Subsections (2) and (3) of Section A establish specific conditions which must be met, as applicable, both retroactively and prospectively, if the subject transaction involves a commitment or a participation. The conditions regarding commitments are essentially those contained in the proposed exemption modified only to reflect the adoption of the "recognized mortgage loan" standard. The conditions addressing participations are based on the Department's understanding of the operation of participation agreements and are designed to provide protections to a plan and its participants and beneficiaries regarding the operation of such an agreement.

Section B provides certain conditions which become applicable 30 days after the date of publication of this exemption.

Subsection (1) requires, as did the proposal, that plan decisions to purchase or sell mortgage investments must be made by an independent fiduciary who is not subject to a controlling influence by certain interested persons. This condition is applicable to all covered transactions. The independent fiduciary is referred to as a "qualified real estate manager" a term defined in Part III of the exemption.

Finally, subsection (2) provides certain recordkeeping requirements which were contained in the proposal. In view of the comments received concerning this requirement, it has been made prospective only.

Part III contains definitions of terms used in the exemption.

Section A defines the term "affiliate" for purposes of the exemption. The definition is the same as has appeared in other class exemptions issued by the Department.

Section B defines the term "established mortgage lender" as an entity which, in the normal course of its business, is engaged in making or purchasing mortgage investments, and either has the approval of HUD to participate in mortgage insurance programs under the National Housing Act, has been approved to act as a seller/servicer for FHLMC or FNMA programs, or is a state housing agency or independent state authority. This term replaces the term "established financial institution" as it applied to the condition of the proposed exemption governing mortgage loan originations. (See Section D of Part II of the proposal.) This new provision is designed to assure that those providing origination services to a plan meet a professional financial standard and are subject to the continuing oversight of independent agencies.

As in the proposed exemption, the final exemption contains a requirement that mortgage investment decisions be made on behalf of a plan by an independent fiduciary. Section C contains the term "qualified real estate manager" a term intended to replace the "established financial institution" used in the proposed exemption. Under the new definition this independent fiduciary is required to be a financial institution which, in the normal course of its business, provides institutional investors with advice regarding mortgage investments and acknowledges in writing its fiduciary responsibilities to the plan. Under this definition many more entities will be eligible to provide the required advisory services to plans than would have been the case under the proposal. The Department believes that the interests of plans will be served and protected under the exemption as granted without the necessity of unduly restricting the ability of responsible plan fiduciaries in choosing their investment advisors.

Section D defines the term "recognized mortgage loan" as the only type of loan covered by the exemption. This term is defined as a mortgage loan on a "residential dwelling unit" which, at its origination was eligible for purchase through an established program by the FHLMC, FNMA or GNMA. Because these agencies have established programs for the acquisition of certain kinds of mortgages and, in so doing, have established extensive underwriting criteria for such loans, the Department has found it possible to provide an exemption under a set of standards which is more flexible than was the case in the original proposal and at the same time provides very

substantial protections to plans, their participants and beneficiaries. These agencies, in addition to setting standards, maintain an active secondary market in qualifying mortgages and maintain standards for originators and servicers as well. In light of these readily ascertainable and understood standards for the making of mortgage loans maintained by these agencies, the Department, by conditioning this exemption on the satisfaction of those standards, has been able to provide substantial relief without the necessity of setting its own standards for employee benefit plan investment in mortgages.

Section E defines the term "residential dwelling unit." Under the exemption only mortgages on units which meet this definition may be made or purchased by plans. As in the case of many other aspects of this exemption, this definition has been substantially broadened from the proposal.

**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 does not extend to transactions prohibited under section 406(b) of the Act or section 4975(c)(1)(E) and (F) of the Code.

3. 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.

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 notices of December 3, 1981, and December 4, 1981, the Department makes the following determinations:

(a) The class exemption set forth herein is administratively feasible;

(b) It is in the interests of plans and 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 procedure set forth in ERISA Procedure 75–1.

**I. Transactions**

Effective January 1, 1975, the restrictions of section 406(a) 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 (Code) by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to the following transactions if the conditions set forth in Part II below are met:

A. The issuance of a commitment by one or more employee benefit plans to provide mortgage financing to purchasers of residential dwelling units, either by making or participating in loans directly to purchasers or by purchasing mortgage loans or participation interests in mortgage loans originated by a third party;

B. The receipt by the plan of a fee in exchange for issuing such commitment;

C. The actual making or purchase of a mortgage loan or participation interest therein pursuant to such commitment;

D. The direct making or purchase by one or more employee benefit plans of a mortgage loan or a participation interest therein other where a commitment has been issued; and

E. The sale, exchange or transfer of a mortgage loan or participation interest therein by an employee benefit plan prior to the maturity date of such instrument whether or not acquired pursuant to this exemption, provided that the ownership interest sold, exchanged or transferred represents the plan's entire interest in such investment.

**II. Conditions**

A. Effective January 1, 1975, the exemption provided for transactions described in Part I is available only if each of the following conditions, as applicable, is met:

(1) General Conditions

(a) Any mortgage loan to be acquired must be a "recognized mortgage loan" (as defined in Section D of Part III) or a participation interest in such loan for the purchase of a "residential dwelling unit" (as defined in Section E of Part III).

(b) Any mortgage loan must be originated (either directly for the plan or by the origination-purchase process) by an "established mortgage lender" (as defined in Section B of Part III); (i) who qualifies the recipient and (ii) as to which neither the plan, nor an employer or group of employers contributing to the plan, nor an employee organization any of whose members are covered by the plan, has the power to exercise a controlling influence over the management or policies of such "established mortgage lender";

(c) The price paid or received by the plan must be at least as favorable to the plan as a similar transaction involving unrelated parties; and

(d) No person who is a developer or a builder involved in the development or construction of the units, or a lender who is associated with the construction financing arrangement for the units, or who, at the time the decision to purchase is made by the plan (whether directly or pursuant to a commitment) is the owner of a mortgage or a participation interest therein which is subsequently sold to the plan, shall have exercised any discretionary authority or control or rendered any investment advice that would make that person a fiduciary with respect to the plan's decision to purchase, or to commit to purchase, a mortgage loan or a participation interest therein or setting the terms thereof.

(2) Specific Conditions Applicable to Commitments

Where the decision by the plan involves a commitment to purchase either a mortgage loan or participation interest therein:

(a) The commitment must be in writing and must be at least as favorable to the plan as a commitment involving unrelated parties and consistent with customary practices in the residential finance industry; and

(b) The commitment must provide for the use of underwriting guidelines and mortgage instruments which will ensure that all mortgage loans originated pursuant to such commitment will result in a "recognized mortgage loan";

(3) Specific Conditions Applicable to Participations

Where the acquisition by the plan involves a participation interest in a mortgage loan(s) (whether directly or pursuant to a commitment):

(a) The participation agreement governing such transaction must provide that: (i) the rights and interests evidenced by such participation interest not be subordinated to the rights and interests of other holders of the same participation agreement, (ii) the majority interest in the participation agreement must be owned by parties independent of and not controlled by the person selling the participation interest and servicing the underlying mortgage(s), and (iii) in the event of an inability to obtain collections on any mortgage loan(s) underlying the participation agreement, decisions regarding foreclosure options must be directed by persons other than the seller/servicer; and

(b) Such participation agreement must be in writing and must be at least as favorable to the plan as a participation agreement involving unrelated parties and consistent with customary practices in the residential finance industry.

B. Effective 30 days after date of publication of this notice in the Federal Register the exemption provided for tarnsactions described in Part I is available only if each of the following conditions is satisfied in addition to each of the applicable conditions described in section A of this Part II:

(1) The decision to purchase or sell the mortgage loan or participation interest therein, or to issue a commitment to do so, must be made on behalf of the plan by a "qualified real estate manager" (as defined in Section C of Part III) as to which neither the plan, nor an employer or group of employers contributing to the plan, nor an employee organization any of whose members are covered by the plan, has the power to exercise a controlling influence over the management or policies of such "qualified real estate manager."

(2) (a) The plan shall maintain for the duration of any loan made pursuant to this exemption records necessary to enable the persons described in paragraph (b) of this sub-section to determine whether the conditions of this exemption have been met, except that: (i) a prohibited transaction will not be deemed to have occurred, if due to circumstances beyond the control of the fiduciaries of the plan, records are lost or destroyed prior to the termination of the loan and, (ii) no party in interest shall be subject to the civil penalty which may be assessed under section 502(i) of ERISA, or to the taxes imposed by section 4975(a) and (b) of the Code, if the records are not maintained or are not available for examination as required by subparagraph (b) below.

(b) Notwithstanding any provisions of subsection (a)(2) and (b) of section 504 of the Act, the records referred to in subparagraph (a) of this paragraph must be unconditionally available at their customary location for examination during normal business hours by: any trustee, investment manager, participant or beneficiary of the plan, or any duly authorized employee or representative of such person or of the Department or the Internal Revenue Service.

### III. Definitions

For purposes of this exemption:

A. References to persons described in this exemption includes their affiliates. An affiliate is defined as:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person;

(2) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and

(3) Any corporation or partnership of which such person is an officer, director or partner.

B. An "established mortgage lender" means an organized business enterprise which has as one of its principal purposes in the normal course of business the origination of loans secured by real estate mortgages or deeds of trust and which has satisfied the qualification requirements of one of the following categories:

(1) Approval by the Secretary of the Department of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act;

(2) Approval by the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation as a qualified Seller/Servicer; or

(3) A State agency or independent State authority empowered by State law to raise capital to provide financing residential dwelling units.

C. A "qualified real estate manager" means fiduciary as defined in section 3(21) of the Act who: (1) Is a financial institution or business organization, which in the normal course of business advises institutional investors regarding investments similar to those in which the plan desires to engage and which are described in Part I of this exemption; and (2) acknowledges in writing to the plan that it will make decisions regarding plan investments in mortgage loans or participation interests therein in its capacity as a fiduciary of such plan.

D. A "recognized mortgage loan" is any mortgage loan on a "residential dwelling unit" which, at the time of its origination, was eligible, through an established program, for purchase by the Federal National Mortgage Association, the Government National Mortgage Association or the Federal Home Loan Mortgage Corporation;

E. A "residential dwelling unit" or "unit" means: (1) owner occupied non-farm property comprising one to four dwelling units, including detached houses, townhouses, manufactured housing, condominiums, units in a housing cooperative, or a unit in a multi unit subdivision (planned unit development) restricted by recorded documents which limit the use of the unit to residential purposes and provide for maintenance of common facilities; or (2) certain non-owner occupied units where such unit complies with the uniform underwriting standards required for investor loans to qualify as a "recognized mortgage loan" under this exemption.

Signed at Washington, D.C. this 13th day of May 1982.

**Jeffrey N. Clayton,**

*Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13402 Filed 5-13-82; 3:17 pm]

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**[Prohibited Transaction Exemption 82-86; Exemption Application Nos. D-3014 and D-3015]**

## Exemption From the Prohibitions for Certain Transactions Involving the Michael Merkley Ranch, Inc. Defined Benefit Retirement Plan and the Michael Merkley Ranch, Inc. Profit Sharing Plan Located in Sacramento, California

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Grant of individual exemption.

**SUMMARY:** This exemption permits the proposed leasing (the Proposed Lease) by the Michael Merkley Ranch, Inc. Defined Benefit Retirement Plan (the Defined Benefit Plan) and the Michael Merkley Ranch, Inc. Profit Sharing Plan (the Profit Sharing Plan, collectively, the Plans) of certain real property (the Property) to Michael Merkley Ranch, Inc. (the Employer), the sponsor of the Plan.

**FOR FURTHER INFORMATION CONTACT:** Richard Small of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S.

Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216. (202) 523–8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On March 12, 1982, notice was published in the Federal Register (47 FR 10929) of the pendency before the Department of Labor (the Department) of a proposal to grant an exemption from the restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1) (A) through (E) of the Code, for the above described transaction. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held relating to this exemption. The applicant has represented that it has satisfied the notification requirements as set forth in the notice of pendency. No public comments and no requests for a hearing were received by the Department.

The notice of pendency 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 exemptions of the type proposed to the Secretary of Labor.

### 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 fiduiciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable 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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does the fact the transaction is the subject of an exemption affect the requirement of section 401(a) of the Code that a 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)(3) of the Act and section 4975(c)(1)(F) of the Code.

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is, in fact, a prohibited transaction.

### Exemption

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following determinations:

(a) The exemption is administratively feasible;

(b) It is in the interests of the Plans and of its participants and beneficiaries; and

(c) It is protective of the rights of the participants and beneficiaries of the Plans.

Accordingly the restrictions of section 406(a), 406(b)(1) and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to the Proposed Lease of the Property by the Plans to the Employer provided that the terms and conditions of the Proposed Lease are at least as favorable to the Plans as those which the Plans would receive in a similar transaction with an unrelated party.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction to be comsummated pursuant to this exemption.

Signed at Washington, D.C., this 12th day of May, 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13440 Filed 5-17-82; 8:45 am]

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**[Prohibited Transaction Exemption 82-84; Exemption Application No. D-2948]**

## Exemption From the Prohibitions for a Certain Transaction Involving the Kinco, Inc. Profit Sharing Plan and Trust Located in Jacksonville, Fla.

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Grant of individual exemption.

**SUMMARY:** This exemption would permit the contribution of a mortgage note receivable (the Note) by Kinco, Inc. (the Employer) to the Kinco, Inc. Profit Sharing Plan and Trust (the Plan), and the guaranty of the mortgage note by the principal shareholders of the Employer.

**FOR FURTHER INFORMATION CONTACT:** Ms. Linda Hamilton of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216. (202) 523–8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On March 5, 1982, notice was published in the Federal Register (47 FR 9610) of the pendency before the Department of Labor (the Department) of a proposal to grant an exemption from the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1) (A) through (E) of the Code, for the above-described transaction. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held relating to this exemption. The applicant has represented that it has complied

with the requirements of notification to interested persons as set forth in the notice of pendency. No public comments and no requests for a hearing were received by the Department.

The notice of pendency 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 exemptions of the type proposed to the Secretary of Labor.

General Information

The attention of interested person 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 fidiciary or other party in interest or disqualified person with respect to a plan to which the exemption is applicable 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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does the fact the transaction is the subject of an exemption affect the requirement of section 401(a) of the Code that a 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)(3) of the Act and section 4975(c)(1)(F) of the Code.

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is, in fact, a prohibited transaction.

Exemption

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following determinations:

(a) The exemption is administratively feasible;

(b) It is in the interests of the Plans and of its participants and beneficiaries; and

(c) It is protective of the rights of the participants and beneficiaries of the Plans.

Accordingly the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to (1) the contribution of the Note by the Employer to the Plan provided that the Note is valued at its fair marekt value when contributed, and (2) the guaranty of the Note by the principal shareholders of the Employer.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction to be comsummated pursuant to this exemption.

Signed at Washington, D.C., this 12th day of May, 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13442 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-29-M

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**[Prohibited Transaction Exemption 82-82; Exemption Application No. L-2536]**

## Exemption From the Prohibitions for Certain Transactions Involving Retail Clerks Local 212 Western New York Pension Plan Located in Buffalo, N.Y.

**AGENCY:** Pension and Welfare Benefit Programs, Office Labor.

**ACTION:** Grant of Individual Exemption.

**SUMMARY:** This exemption permits, effective May 23, 1980, the decision by those trustees of the Retail Clerks Local 212 Western New York Pension Plan (the Plan) who represent Local 212, United Food and Commercial Workers Union (the Union) to retain the Union for a period of five years ot provide certain administrative services to the plan.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Sandler of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216. (202) 523-8195. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On February 5, 1982, notice was published in the **Federal Register** (47 FR 5526) of the pendency before the Department of Labor (the Department) of a proposal to grant an exemption from the restrictions of section 406(b)(2) of the Employee Retirement Income Security Act of 1974 (the Act). The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to summit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held relating to this exemption. The applicant has represented that a copy of the notice was distributed in accordance with the requirments set forth in the proposed exemption. No public comments and no requests for a hearing were received by the Department.

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 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. 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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act.

(2) This exemption does not extend to transactions prohibited under section 406(a), 406(b) (1) and (3) of the Act.

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act, including Statutory or Administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an Administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is, in fact, a prohibited transaction.

**Exemption**

In accordance with section 408(a) of the Act and the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following determinations:

(a) The exemption is administratively feasible;

(b) It is in the interests of the Plan and of its participants and beneficiaries; and

(c) It is protective of the rights of the participants and beneficiaries of the Plan.

Accordingly, the restrictions of section 406(b)(2) of the Act shall not apply, effective May 23, 1980, to the decision by the Union Trustees to retain the Union to provide administrative services to the Plan for a five year period.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction to be consummated pursuant to this Exemption.

Signed at Washington, D.C., this 12th day of May 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13444 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-29-M

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**[Prohibited Transaction Exemption 82-83; Exemption Application No. D-2736]**

## Exemption From the Prohibitions for Certain Transactions Involving Retirement Plans of the Westinghouse Electric Corp. and its Affiliates Located in Pittsburgh, Pa.

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Grant of individual exemption.

**SUMMARY:** This exemption provides (a) general relief for various transactions involving the assets of a real estate advisory account (the W Account) managed by The Equitable Life Assurance Society of the United States (Equitable) for the retirement plans (the Plans) now or hereafter maintained by the Westinghouse Electric Corporation (Westinghouse) or its affiliates, and (b) specific relief regarding (i) the furnishing by Westinghouse or its affiliates of goods and services with respect to real property investments of the W Account, and (ii) transactions involving places of public accommodation which are acquired for the W Account.

**EFFECTIVE DATE:** This exemption is effective August 26, 1981.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Miriam Freund, of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216. (202) 523-8971. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On February 5, 1982, notice was published in the Federal Register (47 FR 5537) of the pendency before the Department of Labor (the Department) of a proposal to grant an exemption from: (a) the restrictions of section 406(a)(1) (A) through (D) of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1) (A) through (D) of the Code, for the general section of the exemption mentioned above; and (b) from the restrictions of sections 406(a)(1) (A) through (D) and 406 (b)(1) and (b)(2) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, for the two specific sections of the exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held relating to this exemption. The applicant has represented that a copy of the notice has been furnished to interested persons in compliance with the provisions of the notice of proposed exemption. No requests for a hearing were received by the Department.

The Department has received two comments on the proposed exemption. The first requests that the exemption be limited to prevent Equitable from investing Plan assets held in the W Account in any Equitable or Westinghouse real property or in any real estate owned by employees of Equitable or Westinghouse. In this regard, section (a)(1) (i) and (ii) of the proposed exemption (on page 5541) would not permit, among other things, Plan assets in the W Account to be invested in real property owned by Equitable, Westinghouse, employees of Equitable, and other specified parties. This section of the proposed exemption, however, would permit Plan assets in the W Account to be invested in real estate owned by an employee of Westinghouse if such employee does not exercise discretionary authority, responsibility, or control or provide investment advice with respect to either the investment of Plan assets in the W Account or the management and disposition of Plan assets held in the W Account (see section (a)(1)(iii) of the proposed exemption).

The applicant believes that permitting Plan assets in the W Account to be invested in real estate owned by other Westinghouse employees is administratively feasible, in the interests of the Plans and their participants and beneficiaries, and protective of the rights of such participants and beneficiaries because none of these other employees has any direct or indirect responsibility for the investment or management of assets held in the W Account or would be in a position to influence the investment or management of such assets. Westinghouse and its affiliates have more than 100,000 employees. As mentioned above, section (a)(1)(iii) of the proposed general exemption already excludes from its coverage any transaction with a Westinghouse employee who is involved in the investment or management of such assets, such as a member of the Westinghouse Pension Plan Administration Committee or those Westinghouse officers, directors, or employees (if any) who may be involved in the investment of Plan assets or the selection of investment managers. Excluding other employees, who are not involved in the investment or management of assets held in the W Account, would preclude nonabusive transactions with such employees, thereby adding significantly to the recordkeeping and compliance burdens of the W Account.

In view of the foregoing, the Department has decided to limit the types of parties in interest only to the extent of the limitations specified in the proposed exemption.

The other comment was submitted by the applicant to clarify which plans will be covered by the exemption and to provide additional information relating to the holding of title to properties in the W Account. Regarding the first point, the application for exemption (page 1, paragraph 1) states that the exemption requested involves the six plans named

in the Notice of Proposed Exemption.[1] However, the applicant's comment letter recommends that parts of the exemption should be modified to cover transactions with parties in interest, of the types specified in the proposed exemption, with respect to any plan that is now or may hereafter be maintained by Westinghouse or its affiliates. The parts of the proposed exemption affected are the general exemption (section (a), on page 5541) and the specific exemption for transactions involving places of public accommodation (section (b)(2), on page 5541). The applicant represents that except for the six plans listed in the Notice of Proposed Exemption, neither Westinghouse nor any of its affiliates currently has any other employee benefit plans that are contemplated to become participants in the W Account. However, it is conceivable that other plans may participate in the W Account in the future as a result of mergers or the acquisition of new subsidiaries by Westinghouse or its affiliates. Thus, the applicant wishes the exemption to cover transactions with parties in interest with respect to these plans, as well as to the six plans named in the Notice of Proposed Exemption.

The Department agrees to modify the exemption to clarify that the plans affected are those that are now maintained or may hereafter be maintained by Westinghouse or its affiliates.

The second item in the applicant's comment letter explains that under certain circumstances ancillary trustees or tax-exempt corporations will be used to hold title to real properties managed in the W Account. The reason for using such intermediaries is to alleviate any difficulties that might arise in connection with the application of state laws concerning out-of-state corporations to Mellon Bank, N.A. (Mellon), the trustee of the master trust of which the W Account will be a part (see paragraphs 3 and 7 of the Summary of Facts and Representations in the Notice of Proposed Exemption). Thus, an ancillary trustee locate within the state where the property investment is situated may be appointed to hold legal title to the property on behalf of the W Account. Such ancillary trustee would possess no discretionary responsibility, authority, or control over the management and operation of the property. Alternatively, a title-holding corporation that qualifies for tax-exempt status under section 501(c)(2) of the Code may be formed to hold title to properties within a state that are managed in the W Account. When this alternative is used, Equitable will be responsible for the formation and maintenance of the section 501(c)(2) corporation. Mellon will hold in trust, on behalf of the W Account, all of the shares of stock of each such corporation and will provide Equitable with a proxy to vote all such shares. Equitable will exercise its proxy to elect directors (who, in turn, will appoint the officers) of each such corporation who will be responsible, at Equitable's discretion, for causing such corporation to engage in transactions, hold real property in such corporation's name, and do all other things deemed appropriate by Equitable on behalf of the W Account.

The applicant represents that both of these types of intermediaries are commonly used by institutional real estate investors to hold title to properties and that using such intermediaries will affect neither Equitable's responsibilities in managing real properties in the W Account nor the material terms of any of the subject transactions. Based on the foregoing, the Department agrees with the applicant that the use of these title-holding alternatives will not have a material bearing on the proposed exemption.

The notice of pendency 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 exemptions of the type proposed to the Secretary of Labor.

**General Information**

The attention of interested persons is directed to the following:

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 or disqualified person with respect to a plan to which the exemption is applicable 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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a) (1) (B) of the Act; nor does the fact the transaction is the subject of an exemption affect the requirement of section 401(a) of the Code that a 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) (3) of the Act and section 4975(c) (1) (f) of the Code.

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is, in fact, a prohibited transaction.

**Exemption**

In accordance with section 408(a) of the Act and section 4975(c) (2) of the Code and the procedues set forth in ERISA Procedure 75–1 and based upon the entire record, the Department makes the following determinations:

(a) The exemption is administratively feasible;

(b) It is in the interest of the Plans and of their participants and beneficiaries; and

(c) It is protective of the rights of the participants and beneficiaries of the Plans.

Accordingly, the following relief is granted, effective as of August 26, 1981:

(a) *General Exemption*—the restrictions of section 406(a)(1)(A) through (D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (D) of the Code shall not apply to any transaction arising in connection with the acquisition, ownership management, development, leasing, or sale of real property (including the acquisition, ownership, or sale of any joint venture or partnership interest in such property) and the borrowing or lending of money in connection therewith, between a party in interest with respect to the Plans and the W Account provided that the following conditions are met:

(1) Such party in interest is not—

(i) Equitable, any person directly or

[1] Section 4.06(1) of ERISA Proc. 75–1 (40 FR 18471, April 28, 1975) requires each application for exemption to include the name and type of plan or plans involved.

indirectly controlling, controlled by, or under common control with Equitable, any officer, director, or employee of Equitable, or any partnership in which Equitable (on behalf of its general account) is a partner;

(ii) Westinghouse or any affiliate of Westinghouse (within the meaning of section 407(d)(7) of the Act); or

(iii) A person who exercises discretionary authority, responsibility, or control, or who provides investment advice, with respect to the investment of Plan assets in the W Account or with respect to the management or disposition of the Plan assets held in the W Account;

(2) At the time the transaction is entered into, and at the time of any subsequent renewal thereof that requires the consent of Equitable, the terms of the transaction are not less favorable to the W Account than the terms generally available in arm's-length transactions between unrelated parties;

(3) Equitable maintains for a period of six years from the date of each transaction mentioned above the records necessary to enable the persons described in paragraph (4) of this section to determine whether the conditions of this exemption have been met, except that (i) a prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of Equitable, the records are lost or destroyed prior to the end of the six-year period, and (ii) no party in interest shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975 (a) and (b) of the Code, if the records are not maintained, or are not available for examination as required by paragraph (4) below; and

(4) (i) Except as provided in subparagraph (ii) of this paragraph and notwithstanding any provisions of subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (3) of this section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any duly authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a Plan who has the authority to acquire or dispose of the interests of the Plan in the W Account or any duly authorized employee or representative of such fiduciary,

(C) Any contributing employer to any Plan or any duly authorized employee or representative of that employer,

(D) Any participant or beneficiary of any Plan or any duly authorized employee or representative of such participant or beneficiary;

(ii) None of the persons described in subparagraphs (i)(B) through (i)(D) of this paragraph shall be authorized to examine Equitable's trade secrets or commercial or financial information which is privileged or confidential; and

(b) *Specific Exemptions*—The restrictions of section 406(a)(1) (A) through (D) and 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not apply to:

(1) *Furnishing of Goods and Services.* The furnishing of goods and services with respect to the real property investments of the W Account described in section (a) above by Westinghouse or any affiliate thereof (within the meaning of section 407(d)(7) of the Act), provided that—

(i) The transaction satisfies the requirements of subparagraphs (a)(2), (3) and (4) of this proposed exemption, and

(ii) The total amount involved in the furnishing of such goods and services in any calendar year does not exceed the greater of $25,000 or 0.5 percent of the fair market value of the assets acquired for the W Account on the most recent valuation date of the W Account prior to the transaction.

(2) *Transactions Involving Places of Public Accommodation.* The furnishing of services, facilities, and any goods incidental to such services and facilities by a place of public accommodation acquired for the W Account, to a party in interest with respect to the Plans if the services, facilities, or incidental goods are furnished on a comparable basis to the general public and if the requirements of subparagraphs (a) (3) and (4) of this proposed exemption are met.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions which are the subject of this exemption.

Signed at Washington, D.C., this 12th day of May 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13443 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-29-M

**[Prohibited Transaction Exemption 82-85; Exemption Application No. D-2974]**

## Exemption From the Prohibitions for Certain Transactions Involving Pension Plans Participating in the Alco Standard Corporation Group Trust Fund, Located in Valley Forge, Pennsylvania

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Grant of Individual Exemption.

**SUMMARY:** This exemption permits the acquisition and holding of certain excess qualifying employer securities by plans participating in the Alco Standard Corporation Group Trust Fund (the Fund) which plans acquired their interest in the Fund subsequent to December 30, 1975.

**EFFECTIVE DATE:** This exemption is effective December 31, 1975.

**FOR FURTHER INFORMATION CONTACT:** Alan H. Levitas of the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20216. (202) 523-8884. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** On March 26, 1982, notice was published in the **Federal Register** (47 FR 13063) of the pendency before the Department of Labor (the Department) of a proposal to grant an exemption from the restrictions of sections 406(a), 406 (b)(1) and (b)(2) and 407(a) of the Employee Retirement Income Security Act of 1974 (the Act) and from the sanctions resulting from the application of section 4975 of the Internal Revenue Code of 1954 (the Code) by reason of section 4975(c)(1) (A) through (E) of the Code, for the transactions described in an application filed by legal counsel for the Fund. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, D.C. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held relating to this exemption. The applicant has represented that a copy of the notice has been furnished to interested persons in compliance with the requirements set forth in the notice of proposed exemption. No public comments and no

requests for a hearing were received by the Department.

The notice of pendency 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 exemptions of the type proposed to the Secretary of Labor.

**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 or disqualified person with respect to a plan to which the exemption is applicable 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 or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does the fact the transaction is the subject of an exemption affect the requirement of section 401(a) of the Code that a 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)(3) of the Act and section 4975(c)(1)(F) of the Code.

(3) This exemption is supplemental to, and not in derogation of, any other provisions of the Act and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption or transitional rule is not dispositive of whether the transaction is, in fact, a prohibited transaction.

**Exemption**

In accordance with section 408(a) of the Act and section 4975(c)(2) of the Code and the procedures set forth in ERISA Procedure 75–1 (40 FR 18471, April 28, 1975), and based upon the entire record, the Department makes the following determinations:

(a) The exemption is administratively feasible;

(b) It is in the interests of the Fund and of its participants and beneficiaries; and

(c) It is protective of the rights of the participants and beneficiaries of the Fund.

Accordingly the restrictions of section 406(a), 406 (b)(1) and (b)(2) and 407(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code, shall not aply to excess acquisition and holding of qualifying employer securities by a plan if such excess results solely from the plan's acquisition of an interest in the Fund subsequent to December 30, 1975, provided (1) that the terms of the transactions are not less favorable to the plans than those obtainable in arm's length transactions with unrelated parties at the time of consummation of each transaction; and (2) the Fund does not acquire any additional Alco common stock if such acquisition would cause the Fund to violate section 407(a) of the Act.

The availability of this exemption is subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which are the subject of this exemption.

Signed at Washington, D.C., this 12th day of May, 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13441 Filed 5-17-82; 8:45 am]
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**[Application No. D-3187]**

## Proposed Exemption for a Certain Transaction Involving the Massachusetts State Carpenters Pension Fund, Located in Burlington, Massachusetts

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Notice of proposed exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code). The proposed exemption would exempt the loan of $500,000 by the Massachusetts State Carpenters Pension Fund (the Plan) to Northampton Hotel Associates (the Partnership). One of the partners in the Partnership, Irwin J. Nebelkopf (Nebelkopf) is an owner of Nebel Heating Corp. (Nebel), which is a contributing employer to the Plan. The proposed exemption, if granted, would affect the Partnership, participants and beneficiaries of the Plan, and others participating in the transaction.

**DATES:** Written comments must be received by the Department of Labor on or before July 6, 1982.

**ADDRESS:** All written comments (at least three copies) should be sent to the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, D.C. 20216, Attention: Application No. D-3187. The application for exemption and 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, Room N-4677, 200 Constitution Avenue NW., Washington, D.C. 20216.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department of Labor, telephone (202) 523-8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of an application for exemption from the restrictions of section 406(a) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (D) of the Code. The proposed exemption was requested in an application filed on behalf of Nebel, pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). 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 exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.

**Summary of Facts and Representations**

The application contains representations with regard to the proposed exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. The Plan is a multi-employer pension plan which covers persons employed as carpenters. The Plan has approximately 10,000 participants, and

as of May 31, 1981, had assets of approximately $110,000,000.

2. Nebel is a contributing employer to the Plan. It is engaged in the business of constructing residential, commercial and industrial buildings as a general contractor. Nebel has been engaged to serve as the general contractor with respect to the historic rehabilitation of the Hotel Northampton (the Hotel), which is owned by the Partnership.

3. Nebelkopf is a fifty percent stockholder in Nebel. The remaining fifty percent is owned by persons unrelated to Nebelkopf. Nebelkopf is also a general partner in the Partnership, owning no more than a one-third interest in the Partnership. The other general partners are unrelated to Nebelkopf or to Nebel. The sale of limited partnership interests has not yet been closed. After the closing of such interests, Nebelkopf will own not more than a one-sixth interest in the Partnership.

4. The Plan proposes to lend $500,000 to the Partnership, for a 15 year term, at 15% interest for use in the renovation of the Hotel. The loan will be amortized over a 25 year schedule, with the balance due at the end of the 15th year. The loan will be secured by the Hotel land and buildings. The applicant represents that there are no clauses in any of the renovation project documents prohibiting the use of non-union labor.

5. The Partnership estimates that approximately $4,150,000 will be needed to complete the renovation of the Hotel. Of that total, $1,150,000 is to come from capital contributions. First mortgage loans will make up $2,700,000 of the total. The Plan will be participating in the first mortgage on a pro-rata basis. In addition to the subject loan, the first mortgage financing will consist of three loans, each with different terms. It is anticipated that all first mortgage loans will be secured by the same mortgage and all will be serviced by the Nonotuck Savings Bank in Northampton, Massachusetts. The other first mortgage lenders are:

(1) A consortium of seven Northampton banks, the trustees of Smith College and H.S. Gere & Sons, Inc., the publisher of the Northampton Gazette, which loaned $1,000,000 to the Partnership;

(2) The International Union of Operating Engineers Local 98 Pension Fund and Electrical Workers Local 36 Health and Welfare Trust Fund, which loaned $600,000 to the Partnership; and

(3) The Commonwealth Bank and Trust Company, which loanded $600,000 to the Partnership.

6. None of the trustees of the Plan is either a limited or general partner in the Partnership, or a stockholder in Nebel. Neither Nebelkopf nor Nebel has control over or access to Plan funds. Nebel played no role in the Plan's decision to make the subject loan, although the Partnership solicited the loan by direct contact with union officials, and Nebelkopf participated in the Partnership's formal presentation to the Plan.

7. The 15% interest rate on the subject loan was arrived at by arm's-length negotiation. The Partnership wanted to pay no more than 13.2%, as they are paying for the first three years to the Operating Engineers Pension Fund (which will not have participants working on the project) and the Electrical Workers Health and Welfare Fund for the first mortgage loans from those Funds. The Plan trustees insisted on a higher rate for the subject loan, however, and 15% was agreed upon. As protection for the Plan, the trustees insisted that its loan be the final debt paid into the Partnership, that the loan be contingent upon minimum equity contributions being paid into the Partnership, and that an appraisal be obtained.

8. The Hotel land and buildings which will secure all the first mortgage loans have been appraised by Mr. John F. Tehan, Jr. of Springfield, Massachusetts, an independent appraiser, to have a fair market value of $4,685,000 as of December 15, 1981. This amount would be approximately 1.8 times the total amount of first mortgage loans to be secured by the property.

9. Nonotuck Savings Bank (the Bank), which is independent of the Plan and the Partnership, will service all the first mortgage loans, including the subject loan. The Bank has been given the authority to act as agent for all first mortgage lenders in the event of default. The Bank may take foreclosure action in event of default after a ⅔ vote by the lenders approving such action. Voting rights are based on the dollar amounts of the loans.

10. In summary, the applicant represents that the proposed transaction meets the statutory criteria for an exemption under section 408(a) of the Act because: (1) The loan only involves less than 0.5% of Plan assets; (2) the terms of the loan were arrived at by arm's-length negotiation; and (3) the collateral/loan ratio is approximately 180% as determined by an independent appraiser.

**Notice to Interested Persons**

On or before June 1, 1982, the applicant will notify the local unions which represent Plan participants, in care of their bargaining agents, and the employer associations which represent contributing employers. The notice will request that local unions post the notice on bulletin boards in the union halls for a 30 day period. The interested persons will be sent a copy of the proposed exemption by mail, and will be informed of their right to comment within the time period set forth in the notice.

**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, 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 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) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b) of the Act and section 4975(c)(1) (E) and (F) of the Code;

(3) Before an 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 and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the act and 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.

**Written Comments**

All interested persons are invited to submit written comments on the pending exemption to the address above, within the time period set forth above. All comments will be made a part of the

record. Comments should state the reasons for the writer's interest in the pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

**Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption 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). If the exemption is granted, the restrictions of section 406(a) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (d) of the Code shall not apply to a loan by the Plan to the Partnership of $500,000, based on the terms and conditions set forth above, provided that the terms of the transaction are not less favorable to the Plan than those obtainable in an arm's-length transaction with an unrelated party at the time of consummation of the transaction.

The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction to be consummated pursuant to the exemption.

Signed at Washington, D.C., this 13th day of May 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13437 Filed 5-17-82; 8:45 am]
BILLING CODE 4510-29-M

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[Application No. D-3195]

## Proposed Exemption for Certain Transactions Involving Control Data Retirement Plan Located in Minneapolis, Minn.

**AGENCY:** Pension and Welfare Benefit Programs, Office Labor.

**ACTION:** Notice of Proposed Exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code). The proposed exemption would exempt: (1) The proposed investment by the Control Data Retirement Plan (the Plan) of $500,000 in Minnesota Seed Capital Fund, Inc. (MSCF), a portion of the stock of which is owned by parties in interest with respect to the Plan; (2) the future purchase of MSCF stock by the Plan; and (3) the granting of a put option regarding the Plan's MSCF stock by Control Data Corporation (CDC), the Plan sponsor. The proposed exemption, if granted, would affect MSCF, CDC, the Plan and its participants and beneficiaries and other parties participating in the proposed transactions.

**DATE:** Written comments and requests for a public hearing must be received by the Department on or before July 1, 1982.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216, Attention: Application No. D-3195. The application for exemption and 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, Room N-4677, 200 Constitution Avenue, NW., Washington, D.C. 20216.

**FOR FURTHER INFORMATION CONTACT:** Mr. Robert Sandler of the Department, telephone (202) 523-8195. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of an application for exemption from the restrictions of section 406(a), 406(b)(1) and (2) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. The proposed exemption was requested in a application filed on behalf of the Plan, pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA procedure 75-1 (40 FR 18471, April 28, 1975). 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 exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.

**Summary of Facts and Representations**

The application contains representations with regard to the proposed exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. The Plan is a defined benefit plan with 32,097 participants and net assets of approximately $150 million as of December 31, 1981. The Plan trustee, which is Northwestern National Bank of Minneapolis (the Bank), would have the complete and sole authority to act on the Plan's behalf with regard to all facets of the transactions described herein. The bank has extended a line of credit to CDC in the amount of $24 million. This line of credit represents approximately 2.3% of CDC's total available line of credit and less than ½ of 1% of the Bank's current commercial loan business.

2. MSCF was incorporated on July 30, 1980 under the laws of the State of Minnesota. MSCF was formed for the purpose of investing in new, technologically innovative small businesses by providing the early stage funding and, in some cases, second stage funding when a project-business has achieved a successful start and seeks further funding. MSCF's stated objective is to make a significant return on investment over a period of time, primarily through gains realized on the subsequent disposition of equity investments in successful new businesses. A further, less direct goal is to strengthen local, state and national economies by aiding the growth of businesses, technological innovation, competition, worker productivity and long term employment opportunities.

3. It is proposed that the Plan invest $500,000 upon the grant of the exemption proposed herein and up to a total of 1% of Plan assets in the future in MSCF stock. CDC owns approximately 25% of the stock of MSCF and Mr. William Norris, President of MSCF and president and chairman of the board of CDC, owns approximately 2.5% of the stock of MSCF. MSCF stock is sold in private placements and potential investors are supplied with a private placement memorandum which describes in detail the operation and investment strategies and goals of MSCF.

4. The purchase price that the Plan would pay for the initial $500,000 investment would be $40 per share, which is the offering price of the current issue. If the Plan purchases additional MSCF stock in the future, the purchase price would be determined as follows: (a) If the purchase is from a new issue, the stock would be purchased at the offering price; (b) if the purchase is pursuant to a right of first refusal

(discussed below), the price would be the net book value of the stock; and (c) if the purchase is from another shareholder but not pursuant to a right of first refusal, the purchase price would be the fair market value of the stock as determined by an independent appraiser.

5. In conjunction with the purchase of MSCF stock, the Plan would receive a put option under which all or a portion of the stock could be sold to CDC at such time as the Bank, in its sole discretion, would determine. The put option will be exercised at a price which will be the greater of the net book value of the stock determined as of the end of the most recent calendar quarter, or the fair market value of the stock as determined by an independent appraiser. In accordance with the MSCF stock subscription agreements, the put option would be subject to a right of first refusal of the other MSCF stockholders at the net book value of the stock. CDC and Mr. Norris have agreed to waive their rights of first refusal.

6. In summary, the applicant represents that the proposed transactions satisfy the statutory criteria of section 408(a) of the Act due to the following:

(a) The Bank will have complete and exclusive authority with regard to the Plan's purchases of MSCF stock; (b) the Bank will have complete and exclusive authority with regard to the exercising of all rights inuring to the Plan as a shareholder, and with regard to the exercise of the put option; (c) the Plan will have the option at any time to sell any or all of its MSCF stock to CDC; and (d) except for the put option, the Plan will purchase and dispose of MSCF stock on the same basis as all other shareholders pursuant to the terms and conditions of the private memorandum and the stock subscription agreements.

**Notice to Interested Persons**

Notice of the proposed exemption will be given to all Plan participants and beneficiaries within 14 days of its publication in the **Federal Register** by posting on bulletin boards generally used for employer-employee communications and, with respect to such persons who do not normally have access to such bulletin boards, by first class mail. The notice will inform interested persons of their right to comment on or request a hearing regarding the proposed 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, 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 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) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) Before an 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 and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the Plan; and

(4) The proposed exemption, if granted, wil be supplemental to, and not in derogation of, any other provisions of the Act and 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.

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, 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 pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

**Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption 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). If the exemption is granted, the restrictions of sections 406(a), 406(b) (1) and (2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to: (1) the purchase of $500,000 of MSCF stock; (2) the future purchase of MSCF stock up to a limit of 1% of Plan assets; and (3) the put option given to the Plan by CDC, provided that the terms and conditions of all such transactions are at least as favorable to the Plan as those the Plan could obtain from an unrelated party.

The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transactions to be consummated pursuant to the exemption.

Signed at Washington, D.C., this 12th day of May 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13439 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-29-M

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**[Application Nos. D-2841 and D-2842]**

## Proposed Exemption for Certain Transactions Involving the Jeff Dell Pension and Employee Benefits Plans and Trust Located in New York, N.Y.

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Notice of Proposed Exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and the Internal Revenue Code of 1954 (the Code). The proposed exemption would exempt the cash sale of certain improved real property (the Property) by the Jeff Dell Employee Benefit Plan and Trust (the Money Purchase Pension Plan) and the Jeff Dell Pension Plan and Trust (the Defined Benefit Pension Plan) (collectively, the Plans) to Jeff Dell Film Services, Inc. (the Employer). The proposed exemption, if granted, would affect the participants and beneficiaries

of the Plans and other persons participating in the proposed transaction.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor on or before June 28, 1982.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216, Attention: Application Nos. D-2841 and D-2842. The application for exemption and 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, Room N-4677, 200 Constitution Avenue, NW., Washington, D.C. 20216.

**FOR FURTHER INFORMATION CONTACT:** Ms. Jan Broady of the Department of Labor, telephone (202) 523-8971. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of an application for exemption from the restrictions of section 406(a), 406(b) (1) and (b) (2) of the Act and from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975 (c)(1)(A) through (E) of the Code. The proposed exemption was requested in an application filed on behalf of the Plans, pursuant to section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with procedures set forth in ERISA Procedure 75-1 (40 FR 18471, April 28, 1975). 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 exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.

## Summary of Facts and Representations

The application contains representations with regard to the proposed exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

This notice of pendency was originally published in the **Federal Register** on March 5, 1982, at 47 FR 9611. Because of a decline in the value of the Property, the Employer proposes to modify the sales terms. Therefore, this notice of pendency is being republished as follows:

1. The Employer, a corporation organized under the laws of New York State, is engaged in the film editorial business. On June 2, 1970, the Employer, along with a sister corporation, Jeff Dell Enterprises, Inc.,[1] adopted a profit sharing plan (the Profit Sharing Plan) and on September 30, 1973 the Money Purchase Pension Plan. To comply with relevant provisions of the Act, the Profit Sharing Plan and Money Purchase Pension Plan were restated and consolidated into one document covering both Plans. On October 1, 1979, the Employer and its sister corporation terminated their Profit Sharing Plan and adopted the Defined Benefit Pension Plan. At present, there are eleven participants in the existing Plans.

2. The assets of the Plans, including the terminated Profit Sharing Plan, are commingled for investment purposes. As of August 31, 1981, the Plans held $2,212,895 in total assets. Of these assets, the distributive shares maintained by the individual Plans were $1,068,998 for the Money Purchase Pension Plan, $902,411 for the Profit Sharing Plan and $241,486 for the Defined Benefit Pension Plan. The trustees of the Plans (the Trustees) are Mr. Jeff Dell and his spouse, Mrs. Bunny Dell. The Trustees make investment decisions for the Plans.

3. In January 1981, the Plans purchased land and a building located at 68 East 56th Street, New York, New York (the East 56th Street Property) from Mr. Norman Fuerth (Mr. Fuerth), an unrelated party, for a purchase price of $1,200,000. The Plans paid $400,000 in cash and obtained a first mortgage on the property in the amount of $600,000 from the Chemical Bank of New York. The Plans also obtained a second mortgage on the East 56th Street Property from Mr. Fuerth for the $200,000 remaining balance. The balance was to be repaid in monthly installments over a one year period commencing on the date of closing.

In May 1981, the Plans sold the East 56th Street Property to an unrelated party for $2,375,000 and thereby realized a gain of $1,175,000. The Trustees then decided to purchase additional real property to hold for investment purposes for the Plans. In June 1981, the Plans acquired for the cash price of $1,050,000 another parcel of land and a vacant two story building located at 241 East 51st Street, New York, New York. The Property was purchased pursuant to the terms of a contract of sale entered into between the Trustees and unrelated parties, Mr. and Mrs. Arthur Janov of Beverly Hills, California. At the time of acquisition, the Property represented over 61 percent of the combined total assets of the Plans. The Trustees represent that the acquisition of the Property was a prudent investment for the Plans because of its prime commercial location and its potential for resale and profit.[2]

4. The application documents numerous but futile efforts made by the Trustees to sell the Property to unrelated parties primarily through advertisements appearing in *The New York Times*. In addition, the application states that the Trustees have listed the property with the real estate agent who originally effected the sale to the Plans. However, despite all endeavors no firm offers have been made to the Trustees. The difficulty in selling the real property is attributed to high interest rates and a tight financial market.

5. At present, the Employer leases offices at 10 East 53rd Street, New York, New York from an unrelated party. Since the lease at the current location expires in April 1982 and cannot be renewed, the Employer is looking for new premises in which to relocate its business. Orginally, the Employer requested an exemption to lease from the Plans (the Lease) the vacant building (the Building) situated on the Property. The Lease would have been a "net net" lease whereby the Employer would have assumed all expenses involved in occupying the space, including the payment of real estate taxes, insurance premiums and renovations costs required to make the property habitable for commerical use. The Lease would have been for a ten year term, subject to the right of an independent fiduciary to evict the Employer after five years. The Lease would also have been based on rental amounts and increments as determined by an independent appraisal. Initially, the annual rental was established at $120,402 to reflect the unimproved condition of the Building. Once renovations were made to the Building, the annual rentral would have been increased to $148,500. In addition, Mr. Dell would have guaranteed the Lease in the event of a rental delinquency by the Employer.

6. Because of the high percentage of the Plans' assets that were invested in the Property, the Department could not make a favorable determination with regard to the proposed leasing arrangement. The exemption application

[1] Jeff Dell Enterprises, Inc. is currently an inactive corporation.

[2] In this proposed exemption, the Department expresses no opinion as to whether the acquisitions of the East 56th Street Property and the Property violated any requirement of Part 4 of Title I of the Act.

was then amended to provide for a sale of the Property by the Plans to the Employer. The proposed sale was to be a cash sale whereby the sales price of $1,250,000 was to be due and payable at the time of closing. In addition, no real estate commissions or fees were to be incurred by the Plans.

7. The sales price of the Property is based on independent appraisals made by Mr. Barry Becker (Mr. Becker) and Mr. Jack Chudnoff (Mr. Chudnoff). Both men are New York City-based real estate brokers with over twenty years' experience in the sale and evaluation of residential and commerical properties. In September 1981, Mr. Becker initially appriased the Property for Lease purposes and determined it had an annual fair rental value of $120,402 and a fair market value of $1,600,000 based on the existing state of the premises. To reflect the Employer's intention of purchasing the Property from the Plans, Mr. Becker appraised the Property in January 1982 and found the fair market value to be $1,250,000. Mr. Chudnoff appraised the Property on January 5, 1982 and placed its fair market value at $1,200,000.

With respect to the decline in the fair market value of the Property between September 1981 and January 1982, Mr. Becker stated that the Manhattan real estate market had quieted down and there was a lessening of interest in small properties in the midtown-Manhattan area. He further stated that investor-users were interested in four to five story buildings (the Property has two stories). Mr. Becker attributed the current market to the lack of firm direction as to where interest rates were going, declining corporate profits and increasing unemployment. He stated that buyers with cash had new leverage in making offers to property-owners, and for the time being, and perhaps through the second quarter of 1982, there would be a levelling off of prices.

8. Because of a further decline in market conditions, the Employer proposes to revise the sales price of the Property from the original selling price of $1,250,000 to $1,000,000, or the fair market value of the Property as determined by an independent appraiser on the day of closing.

The Employer represents that in no event will the sales price of the Property be less than $1,050,000, the original purchase price paid by the Plans plus any related expenses incurred by the Plans with respect to the Property.

In connection therewith, by letter dated March 2, 1982, Mr. Chudnoff indicates that due to a softening in the New York real estate market, he does not believe $1,200,000 (the fair market value in his January 5, 1982 appraisal) is obtainable for the subject Property. He suggests the appropriate sales price should be within the range of $1,000,000 to $1,100,000. Therefore, unless the value of the Property changes again by the day of sale, the Employer proposes to revise the sales price to $1,100,000.

9. In summary, it is represented that the proposed transaction satisfies the statutory criteria for an exemption under section 408(a) of the Act because: (a) The sale is a one-time transaction for cash; (b) the Sales price of the Property will be determined by an independent appraisal, and in no event will the sales price be less than the original purchase price paid by the Plans plus expenses incurred by the Plans with respect to the Property; (c) the Plan will incur no real estate commission or fees in connection with the sale; and (d) the Trustees have determined that the sale is in the best interests of the protective of the Plans and their participants and beneficiaries.

**Notice to Interested Persons**

Notice of the pending exemption will be given to the participants and beneficiaries of the Plans within five (5) days of the publication of the notice of pendency in the Federal Register. The notice will include a copy of the pending exemption as published in the Federal Register and will inform interested persons of their right to comment and/or request a hearing within the time frame set forth in the notice of pendency. Notice will be given to participants and beneficiaries by certified mail.

**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, 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 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) The proposed exemption, if granted, will not extend to transactions prohibited under section 406(b)(3) of the Act and section 4975(c)(1)(F) of the Code;

(3) Before an 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 and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and 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.

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, 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 pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

**Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption 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). If the exemption is granted, the restrictions of section 406(a), 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code shall not apply to the cash sale of the Property by the Plans to the Employer, provided that the price received by the Plans is no less than the fair market value of the Property on the date of the sale, and further provided that the sales price is no less than the Plans' original cost plus any expenses incurred by the Plans with respect to the Property.

The proposed exemption, if granted, will be subject to the express condition that the material facts and

representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction to be consummated pursuant to the exemption.

Signed at Washington, D.C., this 12th day of May 1982.

Alan D. Lebowitz,

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82-13436 Filed 5-17-82; 8:45 am]

BILLING CODE 4510-29-M

[Application No. D-3194]

## Proposed Exemption for a Certain Transaction Involving the Jim D. Owen, Pension Plan Trust for Self-Employed Individuals, Single-Employer Plan Located in Knoxville, Tenn.

**AGENCY:** Pension and Welfare Benefit Programs Office, Labor.

**ACTION:** Notice of Proposed Exemption.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor (the Department) of a proposed exemption from certain of the prohibited transaction restrictions of the Internal Revenue Code of 1954 (the Code). The proposed exemption would exempt the sale of a tract of real property to the Jim D. Owen, Pension Plan Trust for Self-Employed Individuals, Single-Employer Plan (the Plan) by Mr. and Mrs. Jim D. Owen, disqualified persons with respect to the Plan. Since Mr. Owen is the only participant in the Plan, which is an HR-10 Plan, there is no jurisdiction under Title I of the Employee Retirement Income Security Act of 1974 (the Act) pursuant to 29 CFR 2510.3-3(b). However, there is jurisdiction under Title II of the Act pursuant to section 4975 of the Code. The proposed exemption, if granted, would affect the Plan and Mr. and Mrs. Owen.

**DATES:** Written comments and requests for a public hearing must be received by the Department of Labor on or before June 21, 1982.

**EFFECTIVE DATE:** If the proposed exemption is granted, it will be effective April 15, 1979.

**ADDRESS:** All written comments and requests for a hearing (at least three copies) should be sent to the Office of Fiduciary Standards, Pension and Welfare Benefit Programs, Room C-4526, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20216, Attention: Application No. D-3194. The application for exemption and 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, Room N-4677, 200 Constitution Avenue, NW., Washington, D.C. 20216.

**FOR FURTHER INFORMATION CONTACT:** Gary H. Lefkowitz of the Department of Labor, telephone (202) 523-8881. (This is not a toll-free number.)

**SUPPLEMENTARY INFORMATION:** Notice is hereby given of the pendency before the Department of an application for exemption from the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) through (E) of the Code. The proposed exemption was requested in an application filed by Mr. Owen, pursuant to section 4975(c)(2) of the Code, and in accordance with procedures set forth in Rev. Proc. 75-26, 1975-1 C.B. 722. 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 exemptions of the type requested to the Secretary of Labor. Therefore, this notice of pendency is issued solely by the Department.

### Summary of Facts and Representations

The application contains representations with regard to the proposed exemption which are summarized below. Interested persons are referred to the application on file with the Department for the complete representations of the applicant.

1. The Plan is a Keogh Plan with one participant, Mr. Owen. The trustee for the Plan is the Southern Industrial Banking Corporation. The Plan document gives Mr. Owen broad investment discretion.

2. On March 28, 1978, Mr. and Mrs. Owen purchased, from unrelated parties, two large tracts of rough mountain land in remote Hancock County, Tennessee. The price paid was $9,000 per tract.

3. In early 1979, Mr. Owen decided that the purchase of one of the tracts (the Property) by the Plan from Mr. and Mrs. Owen would be in the best interests of the Plan. Mr. Owen decided that the transaction would offer the Plan a diversification of investments with good potential for high interest yield.

4. On April 15, 1979, Mr. and Mrs. Owen conveyed the Property to the Plan for consideration of $9,000. This amount was the same as the price Mr. and Mrs. Owen had paid for the Property in 1978. An independent appraiser, Mr. Bob Hodges of Knoxville, Tennessee, has estimated the fair market value of the Property to be not less than $11,250 as of April 15, 1979.

5. In summary, the applicant represents that the transaction meets the statutory criteria for exemption under section 4975(c)(2) of the Code because: (1) The Plan paid the same purchase price that Mr. and Mrs. Owen had paid for the Property one year before, and this price was no more than the fair market value as established by an independent appraiser; (2) the acquisition provides the Plan with diversification of investments and provides a significant long-term investment with the potential for large return; and (3) the only Plan participant affected by the transaction was Mr. Owen, and he desired and caused the transaction to be consummated.

### Notice of Interested Persons

Because Mr. Owen is the only participant in the Plan, it has been determined that there is no need to distribute the notice of pendency to interested persons.

### Tax Consequences of Transaction

The Department of the Treasury has determined that if a transaction between a qualified employee benefit plan and its sponsoring employer (or affiliate thereof) results in the plan either paying less than or receiving more than fair market value such excess may be considered to be a contribution by the sponsoring employer to the plan and therefore must be examined under applicable provisions of the Internal Revenue Code, including sections 401(a)(4), 404 and 415.

### 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 4975(c)(2) of the Code does not relieve a fiduciary or other disqualified person from certain other provisions of the Code, including any prohibited transaction provisions to which the exemption does not apply; 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 proposed exemption, if granted, will not extend to transactions

prohibited under section 4975(c)(1)(F) of the Code;

(3) Before an exemption may be granted under section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan; and

(4) The proposed exemption, if granted, will be supplemental to, and not in derogation of, any other provisions of 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.

**Written Comments and Hearing Requests**

All interested persons are invited to submit written comments or requests for a hearing on the pending exemption to the address above, 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 pending exemption. Comments received will be available for public inspection with the application for exemption at the address set forth above.

**Proposed Exemption**

Based on the facts and representations set forth in the application, the Department is considering granting the requested exemption under the authority of section 4975(c)(2) of the Code and in accordance with the procedures set forth in Rev. Proc. 75–26, 1975–1 C.B. 722. If the exemption is granted, the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1) (A) through (E) of the Code shall not apply to the sale on April 15, 1979 of the Property by Mr. and Mrs. Jim D. Owen to the Plan for $9,000, provided that this amount was not higher than the fair market value of the Property as of the date of sale.

The proposed exemption, if granted, will be subject to the express condition that the material facts and representations contained in the application are true and complete, and that the application accurately describes all material terms of the transaction which is the subject of this proposed exemption.

Signed at Washington, D.C., this 13th day of May 1982.

**Alan D. Lebowitz,**

*Assistant Administrator for Fiduciary Standards, Pension and Welfare Benefit Programs, Labor-Management Services Administration, U.S. Department of Labor.*

[FR Doc. 82–13438 Filed 5–17–82; 8:45 am]

BILLING CODE 4510–29–M

## NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

### Privacy Act of 1974; Revised Systems of Records

**AGENCY:** National Endowment for the Humanities.

**ACTION** Notice of revisions.

**SUMMARY:** National Foundation on the Arts and the Humanities Systems of Records under the Privacy Act of 1974 were last published in the **Federal Register** September 20, 1977, 42 FR 47434 (1977). The following notice updates information included in the earlier notice of systems of records maintained by the Humanities Endowment.

**FOR FURTHER INFORMATION CONTACT:** Stephen J. McCleary. Deputy General Counsel, National Endowment for the Humanities, Washington, D.C. 20506, (202) 724–0367.

**SUPPLEMENTARY INFORMATION:** The National Endowment for the Humanities and the National Endowment for the Arts no longer share an administrative staff. Also, locations of systems and retention and disposal information have changed during the past several years. The following updates the Humanities Endowment's notice of systems of records by reflecting these changes.

Dated: May 12, 1982.

**Victor Loughnan,**

*Director of Administration.*

*Alphabetical List of Systems Names*

Consultants, Reviewers and Panelists—NEH–1
Contracts—NEH–2
Employee Payroll, Leave and Attendance Records and Files—NEH–3
Equal Employment Opportunity Case File—NEH–4
Grant Applications—NEH–5
Grants to Individuals—NEH–6
Personnel Records—NEH–7

**NEH–1**

**SYSTEM NAME:**

Consultants, Reviewers and Panelists—NEH—1

**SYSTEM LOCATION:**

NEH—806 15th Street, NW., Washington, DC 20506.

**CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:**

Past and present members of the National Council on the Humanities, Advisory Panels to the Humanities Endowment, and scholars and experts who may be called upon to serve on advisory panels or to review applications.

**CATEGORIES OF RECORDS IN THE SYSTEM:**

Contains name, address and telephone number of individual. Contains compensation claims, travel diaries, notification of personnel actions, correspondence. May contain curriculum vitae and press clippings.

**AUTHORITY FOR MAINTENANCE OF THE SYSTEM:**

National Foundation on the Arts and the Humanities Act of 1965, as amended (20 U.S.C. 951 et seq.).

The records are used by Endowment staff in administration of our peer review system, including identification of scholars to serve as consultants, reviewers and panelists; 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 the individual about whom the record is maintained.

**POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:**

**STORAGE:**

Maintained in 9 inch by 12 inch folders or computer data base.

**RETRIEVABILITY:**

Indexed by name or indexed keys.

**SAFEGUARDS:**

Records are maintained in lockable drawers, file cabinets, or computer controlled by passwords.

**RETENTION AND DISPOSAL:**

Retained indefinitely.

**SYSTEM MANAGER(S) AND ADDRESS:**

Secretary to the National Council on the Humanities, Office of the General Counsel; Director, ADP Systems, 806 15th St., NW., Washington, DC 20506.

**NOTIFICATION PROCEDURE:**

See Title 45 CFR Part 1115.

**RECORD ACCESS PROCEDURES:**

Same as above.

RECORD SOURCE CATEGORIES:

Individual on whom record is maintained, newspapers and journals, Endowment employees.

NEH–2

SYSTEM NAME:

Contracts—NEH—2

SYSTEM LOCATION:

NEH—Office of the General Counsel, Room 1000, 806 15th Street, NW., Washington, DC 20506.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have entered into contracts with the Endowment.

CATEGORIES OF RECORDS IN THE SYSTEM:

Contains contract, including name and address of contractor, specific and general contract provisions, contract amendments, correspondence, relevant back-up material.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Foundation on the Arts and the Humanities Act of 1965, as amended (20 U.S.C. 951 et seq.).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

General Accounting Office audits; reporting on agency contracting activities to the Federal Procurement Data Center and other agencies, general congressional oversight; 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 the individual about whom the record is maintained.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in 12 inch by 10 inch folders.

RETRIEVABILITY:

Indexed by name and number.

SAFEGUARDS:

Records are maintained in a lockable file cabinet.

RETENTION AND DISPOSAL:

Scheduled for destruction 6 years, 3 months after fianl payment is made.

SYSTEM MANAGER(S) AND ADDRESS:

General Counsel—NEH, Room 1000, 806 15th St., NW., Washington, DC 20506.

NOTIFICATION PROCEDURE:

See Title 45 CFR Part 1115.

RECORD ACCESS PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Individual on whom the record is maintained. Foundation employees involved in contract development, administration, and execution.

NEH–3

SYSTEM NAME:

Employee payroll and leave and attendance records and files—NEH–3.

SYSTEM LOCATION:

Payroll Processing Branch, 1500 Bannister Road, Kansas City, MO 64131.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Endowment employees.

CATEGORIES OF RECORDS IN THE SYSTEM:

Records consist of manual and automated files containing payroll-related information for Endowment employees. Payroll and leave and attendance records and information includes many records or information also maintained in employee's official folder and related files maintained in accordance with Office of Personnel Management regulations and of which notice has been given by the OPM in its notice of Governmentwide systems of personnel records. Payroll and related information consists of various forms which disclose on a biweekly, year-to-date, and in some cases an annual basis, payroll and leave data for each employee relating to rate and amount of pay, leave, and hours worked, and leave balances; tax and retirement deductions; life insurance and health insurance deductions; savings allotments; savings bond and charity deductions; mailing addresses and home addresses.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Foundation on the Arts and the Humanities Act of 1965, as amended (20 U.S.C. 951 et seq.). Federal Personnel Manual and Treasury Fiscal Requirements Manual.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Used to prepare payroll and to meet Government payroll recordkeeping and reporting requirements, and for retrieving and supplying payroll and leave information as required for agency needs. Notice of Governmentwide Systems of Personnel Records: "C.S.C.—General Personnel Records (Official Personnel folder and records related thereto)"; 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 the individual about whom the record is maintained.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Time and attendance files maintained on 8 inch by 5 inch cards included with other information maintained in 9 inch by 12 inch folders or computer data base.

RETRIEVABILITY:

Indexed by name.

SAFEGUARDS:

Records are maintained in a lockable file cabinet, or computer data base controlled by password.

RETENTION AND DISPOSAL:

Records maintained for three years or until audited by the General Accounting Office.

SYSTEM(S) MANAGER AND ADDRESS:

Accounting Officer, Room 815, Shoreham Building, 806 15th St., NW., Washington, DC 20506.

NOTIFICATION PROCEDURE:

See Title 45 CFR Part 1115.

RECORD ACCESS PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Individual on whom the record is maintained.

NEH–4

SYSTEM NAME:

Equal Employment Opportunity Case File–NEH–4

SYSTEM LOCATION:

Room 506, 806 15th Street, NW., Washington, DC 20506.

CATEGORIES OF RECORDS IN THE SYSTEM:

Contains transcripts, documentation concerning pre-complaint counseling activities, documentation concerning filing of complaint, written records of terms of adjustment and disposition of complaint.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

Title 5 CFR chapter I, Part 713.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Implementation of Endowment program for equal opportunity in employment and personnel operations; disclosure may be made to a congressional office from the record of an individual in resonse to an inquiry from the congressional office made at the request of the individual about whom the record is maintained.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in 9 inch by 12 inch folders.

RETRIEVABILITY:

Retrievable by name.

SAFEGUARDS:

Maintained in lockable filing cabinets.

RETENTION AND DISPOSAL:

Retained for four years after resolution of the case, then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Equal Employment Opportunity Officer, Room 506, 806 15th St., NW., Washington, DC 20506.

NOTIFICATION PROCEDURE:

See Title 45 CFR Part 1115.

RECORD ACCESS PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Individual on whom the record is maintained. Foundation employees involved in the claim or proceeding.

NEH–5

SYSTEM NAME:

Grant Applications–NEH–5

SYSTEM LOCATION:

806 15th Street, NW., Washington, DC 20506.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals and institutions applying to the National Endowment for the Humanities for financial assistance.

CATEGORIES OF RECORDS IN THE SYSTEM:

Grant application, sample of work where appropriate.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Foundation on the Arts and Humanities Act of 1965, as amended (20 U.S.C. 951 et seq.).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

General administration of grant review process; statistical research; congressional oversight and analysis of trends; 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 the individual about whom the record is maintained.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS TO THE SYSTEM:

STORAGE:

9 inch by 12 inch folders.

RETRIEVABILITY:

Indexed by name of applicant.

RETENTION AND DISPOSAL:

Successful applications are merged into "Grants to Individuals and Institutions" file. Rejected applications are retained for five years then destroyed.

SYSTEM MANAGER(S) AND ADDRESS:

Grants Officer-NEH, Room 522, 806 15th St., NW., Washington, DC 20506.

NOTIFICATION PROCEDURE:

See Title 45 CFR Part 1115.

RECORD ACCESS PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Individual and institution on whom the record is maintained.

NEH–6

SYSTEM NAME:

Grants to individuals and Institutions—6

SYSTEM LOCATION:

806 15th Street, NW., Washington, DC 20506.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals and institutions receiving grant awards from the National Endowment for the Humanities.

CATEGORIES OF RECORDS IN THE SYSTEM:

Grant application including sample of work where appropriate, award notification letter, grant award acceptance agreement, payment schedule, relevant correspondence, final report.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

National Foundation on the Arts and the Humanities Act of 1965, as amended (20 U.S.C. 951 et seq.).

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Administrative processing, general statistical research, congressional analysis of trends; 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 the individual about whom the record is maintained.

Information concerning grantees, principal investigator's location of grantee, title of grant, field of study, type of grantee, special characteristics, length of award, application date, date of recommendation, grant number, division and program element, amount and brief description of purpose of award is routinely forwarded to the Smithsonian Science Information Exchange (SSIE) and the Foreign Area Research Unit (FARU) in the Intelligence and Research Office of the Department of State.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in 9 inch by 12 inch folders.

RETRIEVABILITY:

Indexed by name of individual, name of institution, and number.

SAFEGUARDS:

Records are maintained in a lockable filing cabinet.

RETENTION AND DISPOSAL:

After receipt of final reports. Retained for ten years.

SYSTEM MANAGER(S) AND ADDRESS:

Grants Officer—NEH, Room 522, 806 15th St., NW., Washington, DC 20506.

NOTIFICATION PROCEDURE:

See Title 45 CFR Part 1115.

RECORD ACCESS PROCEDURES:

Same as above.

RECORD SOURCE CATEGORIES:

Individual on whom the record is maintained. Employees involved in administration of the grant.

NEH–7

SYSTEM NAME:

Personnel Records—NEH–7.

SYSTEM LOCATION:

Room 410, 806 15th Street, N.W., Washington, DC 20506.

This system of records is part of the Office of Personnel Management's government-wide system of personnel

records "OPM/GOVT—1—General Personnel Records" and subject to that agency's rules.

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## NUCLEAR REGULATORY COMMISSION

[Docket No. 50-368]

### Arkansas Power & Light Co. (Arkansas Nuclear One, Unit 2); Exemption

I

The Arkansas Power and Light Company (the licensee) is the holder of Facility Operating License No. NPF-6 which authorizes operation of Arkansas Nuclear One, Unit No. 2. This license provides, among other things, that they are subject to all rules, regulations and Orders of the Commission now or hereafter in effect.

The facility uses a Combustion Engineering, Inc. pressurized water reactor at the licensee's site located in Pope County, Arkansas.

II

On November 19, 1980, the Commission published a revised 10 CFR 50.48 and a new Appendix R to 10 CFR 50 regarding fire protection features of nuclear power plants (45 FR 76602). The revised § 50.48 and Appendix R became effective on February 17, 1981. Section 50.48(c) established the schedules for satisfying the provisions of Appendix R. Section III of Appendix R contains fifteen subsections, lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant. One of these fifteen subsections, III.G., is the subject of this exemption request. III.G. specifies detailed requirements for fire protection of the equipment used for safe shutdown by means of separation and barriers (III.G.2). If the requirements for separation and barriers could not be met in an area, alternative safe shutdown capability, independent of that area and equipment in that area, was required (III.G.3.).

Section 50.48(c) required completion of all modifications to meet the provisions of Appendix R within a specified time from the effective date of this fire protection rule, Febuary 17, 1981, except for modifications to provide alternative safe shutdown capability. These latter modifications (III.G.3.) require NRC review and approval. Hence, § 50.48(c) requires their completion within a certain time after NRC approval. The date for submittal of design descriptions of any modifications to provide alternative safe shutdown capability was specified as March 19, 1981.

By letter dated March 19, 1981, Arkansas Power and Light Company requested exemptions from meeting the schedule requirements for those items as outlined in 10 CFR 50.48(c). The staff discussed the March 19, 1981, request with Arkansas Power and Light Company and it was understood that Arkansas Power and Light Company was requesting exemption from meeting the schedule requirements for those items (of Appendix R Section III.G and L) as outlined in 10 CFR 50.48(c). By letter dated January 15, 1982, Arkansas Power and Light Company indicated that they were unable to commit to any firm schedule for submitting technical exemptions and design details.

When this Fire Protection Rule was approved by the Commission, it was understood that the time required for each licensee to re-examine those previously-approved configurations at its plant to determine whether they meet the requirements of Section III.G of Appendix R to 10 CFR Part 50 was not well known and would vary depending upon the degree of conformance. For each item of nonconformance that was found, a fire hazard analysis had to be performed to determine whether the existing configuration provided sufficient fire protection. If it did, a basis had to be formulated for an exemption request. If it did not, modifications to either meet the requirements of Appendix R or to provide some other acceptable configuration, that could be justified for example, had to be designed. Where fire protection features alone could not ensure protection of safe shutdown capability, alternative safe shutdown capability had to be designed as required by Section III.G.3. of Appendix R. Depending upon the extensiveness and number of the areas involved, the time required for this re-examination, reanalysis and redesign could vary from a few months to a year or more. The Commission decided, however, to require one, short-term date for all licensees in the interest of ensuring a best-effort, expedited completion of compliance with the Fire Protection Rule, recognizing that there would be a number of licensees who could not meet these time restraints but who could then request appropriate relief through the exemption process. Licensees for 44 of the 72 plants to which Appendix R applies (plants with an operating license issued prior to January 1, 1979) have requested such schedular relief.

The licensees for the remaining 28 plants made submittals to meet the schedular requirements of § 50.48(c). All of these submittals, however, were deficient in some respects. In general, much of the information requested in a generic letter (81-12) dated February 20, 1981, to the licensees of all 72 plants, was not provided. Therefore, additional time is being used to complete those submittals also.

III

Prior to the issuance of Appendix R, the Arkansas Nuclear One, Unit No. 2 had been reviewed against the criteria of Appendix A to the Branch Technical Position 9.5-1 (BTP 9.5-1). The BTP 9.5-1 was developed to resolve the lessons learned from the fire at Browns Ferry Nuclear Plant. It is broader in scope than Appendix R, formed the nucleus of the criteria developed further in Appendix R and in its present revised form constitutes the section of the Standard Review Plan used for the review of applications for construction permits and operating licenses of new plants. The review was completed by the NRC staff and its fire protection consultants and a Fire Protection Safety Evaluation (FPSER) [1] was issued. Some items remained unresolved. Further discourse between the licensee and the NRC staff resulted in resolution of several of these items as documented in letters [2] [3] [4] to Arkansas Power and Light Company. The FPSER supported the issuance of an amendment to the operating license of Arkansas Nuclear One, Unit No. 2 which required modifications to be made to plant physical features, systems, and administrative controls to meet the criteria of Appendix A to BTP 9.5-1. All of these modifications have been completed. Therefore, Arkansas Nuclear One, Unit No. 2 has had upgrading to a high degree of fire protection already and the extensive reassessment involved in this request for exemption from the schedular dates of § 50.48(c) time is to quantify, in detail, the differences between what was recently

[1] Arkansas Nuclear One, Unit No. 2—Operating License No. NPF-6 Amendment 1 dated September 1, 1978 supported by FPSER (NUREG-0223) published in August 1978.

[2] Letters dated January 17 and April 16, 1980 from Mr. R. W. Reid, NRC, to Mr. William Cavanaugh, III, AP&L Co., approving FPSER Item 3.6 "Protection of Redundant Cables in the Cable Spreading Room (2078-L)".

[3] Letter dated April 25, 1980 from Mr. R. W. Reid, NRC, to Mr. William Cavanaugh, III, approving FPSER Item 3.15 "Manual Hose Stations".

[4] Letter dated November 5, 1980 from Mr. R. W. Reid, NRC, to Mr. William Cavanaugh, III, approving FPSER Items 3.14 "Smoke Detectors" and 3.18 "RCP Oil Collection System".

approved and the specific requirements of Section III.G to Appendix R of 10 CFR Part 50.

In the letter dated January 15, 1982, Arkansas Power and Light Company stated that they were unable to commit to any firm schedule for submitting exemption requests and design details.

Based on the above considerations, we find that the licensee has completed a substantial part of the fire protection features at Arkansas Nuclear One, Unit No. 2 in conformance with the requirements of the Fire Protection Rule and is applying significant effort to complete the reassessment of any remaining modifications which might be necessary for strict conformance with Section III.G. We find that because of the already-completed upgrading of this facility, there is no undue risk to the health and safety of the public involved with continued operation until the completion of this reassessment on July 1, 1982. This date is based upon the response of all the licensees with regard to the time needed to perform the reassessment required and the redesign of plant features if necessary. All but a few licensees indicated submittal dates prior to July 1, 1982, and many have already made their submittals. Arkansas Power and Light Company did not indicate a submittal date. Therefore, an exemption should be granted to allow only such time for completion as is consistent with the time needed by other licensees for similar efforts. However, because we have found that most submittals of this reanalysis to date from other licensees have not been complete; that is, not all of the information requested by Generic Letter 81–12 dated February 20, 1981, was provided, we are adding a condition to this Exemption that requires all such information to be submitted by the date granted.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, an exemption is authorized by law and will not endanger life or property, or the common defense and security and is otherwise in the public interest and hereby grants the following exemptions with respect to the requirements of Section III.G. of Appendix R to 10 CFR Part 50:

(1) The date, March 19, 1981, for submittal of plans and schedules to achieve compliance as required by § 50.48(c)(5) is extended to July 1, 1982;

(2) The date, March 19, 1981, for filing exemption requests pursuant to § 50.48(c)(6) which includes a tolling provision is extended to July 1, 1982;

(3) The date, March 19, 1981, for submittal of design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3,[5] as required by § 50.48(c)(5) is extended to June 30, 1982; and

(4) The date, February 17, 1981, from which the installation schedules established in § 50.48(c) (2) and (3) are calculated, is extended to July 1, 1982;

*Provided* the following conditions are met:

(1) Requests for exemption pursuant to § 50.48(c)(6) must include:

(a) A concise statement of the extent of the exemption;

(b) A concise description of the proposed alternative design features related to assuring post-fire shutdown capability; and

(c) A sound technical basis that justifies the proposed alternative in terms of protection afforded to post-fire shutdown capability, degree of enhancement in fire safety by full compliance with III.G requirements, or the detriment to plant safety incurred by full compliance with III.G. A simple statement that the feature for which the exemption is requested was previously approved by the staff is not sufficient. A simple assertion that in the licensee's judgment the feature for which the exemption is requested is adequate fire protection is not sufficient.

(2) The design descriptions of alternative or dedicated shutdown systems to comply with Sections III.G.3., as required by § 50.48(c)(5) shall include a point-by-point response to each item in Section 8 of Enclosure 1 to Generic Letter 81–12 dated February 20, 1981, and to each item in Enclosure 2 to Generic Letter 81–12, dated February 20, 1981.

If the licensee does not meet the above conditions, the licensee will be found in violation of 10 CFR 50.48(c) even though the submittal may be made within the time limit granted by the exemption. If such a violation occurs, imposition of a civil penalty will be considered under Section 234 of the Atomic Energy Act, as amended. Such a violation will be a continuing one beginning with the date set in the exemption for submittal and terminating when all inadequacies are corrected.

A delay in the determination of inadequacy by the staff, caused by the workload associated with reviewing all of the submittals falling due near the same time, will not relieve the licensee of the responsibility for completeness of the submittal, nor will such delay cause any penalty that may be imposed to be mitigated.

The NRC staff has determined that the granting of this Exemption will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with this action.

Dated at Bethesda, Maryland this 10th day of May 1982.

For the Nuclear Regulatory Commission.

**Harold R. Denton,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 82-13462 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

[5] By implication, this includes III.L which specifies the criteria for meeting III.G.3.

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**[Docket Nos. 50–317 and 50–318]**

## Baltimore Gas and Electric Co. (Calvert Cliffs Nuclear Power Plant Unit Nos. 1 and 2); Exemption

I

The Baltimore Gas and Electric Company (the licensee) is the holder of Facility Operating License Nos. DPR–53 and DPR–69 which authorize operation of the Calvert Cliffs Nuclear Power Plant, Unit Nos. 1 and 2. These licenses provide, among other things, that they are subject to all rules, regulations and Orders of the Commission now or hereafter in effect.

The facility comprises two pressurized water reactors at the licensee's site located in Calvert County, Maryland.

II

On November 19, 1980, the Commission published a revised 10 CFR 50.48 and a new Appendix R to 10 CFR Part 50 regarding fire protection features of nuclear power plants (45 FR 76602). The revised § 50.48 and Appendix R became effective on February 17, 1981. Section 50.48(c) established the schedules for satisfying the provisions of Appendix R. Section III of Appendix R contains fifteen subsections, lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant. One of these fifteen subsections, III.G., is the subject of this exemption request. Subsection III.G. specfies detailed requirements for fire protection of the equipment used for safe shutdown by means of separation and barriers (III.G.2). If the requirements for separation and barriers could not be met in an area, alternative safe shutdown capability, independent of

that area and equipment in that area, was required (III.G.3).

Section 50.48(c) required completion of all modifications to meet the provisions of Appendix R within a specified time from the effective date of this fire protection rule, February 17, 1981, except for modifications to provide alternative safe shutdown capability. These latter modifications (III.G.3.) require NRC review and approval. Hence § 50.48(c) requires their completion within a certain time after NRC approval. The date for submittal of design descriptions of any modifications to provide alternative safe shutdown capability was specified as March 19, 1981.

By letter dated May 18, 1981, the licensee requested exemptions from 10 CFR 50.48(c) with respect to the requirements of Section III.G of Appendix R as follows:

(1) Extend from March 19, 1981, to October 1, 1981, the date for submittal of design descriptions of alternative or dedicated shutdown systems for Calvert Cliffs Unit 1 to comply with Section III.G.3., and

(2) Extend from March 19, 1981, to February 1, 1982, the date for submittal of design descriptions of alternative or dedicated shutdown systems for Calvert Cliffs Unit 2 to comply with Section III.G.3.

When this Fire Protection Rule was approved by the Commission, it was understood that the time required for each licensee to re-examine those previously-approved configurations at its plant to determine whether they meet the requirements of Section III.G of Appendix R to 10 CFR Part 50 was not well known and would vary depending upon the degree of conformance. For each item of non-conformance that was found, a fire hazards analysis had to be performed to determine whether the existing configuration provided sufficient fire protection. If it did, a basis had to be formulated for an exemption request. If it did not, modifications to either meet the requirements of Appendix R or to provide some other acceptable configuration, that could be justified for an exemption, had to be designed. Where fire protection features alone could not ensure protection of safe shutdown capability, alternative safe shutdown capability had to be designed as required by Section III.G.3. of Appendix R. Depending upon the extensiveness and number of the areas involved, the time required for this re-examination, reanalysis and redesign could vary from a few months to a year or more. The Commission decided, however, to require one, short-term date for all licensees in the interest of ensuring a best-effort, expedited completion of compliance with the Fire Protection Rule, recognizing that there would be a number of licensees who could not meet these time restraints but who could then request appropriate relief through the exemption process. Licensees for 44 of the 72 plants to which Appendix R applies (plants with an operating license issued prior to January 1, 1979) have requested such schedular relief.

The licensees for the remaining 28 plants made submittals, to meet the schedular requirements of § 50.48(c). All of these submittals, however, were deficient in some respects. In general, much of the information requested in a generic letter (81–12) dated February 20, 1981, to the licensees of all 72 plants, was not provided. Therefore, additional time is being used to complete those submittals also.

## III

Prior to the issuance of Appendix R, Calvert Cliffs Units 1 and 2 had been reviewed against the criteria of Appendix A to the Branch Technical Position 9.5–1 (BTP 9.5–1). The BTP 9.5–1 was developed to resolve the lessons learned from the fire at Browns Ferry Nuclear Plant. It is broader in scope than Appendix R, formed the nucleus of the criteria developed further in Appendix R and in its present, revised from constitutes the section of the Standard Review Plan used for the review of application for construction permits and operating licenses of new plants. The review was completed by the NRC staff and its fire protection consultants and a Fire Protection Safety Evaluation (FPSER) was issued on September 14, 1979. With issuance of the FPSER, a few items remained unresolved. Further discourse between the licensee and the NRC staff resulted in resolution of most of these items as documented in two supplements to the FPSER dated October 2, 1980 and March 18, 1982. In addition to the licensee's analysis for compliance of Calvert Cliffs Units 1 and 2 to Section III.G.3 of Appendix R, the only remaining fire protection issue concerns the adequacy of protection afforded to certain openings in fire barriers. Our letter of June 30, 1981 suspended the schedule concerning this item in accordance with 10 CFR 50.48(c)(6). This issue will be addressed in future correspondence.

The FPSER supported the issuance of License Amendments 41 and 23 to the operating licenses for Calvert Cliffs Units 1 and 2 which required modifications to be made to plant physical features, systems, and administrative controls to meet the criteria of Appendix A to BTP 9.5–1. All of these modifications have been completed. Therefore, Calvert Cliffs Units 1 and 2 have been upgraded to a high degree of fire protection already and the extensive reassessment involved in this request for additional time is to demonstrate, in detail, the conformance to the specific requirements of Section III.G to Appendix R of 10 CFR Part 50.

As mentioned earlier there are 14 other subsections which contain criteria for other aspects of fire protection features. One of these, Section III.L., provides the criteria for Alternative Safe Shutdown capability and thus affects the final reassessment and redesign, if necessary, of this feature at the Calvert Cliffs Units 1 and 2. Nevertheless, compliance with the remaining applicable sections of Appendix R has been completed on or before the implementation dates required by the Fire Protection Rule.

Based on the above considerations, we find that the licensee has completed a substantial part of the fire protection features at Calvert Cliffs Units 1 and 2 in conformance with the requirements of the Fire Protection Rule and is applying significant effort to complete the reassessment of any remaining modifications which might be necessary for strict conformance with section III.G. We find that because of the already-completed upgrading of these facilities, there is no undue risk to the health and safety of the public involved with continued operation until the completion of this reassessment. Therefore, an exemption should be granted to allow such time for completion. However, because we have found that most submittals of this reanalysis to date from other licensees have not been complete; that is, not all of the information requested by Generic Letter 81–12 dated February 20, 1981, was provided, we are adding a condition to the Exemption that requires all such information to be submitted by the date granted.

## IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest and hereby grants the following exemptions with respect to the requirements of Section III.G. of Appendix R to 10 CFR Part 50:

(1) Extend from March 19, 1981, to October 1, 1981, the date for submittal of design descriptions of alternative or

dedicated shutdown systems for Calvert Cliffs Unit 1 to comply with Section III.G.3., and

(2) Extend from March 19, 1981 to February 1, 1982, the date for submittal of design descriptions of alternative or dedicated shutdown systems for Calvert Cliffs Unit 2 to comply with Section III.G.3.

*Provided* the following condition is met:

The design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3., as required by § 50.48(c)(5) shall include a point-by-point response to each item in Section 8 of Enclosure 1 to Generic Letter 81–12 dated February 20, 1981, and to each item in Enclosure 2 to Generic Letter 81–12, dated February 20, 1981.

If the licensee does not meet the above conditions, the licensee will be found in violation of 10 CFR 50.48(c) even though the submittal may be made within the time limit granted by the exemption. If such a violation occurs, imposition of a civil penalty will be considered under Section 234 of the Atomic Energy Act, as amended. Such a violation will be a continuing one beginning with the date set in the exemption for submittal and terminating when all inadequacies are corrected.

A delay in the determination of inadequacy by the staff, caused by the workload associated with reviewing all of the submittals falling due near the same time, will not relieve the licensee of the responsibility for completeness of the submittal, nor will such delay cause any penalty that may be imposed to be mitigated.

The NRC staff has determined that the granting of this Exemption will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with this action.

Dated at Bethesda, Maryland this 10th day of May 1982.

For the Nuclear Regulatory Commission.

**Harold R. Denton,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 82-13463 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

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**[Docket Nos. 50-329 and 50-330]**

## Consumers Power Co.; Availability of Safety Evaluation Report for the Midland Plant, Units 1 and 2

The Office of Nuclear Reactor Regulation has published its Safety Evaluation Report on the proposed operation of the Midland Plant, Units 1 and 2, located in Midland County, Michigan. Notice of receipt of Consumers Power Company's application for a facility operating license for Midland Plant, Units 1 and 2, was published in the Federal Register on March 3, 1978 (43 FR 8870).

The report (Document No. NUREG–0793) is being referred to the Advisory Committee on Reactor Safeguards and is being made available at the Commission's Public Document Room, 1717 H Street NW., Washington, D.C. 20555 and at the Grace Dow Memorial Library, 1710 W. St. Andrews Road, Midland, Michigan 48640. Copies may be purchased for $13.00 directly from NRC by sending check or money order, payable to Superintendent of Documents, to Director, Division of Technical Information and Document Control, U.S. NRC, Washington, D.C. 20555. GPO Deposit Account holders may charge their orders by calling (301) 492–9530. Copies are also available for purchase through the National Technical Information Service, Springfield, Virginia 22161.

Dated at Bethesda, Maryland, this 11th day of May 1982.

For the Nuclear Regulatory Commission.

**Elinor G. Adensam,**

*Chief, Licensing Branch No. 4, Division of Licensing.*

[FR Doc. 82-13464 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

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**[Docket No. 50-335]**

## Florida Power and Light Co. (St. Lucie Plant Unit No. 1); Exemption

I

The Florida Power and Light Company (the licensee) is the holder of Facility Operating License No. DPR–67 which authorizes operation of the St. Lucie Plant, Unit No. 1, a pressurized water reactor located in St. Lucie County, Florida. This license provides, among other things, that it is subject to all rules, regulations and Orders of the Commission now or hereafter in effect.

II

On November 19, 1980, the Commission published a revised 10 CFR 50.48 and a new Appendix R to 10 CFR 50 regarding fire protection features of nuclear power plants (45 FR 76602). The revised 50.48 and Appendix R became effective on February 17, 1981. Section 50.48(c) established the schedules for satisfying the provisions of Appendix R. Section III of Appendix R contains fifteen subsections, lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant. One of these fifteen subsections, III.G., is the subject of this exemption request. III.G. specifies detailed requirements for fire protection of the equipment used for safe shutdown by means of separation and barriers (III.G.2). If the requirements for separation and barriers could not be met in an area, alternative safe shutdown capability, independent of that area and equipment in that area, was required (III.G.3.).

Section 50.48(c) required completion of all modifications to meet the provisions of Appendix R within a specified time from the effective date of this fire protection rule, February 17, 1981, except for modifications to provide alternative safe shutdown capability. These latter modifications (III.G.3. require NRC review and approval. Hence, § 50.48(c) requires their completion within a certain time after NRC approval. The date for submittal of design descriptions of any modifications to provide alternative safe shutdown capability was specified as March 19, 1981.

By letter dated March 19, 1981, as supplemented April 3 and July 10, 1981, and January 20 and March 18, 1982, Florida Power and Light requested exemptions from 10 CFR 50.48(c) with respect to the requirements of Section III.G of Appendix R as follows:

Should the Commission deny Florida Power and Light's (FPL's) request for an exemption for all areas of the plant that have already been reviewed and approved by the Commission as shown by the NRC's safety Evaluation Report (SER) for St. Lucie Unit No. 1, extend for a period of twelve months from the date of denial, pursuant to §§ 50.12(a) and 50.48(c), the date for submittal of plans, schedules and/or design descriptions for any modifications necessary to achieve compliance with, and/or request exemptions from Sections III.G.2 and III.G.3 of Appendix R for all items not in compliance with sections III.G.2 and III.G.3 regardless of whether such items were ever approved in the SER.

By letter dated June 4, 1981 the Commission did deny the exemption requested for those areas of the plant which have already been reviewed and approved by the Commission. Therefore, the twelve month delay requested corresponds to a submittal date of June 4, 1982.

When this Fire Protection Rule was approved by the Commission, it was understood that the time required for each licensee to re-examine those previously-approved configurations at its plant to determine whether they meet

the requirements of Section III.G of Appendix R to 10 CFR Part 50 was not well known and would vary depending upon the degree of conformance. For each item of non-conformance that was found, a fire hazards analysis had to be performed to determine whether the existing configuration provided sufficient fire protection. If it did, a basis had to be formulated for an exemption request. If it did not, modifications to either meet the requirements of Appendix R or to provide some other acceptable configuration, that could be justified for an exemption, had to be designed. Where fire protection features alone could not ensure protection of safe shutdown capability, alternative safe shutdown capability had to be designed as required by Section III.G.3 of Appendix R. Depending upon the extensiveness and number of the areas involved, the time required for this reexamination, reanalysis and redesign could vary from a few months to a year or more. The Commission decided, however, to require one, short-term date for all licensees in the interest of ensuring a best-effort, expedited completion of compliance with the Fire Protection Rule, recognizing that there would be a number of licensees who could not meet these time restraints but who could then request appropriate relief through the exemption process. Licensees for 44 of the 72 plants to which Appendix R applies (plants with an operating license issued prior to January 1, 1979) have requested such schedular relief.

The licensees for the remaining 28 plants made submittals to meet the schedular requirements of § 50.48(c). All of these submittals, however, were deficient in some respects. In general, much of the information requested in a generic letter (81–12) dated February 20, 1981, to the licensees of all 72 plants, was not provided. Therefore, additional time is being used to complete those submittals also.

III

Prior to the issuance of Appendix R, St. Lucie Unit No. 1 had been reviewed against the criteria of Appendix A to the Branch Technical Position 9.5–1 (BTP 9.5–1). The BTP 9.5–1 was developed to resolve the lessons learned from the fire at Browns Ferry Nuclear Plant. It is broader in scope than Appendix R, formed the nucleus of the criteria developed further in Appendix R and in its present, revised form constitutes the section of the Standard Review Plan used for the review of applications for construction permits and operating licenses of new plants. The review was completed by the NRC staff and its fire protection consultants and a Fire Protection Safety Evaluation (FPSER) was issued. As a result of that review numerous modifications have been made to plant physical features, systems, and administrative controls to meet the criteria of Appendix A to BTP 9.5–1. St. Lucie Unit No. 1 has been upgraded to a high degree of fire protection already and the extensive reassessment involved in this request for additional time is to quantify, in detail, the differences between what was recently approved and the specific requirements of Section III.G of Appendix R to 10 CFR Part 50.

In its March 19, 1981 exemption request, the licensee stated that "Except to the extent specific exemptions are requested in this document, St. Lucie 1 is in full compliance with the requirements of the rule." A few items addressed in the exemption request and which are not subject to the requirements of Section III.G remain unresolved. These items deal with Section III.A, Water Supplies for Fire Suppression Systems. The licensee has requested until the Spring 1983 reload to reroute fire pump cables; not to replace existing fire pump controllers with U.L. approved controllers meeting all the requirements of NFPA–20; and not to automatically load the fire pumps onto vital buses in the presence of a safeguards actuation.

These exemption requests are being reviewed by the staff. The staff has, with respect to the technical exemptions requested, previously determined that the licensee has provided sound technical bases warranting further staff review. Because the Spring 1983 reload is the first scheduled outage, following receipt of the final design plans, in which to perform the cable rerouting, the current fire pump controllers and switchgear are nuclear class IE and seismic category I, and the fire pumps will auto load onto the vital buses in the event of loss of offsite power and a drop in fire system pressure the staff has determined that the outstanding exemption requests associated with Section III.A do not affect the acceptability of the requested delay in submitting Section III.G information. Furthermore, compliance with the balance of the Fire Protection Rule means that fire protection requirements, other than the identified exemptions from Section III.A and the requested delay in submitting Section III.G information, have been or will be completed on or before the implementation dates required by the Fire Protection Rule.

Based on the above considerations, we find that the licensee has completed a substantial part of the fire protection features at St. Lucie Unit 1 in conformance with the requirements of the Fire Protection Rule and is applying significant effort to complete the reassessment of any remaining modifications which might be necessary for strict conformance with Section III.G. We find that because of the already-completed upgrading of this facility, there is no undue risk to the health and safety of the public involved by delaying the completion of this reassessment until June 4, 1982. Therefore, an exemption should be granted to allow such time for completion. However, because we have found that most submittals of this reanalysis to date from other licensees have not been complete; that is, not all of the information requested by Generic Letter 81–12 dated February 20, 1981, was provided, we are adding a condition to this Exemption that requires all such information to be submitted by the date granted.

IV

Accordingly, the Commission has determined that, pursuant to 10 CFR 50.12, an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest and hereby grants the following exemption with respect to the requirements of Section III.G of Appendix R to 10 CFR Part 50:

The date, March 19, 1981, for submittal of plans, schedules and/or design descriptions for any modifications necessary to achieve compliance with, and/or request exemption from Sections III.G.2 and III.G.3 of Appendix R. is extended to June 4, 1982.

*Provided* the following conditions are met:

(1) Requests for exemption pursuant to §50.48(c)(6) must include:

(a) A concise statement of the extent of the exemption;

(b) A concise description of the proposed alternative design features related to assuring post-fire shutdown capability; and

(c) a sound technical basis that justifies the proposed alternative in terms of protection afforded to post-fire shutdown capability, degree of enhancement in fire safety by full compliance with III.G requirements, or the detriment to plant safety incurred by full compliance with III.G. A simple statement that the feature for which the exemption is requested was previously approved by the staff is not sufficient. A simple assertion that in the licensee's

judgment the feature for which the exemption is requested is adequate fire protection is not sufficient.

(2) The design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3., as required by § 50.48(c)(5) shall include a point-by-point response to each item in Section 8 of Enclosure 1 to Generic Letter 81–12 dated February 20, 1981, and to each item in Enclosure 2 to Generic Letter 81–12, dated February 20, 1981.

If the licensee does not meet the above conditions, the licensee will be found in violation of 10 CFR 50.48(c) even though the submittal may be made within the time limit granted by the exemption. If such a violation occurs, imposition of a civil penalty will be considered under Section 234 of the Atomic Energy Act, as amended. Such a violation will be a continuing one beginning with the date set in the exemption for submittal and terminating when all inadequacies are corrected.

A delay in the determination of inadequacy by the staff, caused by the workload associated with reviewing all of the submittals falling due near the same time, will not relieve the licensee of the responsibility for completeness of the submittal, nor will such delay cause any penalty that may be imposed to be mitigated.

The NRC staff has determined that the granting of this Exemption will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with this action.

Dated at Bethesda, Maryland this 10th day of May 1982.

For the Nuclear Regulatory Commission.

**Harold R. Denton,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 82-13465 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

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[Docket No. 50-271]

## Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station); Exemption

I

The Vermont Yankee Nuclear Power Corporation (the licensee) is the holder of Facility Operating License No. DPR-78 which authorizes operation of the Vermont Yankee Nuclear Power Station. The license provides, among other things, that it is subject to all rules, regulations and Orders of the Commission now or hereafter in effect.

The facility is a boiling water reactor at the licensee's site located near Vernon, Vermont.

II

On November 19, 1980, the Commission published a revised Section 10 CFR 50.48 and a new Appendix R to 10 CFR Part 50 regarding fire protection features of nuclear power plants (45 FR 76602). The revised § 50.48 and Appendix R became effective on February 17, 1981. Section 50.48(c) established the schedules for satisfying the provisions of Appendix R. Section III of Appendix R contains fifteen subsections, lettered A through O, each of which specifies requirements for a particular aspect of the fire protection features at a nuclear power plant. One of these fifteen subsections III.G., is the subject of this Exemption. Section III.G. specifies detailed requirements for fire protection of the equipment used for safe shutdown by means of separation and barriers (III.G.2). If the requirements for separation and barriers could not be met in an area, alternative safe shutdown capability, independent of that area and equipment in that area, was required (III.G.3).

Section 50.48(c) required completion of all modifications to meet the provisions of Appendix R within a specified time from the effective date of this fire protection rule, February 17, 1981, except for modifications to provide alternative safe shutdown capability. These latter modifications (III.G.3) require NRC review and approval. Hence, § 50.48(c) requires their completion within a certain time after NRC approval. The date for submittal of design descriptions of any modifications to provide alternative safe shutdown capability was specified as March 19, 1981.

By letter dated February 13, 1981, Vermont Yankee Nuclear Power Corporation, among other things, requested exemption from 10 CFR 50.48(c) with respect to the requirements of Section III.G. of Appendix R in order to extend from March 19, 1981, to July 30, 1981, the date for submittal of design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3.

When this Fire Protection Rule was approved by the Commission, it was understood that the time required for each licensee to reexamine those previously-approved configurations at its plant to determine whether they meet the requirements of Section III.G. of Appendix R to 10 CFR Part 50 was not well known and would vary depending upon the degree of conformance. For each item of nonconformance that was found, a fire hazards analysis had to be performed to determine whether the existing configuration provided sufficient fire protection. If it did, a basis had to be formulated for an exemption request. If it did not, modifications to either meet the requirements of Appendix R or to provide some other acceptable configuration, that could be justified for an exemption, had to be designed. Where fire protection features alone could not ensure protection of safe shutdown capability, alternative safe shutdown capability had to be designed as required by Section III.G.3. of Appendix R. Depending upon the extensiveness and number of the areas involved, the time required for this reexamination, reanalysis and redesign could vary from a few months to a year or more. The Commission decided, however, to require one, short-term date for all licensees in the interest of ensuring a best-effort, expedited completion of compliance with the Fire Protection Rule, recognizing that there would be a number of licensees who could not meet these time restraints but who could then request appropriate relief through the exemption process. Licensees for 44 of the 72 plants to which Appendix R applies (plants with an operating license issued prior to January 1, 1979) have requested such schedular relief.

The licensees for the remaining 28 plants made submittals to meet the schedular requirements of § 50.48(c). All of these submittals, however, were deficient in some respects. In general, much of the information requested in a generic letter (81–12) dated February 20, 1981, to the licensees of all 72 plants, was not provided. Therefore, additional time is being used to complete those submittals also.

III

Prior to the issuance of Appendix R, the Vermont Yankee Nuclear Power Station had been reviewed against the criteria of Appendix A to the Branch Technical Position 9.5–1 (BTP 9.5–1). The BTP 9.5–1 was developed to resolve the lessons learned from the fire at Browns Ferry Nuclear Plant. It is broader in scope than Appendix R, formed the nucleus of the criteria developed further in Appendix R and in its present, revised form constitutes the section of the Standard Review Plan used for the review of applications for construction permits and operating licenses of new plants. The review was completed by the NRC staff and its fire protection consultants and a Fire Protection Safety

Evaluation (FPSER) was issued. A few items remained unresolved. Further discourse between the licensee and the NRC staff resulted in resolution of these items as documented in a supplement to the FPSER. The FPSER and its supplement supported the issuance of amendments to the operating license of the Vermont Yankee Nuclear Power Station [1] which required modifications to be made to plant physical features, systems, and administrative controls to meet the criteria of Appendix A to BTP 9.5-1. All of these modifications have been completed. Therefore, the Vermont Yankee Nuclear Power Station has been upgraded to a high degree of fire protection already and the extensive reassessment involved in this request for additional time is to quantify, in detail, the differences between what was recently approved and the specific requirements of Section III.G. to Appendix R of 10 CFR Part 50.

Based on the licensee's request for exemption, all other applicable subsections of Appendix R would be met on the schedules required by 10 CFR 50.48(c). As mentioned earlier there are 14 other subsections which contain criteria for other aspects of fire protection features. One of these, Section III.L., provides the criteria for Alternative Safe Shutdown capability and thus affects the final reassessment and redesign, if necessary, of this feature at the Vermont Yankee Nuclear Power Station. Nevertheless, this means that compliance with the remaining applicable sections of Appendix R have been or will be completed on or before the implementation dates required by the Fire Protection Rule.

Based on the above considerations, we find that the licensee has completed a substantial part of the fire protection features at Vermont Yankee Nuclear Power Station in conformance with the requirements of the Fire Protection Rule and is applying significant effort to complete the reassessment of any remaining modifications which might be necessary for strict conformance with the Section III.G. We find that because of the already-completed upgrading of the facility, there is no undue risk to the health and safety of the public involved with continued operation until the completion of this reassessment on July 31, 1981. Therefore, an exemption should be granted to allow such time for completion. However, because we have found that most submittals of this reanalysis to date from other licenses have not been complete; that is, not all of the information requested by Generic Letter 81-12 dated February 20, 1981, was provided, we are adding a condition to this exemption that requires all such information to be submitted by the date granted.

[1] Vermont Yankee Nuclear Power Station—Operating License DPR-28, Amendment 43 supported by FPSER issued January 30, 1978, Letter from NRC to Vermont Yankee Nuclear Power Corporation supported by Supplement to FPSER issued October 24, 1980.

## IV

Accordingly, the Commission had determined that, pursuant to 10 CFR 50.12, an exemption is authorized by law and will not endanger life or property or the common defense and security and is otherwise in the public interest and hereby grants the following exemption with respect to the requirements of Section III.G. of Appendix R to 10 CFR Part 50: The date, March 19, 1981, for submittal of design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3, as required by 50.48(c)(5) is extended to July 31, 1981.

*Provided* the following condition is met: The design descriptions of alternative or dedicated shutdown systems to comply with Section III.G.3., as required by § 50.48(c)(5) shall include a point-by-point response to each item in Section 8 of Enclosure 1 to generic letter 81-12 dated February 20, 1981, and to each item in Enclosure 2 of Generic Letter 81-12, dated February 20, 1981.

If the license does not meet the above condition, the license will be found in violation of 10 CFR 50.48(c) even though the submittal may be made within the time limit granted by the exemption. If such a violation occurs, imposition of a civil penalty will be considered under Section 234 of the Atomic Energy Act, as amended. Such a violation will be a continuing one beginning with the date set in the exemption for submittal and terminating when all inadequacies are corrected.

A delay in the determination of inadequacy by the staff, caused by the workload associated with reviewing all of the submittals falling due near the same time, will not relieve the licensee of the responsibility for completeness of the submittal, nor will such delay cause any penalty that may be imposed to be mitigated.

The NRC staff has determined that the granting of this exemption will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in conneciton wiht this action.

Dated at Bethesda, Maryland this 10th day of May 1982.

For the Nuclear Regulatory Commission.

**Harold R. Denton,**

*Director, Office of Nuclear Reactor Regulation.*

[FR Doc. 82-13466 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

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**[Docket No. 50-305)**

### Wisconsin Public Service Corp.; et al.; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has issued Amendment No. 44 to Facility Operating License No. DPR-43, issued to Wisconsin Public Service Corporation, Wisconsin Power and Light Company, and Madison Gas and Electric Company (the licensees), which revised Technical Specifications for operation of the Kewaunee Nuclear Plant (the facility) located in Kewaunee, Wisconsin. The amendment is effective as of the date of issuance.

The amendment revises the Technical Specification in relation to Environmental Monitoring of Radioactive Effluents.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment. Prior public notice of this amendment was not required since this amendment does not involved a significant hazards consideration.

The Commission has determined that the issuance of this amendment will not result in any significant environmental impact and that pursuant to 10 CFR 51.5(d)(4) an environmental impact statement or negative declaration and environmental impact appraisal need not be prepared in connection with issuance of this amendment.

For further details with respect to this action, see (1) the application for amendment dated February 20, 1981, (2) Amendment No. 44 to License No. DPR-43 and (3) the Commission's related Safety Evaluation. All of these items are available for public inspection at the Commission's Public Document Room, 1717 H Street, N.W., Washington D.C. and at the Kewaunee Public Library, 314 Milwaukee Street, Kewaunee, Wisconsin 54216. A copy of items (2) and (3) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington,

D.C. 20555: Attention: Director, Division of Licensing.

Dated at Bethesda, Maryland, this 4th day of May 1982.

For the Nuclear Regulatory Commission.

**Steven A. Varga,**

*Chief, Operating Reactors Branch No. 1, Division of Licensing.*

[FR Doc. 82-13467 Filed 5-17-82; 8:45 am]

BILLING CODE 7590-01-M

## OFFICE OF MANAGEMENT AND BUDGET

### New Statistical Standard on Comparability of Statistics on Business Size

**AGENCY:** Office of Information and Regulatory Affairs, OMB.

**ACTION:** Notice of adoption of the new statistical standard entitled, Comparability of Statistics on Business Size.

**SUMMARY:** The new statistical standard provides common size of business categories to be followed by statistical agencies in their tabulations of business size data. The standard was formulated as part of a Government-wide effort to assist the Small Business Administration in developing a small business data base. The uniform size categories will enhance the use of business size data for economic analysis and policymaking. The standard was endorsed in the President's March 1982 report on small business. This is the first Government-wide standardization of business size statistical data.

A draft standard was published in the December 2, 1980 **Federal Register** and the December 1980 *Statistical Reporter* for public comment. There were no objections to adopting the standard. A new item was added to the draft which recommends the provision of information on the average firm size within each category; such information is now published by the statistical agencies and presents no problem in the data compilation.

### Issues in Developing the Business Size Standard

In developing the standard, special attention was given to balancing the considerations of which classifications are most relevant for analysis and policymaking, easy to understand, and do not diverge in a major way from existing size categories. Also, while the interest for analyses of small business is in businesses at the lower end of the size spectrum, it is necessary to trace developments in firms of a wide range of size categories in order to better understand the relationship of "small business" to the rest of the economy.

The employment, revenues, and assets size variables are based on numerical criteria only. They do not include descriptive terminology such as "small," "medium" or "large." Such nomenclature is a qualitiative assessment which may vary with the use of the data, and is best left to users to apply as they see fit.

The standard provides for Federal agencies to use the statistical size categories for administering programs in the section on "Use for Federal Nonstatistical Purposes." It states that they shall be used * * * "only if the responsibile Secretary (Administrator) has first determined that the use of such size categories is appropriate to the implementation of the program's objectives." In addition, if they are used in the operative text of a law or regulation, an example of recommended language to accompany their use is given to assure sufficient flexibility.

The new standard is published below.

**Christopher DeMuth,**

*Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.*

### Statistical Standard: Comparability of Statistics on Business Size

The purpose of this directive is to provide a standard means of comparing business size series prepared by various Federal agencies. The Statistical Business Size Categories in the table below are to be used to classify reporting businesses by employment (number of employees), revenues (sales, receipts, shipments, etc.), or assets. Tabulations based on these categories shall be accompanied by precise definitions of the variables used to measure size (i.e., employment, revenues, or assets) and of the type of reporting unit tabulated (e.g., establishments, enterprises, companies, taxpaying units). Such definitions shall include adequate detail to allow comparisons with other definitions commonly used by Federal agencies.

1. *Combining or Partitioning Categories.* At the discretion of the agency which controls the data, adjacent size categories may be combined and/or the size scale may be truncated in published tabulations. Justification for such actions includes factors as the limited scope of the data, the need to assure the confidentiality of individual response, or very large sampling variability at the recommended level of detail. For example, tabulations of small businesses often truncate the upper end of the scale of size categories. The reasons for such actions shall be noted in the affected publication.

Whenever data are published that combine size categories, the Agency which controls the data shall maintain unpublished estimates or internal documentation sufficient to allow reasonable retrospective estimates of the unpublished detail. However, if categories are combined to assure confidentiality of individual responses, the unpublished estimates or agency documentation must be maintained in a form which is consistent with the confidentiality objective and the agency's authority to protect information from disclosure.

STATISTICAL BUSINESS SIZE CATEGORIES

EMPLOYMENT

[Number of employees]

| | | |
|---|---|---|
| 0 | (none) | |
| 1 | under | 5 |
| 5 | under | 10 |
| 10 | under | 20 |
| 20 | under | 50 |
| 50 | under | 100 |
| 100 | under | 250 |
| 250 | under | 500 |
| 500 | under | 1,000 |
| 1,000 | under | 2,500 |
| 2,500 | under | 5,000 |
| 5,000 | under | 10,000 |
| 10,000 | or more | |

REVENUES OR ASSETS

| | | |
|---|---|---|
| | under | $25,000. |
| $25,000 | Under | $50,000. |
| $50,000 | Under | $100,000. |
| $100,000 | Under | $250,000. |
| $250,000 | Under | $500,000. |
| $500,000 | Under | $1 million. |
| $1 million | Under | $2.5 million. |
| $2.5 million | Under | $5 million. |
| $5 million | Under | $10 million. |
| $10 million | Under | $25 million. |
| $25 million | Under | $50 million. |
| $50 million | Under | $100 million. |
| $100 million | Under | $250 million. |
| $250 million | Under | $500 million. |
| $500 million | Under | $1 billion. |
| $1 billion | Under | $2.5 billion. |
| $2.5 billion | Under | $5 billion. |
| $5 billion | or more | |

An agency may also define additional partitions within the standard tables to meet particular analytical needs. These partitions, however, must be in addition to and not in lieu of the standard categories, i.e., they must not prevent summing to the standard categories.

The largest size categories in the standard tables were selected to accommodate current (1980) uses. If it becomes useful to define additional (larger) categories, they should be defined in a manner consistent with the pattern established in the standard tables (e.g., 10,000 under 25,000 employees or $5 billion under $10 billion revenues).

2. *Average Size Within Categories.* The average size of firms within a size category may range from the lower to the upper end of the category. Knowledge of the average size provides additional information for analyzing patterns and trends in firm size. Therefore, it is recommended that statistical tabulations of business size data include the average size of firms in each category or information on the number of firms in each category that would enable the user to calculate the average size.

3. *Effect on Data Collection Activities.* The requirement to use Statistical Business Size Categories will often impact the planning of data collection activities. The size categories should be considered in defining stratum boundaries and in choosing cutoffs to limit reporting burden or for other purposes. Data collection plans which unnecessarily impede or encumber analyses based on the standard size categories should be avoided.

4. *Transition to New Size Categories.* Data tabulations that are presented in the new size categories for the first time shall be accompanied by overlapping data in the old categories for the same period, or some other means of bridging the old and new categories. This will enable users to link the historical data in the transition period and thus minimize the effect on the continuity of the series.

5. *Use for Federal Nonstatistical Purposes.* The Statistical Business Size Categories shall be used in the administration of any regulatory, administrative, or tax program only if the responsible Secretary (Administrator) has first determined that the use of such size categories is appropriate to the implementation of the program's objectives.

If the term, "Statistical Business Size Categories" is to be used in the operative text of a law or regulation, language similar to the following should be used to assure sufficient flexibility: "Business size categories shall mean the Statistical Business Size Categories as defined by the Office of Management and Budget subject to such modifications with respect to individual businesses or groups of businesses as the Secretary (administrator) may determine to be appropriate for the purpose of this Act (regulation)".

[FR Doc. 82-13413 Filed 5-17-82; 8:45 am]

BILLING CODE 3110-01-M

## PRESIDENT'S ECONOMIC POLICY ADVISORY BOARD

### Meeting

May 14, 1982.

The President's Economic Policy Advisory Board will meet on May 20, 1982, at the White House, Washington, D.C. from 10:00 a.m. to 2:30 p.m. Unexpected circumstances preclude the customary 15 days advance notice for such a meeting.

The purpose of the meeting is to review and discuss:

(a) Economic Outlook and Financial Market Developments.

(b) International Economic Intelligence Outlook.

All agenda items concerns matters listed in section 552b(c) of Title 5, United States Code, specifically subparagraphs (1), (4), (8), and (9) thereof, and will be closed to the public.

For further information, please contact the Office of Policy Development, the White House, at (202) 456-6515.

**Edwin L. Harper,**

*Assistant to the President for Policy Development.*

[FR Doc. 82-13687 Filed 5-17-82; 10:34 am]

BILLING CODE 3195-01-M

## SYNTHETIC FUELS CORPORATION

### Interim Policy on Standards of Conduct

**ENTITY:** Synthetic Fuels Corporation.

**ACTION:** Publication of interim policy on standards of conduct.

**SUMMARY:** This notice publishes and invites public comment on an Interim Policy on Standards of Conduct implemented by the U.S. Synthetic Fuels Corporation to carry out the requirements of Sections 118(a) and 118(d) of the United States Synthetic Fuels Corporation Act of 1980, Pub. L. 96-294 relating to financial disclosure and post-employment restrictions applicable to directors, officers and employees of the Corporation, and for other purposes.

**PERSON TO CONTACT FOR MORE INFORMATION:** Owen J. Malone, U.S. Synthetic Fuels Corporation, Office of General Counsel, 1900 L Street, NW., Washington, D.C. 20586, (202) 653-4230.

### Interim Policy on Standards of Conduct

*To All Interested Parties*

The United States Synthetic Fuels Corporation ("Corporation") announces an interim policy on standards of conduct applicable to directors, officers, and employees of the Corporation.

The responsibility for these matters will be vested primarily in the Corporation's Ethics Officer, Mr. Owen J. Malone, Office of General Counsel, United States Synthetic Fuels Corporation, Suite 540, 1900 L Street, NW., Washington, D.C. 20586.

It is contemplated that the Corporation's Board of Directors will conduct a further review of the Interim Policy in light of comments received following this publication.

Comments will only be accepted in writing through June 15, 1982, and should be directed to the Corporation's Office of General Counsel. For further information regarding this interim policy or the comment period, contact Owen J. Malone: telephone (202) 653-4230.

### Interim Policy—Standards of Conduct

April 27, 1982.

**Standards of Conduct**

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## Part 1—General

### *Section 1. Purpose and Scope*

(a) The purpose of this policy is to assure that the business of the United States Synthetic Fuels Corporation (the "Corporation") is conducted effectively, objectively, and without improper influence or the appearance thereof. The Corporation expects that its Directors, Officers, and Employees will exhibit courtesy, consideration, and promptness in all dealings with the public, with parties having business before the Corporation, and with government agencies and will avoid any action, whether or not specifically prohibited by this policy, which might result in, or create the appearance of:

(1) Using Corporation office for private gain;

(2) Giving improper preferential treatment to any person;

(3) Impeding the efficiency and economy of the operations of the Corporation;

(4) Making a Corporation decision outside of official channels; or

(5) Affecting adversely the confidence of the public in the integrity of the Corporation.

(b) This policy also implements:

(1) The financial disclosure provisions of the Ethics in Government Act of 1978, as amended (Pub. L. 95–521), made applicable to the Corporation by Section 118(a) of the Energy Security Act (Pub. L. 96–294) (the "Act" or the "Energy Security Act");

(2) The regulations relating to the financial disclosure provisions of the Ethics in Government Act of 1978, as amended, issued by the Office of Personnel Management (5 CFR Part 734);

(3) The provisions of Section 207(a) of title 18 of the United States Code (and subsections (f), (h), and (j) of such section to the extent that they relate to section 207(a)) relating to post-employment prohibitions applicable to former Directors, Officers, and Employees of the Corporation, pursuant to Section 118(d) of the Energy Security Act; and

(4) The regulations relating to 18 U.S.C. 207(a) and subsection (f), (h), and (j) of said section as they relate to 18 U.S.C. 207(a), issued by the Office of Personnel Management. (5 CFR Part 737).

In addition, this policy directs the attention of the Directors, Officers, and Employees of the Corporation to certain important prohibitions and requirements imposed by the Energy Security Act and other laws of the United States. This policy does not purport to reflect or enumerate all restrictions or requirements imposed by statutes, regulations or otherwise upon Corporation Directors, Officers, and Employees and former Directors, Officers, and Employees of the Corporation. The omission of a restatement of or a reference to any restriction or requirement in no way alters the legal effect of that restriction or requirement and any such restriction or requirement, as the case may be, continues to be applicable in accordance with its own terms.

(c) It is expected that the provisions of this policy will be observed and administered in a manner which is consistent with both their spirit and their letter.

### *Section 2. Applicability*

Unless specifically provided otherwise, the provisions of this policy apply to all Directors and Employees of the Corporation.

### *Section 3. Definitions*

Unless the context requires otherwise, the following definitions apply in this policy:

"Act" and "Energy Security Act" mean the Energy Security Act (95 Stat. 611, Pub. L. 96–294) approved June 30, 1980.

"Board of Directors" and "Board" mean the Board of Directors of the Corporation.

"Chairman" means the Chairman of the Board of Directors or his delegee.

"Corporation" or the "United States Synthetic Fuels Corporation" means the corporation created by Subtitle B of Title I of the Act.

"Director" means a member of the Board of Directors.

"Employee" means a Corporation officer or a full-time or part-time employee of the Corporation or an employee of a Government agency assigned or detailed to the Corporation.

"Ethics Officer" means the person designated pursuant to Section 5 hereof to administer this policy and the provisions of Title II of the Ethics in Government Act within the Corporation.

"Participating Organization" means any entity listed on the List of Participating Organizations published from time to time by the Ethics Officer under Section 6(b)(5) hereof, which List shall contain the name of each firm, corporation or other entity which has undertaken or formally proposes to undertake a synthetic fuels project involving the Corporation and any other entity participating in any material way in any such project, including but not limited to financial institutions, investment bankers, construction companies engineering firms, supply contractors and attorneys.

### *Section 4. Corporation Ethics Program*

(a) The Corporation's ethics program shall consist generally of liaison with the Office of Government Ethics; review of financial disclosure reports; ethics counseling; and the administration of this policy within the Corporation.

(b) The Ethics Officer under the direction of the Chairman is the Corporation official responsible for establishing, maintaining, and carrying out the Corporation's ethics program. To carry out this responsibility, sufficient resources (including investigative, audit, legal, and administrative staff as necessary) shall be made available to enable the Corporation to administer its program in a positive and effective manner.

### *Section 5. Designated Corporation Ethics Officer*

(a) By designation of the Chairman, a qualified attorney in the Office of the General Counsel of the Corporation shall serve as the Corporation's ethics official and as such will administer the provisions of Title II of the Ethics in Government Act within the Corporation, coordinate and manage the

Corporations's ethic program, and provide liaison to the Office of Government Ethics with regard to all aspects of the Corporation's ethics program.

(b) The Chairman may designate an alternate Corporation Ethics Officer who shall serve in an acting capacity in the absence of the designated Ethics Officer.

*Section 6. Responsibilities and Administration*

(a) Each Employee shall:

(1) Read and comply with this policy and the statutes and regulations referred to herein. Each Employee shall receive a copy of this policy and acknowledge such receipt in writing prior to assuming duties at the Corporation or, if already employed, promptly after the effective date of the policy;

(2) Be mindful of the high standards of integrity expected of them in all their activities, personal and official;

(3) Recognize that violation of the provisions of this policy or the laws referred to herein may subject them to dismissal, disciplinary action, and other penalties;

(4) Discuss with the Ethics Officer any problems arising out of this policy.

(b) The Ethics Officer shall:

(1) Assure that required reports are promptly filed by all Directors and Employees;

(2) Review all reports submitted to him;

(3) Notify Directors and Employees at the time of entrance on duty and periodically thereafter of the availability of counseling services and how and where these services are available;

(4) Bring the provisions of this policy to the attention of each Director and Employee as circumstances warrant;

(5) Compile, maintain, and periodically update a list of all Participating Organizations and submit such list to the Vice President for Administration for distribution to all Directors and Employees; and

(6) Serve as the Corporation's designee to the Office of Government Ethics on matters within the jurisdiction of that office covered by this policy.

(c) The Director of Personnel shall:

(1) Distribute to prospective Employees, and departing Employees, those forms required to be submitted pursuant to this policy; and

(2) Distribute a copy of this policy to all prospecive Employees at the time of an offer of employment with the Corporation is made, or if possible, prior to making such offer.

**Part 2—Conduct of Employees**

*Section 7. General*

(a) It is the policy of the Corporation not to interfere in the private lives of its Directors and Employees. However, in view of the public trust confided to the Corporation by the Energy Security Act, certain standards of conduct, some of which are statutory, are required to assure the proper performance of the Corporation's business and the maintenance of public confidence in the Corporation. The provisions of this section are designed to insure the fulfillment of that trust and the maintenance of that public confidence. Adherence to the provisions in this section requires that Directors and Employees not do indirectly what would be improper to do directly.

(b) The attention of Director and Employees is directed to the following statutory provisions:

(1) The prohibition contained in section 118(c) of the Act (42 U.S.C. 8714(c)) relating to a Director voting on any matter in which, to his or her knowledge, he or she has a financial interest (See Section 17(g) hereof).

(2) The prohibition contained in section 118(d) of the Act (42 U.S.C. 8714(d)) relating to post-employment activities of former Directors and Employees of the Corporation (See Section 20 hereof).

(3) The prohibition contained in section 161 of the Act (42 U.S.C. 8716) relating to false statements in connection with certain Corporation activities.

(4) The prohibition contained in section 162 of the Act (42 U.S.C. 8762) relating to forgery of Corporation instruments and agreements.

(5) The prohibition contained in section 163 of the Act (42 U.S.C. 8763) relating to misappropriation of funds and unauthorized activities in relation to the Corporation's business.

(6) The prohibition contained in section 164 of the Act (42 U.S.C. 8764) relating to conspiracy to commit acts made unlawful by sections 161, 162, or 163 of the Act.

(7) The prohibition contained in section 171(b) of the Act (42 U.S.C. 8771(b)) relating to the exercise of the Corporation's authorities.

(8) The prohibition contained in section 121(c) of the Act (42 U.S.C. 8717(c)) and 18 U.S.C. 1905 relating to the disclosure of confidential information.

(9) The prohibition contained in 18 U.S.C. 201 relating to the solicitation or receipt of anything of value for or because of an official act.

(10) The prohibition contained in 18 U.S.C. 1719 relating to misuse of the franking privilege.

(11) The prohibition contained in 18 U.S.C. 600 relating to promises of employment or other benefit for political activity.

(12) The prohibition contained in 18 U.S.C. 601 relating to deprivation of employment or other benefit for political contribution.

(13) The prohibition contained in 18 U.S.C. 602 relating to solicitation of political contributions.

(14) The prohibition contained in 18 U.S.C. 603 relating to making political contributions.

*Section 8. Gifts, Gratuities, Entertainment, and Favors*

(a) Acceptance of gifts, gratuities, entertainment, and favors from those who have or seek business with the Corporation may be a source of embarrassment to both the Corporation and the Director or Employee involved, may affect or appear to affect the objective judgment of the recipient, and may impair public confidence in the integrity of the Corporation's business relationships. Therefore, except as provided in subection (b) of this section, no Director or Employee shall knowingly solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from any Participating Organization or any person who (1) has, or is seeking to obtain, contractual, or other business or financial relations with the Corporation; or (2) has interests that may be substantially affected by the performance or nonperformance of the Director's or Employee's official duty. In those cases in which the tender of any such gift, gratuity, or other thing of monetary value occurs under circumstances making the return thereof to the donor either impractical or impossible, the item involved shall be promptly delivered to the Vice President for Administration of the Corporation. All such items delivered to the Vice President shall be disposed of by him in accordance with instructions of the General Counsel of the Corporation.

(b) Notwithstanding the foregoing, a Director or Employee may:

(1) Accept gifts, entertainment, or favors given him as a result of obvious family or personal relationships (such as those between a parent, child, spouse, or other relative of the Director or Employee) when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors;

(2) Accept food and refreshments of moderate value on infrequent occasions in the ordinary course of a luncheon or dinner meeting or other meeting or on an inspection tour where such Director or Employee is authorized by the Corporation to be in attendance;

(3) With approval of the Vice President to whom he or she reports and the Ethics Officer, accept food and refreshment, transportation, lodging, or subsistence from a consumer, environmental, industrial, technical, trade, professional, or other association or similar group, in connection with the Employee's participation in a widely attended luncheon, dinner, seminar, conference, or similar gathering sponsored by the donor; provided that this exception shall not apply when the donor is a Participating Organization or an association or group composed principally of Participating Organizations.

(4) Accept loans from banks or other financial institutions or parties on customary terms to finance proper and usual activities such as home mortgage loans;

(e) Accept unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars, and other items of nominal intrinsic value; and

(f) Accept transportation to inspect or investigate a location of facility, if under the circumstances it would be unduly inconvenient or inefficient to use other transportation.

*Section 9. Outside Employment and Other Outside Activity*

(a) Employees are prohibited from holding employment with any Participating Organization and shall not engage in any other outside employment or outside activity not compatible with the full and proper discharge of the duties and responsibilities of their Corporation employment. 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 circumstances in which acceptance may result in, or create the appearance of, a conflict of interest; or

(2) Outside employment which tends to impair the individual's mental or physical capacity to perform his or her Corporation duties and responsibilities in an acceptable manner, or which requires time or attention during the Employee's official work hours.

(b) Within the limitations imposed by this section, Employees are encouraged to engage in teaching, lecturing, and writing. However, a Director or Employee shall not, either for or without compensation, engage in teaching, lecturing or writing that is dependent on information obtained as a result of the Employee's Corporation employment, except (1) where that information has been made available to the general public or will be made available on request, or (2) when the Chairman gives written authorization for the use of non-public information on the basis that the use is in the public interest. To the extent there is a variance, any such teaching, lecturing, and writing shall clearly distinguish the views of the Employee from those of the Corporation and its management. In addition, Directors and Employees, shall not accept any compensation or honorarium for any consultation, lecture, discussion, writing, or appearance the subject matter of which is devoted substantially to the responsibilities, programs, or operations of the Corporation.

(c) No Employee shall accept a fee from an outside source on account of a public appearance, speech, or lecture (1) if the public appearance or the preparation or delivery of the speech or lecture was a part of the official duties of the Employee, (2) if the public appearance, speech, or lecture was made during official working hours, or (3) if travel for the purpose of the public appearance, speech, or lecture was made at Corporation expense. In addition, no Employee shall accept a fee for the preparation, publication, or review of an article, story or book if it was prepared during official working hours or was part of the official duties of the Employee.

(d) This section shall not preclude an Employee from:

(1) participating in discussions and meetings of a professional nature and from receiving from outside sources (other than a Participating Organization) bona fide reimbursement for actual expenses of travel and subsistence incurred in connection with his or her participation if such Employee's participation is not a part of his official duties at the Corporation;

(2) participating in the affairs of, or acceptance of an award for a meritorious public contribution or achievement given by a charitable, religious, professional, social, fraternal, educational, recreational, public service, or civic organization.

*Section 10. Confidential Information*

(a) Section 163(a)(4) of the Act makes it a criminal offense for anyone to give to any person any unauthorized information concerning any future action or plan of the Corporation, or having such information to invest or speculate, directly or indirectly, in the securities or property of any company, bank, or corporation receiving financial assistance from the Corporation. Criminal statutes also prohibit a Director or employee from disclosing, other than as provided by law, confidential business information obtained through his employment (Section 121(c) of the Act, and 18 U.S.C. 1905).

(b) A Corporation Director or Employee shall not make use or give the appearance of making use, or permit others to make use or give the appearance of making use, of Corporation information not made available to the general public, for the purpose of furthering a private interest.

(c) As a result of their official duties, Directors and Employees will frequently have access to business information of a confidential nature, including commercial, financial, or proprietary data provided by companies seeking financial assistance from the Corporation. Such information is disclosed for official use within the Corporation and is made available for no other purpose than consideration of the financial assistance application or other Corporation matters. Where such confidential business information might be compromised in responding to outside inquiries from apparently authorized or legitimate sources, such as Government agencies, these inquiries should be referred to the Director of Public Disclosure to determine whether the nature and circumstances of such inquiries justify disclosure of the particular information sought.

*Section 11. Use of Corporation Property*

A Director or Employee shall not, directly or indirectly, use, or allow the use of, Corporation property of any kind, including property leased to the Corporation, for other than officially approved activities. An employee has a positive duty to protect and conserve Corporation property, including equipment, supplies, and other property entrusted or issued to him.

*Section 12. Gambling, Betting, and Lotteries*

An Employee shall not participate, while on Corporation owned or leased property, or while on duty for the Corporation, 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 numbers slips or tickets.

*Section 13. Courtesy*

A Employee shall conduct himself in a manner that will assure effective

accomplishment of his responsibilities and must observe the requirements of courtesy, consideration, and promptness in dealing with those seeking the Corporation's assistance.

*Section 14. Availability of Counseling*

Each Director or Employee may consult the Ethics Officer at any time during normal Corporation hours for counseling on problems raised by this policy.

*Section 15. Complaints*

Complaints from any source concerning the subject matter of this policy, whether emanating from within or outside the Corporation, are to be submitted to the Ethics Officer.

**Part 3—Financial Interests, Prior Employment, and Similar Interests**

*Section 16. Restrictions Related to Employee Financial Interests, Prior Employment, and Similar Interests*

(a) The maintenance of public confidence in the Corporation requires that a Director or Employee not take any action which would constitute the use of his or her Corporation position to advanced personal or private interests.

(b) After assuming an officer or employment with the Corporation, a Director or Employee shall not acquire any financial interest in a Participating Organization while it is on the list of Participating Organizations maintained by the Ethics Officer pursuant to Section 6(b)(5).

(c) Unless authorized to do so as provided hereafter in this section, an Employee shall not participate personally and substantially as an Employee in a particular matter in which the Employee knowingly has a financial interest or in which he or she participated personally and substantially prior to employment by the Corporation.

(d) For purposes of this section—

(1) An Employee "participates" in a particular matter through decision, approval, disapproval, recommendations, evaluation, the rendering of advice, negotiation, investigation, implementation, or otherwise.

(2) "Particular matter" is any synthetic fuel project proposal or other application, request for determination, determination, proposal, agreement, contract, claim, controversy, or other similar matter involving a specific party or parties under consideration within the Corporation.

(3) A "financial interest" of an Employee includes the financial interest of the Employee's spouse, dependent child, partner, or an organization (other than the Corporation) in which the Employee is serving as an officer, director, trustee, partner, or employee, or any person or organization with whom the Employee is negotiating or has an arrangement concerning prospective employment. An Employee shall be deemed to be negotiating for prospective employment upon an expression of interest in response to a solicitation for future employment by either the Employee or the person or organization.

(e) With the approval of the Chairman, the Ethics Officer may waive the restrictions of subsection (c) of this section in a particular matter for an individual if the Ethics Officer determines in writing that the interest is too remote or too inconsequential, or the prior participation was too insubstantial, to affect the integrity of the services which the Corporation may expect of the individual. This determination shall be made after consultation with the Vice President in charge of the Employee's work assignment. Where it appears that a conflict of interest would arise in other matters in which the Employee might in the future be involved in the performance of normal duties, the Ethics Officer will so advise the Chairman and appropriate action shall be taken.

(f) The Chairman may by rule waive the restrictions of subsection (c) of this section for classes of financial interests which the Chairman determines are too remote or too inconsequential to affect the integrity of an Employee's services. The restrictions on the following financial interests are waived pursuant to this paragraph:

Financial interests in mutual funds, regulated investment companies or similarly constituted entities the portfolios of which are widely diversified, an similarly constituted commercially fungible entities.

(g) Procedure Applicable to Directors.

(1) Subsection 118(c) of the Act prohibits a Director from voting on any matter respecting any application, contract, claim, or other particular matter pending before the Corporation, in which, to the Director's knowledge, he or she, his or her spouse, minor child, partner, or an organization (other than the Corporation) in which the Director is serving as an officer, director, trustee, partner, or employee, or any person or organization with whom the Director is negotiating or has any arrangement concerning prospective employment, has a financial interest. This prohibition shall not apply if the Director first advises the Board of Directors of the nature of the particular matter in which he or she proposes to participate and makes full disclosure of such financial interest, and the Board of Directors determines by majority vote that the financial interest is too remote or too inconsequential to affect the integrity of such Director's services for the Corporation in that matter. The Director involved shall not participate in such determination.

(2) Prior to any meeting of the Board of Directors at which the Board is expected to vote on any matter respecting any application, contract, claim, or other particular matter pending before the Corporation, the Ethics Officer shall review the financial disclosure report filed with the Corporation by each Director and shall advise each Director in writing if any reported financial interest is within the purview of section 118(c)(1) of the Act.

(3) If a Director has a financial interest within the purview of section 118(c)(1) of the Act and believes that the interest is too remote or too inconsequential to affect the integrity of his services for the Corporation in the particular matter on which the Board is scheduled to vote, he may request the Ethics Officer to evaluate the particular financial interest and make a recommendation to the Board of Directors as to whether, in his opinion, the financial interest in question is too remote or too inconsequential to affect the integrity of the Director's service within the meaning of section 118(c)(3) of the Act.

**Part 4. Executive Personnel Financial Disclosure Requirements**

*Section 17. Financial Disclosure Requirements for Directors and Certain Employees*

(a) Statutory. Section 118(a) of the Act and Title II of the Ethics in Government Act of 1978, (the 1978 "Act") (Pub. L. 95–521, as amended), requires the Directors and certain Employees of the Corporation to disclose personal financial interests and a description of certain employment relationships in order to avoid potential conflicts of interest, and the appearance of such conflicts, which may arise as they carry out the duties of their positions. The 1978 Act directs the Office of Government Ethics ("OGE") to provide for the systematic review of the financial holdings of both current and prospective Directors and Employees. The Office of Personnel Management ("OPM"), on the recommendation of the Director of OGE, has promulgated regulations establishing the procedures for the filing, review, and public

availability of the Financial Disclosure Report required under the 1978 Act. (5 CFR Part 734).

(b) General Policy and Purpose. The purpose of this section is to implement the statutory requirements and to provide guidelines for those Directors and those Employees who are required to submit financial disclosure reports under the 1978 Act and the OPM regulations. Reference should be made to the Ethics Act and regulations for detailed statements of the law, definitions, exemptions, limitations, and illustrative examples (5 CFR 734.103).

Under Title II of the Ethics Act, Directors and officers of the Corporation, and Employees whose positions are compensated at a rate equivalent to or above that payable for the grade GS–16 of the Federal General Schedule under 5 U.S.C. 5332, are required to complete financial disclosure forms, disclosing any other employment relationships, any income received (other than from Corporation employment), assets, liabilities, and certain purchases, sales, exchanges, and gifts. These reports are not net worth statements. Only assets held as investments and certain other items must be reported. Items for personal use, such as a residence, a personal automobile or jewelry not held for sale need not be reported. Although the reports must be made available if requested by a member of the public, subject to compliance with certain procedures set out in the OPM regulations, they cannot be used for any commercial purpose, for establishing credit rating or, directly or indirectly, in the solicitation of money for any political, charitable or other purpose. In the event that a report is used by a person for one of these prohibited purposes, the Attorney General may institute a civil action against such person.

(c) Persons Required to File—General Requirements for Filing.

Each Director and each employee compensated at a rate equivalent to or above the rate payable for grade GS–16 of the General Schedule prescribed by 5 U.S.C. 5332, and any other Employee in a position determined by the Director of OGE to be of equal classification and certain others unless excluded pursuant to 5 CFR 734.203 (hereinafter referred to as a "reporting individual"), shall file a report in accordance with the following rules:

(1) A reporting individual who, during any calendar year, performs the duties of his or her office for more than sixty days shall file a report on or before May 15 of the succeeding year.

(2) Within thirty days of assuming a position or office at the Corporation, a reporting individual shall file a report, unless such individual:

(a) Has left another position within the thirty days prior to the assumption of the Corporation position in which a report required by 5 CFR 734.201 has previously been filed, or

(b) Has already filed such a report as a nominee for the Corporation position.

(3) On or before the thirtieth day after termination of his or her Corporation employment, a reporting individual shall file a report for the period from the end of the calendar year with respect to which a report was last filed to the date on which the individual left such office or position. If the individual assumes employment within thirty days of leaving the Corporation in another position or office in which a report is required to be filed pursuant to Title II of the 1978 Act, he or she need not file a report under this paragraph.

(4) The Ethics Officer may, for good cause shown, grant to any Employee or class of Employees an extension of up to 45 days. OGE may grant an additional extension of up to 45 days if it makes a determination, based upon the reporting individual's specific reasons which have been forwarded to OGE by the Ethics Officer along with his or her own comments on the request, that there is good cause shown for an extension.

(5) Any reporting individual who, as determined by the Ethics Officer, is not reasonably expected to perform the duties of his or her office for more than sixty days in a calendar year need not file a report.

(6) Notwithstanding the provisions of paragraph (5) of this section, if the reporting individual does perform the duties of his or her office or position for more than sixty days in a calendar year, and (i) if such individual is a new entrant or a nominee, he or she shall file a report within fifteen calendar days after the sixty-first day unless the individual has filed a request for a waiver which is subsequently granted or (ii) if such individual is terminating employment, he or she shall file a report required by paragraph (3) of this section.

(7) In unusual circumstances, the Director of OGE may grant a request for a waiver of any public reporting requirement otherwise applicable under this section for a reporting individual who is reasonably expected to perform, or has performed, the duties of his or her office for less than 130 days in a calendar year. Such a determination will be made after OGE has received advice from the Corporation and shall be in accordance with the guidelines established in 5 CFR 734.205.

(d) Contents of Reports. The information required to be included in each report is fully described in the instructions accompanying the Executive Personnel Financal Disclosure Report (S.F. 278) prescribed by OGE and in regulations promulgated by OGE (5 CFR Part 734), which requirements are incorporated herein by reference. Directors and Employees are encouraged to consult with the ethics officer, as necessary, concerning such requirements.

(e) Filing, Custody, Review. A reporting individual shall file the report with the Ethics Officer of the Corporation, who shall note on the report or supplemental report the date it is received. The Ethics Officer shall submit the report of each Director, as well as his or her own report, to the Director of OGE after he or she has reviewed it (except that the Chairman or his delegee shall review the report of the Ethics Officer).

(f) The Corporation shall, within fifteen days after any report is received by the Ethics Officer, make each report filed with it under this Part available to the Public by permitting inspection of such report by, or furnishing a copy of such reprot to, any person who makes a written application stating (1) the person's name, occupation and address, (2) the name and address of any other person or organization on whose behalf the inspection or copy is requested, and (3) that such person is aware of the prohibitions on obtaining or using the report for (a) any unlawful purpose, (b) any commercial purpsoe, other than by news and communications media for dissemination to the general public, (c) determining or establishing the individual's credit rating, or (d) use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose. The Corporation may require a reasonable fee to be paid which is necessary to recover the direct cost of reproduction or mailing of such report, or may waive or reduce the fee if the Corporation determines that such waiver or reduction is in the public interest.

All reports shall be retained by the Corporation for six years, during which time they shall be made available to the public as provided above. After the six-year period a report shall be destroyed, unless needed in an ongoing investigation.

(g) The Ethics Officer shall review each report within 60 days after the date of filing (or earlier if required by the expedited procedure of 5 CFR 734.604(c)) in order to determine that the individual is in compliance with applicable laws

and regulations and that the interests or positions disclosed on the form do not violate any applicable statute or regulation. Such review shall be conducted pursuant to 5 CFR 734.604.

(h) The Chairman of the Corporation shall refer to the Attorney General the name of any individual he or she has reasonable cause to believe has willfully falsified or willfully failed to file information required to be reported and may take any appropriate personnel or other action in accordance with applicable law or Corporation policy against such individual.

**Part 5—Financial Interests of Other Corporation Employees**

*Section 18. Financial Disclosure Reports*

(a)*Filing Requirement.* To the extent they are not covered by Part 4 of these Standards of Conduct, reports of employment and financial interest shall also be submitted by:

(1) Each Corporation Employee whose position is compensated at a rate equivalent to that payable for grade GS–13 or above of the General Schedule established by Chapter 53 of title 5 of the United States Code who occupies a position the basic duties and responsibilities of which consist of the investigation, evaluation, negotiation, administration, or implementation of any synthetic fuels project formally proposed to the Corporation or the procurement of goods and services for the Corporation; and

(2) Such other Employees who are in positions which otherwise meets the criteria set out in clause (1) (other than rate of compensation), and whose inclusion has been determined by the Chairman in writing as essential to protect the integrity of the Corporation and avoid Employee involvement in a possible conflict-of-interest situation.

(b) *Time and Place for Submission.* The reports referred to in this section shall be submitted to the Ethics Officer. An Employee who, after the effective date of this policy, is appointed to a position requiring submission of such report, shall submit such report within 30 days after appointment. Each covered Employee who previously submitted any such report shall submit a supplementary report on or before June 30 of each succeeding year, regardless of whether or not there were occurrences which would require changes in, or additions to, information previously submitted.

(c) *Form of Reports.* Reports of employment and financial interests shall be submitted on a standard form "Report of Financial Interests," copies of which are available in the Personnel Office of the Corporation.

The folowing rules shall be observed in preparing the statements:

(1) The interest, if any, of a spouse, minor child, or other member of the employee's immediate household is considered to be an interest of the Employee. For the purpose of this section, "member of an employee's immediate household" means those blood relations who are residents of the employee's household.

(2) If any information required to be included on a Report of Financial Interests or supplementary report, including holdings placed in trust, is not known to the Employee but is known to another person, the Employee shall request that other person to submit information in his behalf.

(3) An employee is not required to submit in a report of Financial Interests or supplementary report any information relating to the Employee's connection with, or interest in, a professional society, a charitable, religious, social, fraternal, recreational, public service, civic or political organization or a similar organization not conducted as a business enterprise.

(d) *Confidentiality of Employee's Statements.* The Corporation shall hold each Report of Financial Interests, and each supplementary report, filed under this section in confidence. To insure this confidentiality, the Ethics Officer is designated to review and retain the reports, and shall be responsible for the maintenance of the reports in confidence, and he shall not allow access to, or allow information to be disclosed from a report except as necessary to carry out the purpose of this section. The corporation shall not disclose information from a report except as the Chairman may determine for good cause shown. All reports filed under this section shall be retained by the Corporation for six years, after which period a report shall be destroyed, unless needed in an ongoing investigation.

(e) *Effect of Employee's Reports on Other Requirements.* The reports required by this section are in addition to, and not in substitution for, or in derogation of, any similar requirement imposed by law, or regulation. The submission of a report or supplementary report by an employee does not permit him or any other person to participate in a matter in which his or the other person's participation is prohibited by law, or this policy.

(f) Review of Statements and Remedial Action. All reports submitted under this section shall be reviewed by the Ethics Officer. If, in the judgment of the Ethics Officer, any report discloses a conflict of interest, or an apparent or potential conflict of interest between the interests of the Employee and the performance of such Employee's duties at the Corporation, the ethics Officer shall consult with such Employee and shall take such action as he deems appropriate to resolve such conflict, or apparent or potential conflict. If the Ethics Officer is unable to resolve the situation, he shall report the matter to the Chairman who shall then take appropriate remedial action to end such conflict or potential conflict, or apparent conflict. Remedial action may include, but is not limited to:

(1) Changes in assigned duties;

(2) Disqualification for a particular assignment;

(3) Divestment by the Employee of his conflicting interest; or

(4) Disciplinary action.

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable laws and regulations.

(g) Exclusions From Reporting Requirements.

(1) Any Employee who considers that his or her position has been improperly included among those requiring the submission of the reports required by this section may submit the matter for review by the Ethics Officer.

(2) Employees in positions that meet the criteria in subsection (a) of this section may be excluded from the reporting requirements of this section if the Chairman determines that:

(a) The duties of a position are at such a level of responsibility that the likelihood of the incumbent's involvement in a conflict-of-interest situation is remote; or

(b) The duties of a position are at such a level of responsibility that the submission of a report is not necessary because of the degree of supervision and review over the incumbent or the inconsequential effect of the duties of the position on the integrity of the Corporation.

**Part 6. Post-Employment Conflicts of Interest.**

*Section 19. Post-Employment Conflicts of Interest*

(a) *Statutory.* Section 118(b) and 118(d) of the Act relate to post-employment activities of Directors and Employees. Section 118(b) applies to former Federal employees employed by the Corporation and provides that the laws governing post-Federal employment shall not apply to them while acting on behalf of the

Corporation. Section 118(d) provides that section 207(a) of title 18 of the United States Code (and subsections (f), (h), and (j) of such section to the extent they relate to subsection (a)) shall apply to former Directors, officers and employees of the Corporation as if they were former officers or employees of the executive branch of the United States Government, and also provides that section 207(a) shall apply to the Corporation as if it were an agency of the executive branch of the United States Government. In addition, under the Ethics in Government Act of 1978 the Office of Government Ethics within the Office of Personnel Management has supervisory jurisdiction over the administration of subsection (j) of section 207 throughout the Government. Pursuant to the 1978 Act, the OPM has, on the recommendation of the Director of OGE and in consultation with the Attorney General, issued regulations in 5 CFR Part 737 to guide agencies (including the Corporation) in exercising the administrative enforcement authority contained in Section 18 U.S.C. 207(j), and to provide guidance to individuals who must conform to the law. Criminal enforcement of the provisions of 18 U.S.C. 207(a) is the exclusive responsibility of the Attorney General.

(b) *Purpose.* It is the purpose of this section to provide guidelines for Directors and Employees within the framework of 18 U.S.C. 207(a) and the OPM regulations. Reference should be made to the regulations, and the Ethics Officer should be consulted, for detailed statements of the law, definitions, exemptions, limitations and illustrative examples.

(c) *Guidelines.* The statute bars certain acts by former Directors and Employees, which may reasonably give the appearance of making unfair use of prior Corporation employment and affiliations. It does not, however, bar any former Director or Employee, regardless of rank, from employment with any private or public employer after he or she has left the Corporation's employ. Nor does it bar employment even on a particular matter in which the former Director or Employee had major official involvement except in certain circumstances involving persons engaged in professional advocacy. Rather, the specific prohibitions arise from a combination of the following factors which in any given situation may include the following: (1) The nature and extent of the involvement in a particular matter by the individual while employed by the Corporation, (2) the identity of the particular matter with which the individual dealt while employed by the Corporation with the same matter with respect to which he or she may represent others after leaving the Corporation, (3) the manner in which the former Director or Employee appears before or communicates with the Corporation or the U.S. Government, and (4) the position occupied by the individual while in the Corporation's employ.

(d) Permanent restriction against any former Director or Employee acting as representative as to a particular matter in which the Director or Employee personally and substantially participated.

(1) The Prohibition of 18 U.S.C. 207(a). No former Director or Employee after terminating employment with the Corporation shall knowingly act as agent or attorney for, or otherwise represent any other person, in any formal or informal appearance before, or with intent to influence, make any oral or written communication on behalf of any other person (1) to the Corporation or otherwise to the United States, (2) in connection with any particular Corporation matter involving a specific party, and (3) in which matter such Director or Employee participated personally and substantially while with the corporation.

(2) Pertinent combination of factors involved in this prohibition include the following:

(a) Since the prohibition has no time limit, it raises a permanent bar to the proscribed activity;

(b) The former Employee is prohibited from acting as agent or attorney for any other person, but not for himself;

(c) It prohibits representation by an "appearance" even if only in a technical procedural sense regardless of physical presence;

(d) It also prohibits any communication with intent to influence;

(e) The prohibition against an appearance or communication extends to other departments, agencies and courts of the United States and is not limited to the Corporation;

(f) The representation by the former Employee must be in connection with a particular matter involving specific parties; and

(g) The particular matter must be one in which the former Employee participated personally and substantially while in the Corporation's employ.

(3) The prohibition in paragraph (1) of this subsection shall not apply to:

(a) Any appearance, attendance, or communication by a former Director or employee who is employed by and acting on behalf of the United States; or

(b) Any appearance or communication by the individual where such appearance or communication is made in response to a subpoena, or concerns any matter of an exclusively personal and individual nature such as pension benefits.

(e) Exemption for persons with special qualifications.

(1) A former Director or Employee may be exempted from the prohibitions of 18 U.S.C. 207(a) and this section if the Chairman, in consultation with the Director of OGE, executes a certification published in the **Federal Register** that such individual has outstanding qualifications in a scientific, technological, or other technical discipline and is acting with respect to a particular matter which requires such qualifications and that the national interest would be served by such individual's participation.

(2) This exemption shall be used only in instances where the former Director or Employee's services are needed on so continuous and comprehensive a basis that other procedures for the communication of technical information designed to isolate the individual from other aspects of the matter would be burdensome and impractical.

(3) The exemption shall be effective upon the execution of the certification required by paragraph (1), provided that it is transmitted to the **Federal Register** for publication.

(f) Testimony and statements subject to penalty of perjury. A former Corporation Director or Employee may make any statement required to be made under penalty of perjury.

(g) Administrative Enforcement.

(1) Information of Violation. On receipt of information regarding a possible violation of 18 U.S.C. 207(a) and after determining that such information appears substantiated, the Chairman or the Ethics Officer, if so directed by the Chairman, shall expeditiously provide such information along with any comments or pertinent Corporation policy to the Director of the OGE and to the Criminal Division, Department of Justice. Any continuing investigation by the Corporation on administrative action shall be coordinated with the Department of Justice to avoid prejudicing criminal proceedings unless the Department of Justice advises the Corporation that it does not intend to initiate criminal prosecution (18 U.S.C. 207, 5 CFR 737.27).

(2) Initiation of Administrative Proceedings. Whenever the Corporation

has determined after appropriate review that there is reasonable cause to believe that a former Director or Employee has violated any of the provisions of 18 U.S.C. 207(a) or 5 CRR 737, it may initiate an administrative disciplinary proceeding by providing the former Director or Employee with notice as defined in the statute. Prior to a determination of sufficient cause to initiate an administrative disciplinary hearing, all records under the Corporation's control relating to allegations of a violation shall be confidential, subject to applicable law (18 U.S.C. 207, 5 CFR 737.27).

(3) Notice and Hearing. The notice of an administrative disciplinary proceeding and any hearing pursuant to such notice requested by the former Director or Employee shall follow the procedures set forth in 5 CFR 737.27(a) (3), (4), (5), (6), (7) and (8).

(4) Administrative Sanctions. Actions which may be taken by the Corporation in the case of an individual who is found in violation of 18 U.S.C. 207(a) or 5 CFR Part 737, after a final administrative decision, or who failed to request a hearing after receiving adequate notice, include: (1) Prohibiting the individual from making, on behalf of any other person except the United States, any formal or informal appearance before, or, with the intent to influence, any oral or written communication to, the Corporation on any matter of business for a period not to exceed five years, which may be accomplished by directing corporation Employees to refuse to participate in such appearance or to accept any such communications, or (2) taking other appropriate disciplinary action.

**Part 7—Procedures and Standards of Conduct Applicable to Consultants.**

*Section 20. Procedures Applicable to Consultants*

(a) This section sets forth procedures which shall be observed in appointing and utilizing consultants.

(1) All individuals and organizations retained to perform consulting services for the Corporation shall be required to read the "Standards of Conduct of Consultants to the Corporation" set forth in subsection (b) of this Section.

(2) Prior to appointment or retention prospective consultants shall be required to make disclosure of any financial interest in and any affiliation with any person, firm, or organization listed on the list of participating organizations published by the Ethics Officer pursuant to section 6(b)(5) of this policy. "Affiliation" includes, but is not limited to service as an employee, officer, member, owner, director, trustee, advisor, or consultant.

(3) No consultant having any financial interest in or affiliation with any Participating Organization shall be retained by the Corporation, unless the Ethics Officer determines in writing (1) that the financial interest or affiliation is too remote or too inconsequential to affect the integrity of the services which the Corporation may expect from the consultant or (2) that satisfactory arrangements have been made to obviate any conflicts of interest on the part of such consultant. This determination shall be made after consultation with the Employee proposing retention of the consultant.

(4) Each person who is retained as an individual to provide consulting services on a full-time, part-time, or intermittent basis for more than 60 days in a calendar year at a rate of compensation equivalent to or above the rate payable for grade GS–16 of the General Schedule prescribed by 5 U.S.C. 5332 shall file a financial disclosure report in accordance with section 18 of this Policy. Individual consultants compensated at a rate less than the rate payable for grade GS–16 but equivalent to or above the rate payable for GS–13 of such schedule whose services for the Corporation meet the criteria set out in Section 19(a) shall file a "Report of Financial Interests" in accordance with section 19 of this policy.

(5) The Ethics Officer shall advise those authorizing the services of consultants of the requirements of this section, and each officer of the Corporation shall observe such requirements in engaging consultant services for the Corporation.

(b) Standards for Conduct for Outside Consultants. The following is intended for the guidance of consultants retained to provide services to the Corporation.

(1) Inside information. A consultant must conduct himself in a manner devoid of the slightest suggestion that he is exploiting his Corporation consultancy for private advantage. Thus, a consultant must not, on the basis of any information gained in the course of his activities with the Corporation invest or recommend investment in any commodities, land or securities. Moreover, he should be careful in his personal financial activities to avoid any appearance of acting on the basis of information obtained in the course of his activities with the Corporation.

(2) It is important for a consultant to have access to Corporation data pertinent to his duties and to maintain familiarity with the Corporation's plans and programs and the requirements thereof, within the area of his responsibility. Where such data have been made generally available to the public, there is generally no impropriety in a consultant's utilizing such information in the course of his non-Corporation activities after it has become so available. However, a consultant may, in addition, acquire information which is not generally available to those outside the Corporation. In the event, he may not use such information for the benefit of a business or other entity by which he is employed or retained or in which he has a financial interest.

(3) Consultants must also be alert to section 163(a)(4) of the Energy Security Act which makes it a criminal offense for anyone to give to any person any unauthorized information concerning any future action or plan of the Corporation, or having such knowledge to invest or speculate, directly or indirectly, in the securities or property of any company, bank, or corporation receiving financial assistance from the Corporation.

(4) Consultants and advisors are encouraged to confer with the Ethics Officer and other appropriate persons at the Corporation to assist them in the identification of information not generally available and in the resolution of any actual or potential conflict between duties to the Corporation and to other employers or clients.

(5) Occasionally an individual who becomes a consultant to the Corporation may, subsequent to his designation as such, be requested by another party to act in a similar capacity. In some cases the request may give the appearance of being motivated by the desire of the other party to secure inside information. Where the consultant has reason to believe that the request for his services is so motivated, he should make a choice between acceptance of the tendered employment and continuation of his Corporation consultancy. In such circumstances he may not engage in both.

(6) A consultant shall not use his position in any way to coerce, or give the appearance of coercing, another person to provide any financial benefit to him or persons with whom he has family, business, or financial ties.

(c) Statutory provisions. The attention of all Corporation consultants is directed to the following statutory provisions:

(1) The prohibition contained in Section 161 of the Act (42 U.S.C. 8761) relating to false statements in connection with certain Corporation activities.

(2) The prohibition contained in section 162 of the Act (42 U.S.C. 8762) relating to forgery of Corporation instruments and agreements.

(3) The prohibition contained in section 163 of the Act (42 U.S.C. 8763) relating to misappropriation of funds and unauthorized activities in relation to the Corporation's business.

(4) The prohibition contained in section 164 of the Act (42 U.S.C. 8764) relating to conspiracy to commit acts made unlawful by sections 161, 162, or 163 of ther Act;

(5) The prohibition contained in section 171(b) of the Act (42 U.S.C. 8771(b)) relating to the exercise of the Corporation's authorities;

(6) The Prohibition contained in section 121(c) of the Act (42 U.S.C. 8717(c)) and 18 U.S.C. 1905 relating to the disclosure of confidential information;

(7) The Prohibition contained in in 18 U.S.C. 201 relating to the solicitation or receipt of anything of value for or because of an official act;

(8) The Prohibition contained in section in 18 U.S.C. 1719 relating to misuse of the franking privilege.

Synthetic Fuels Corporation.

Dated: May 13, 1982.

**Edward E. Noble,**

*Chairman of the Board of Directors.*

[FR Doc.82-13412 filed 5-17-82; 8:45 am]

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## SMALL BUSINESS ADMINISTRATION

### Minority Small Business and Capital Ownership Development Assistance; Minority Group Consideration; Asian Indian Americans

Pursuant to the provisions of Section 8(a) of the Small Business Act, 15 U.S.C. 637(a) et. seq., as amended, and 13 CFR 124. 1–1 (c)(3)(iv)(A), notice is hereby given that the Small Business Administration (SBA) has received a request that it consider Asian Indian Americans to be a minority group which has members who are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for SBA's section 8(a) program.

Asian Indian Americans are defined for the purposes of the 8(a) program as U.S. Citizens who trace their national origin to India. SBA has decided that the request is adequately documented and makes a prima facie showing that the group has suffered chronic racial or ethnic prejudice or cultural bias, and has decided to publish this notice of its intent to consider the group to have members who are socially disadvantaged because of their identification with the group for purposes of eligibility for the section 8(a) program.

SBA shall receive comments and information from the public, on or before June 18, 1982, which tend to show:

(1) If the group has suffered the effects of discriminatory practices or similar invidious circumstances over which its members have no control,

(2) If the group has generally suffered from prejudice or bias,

(3) If such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in Pub. L. 95–507, 96–302, and

(4) If such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business people.

All such comments and information should be submitted to:

Mr. Robert L. Wright, Jr., Associate Administrator, Minority Small Business and Capital Ownership Development, U.S. Small Business Administration, 1441 L Street, N.W., Washington, D.C. 20416.

Subsequent to the close of the receipt of information on this matter, SBA will consider the information received in response to this notice and will publish its decision on the group's request in the form of a Notice in the Federal Register, pursuant to the provisions of 13 CFR 124.1–1(C)(3)(iv)(D).

Dated: May 11, 1982.

**James C. Sanders,**

*Administrator.*

[FR Doc. 82-13395 Filed 5-17-82; 8:45 am]

BILLING CODE 8025-01-M

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**[Declaration of Disaster Loan Area No. 2038]**

### California; Declaration of Disaster Loan Area

As a result of the President's major disaster declaration, I find that the county of Orange, California constitutes a disaster loan area because of damage resulting from a fire beginning on April 21, 1982. Eligible persons, firms and organizations may file applications for loans for physical damage until the close of business on June 24, 1982, and for economic injury until January 24, 1983, at: Small Business Administration, 350 S. Figueroa Street, 6th Floor, Los Angeles, California 90071, or other locally announced locations.

Interest rates for applicants filing for assistance under this declaration are as follows:

| | Percent |
|---|---|
| Homeowners with credit available elsewhere | 15⅜ |
| Homeowners without credit available elsewhere | 7⅝ |
| Businesses with credit available elsewhere | 16½ |
| Businesses without credit available elsewhere | 8 |
| Businesses (EIDL) without credit available elsewhere | 8 |
| Other (non-profit organizations including charitable and religious organizations) | 11½ |

It should be noted that assistance for agricultural enterprises is the primary responsibility of the Farmers Home Administration as specified in Pub. L. 96–302.

Information on recent statutory changes (Pub. L. 97–35, approved August 13, 1981) is available at the above-mentioned office.

(Catalog of Federal Domestic Assistance Programs Nos. 59002 and 59008)

Dated: April 28, 1982.

**J. C. Sanders,**

*Administrator.*

[FR Doc. 82-13415 Filed 5-17-82; 8:45 am]

BILLING CODE 8025-01-M

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**[License No. 05/05–0165]**

### White River Capital Corp.; Issuance of a Small Business Investment Company License

On December 15, 1981, a notice was published in the Federal Register [46 FR 61383) stating that an application has been filed by White River Capital Corporation, 500 Washington Street, Columbus, Indiana 47201, with the Small Business Administration (SBA) pursuant to § 107.102 of the Regulations governing small business investment companies (13 CFR 107.102 (1981)) for a license as a small business investment company.

Interested parties were given until close of business December 31, 1981, to submit their comments to SBA. No comments were received.

Notice is hereby given that, pursuant to Section 301(c) of the Small Business Investment Act of 1958, as amended, after having considered the application and all other pertinent information, SBA issued License No. 05/05–0165 to White River Capital Corporation to operate as a small business investment company.

(Catalog of Federal Domestic Assistance Program No. 59.011, Small Business Investment Companies)

Dated: May 11, 1982.

**Robert G. Lineberry,**

*Acting Deputy Associate Administrator for Investment.*

[FR Doc. 82-13414 Filed 5-17-82; 8:45 am]

BILLING CODE 8025-01-M

## DEPARTMENT OF THE TREASURY

### Customs Service

### Performance Review Boards; Appointment of Members

**AGENCY:** U.S. Customs Service.

**ACTION:** General notice; correction.

**SUMMARY:** This document corrects a name of the list of members of the U.S. Customs Services Performance Review Board which appeared at page 18209 in the Federal Register of Wednesday, April 28, 1982 (47 FR 18208).

**FOR FURTHER INFORMATION CONTACT:** Alexander Faison, Director, Office of Human Resources, U.S. Customs Service, 1301 Constitution Avenue, NW., Room 3417, Washington, D.C., (202) 566-5563.

The following correction is made to the document:

On page 18209, the name and title "Edward F. Kwas—Assistant Regional Commissioner, (Operations) U.S. Customs Service", which appears in the list at the end of the first paragraph under the caption "Supplementary Information", is removed, and the name and title "George Estengo, Deputy Assistant Secretary (Administration), Department of the Treasury" is inserted in its place.

Dated: May 13, 1982.

Alexander Faison,

*Director, Office of Human Resources.*

[FR Doc. 82-13423 Filed 5-17-82; 8:45 am]

BILLING CODE 4820-02-M

## Office of the Secretary

### [Dept. Circular Public Debt Series—No. 13-82]

### Treasury Notes for May 31, 1984, Series S-1984

May 13, 1982.

#### I. 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 $5,500,000,000 of United States securities, designated Treasury Notes of May 31, 1984, Series S-1984 (CUSIP No. 912827 NF 5). 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 June 1, 1982, and will bear interest from that date, payable on a semiannual basis on November 30, 1982, and each subsequent 6 months on May 31 and November 30 until the principal becomes payable. They will mature May 31, 1984, and will not be subject to call for redemption prior to maturity. In the event an interest payment date or the maturity date is a Saturday, Sunday, or other nonbusiness day, the interest or principal is payable on the next-succeeding business day.

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 Daylight Saving time, Wednesday, May 19, 1982. Noncompetitive tenders as defined below will be considered timely if postmarked no later than Tuesday, May 18, 1982, and received no later than Tuesday, June 1, 1982.

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., 7.10%. 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. 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.

3.4. 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.

3.5. Immediately after the closing hours, tenders will be opened, followed by a public announcement of the amount and yield range of accepted bids. Subjects 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.q., 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.

3.6. 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 expressely 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 3.4., must be made or completed on or before Tuesday, June 1, 1982. 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 Thursday, May 27, 1982. 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 our 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 interm 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.

Paul H. Taylor,

*Fiscal Assistant Secretary.*

[FR Doc. 82-13722 Filed 5-17-82; 11:40 am]

BILLING CODE 4810-40-M

# Notices

Federal Register
Vol. 47, No. 96
Tuesday, May 18, 1982

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.

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1

**CONSUMER PRODUCT SAFETY COMMISSION**

**TIME AND DATE:** 10 a.m., Thursday, May 20, 1982.

**LOCATION:** Third Floor Hearing Room, 1111 18th Street, NW., Washington, D.C.

**STATUS:** Open.

**MATTERS TO BE CONSIDERED:**

1. *Baby Walkers*
The staff will brief the Commission on the status of CPSC staff activities concerning baby walkers, including CPSC engineering tests conducted to evaluate the stability of currently available baby walkers.
2. *Infant Strangulations*
The staff will brief the Commission on alternative strategies to address hazards of entanglement strangulation of young children.
3. *Infant Suffocations*
The staff will brief the Commission on infant suffocations associated with plastic materials and on possible efforts to increase consumer awareness of this hazard.
4. *Expandable Baby Gates and Wooden Enclosures*
The staff will brief the Commission on CPSC staff activities regarding possible entrapment hazards associated with expandable baby gates and wooden enclosures.

**CONTACT PERSON FOR ADDITIONAL INFORMATION:** Sheldon D. Butts, Deputy Secretary, Office of the Secretary, Suite 342, 5401 Westbard Avenue, Bethesda, MD 20207; Telephone (301) 492–6800.

[S–731–82 Filed 5–14–82; 1:35 pm]

BILLING CODE 6355–01–M

2

**FEDERAL ELECTION COMMISSION**

**PREVIOUSLY ANNOUNCED DATE AND TIME:** Thursday, May 20, 1982 at 10:00 a.m.

**PLACE:** 1325 K Street, NW., Washington, D.C. (fifth floor).

**THE FOLLOWING CHANGES HAVE BEEN MADE IN THE OPEN MEETING:**

Deletions—
Letter from Senator Mathias re Citizens' Research foundation and request from CFR re waiver of fees
Revision to debt settlement procedures
Addition—
Proposed legislative recommendations will be continued from the May 13, 1982 meeting.

**PERSON TO CONTACT FOR INFORMATION:** Mr. Fred Eiland, Public Information Officer Telephone: 202–523–4065.

**Marjorie W. Emmons,**
*Secretary of the Commission.*

[S–732–82 Filed 5–14–82, 2:24 pm]

BILLING CODE 6715–01–M

3

**FEDERAL RESERVE SYSTEM**

Board of Governors

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** 47 FR 20438, May 12, 1982.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING:** 10 a.m., Monday, May 17, 1982.

**CHANGES IN THE MEETING:** Addition of the following closed item to the meeting:

Issues relating to bankers' acceptances in connection with the Board's statement on H.R. 6016, Bank Export Services Act.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board: (202) 452–3204.

Dated: May 14, 1982.

**James McAffee,**
*Assistant Secretary of the Board.*

[S–733–82 Filed 5–14–82; 3:37 pm]

BILLING CODE 6210–01–M

4

**FEDERAL RESERVE SYSTEM**

Board of Governors.

**TIME AND DATE:** 10 a.m., Tuesday, May 25, 1982.

**PLACE:** 20th Street and Constitution Avenue NW., Washington, D.C. 20551.

**STATUS:** Closed.

**MATTERS TO BE CONSIDERED:**

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve Systems employees.
2. Any items carried forward from a previously announced meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204.

Dated: May 14, 1982.

**James McAffee,**
*Associate Secretary of the Board.*

[S–734–82 Filed 5–14–82; 3:38 pm]

BILLING CODE 6210–01–M

5

**NATIONAL TRANSPORTATION SAFETY BOARD**

**[NM–82–13]**

**"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT:** 47 FR 20066, May 10, 1982.

**PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING:** 9 a.m., Thursday, May 20, 1982.

**CHANGE IN MEETING:** A majority of the Board has determined by recorded vote that the business of the Board requires revising the agenda of this meeting and that no earlier announcement was possible. The agenda as now revised is set forth below:

**MATTERS TO BE CONSIDERED:**

1. *Proposed Board Order:* Safety Studies Program.
2. Safety Studies Proposals.
3. *Brief of Aviation Accident:* U.S. Air Carrier, File No. 1–0015; Texas International Airlines, Baton Rouge, Louisiana, March 15, 1980.
4. *Opinion and Order:* Administrator v. Alphin, Dkt. SE–4224; disposition of respondent's petition for reconsideration and rehearing.
5. *Opinion and Order:* Administrator v. Blackburn, Dkt. SE–5262; disposition of the appeals of both parties.
6. *Opinion and Order:* Administrator v. Garber, Dkt. SE–5252; disposition of respondent's appeal.
7. *Opinion and Order:* Administrator v. Honan, Dkt. SE–5192; disposition of respondent's appeal.

**CONTACT PERSON FOR MORE INFORMATION:**
Sharon Flemming, (202) 382–6525.

May 13, 1982.

[S–729–82 Filed 5–14–82; 10:00 am]

BILLING CODE 4910–58–M

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6

**NUCLEAR REGULATORY COMMISSION**

**DATE:** Week of May 17, 1982.

**PLACE:** Commissioner' Conference Room, 1717 H St., NW., Washington, D.C.

**STATUS:** Open and closed.

**MATTERS TO BE DISCUSSED:** *Wednesday, May 19:*

10:00 a.m.:

Status Report on Capability of Reactors to go to Cold/Hot Shutdown (public meeting)

*Thursday, May 20:*

10:00 a.m.:

Discussion of Court Decision on S–3 Rule (closed—Exemption 10)

2:00 P.M.:

Briefing on Generic Evaluation of First-Round Exercises and Appraisals (NTOLs and ORs)— (public meeting)

*Friday, May 21:*

10:00 a.m.:

Discussion of Enforcement Action (closed—Exemption 5)

1:00 p.m.:

Briefing on Design Basis Threat (closed—Exemptions 1 & 3)

**AUTOMATIC TELEPHONE ANSWERING SERVICE FOR SCHEDULE UPDATE:** (202) 634–1498. Those planning to attend a meeting should reverify the status on the day of the meeting.

**CONTACT PERSON FOR MORE INFORMATION:** Walter Magee (202) 634–1410

**Walter Magee,**

*Office of the Secretary.*

May 12, 1982.

[S–730–82 Filed 5–14–82; 10:00 a.m.]

BILLING CODE 7590–01–M

federal register

Tuesday
May 18, 1982

Part II

# Department of the Interior

## Office of Surface Mining Reclamation and Enforcement

## Surface Mining Control and Reclamation Act of 1977; Kentucky

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining Reclamation and Enforcement

### 30 CFR Part 917

### Conditional Approval of the Permanent Regulatory Program Submission from the Commonwealth of Kentucky Under the Surface Mining Control and Reclamation Act of 1977

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Final rule.

**SUMMARY:** On December 30, 1981, the Commonwealth of Kentucky resubmitted to the Department of the Interior its proposed permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.* This follows an initial approval in part and disapproval in part of the proposed program which was published in the **Federal Register** on October 22, 1980 (45 FR 69940–69970). The purpose of the resubmission is to demonstrate the State's intent and capability to administer and enforce the provisions of SMCRA and the permanent regulatory program regulations, 30 CFR Chapter VII.

Only those portions of the Commonwealth's original submission which were initially not approved or which were changes are considered in this decision. This rule grants conditional approval of the Kentucky permanent regulatory program.

A new Part 917 is being added to 30 CFR Chapter VII to implement this decision.

**EFFECTIVE DATE:** This conditional approval is effective May 18, 1982. This conditional approval will terminate as specified in 30 CFR 917.11 unless the deficiencies identified below have been corrected in accordance with the dates specified in 30 CFR 917.11.

**ADDRESSES:** See "Supplementary Information" for addresses where copies of the Kentucky program and administrative record on the Kentucky program are available.

**FOR FURTHER INFORMATION CONTACT:** Mr. Arthur Abbs, Chief, Division of State Program Assistance, Program Operations and Inspection, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, South Building, 1951 Constitution Avenue NW., Washington, D.C. 20240. Telephone: (202) 343–5351.

**SUPPLEMENTARY INFORMATION:**

*Availability of Copies.*

Copies of the Kentucky program and the administrative record on the Kentucky program are available for public inspection and copying during regular business hours at:

Administrative Record Room, Office of Surface Mining, Room 5315, 1100 L Street NW., Washington, D.C. 20240. Telephone: (202) 343–7896

Administrative Record Room, Office of Surface Mining, Region II, 530 South Gay Street SW., Suite 500, Knoxville, TN 37902

Bureau of Surface Mining, Reclamation and Enforcement, Capital Plaza Tower, Sixth Floor, Frankfort, KY 40601

Bureau of Surface Mining, Reclamation and Enforcement, Old TB Facility, Laffoon Street, Madisonville, KY 42431

Bureau of Surface Mining, Reclamation and Enforcement, 1632 East Cumberland Avenue, Middlesboro, KY 40965

Bureau of Surface Mining, Reclamation and Enforcement, Howell Building, Route 2, Box 500, Jackson, KY 41339

Bureau of Surface Mining, Reclamation and Enforcement, 431 South Lake Drive, Prestonburg, KY 41653

Bureau of Surface Mining, Reclamation and Enforcement, 165 South Mayo Trail, Pikeville, KY 41051

Bureau of Surface Mining, Reclamation and Enforcement, KY 80, Reclamation Building, London, KY 40601

Bureau of Surface Mining, Reclamation and Enforcement, 620 West Main Street, Grayson, KY 41143

*Background*

The general background on the permanent program, the program approval process, and the Kentucky program submission were discussed in the **Federal Register**, October 22, 1980 (45 FR 69940–69942). Subsequent to that **Federal Register** notice, amendments to the federal regulations were published December 12, 1980 (45 FR 82084–83100); July 17, 1981 (46 FR 37233); September 29, 1981 (46 FR 47720), October 8, 1981 (46 FR 50018–50019); October 28, 1981 (46 FR 53376) and December 7, 1981 (46 FR 59934–59936). An interpretive rule was published November 7, 1980 (45 FR 73945–73946). Additional regulations were suspended pending further rulemaking August 19, 1981 (46 FR 42063).

Also, in the October 22, 1980 **Federal Register** notice, the Secretary announced his partial approval and partial disapproval of the Kentucky program. The rules and legislative provisions in the Commonwealth's initial submission were approved with the exceptions noted under the heading "SECRETARY'S DECISION", October 22, 1980 (45 FR 69964–69970).

*Background on the Kentucky Resubmission*

In accordance with the procedures set forth in 30 CFR 732.13(f), the Commonwealth of Kentucky originally had 60 days from the date of publication of the Secretary's partial approval decision on October 22, 1980, to resubmit a revised program for consideration. On October 31, 1980, the Kentucky Circuit Court for Martin County enjoined the Kentucky Department for Natural Resources and Environmental Protection (DNREP) from submitting or resubmitting to the Office of Surface Mining (OSM) the Kentucky Permanent State Program. On October 31, 1981, acting upon a motion by Kentucky the Court terminated the suspension. The State submitted its revised program for consideration on December 30, 1981. Announcement of Kentucky's resubmission was made in newspapers of general circulation within the Commonwealth of Kentucky and published in the **Federal Register** on January 7, 1982 (47 FR 820–822). That **Federal Register** notice also announced a public comment period extending to February 8, 1982 and a public hearing which was held on January 26, 1982, in Lexington, Kentucky. Kentucky submitted modifications to the resubmission on February 22 and a public comment period was opened on these modifications from February 24 through March 10, 1982.

Public disclosure of comments by federal agencies was made on April 12, 1982 (47 FR 15605–15606). The Administrator of the Environmental Protection Agency transmitted her written concurrence on the Kentucky program.

The Regional Director completed his program review on April 1, 1982, and forwarded the public hearing transcripts, written presentations, and copies of all comments to the Director together with a recommendation that the program be conditionally approved.

The Director recommended to the Secretary that the Kentucky program be conditionally approved.

The statement of the basis and purpose for the Secretary's decision to conditionally approve Kentucky's program consists of this notice and the October 22, 1980 **Federal Register** notice announcing the Secretary's initial decision. The Kentucky program consists of the formal submission of February 29, 1980, (Administrative Record No. Ky–61–A), as amended on June 12, 1980, May 14, 1980, July 18, 1980,

July 22, 1980, July 28, 1980 and December 30, 1981 and February 22, 1982 (Administrative Record Nos. Ky–163, 225, 238, 262, 413 and 438).

Throughout the remainder of this notice, "Kentucky program" or "Kentucky submission" is used to mean the documents cited above together with those parts of the initial submission partially approved on October 22, 1980. The term "resubmission" only refers to those portions of the Kentucky program resubmitted on December 30, 1981 (Administrative Record Ky–413), as modified on February 22, 1982. The title, "Response to October 1980 Findings" refers to that portion of the program resubmission of December 30, 1981, in which DNREP addressed the initial Findings on the program submission. References to "Explanations for Recent Revisions" means that portion of the program resubmission of December 30, 1981, in which DNREP addressed substantive changes to regulations which do not relate to a previous Finding by the Secretary. Citations to KRS and KAR are the Kentucky Revised Statutes and the Kentucky Administrative Rules, respectively.

The Secretary's Findings below are organized to follow the order set forth in section 503 of SMCRA and 30 CFR 732.15, respectively. These sections specify the findings which the Secretary must make before he may approve a regulatory program. When the Secretary announced his initial decision on the Kentucky program, he included with the analysis his findings on the program provisions. The resolution of the previous findings which requested action from the State are addressed within the new findings. Previous findings such as 1.1 (45 FR 69942) and 13.13 (45 FR 69949) which were positive in nature and did not require further action are not rediscussed in this decision. Where appropriate, the reader is referred to specific findings in the October 22, 1980, Federal Register notice for a complete discussion of the issues.

**Secretary's Findings**

*Section 503(a)*

In accordance with section 503(a) of SMCRA the Secretary finds that Kentucky has the capability to carry out the provisions of SMCRA. Findings made in accordance with Section 503(a) of SMCRA are set forth in Findings 1 through 7 below:

*Finding 1*

The Secretary finds that Kentucky has laws which provide, except as noted in the findings below, for the regulation of surface coal mining and reclamation operations on non-Indian and non-federal lands in Kentucky in accordance with SMCRA. The issues underlying this finding are analyzed as follows:

1.1 Previously (Finding 1.2(e) October 22, 1980, Federal Register, 45 FR 69944), the Secretary could find no apparent Kentucky counterpart to Section 520(e) of SMCRA, the savings clause. However, the Secretary is now satisfied that Kentucky's response, to the original finding, in the form of an opinion by the General Counsel of DNREP, has adequately addressed the problem. (See "Response to October 1980 Findings", Administrative Record KY–413.) The addition of a savings clause comparable to Section 520(e) of SMCRA is unnecessary, since State common law and other statutory remedies remain in effect unless specifically abrogated, and KRS 350.250 contains no such express abrogation.

1.2 KRS 350.062(8) classifies abandoned mine land (AML) projects as government-financed projects; which, by the Secretary's previous interpretation (Finding 1.4, October 22, 1980, Federal Register 45 FR 69944), would categorically exempt the projects from environmental performance standards. The amendments to KRS 350.010(1) and 350.062(8) made by the 1980 General Assembly and interpreted by the General Counsel, according to the Kentucky response to this finding (see "Response to October 1980 Findings", Administrative Record KY–413), are in accordance with SMCRA Section 101 *et seq.* and the federal regulations. It is understood that the statutory provisions as amended and interpreted exempt from the performance standards only the coal extracted as an incidental part of AML reclamation projects.

1.3 As discussed in Finding 1.2 of the October 22, 1980, Federal Register notice (45 FR 69943), the Secretary is unable to find KRS 350.250, Citizen Suit, to be consistent with the requirements of SMCRA for the following reasons:

1.3(a) As discussed in Finding 1.2(a) of the October 22, 1980, Federal Register (45 FR 69943), KRS 350.250 is not in accordance with section 520(a) of SMCRA because the Kentucky language creates a right of action only for "any citizen of the Commonwealth" whereas SMCRA creates a right of action for "any person having an interest which is or may be adversely affected."

In the program resubmission Kentucky submitted no new material but requested that the Secretary reconsider the legal opinion submitted by the General Counsel of DNREP prior to the initial decision. This legal opinion and the concerns with it are summarized in the October 22, 1980 Federal Register (45 FR 69943) and are not repeated here. The Secretary has reviewed the original information and finds no basis to reverse the initial decision.

As stated in the initial decision, the Secretary believes that the language, "Any citizen of this Commonwealth having knowledge * * *" is broader than that required by Section 520 of SMCRA in that it does not require, "an interest which is or may be adversely affected," but it is narrower in excluding citizens of other states, foreign corporations, aliens, and possibly even domestic corporations. Therefore, the Secretary finds that the latter feature renders KRS 350.250 not in accordance with SMCRA.

1.3(b) On October 22, 1980 (45 FR 69943) the Secretary determined in finding 1.2(c) that KRS 350.250(3) was not in accordance with section 520 of SMCRA. Kentucky's statute provides that any person who is or may be adversely affected by a violation of the regulatory program may bring a "civil action" in State Circuit Court. Section 520 of SMCRA creates two separate and distinct causes of action, one to compel compliance and one for money damages, making it possible to obtain an injunction and monetary damages in a single legal action. After an analysis of Kentucky law, the Secretary has concluded that Kentucky's statute does not create two separate causes of action, but merely incorporates the common law which allows equitable or injunctive relief only in "extraordinary" circumstances when monetary damages are found to be inadequate.

The Kentucky Rules of Civil Procedure, at Rule 2 (CR2), state that, "There shall be one form of action to be known as 'civil action.' " On its face, this rule seems to support the State's argument that by using the term "civil action" in its statute, all types of causes of action available at common law and their related remedies are made available. The case law construing this rule, however, is otherwise. In *Johnson* v. *Holbrook*, 302 SW2d 608, the Court stated, "Although one form of action is provided by CR2, this merely signifies that legal and equitable claims or defenses may be merged in a pleading * * * [t]his Rule * * * while permitting legal and equitable claims or defenses to be fused for purely procedural purposes, did not intend to abolish, and certainly [was] not intended to abolish, the time-honored distinction between remedies applicable to a legal cause of action or to one sounding in equity." 302 SW2d at 610.

One of the distinctions between the legal remedy of damages and the

equitable remedy of injunction is that an injunction is considered an extraordinary remedy which will not be granted unless remedies at law are unavailable or inadequate. *See Travis* v. *Pennyrile Rule Electric Cooperative*, 399 F.2d 726; *Shotz* v. *American Surety Co. of New York*, 295 SW2d 809; and *Collins* v. *Commonwealth*, 324 SW2d 406. In *Collins*, 324 SW2d at pages 408, 409, the Court cites 28 Am. Jur. 233, quoting, " 'The applicable rule, reaffirmed in almost every case dealing with the matter, is that *in the absence of some positive provision of the law to the contrary*, an injunction will not be granted in cases where there is a choice between the ordinary processes of law and the extraordinary remedy by injunctions, and the remedy at law is sufficient to furnish the injured party the full relief to which he is entitled in the circumstances.' " (Emphasis added.)

In its present form, Kentucky's statute does not contain any positive provision which would change this rule of law and allow a court to grant a plaintiff both monetary damages for his present injury and injunctive relief to prevent future injury. Section 520 of SMCRA changes the common law and creates two separate causes of action which allow a plaintiff to obtain full relief in one proceeding. A recent decision of the U.S. Supreme Court, *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 49 L.W. 4783, June 25, 1981, supports the proposition that specific causes of action and remedies must be provided for by express statutory language to be effective.

For the reasons stated above, the Secretary finds that § 350.250(3) is not in accordance with SMCRA.

Therefore, approval of the Kentucky program is conditioned upon a statutory amendment of KRS 350.250(3) providing that persons who bring suit in state circuit court due to a violation of the state surface mining regulatory program may recover both monetary damages and obtain injunctive relief in a single action.

1.3(c) Finding 1.2(d) of the October 22, 1980 **Federal Register** (45 FR 69949) determined that no Kentucky counterpart to section 520(c)(2), SMCRA, existed relative to intervention by both the Secretary of Interior and DNREP as a matter of right in citizen suits and that, as such, the Kentucky program was deficient. The Secretary has, upon further legal evaluation and reconsideration, determined that a reading of section 520(c)(2) of SMCRA does not support the proposition that a State program must provide for both intervention by the Secretary of the Interior and the state regulatory authority. A State program must allow for the intervention of one or the other, but not both. The Secretarial decision in Colorado program approved the Colorado statute which authorized intervention by the state regulatory authority but not by the Secretary of the Interior (December 15, 1980, 45 FR 82190).

However, Kentucky has not submitted any material establishing that DNREP has the right of intervention. The legal opinion furnished by the State relative to the original finding states that the State has on objection to intervention as a matter of right being given to DNREP. (See Response to October 1980 Findings, Finding 1.2(d), Administrative Record Ky–413.) The document does not address whether DNREP has such a right without a modification to the statute. Therefore, program approval is conditioned upon the enactment of statutory provisions in accordance with SMCRA section 520(c) relative to intervention by the regulatory authority or the submission of a legal opinion which demonstrates that DNREP has such right of intervention.

1.4 Section 526(c) of SMCRA sets forth procedural requirements and substantive criteria for the granting of temporary relief from any order or decision of the Secretary, pending judicial review. The substantive criteria are: (a) that the moving party demonstrate a substantial likelihood that he will prevail on the merits of the final determination of the proceeding; and (b) that temporary relief will not adversely affect the public health or safety or cause significant, imminent environmental harm.

KRS 350.032(2), on the other hand, incorporates by implication the common law standards for injunctive relief applicable in most State courts: (a) the moving party demonstrates that he will suffer immediate and irreparable injury unless temporary relief is granted; (b) the various equities, including harm to the moving party, possible detriment to the public interest, and harm to the opposing party, favor the granting of temporary relief; and (c) the moving party has raised a "substantial question" as to the merits of the dispute. *See Maupin* v. *Stansbury*, 575 SW2d 695 (Ky. Ct. of App. 1978).

The October 22, 1980, Secretarial Finding (1.3) concluded that KRS 350.032(2) is not in accordance with section 526(c) of SMCRA because neither of the substantive federal criteria is required to be met under state law. The Secretary finds no reason to reverse this decision. Therefore, approval of Kentucky's State Program is conditioned on the State's adoption of an amendment to KRS 350.032(2) that incorporates temporary relief criteria that are in accordance with section 526(c) of SMCRA.

*Finding 2*

The Secretary finds that Kentucky has laws which provide sanctions for violations of state laws, regulations or conditions of permits which meet the minimum requirement of SMCRA. The issues underlying this finding are analyzed as follows:

2.1 The Secretary was previously concerned (Finding 2.1, 45 FR 69944) that Kentucky's use of the term "order of suspension" in KRS 350.130(1) is ambiguous and might have an adverse effect on Kentucky's authority to issue summary cessation orders under KRS 350.130 (1) and (4). Kentucky states that the use of this term is superfluous and is the result of language contained in the present statute's predecessor. Kentucky states that DNREP intends to propose legislation eliminating the use of the term "order of suspension." (See "Response to October 1980 Findings", Administrative Record Ky–413.)

Kentucky does not interpret KRS 350.130(1) to require a hearing prior to the issuance of a summary cessation order. Therefore the Secretary finds the concerns in Finding 2.1 of the October 22, 1980, **Federal Register** resolved.

2.2 The Secretary previously requested further information relative to judicial practice in order to determine whether KRS 350.032(2) is consistent with Section 526(b) of SMCRA in regard to a trial *de novo* (Finding 2.2, October 22, 1980, **Federal Register**, 45 FR 69944).

Kentucky's response satisfactorily allays all previous concerns (see "Response to October 1980 Findings", Administrative Record KY–413). Kentucky has submitted material demonstrating that its highest court has consistently held that, where there is an opportunity to be heard before the administrative agency and the statute does not specifically authorize *de novo* review, then *de novo* review is not available. The State cites *Barner v. Turner*, 280 SW 2d 185 (KY 1955); *Department of Economic Security v. Mills*, 391 SW 2d 363 (KY 1965); *Trimble County Board of Supervisors v. Mullikin*, 438 SW 2d 524 (KY 1968); *Department of Public Saftey v. Thomas*, 467 SW 2d 335 (KY 1971).

KRS 350.032 expressly states that an action will be remanded to the administrative forum if the court determines that additional evidence need be taken. Further, a copy of the record must be filed with the appeal,

and no arguments may be raised on an appeal which were not raised at the hearing before the agency. Clearly, then, Kentucky law not only does not specifically authorize *de novo* review; in fact, State law prohibits it. The Secretary, therefore, finds the Kentucky Program provision is in accordance with SMCRA section 526(b).

2.3 As discussed in Finding 2.4 of the October 22, 1980, **Federal Register** (45 FR 69944), the Secretary determined that KRS 350.028(4) was ambiguous and arguably in conflict with SMCRA because it was possible to interpret the Kentucky law so that only a civil penalty would be the proper sanction for a pattern of violations. The Secretary found that an amendment was required unless the State submitted a legal opinion demonstrating that this section is consistent with Sections 521(a)(4) and 518 of SMCRA. A review of this section in its final form as codified shows a material change in the text which renders this section unambiguous. The Secretary, therefore, finds the previous concerns resolved.

2.4 As discussed in Finding 2.5 of the October 22, 1980, **Federal Register** (45 FR 69944–69945), KRS 350.990(1) was found to be inconsistent with Section 518(h) of the Act and 30 CFR 845.15(b) as KRS 350.990(1) fails to provide for a mandatory $750 per day minimum penalty for the failure to comply with the requirements contained in the Kentucky equivalent of imminent danger cessation orders. KRS 350.990(1) provides for the minimum $750 per day penalty for the failure to abate a violation set forth in a notice of non-compliance (Kentucky's equivalent of a notice of violation). However, section 518(h) of the Act provides that the $750 minimum daily penalty for failure to abate a violation includes both a cessation order for imminent harm and a notice of violation.

Kentucky has revised its regulations regarding enforcement actions. The resulting system of citation of violations is different than the Federal system but is no less stringent than the Federal system and will result in the minimum daily fine being imposed whenever any violation is not abated within the proper time period. (See "Response to October 1980 Findings", Administrative Record Ky–413.)

Under the federal system, upon discovery of a violation, an inspector issues either a notice of violation or a cessation order which sets forth the period of abatement and required remedial action. If the violation is not corrected within the allowed period, section 518(h) of SMCRA requires an assessment of a fine of no less than $750 for each day the violation continue. Kentucky will always issue a notice of non-compliance and an order for remedial measures if a violation is discovered (405 KAR 12:020E, section 2(1) and (2)). If a violation is detected which causes or could cause an imminent harm, an order for cessation and immediate compliance will also be issued immediately by a Kentucky inspector (405 KAR 12:020E, section 3(1)(b) and (2)(b)). Required remedial actions will be set forth in both the order for cessation and immediate compliance and the notice of non-compliance and order for remedial measures.

The failure to abate an order for cessation and immediate compliance will also constitute a failure to abate a notice of non-compliance. The mandatory daily penalty provisions of KRS 350.990(1) are thus triggered providing that the failure to abate *either* a notice of non-compliance or an order for cessation and immediate compliance requires assessment of the $750 per day penalty. Thus, Kentucky's regulatory program provides for a minimum daily penalty for the failure to abate any violation issued.

KRS 350.990(1) also provides for the issuance of a maximum penalty of $5,000 per day for an order of cessation and immediate compliance issued when an imminent harm is detected (KRS 350.130(4)). 405 KAR 7:090E, section 10(1) makes it clear that this penalty is to be assessed in addition to the mandatory daily penalty assessed for failing to abate a violation cited in an order of cessation and a notice of non-compliance.

The Secretary expressed concern in Finding 2.5 that an order requiring the cessation of relevant operations in an imminent harm situation would not be issued promptly upon discovery of the imminent harm. Kentucky now describes such orders as "orders for cessation and immediate compliance" rather than "orders to abate and alleviate." 405 KAR 12:020E, section 3(b), as revised, provides that the authorized representative shall *immediately* issue an order for cessation and immediate compliance upon finding an imminent harm situation. Therefore, Kentucky has resolved the issues raised by the Secretary in the October 22, 1980 Finding by revising its regulations concerning issuance of citations.

2.5 As discussed in Finding 2.6 of the October 22, 1980, **Federal Register** (45 FR 69945), the Secretary was concerned that the language of KRS 350.465(3)(h) would unacceptably permit the regulatory authority to substitute penalties other than those provided for by KRS 350.990. The Secretary was especially concerned that KRS 350.465(3)(h) not be interpreted so as to eliminate, or provide exceptions to, the mandatory daily penalty for failing to abate a violation cited in a notice of non-compliance or in an imminent harm cessation order.

Kentucky regulations provide that mandatory daily penalties *shall* be imposed for the failure to abate a violation cited in a notice of non-compliance or order of cessation (405 KAR 7:090E, Section 10). Kentucky views this regulation as limiting the regulatory authority's discretion. (See "Response to October 1980 Findings", Administrative Record Ky–413.) In addition, KRS 350.465(4) provides that, "the Department shall not promulgate regulations which are inconsistent with (the Act)." Kentucky interprets this statute as prohibiting the exercise of Departmental discretion so that the mandatory daily penalties required by section 518(h) cannot be avoided.

The Secretary accepts Kentucky's assurances that KRS 350.465(3)(h) will be interpreted to require the mandatory imposition of penalties in accordance with the requirements of section 518(h) of SMCRA, and finds KRS 350.465 in accordance with the Federal requirements.

*Finding 3*

The Secretary finds that the State regulatory authority will have sufficient administrative and technical personnel and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of SMCRA. Refer to Finding 30 for further discussion.

*Finding 4*

The Secretary finds that the State has laws which provide for effective implementation, maintenance and enforcement of a permit system meeting the requirements of SMCRA. Discussion of significant issues raised during the review of Kentucky statutes in relation to permitting follows:

4.1 As discussed in Finding 4.2 of the October 22, 1980, **Federal Register** (45 FR 69945), the Secretary was concerned that the language "where advisable" in KRS 350.440(1) would allow spoil disposal by end-dumping in situations prohibited under SMCRA. Kentucky has responded by pointing out that its regulations which implement KRS 350.440(1) are fully consistent with federal regulations and that the statutory language is necessary so that alternative spoil disposal methods, such

as durable rock fills, may be provided for by regulation. (See "Response to October 1980 Findings", Administrative Record KY–413.) The Secretary's previous concern is, therefore, resolved.

4.2 This finding pertains to permit denial provisions in KRS 350.085(5), which is the counterpart to Section 522(e)(1) of SMCRA (Congressionally designated areas). As discussed in Finding 4.4 of the October 22, 1980, Federal Register (45 FR 69946), the Kentucky provision contains the qualifying term "privately owned lands." The previous finding expressed concern that this term may not include state and municipally-owned lands.

Kentucky responds that municipal and state owned lands are included in the term "privately owned lands", citing the rationale in *National League of Cities v. Usery*, 95 S.Ct. 2465 (1976) and *United States v. California*, 297 U.S. 175 (1936). Kentucky maintains that a town or state holding lands within one of the described areas and permitting it to be surface mined would not be acting in a governmental capacity but rather in a proprietary one. Given this fact, that the municipality or State would be engaged in interstate commerce and not protected by the Tenth Amendment, and would be subject to the prohibitions in SMCRA. In view of the Kentucky statute's intent to be compatible with SMCRA, Kentucky believes that it is reasonable to interpret the phrase "privately owned lands" as including state and municipally owned land. (See "Response to October 1980 Findings", Administrative Record KY–413.)

The Secretary concludes that the Kentucky statutory provision is acceptable. Kentucky's rationale is that even if the state or municipality conducted surface mining or allowed surface mining to be conducted on its lands within these areas they would not be acting in a governmental capacity and that such mining would, therefore, be prohibited in the Kentucky statute. Furthermore, even if the state should authorize surface mining operations on state or municipal lands in one of the designated areas, the federal provision could and would make such operations illegal. Given the intent of the Kentucky statute to protect the designated areas and, under federal law, the illegal nature of any operations within these areas, no sound basis exists upon which to conclude that the Kentucky statute would jeopardize the protected areas. The language of the Kentucky statute is, therefore, in accordance with the language of the federal statute in this respect.

4.3 As discussed in Finding 4.5 of the October 22, 1980, Federal Register (45 FR 69946), the Secretary was concerned that KRS 350.060(15) would allow surface areas overlying underground mines to be categorically exempted from all bonding requirements. KRS 305.060(16) (formerly 350.060(15)) is acceptable as interpreted by the General Counsel in the Department's response to Finding 4.5. It is the Department's legal opinion that Section 350.060(16) "does not categorically exempt all surface areas overlying underground mines from bonding requirements, but rather it prohibits the *per se* inclusion of all areas overlying underground mines into the bonding requirements without any showing of either surface disturbance or surface impact from the underground workings." (See "Response to October 1980 Findings" Administrative Record Ky–413.) Kentucky's regulations provide for bonding of areas to be affected by surface operations and facilities, at 405 KAR 10:010E section 2. It is not necessary that subsidence control measures be bonded. (See the suspension of 30 CFR 801.16(a), published December 7, 1981 at 46 FR 59934.) Kentucky has adequately demonstrated that KRS 350.060(16) will permit bonding to the extent required by section 509 of SMCRA and the federal regulations.

4.4 As discussed in Finding 4.6 of the October 22, 1980, Federal Register (45 FR 69946), the Secretary was previously concerned that the definition of "overburden" in KRS 350.010 does not contain the language "excluding topsoil" as does 30 CFR 701.5. This finding has been resolved by a policy statement from DNREP. Kentucky has stated that "as a matter of policy, it is the Department's intention to use the definition of 'overburden' contained in 405 KAR 7:020. (See "Response to October 1980 Findings", Administrative Record Ky–413.) The definition found in 405 KAR 7:020 contains the required phrase "excluding topsoil".

*Finding 5*

The Secretary finds that the State has adequate processes for the designation of lands unsuitable for surface coal mining. Significant issues discovered during the review of Kentucky regulations corresponding to Federal regulations implementing section 522 of SMCRA are discussed under Finding 21, below.

*Finding 6*

The Secretary finds that the State has an adequate process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with all of the Federal and State permit processes applicable to the proposed operations. Significant issues discovered during the review of Kentucky regulations corresponding to the Federal regulations on permitting are discussed under Finding 14 below.

*Finding 7*

The Secretary finds that the State has rules and regulations which, except for minor deficiencies discussed in the Findings, are no less effective than 30 CFR Chapter VII. Significant issues discovered during the review of the State regulations, which were enacted under the emergency powers of the Governor, are explained under Findings 12 through 29, below.

**Section 503(b) of SMCRA Findings**

As required by section 503(b)(1)(3) of SMCRA, and 30 CFR 732.11–732.13, the Secretary has, through OSM, fulfilled the requirements set forth in Findings 8 through 10 below:

*Finding 8*

The Secretary has 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 pertinent to the proposed Kentucky program.

*Finding 9*

The Secretary has obtained the written concurrence of the Administrator of the Environmental Protection Agency with respect to those aspects of the Kentucky program which relate to air or water quality standards promulgated under the authority of the Clean Water Act, as amended (33 U.S.C. 1151–1175), and the Clean Air Act as amended (42 U.S.C. 7401 *et seq.*).

*Finding 10*

The Secretary has held public review meetings in Madisonville, Kentucky, on April 16, 1980, and Pikeville, Kentucky, on April 17, 1980, to discuss the completeness of the Kentucky submission; held public hearings on the submission at Madisonville, Kentucky on July 22, 1980, and at Hazard, Kentucky on July 23, 1980, and held a public hearing on the resubmission at Lexington, Kentucky on January 26, 1982.

*Finding 11*

In accordance with section 503(b)(4) of SMCRA, the Secretary finds that Kentucky has, except for minor deficiencies discussed in this decision, the legal authority and sufficient qualified personnel to enforce the

environmental protection standards in accordance with SMCRA.

*30 CFR 732.15 Findings*

In accordance with 30 CFR 732.15, the Secretary makes Findings 12 through 30 below on the basis of information in the Kentucky program submission, resubmission, public comments and testimony, written presentation at public hearings and other relevant information within the administrative record.

*Finding 12*

In accordance with 30 CFR 732.15(a), the Secretary finds that the program provides for the State to carry out the provisions and meet the purposes of SMCRA. The State legislative authority is discussed in Findings 1, 2 and 4. State regulations and narrative descriptions are discussed in Findings 12 through 30. Issues which are general in nature and do not apply to individual program sections only are analyzed as follows:

12.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several State regulations to be substantially identical to their Federal counterparts. For this reason the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** are no longer issues: 12.2(c), 12.2(d), 12.2(e), 12.2(f), 12.2(g) and 12.2(h).

12.2 In the initial decision (Finding 12.1, October 22, 1980, **Federal Register**, 45 FR 69946), the Secretary was concerned that 405 KAR 7:030E, section 2 was inconsistent with 30 CFR 700.11(b) because the State's use of the words "disturbed by" rather than "affected by" might exempt areas above underground mines in determining the total area of the mine for the purposes of the two-acre exemption. Kentucky has deleted section 2 and has revised 405 KAR 7:030E section 1(1) to exempt operations of two acres or less "to which Pub. L. 95–87 does not apply." This will allow Kentucky to react immediately to any future OSM rule or policy changes which interpret SMCRA with regard to what portions of an underground mine must be included in the 2 acre mine size determination. The revised regulation is no less effective than Federal requirements.

12.3 In Finding 12.2(j) of the October 22, 1980, **Federal Register** (45 FR 69948), the Secretary pointed out that the Kentucky definition of "probable hydrologic consequences" does not include aquatic habitat as a consideration. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky correctly states that the Federal definition of "probable hydrologic consequences" is found in the regulations dealing with the small operator assistance program (SOAP) and is applicable only to that part. Kentucky further states that its definition is applicable to all operators, and the elimination of aquatic habitat makes the definition more compatible with the Federal definitions of hydrologic regime, hydrologic balance and probable cumulative impacts. (The Federal District Court in *In re: Permanent Surface Mining Regulation Ltigation*, No. 79–1144, U.S.D.C.D.C., held that section 507 of SMCRA does not authorize requesting a fish and wildlife plan of which aquatic habitat is a part.) The Secretary finds the Kentucky rationale persuasive and finds the State's definition of "probable hydrologic consequences" no less effective than the Federal regulations.

12.4 The Secretary notes that Kentucky has deleted references to physical characteristics from its definitions of "toxic-forming materials" (405 KAR 7:020E, section 1(123)) and "toxic mine drainage" (405 KAR 7:020E, section 1(124)). Although the Federal definitions at 30 CFR 701.5 do contain references to physical conditions, the Secretary agrees with Kentucky's rationale provided for the deletion expressed in the "Explanation for Recent Revisions" (Administrative Record KY–413). Kentucky has pointed out that the customary use of the term "toxic" refers to chemical and not physical characteristics. Further harmful physical characteristics such as combustibility or excessive sediments are regulated under the performance standards referring specifically to combustible materials (405 KAR 16:190E section 3) or the amount of solids to be discharged into streams (405 KAR 16:070E section 1.) Therefore, the Secretary finds the State definitions no less effective than the Federal definitions.

*Finding 13*

In accordance with 30 CFR 732.15(b)(1), the Secretary finds that the Kentucky program submission demonstrates, except as noted below, that the Kentucky DNREP can implement, administer and enforce all applicable requirements of Subchapter K of 30 CFR Chapter VII under existing authority in Kentucky laws, regulations and descriptive elements of the program submission. Kentucky incorporated provisions of 30 CFR Chapter VII, Subchapter K in 405 KAR Chapters 16 and 18. Kentucky's description of its system to administer and enforce the performance standards, found in the narrative entitled, "State section 731.14(g)(4–7) and (15)" is acceptable. Issues related to the State legislative authority are discussed under Findings 1, 2 and 4 above. Significant issues discovered during the review of Kentucky regulations corresponding to Subchapter K of 30 CFR Chapter VII are as follows:

13.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several State regulations to be substantially identical to their Federal counterparts. For this reason the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** are no longer issues: 13.1, 13.2, 13.3, 13.4, 13.5, 13.7, 13.9, 13.10, 13.11, 13.12, 13.14, 13.16, 13.18, 13.20, 13.25, 13.29, 13.32, 13.37, 13.38, 13.39, 13.41, 13.42, 13.43 and 13.51.

13.2 As discussed in Finding 13.6 of the October 22, 1980, **Federal Register** (45 FR 69948), 405 KAR 16:110E, section 1(2) and 18:110E, section 1(2) were previously disapproved because they were not consistent with 30 CFR 816.52 and 817.52 as the State regulations did not require mineralogical and chemical analysis of aquifer, overburden and spoil as a part of monitoring. Kentucky has not revised the regulations in question but has stated that the requirement for anlysis of aquifer, overburden, and spoil has been treated as geologic data required with the permit application under 405 KAR 8:030E and 8:040E rather than as a monitoring requirement (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary believes Kentucky is technically correct and, therefore, finds 405 KAR 16:110E, section 1(2) and 18:110E, section 1(2) no less effective than the Federal regulations.

13.3 Finding 13.8 of the October 22, 1980, **Federal Register** (45 FR 69948), identified 405 KAR 16:060, section 11 and 18:060, section 9 less stringent than 30 CFR 816.57(a) because the State regulation appeared to allow for stream relocation without applying all relevant standards. Upon reviewing the questioned Kentucky regulations, the Secretary finds that they are substantially identical to the corresponding Federal regulations. The Secretary surmises that the original concern was caused by a difference in the structure between the State and Federal regulations. However, the Secretary finds that all Federal criteria for stream relocation are found within 405 KAR 16:060E section 11 and 18:060E section 9 and that these sections are no less effective than the Federal requirements.

13.4 As discussed in Finding 13.15 of the October 22, 1980, Federal Register (45 FR 69949), 405 KAR 16:120E, section 4(9) and 18:120E, section 3(9) were identified as less stringent than 30 CFR 816.65(i) because the State regulations allowed for measuring the vector sum of the three peak particle velocities in three mutually perpendicular directions in lieu of the largest of the three velocities. Kentucky has not revised the regulation in question, but has stated that, mathematically, the magnitude of the vector sum of three mutually perpendicular vectors is always greater than the magnitude of any one of those vectors. If the permittee chooses to use vector sum monitors, then the maximum peak particle velocity recorded will be conservative (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary believes Kentucky is technically correct and, therefore, finds 405 KAR 16:120, section 4(9) and 18:120E, section 3(9) no less effective than Federal regulations.

13.5 In Finding 13.19 of the October 22, 1980, Federal Register (45 FR 69950), the Secretary found 405 KAR 16:130E, Section 1(11) and 18:130E, section 1(11) less stringent than 30 CFR 816.71(k) and 817.71(k)(3), respectively, because the Kentucky regulations allowed coal processing wastes to be disposed of in head-of-hollow or valley fills. However, upon reviewing the regulations in question, the Secretary finds the Kentucky regulations no less effective than federal regulations. 405 KAR 16:130E, section 1(11) and 18:130E, section 1(11) are approved as submitted, as the previous finding was in error because the federal regulations do not prohibit disposal of coal processing waste in head-of-hollow or valley fills.

13.6 As discussed in Finding 13.21 of the October 22, 1980, Federal Register (45 FR 69950), the Secretary previously found 405 KAR 16:130E and 18:130E section 1(7) less stringent than 30 CFR 816.71(g) and 817.71(g) because the Kentucky regulations prohibited "significant" depressions or impoundments on a fill whereas the federal regulations prohibit any depressions or impoundments. Kentucky has revised its regulations to provide, "that no impoundments shall be allowed on the completed fill and no depressions shall be allowed on the completed fill unless they are determined by the Department to have no potential adverse effect on the stability of the fill and to have no potential for interference with the approved post-mining land use." Kentucky has stated that it is the State's intent to allow minute depressions caused by natural settling (see "Response to October 1980 Findings", Administrative Record Ky–413). The Secretary believes the revised language of 405 KAR 16:130E and 18:130E, section 1(7) is no less effective than the federal requirements.

13.7 In Finding 13.22 of the October 22, 1980, Federal Register (45 FR 69951), the Secretary found 405 KAR 16:130E and 18:130E, section 2(2)(c) less stringent than 30 CFR 816.72(b)(3) and 817.72(b)(3) because the State regulations allowed for smaller drainage systems on fills than are allowed by federal regulations. Kentucky has pointed out that its regulations do have the same minimum size requirements except where the applicant demonstrates, through a detailed engineering analysis, that a smaller drain would be adequate (see "Response to October 1980 Findings", Administrative Record Ky–413). The Secretary believes there are situations where a smaller drain size would be adequate and agrees that the State regulatory authority should have the discretion to approve variations where no environmental harm would result. Therefore, the Secretary finds the state provisions no less effective than the federal regulations.

13.8 As discussed in Finding 13.23 of the October 22, 1980, Federal Register (45 FR 69950), 405 KAR 16:130E, section 2(3) and 18:130, section 2(3) were found inconsistent with 30 CFR 816.72(c) and 817.72(c) because the State allowed for greater than 4 foot lifts of excess spoil in valley fills. The Kentucky regulations also allow for alternate methods of controlled placement. However, the Kentucky regulations allow lifts greater than 4 feet only where an engineering analysis shows that it is appropriate. Further, the State's regulations expressly prohibit end dumping over the outslope of the fill, and Kentucky has assured OSM that no "alternate methods of spoil placement" would be allowed that have not been sanctioned by OSM (see "Response to October 1980 Findings", Administrative Record Ky–413).

The Secretary acknowledges that there are circumstances where an engineering analysis would show that lifts of greater than 4 feet would provide sufficient compaction for a safe fill. Since the State has agreed to limit alternate methods of placement to those approved by OSM, the Secretary finds that the state regulations are no less effective than the federal requirements.

13.9 As discussed in Finding 13.24 of the October 22, 1980, Federal Register (45 FR 69950), the Secretary found 405 KAR 16:130 and 18:130, section 4(4)(c) less stringent than 30 CFR 816.74(c)(3) and 817.74(c)(3) because the state regulations failed to require that the internal drainage system for durable rock fills be protected by a properly designed filter system in all cases. In the October 22, 1980, finding, the Secretary recognized that while Kentucky's argument that some rock drains would remain free draining without a filter system was valid, the federal regulations made no exception to the filter requirement. Kentucky argues that its regulations are consistent with the federal requirements in that "there will always be a drainage system and filter as required by 30 CFR 816.74(c), either as a consequence of the nature of the material and method of construction, or by separate construction as required by the Department based upon a case-by-case review of the fill design during the permit review process" (See "Response to October 1980 Findings", Administrative Record KY–413.)

The Secretary believes the state is technically correct and finds 405 KAR 16:130 and 18:130, section 4(4)(c) no less effective than the federal requirements.

13.10 As discussed in Finding 13.26 of the October 22 Federal Register (45 FR 69951), the Secretary previously found 405 KAR 16:190E, section 2(1) inconsistent with 30 CFR 816.102(a) because the state regulation failed to require that final grade not exceed the approximate premining slope and because highwall elimination was limited to only newly created highwalls.

Kentucky has changed language in its regulation regarding the elimination of highwalls to include any highwall that is "adversely physically impacted" in accordance with a decision by the Interior Board of Appeals, *Cedar Coal Company*, IBSMA 79–5. The Secretary finds the change no less effective than the federal regulations as the latter are presently interpreted.

With regard to the issue of final graded slopes not exceeding premining slopes, Kentucky argues that the concept of approximate original contour allows for some flexibility so as to deviate from the premining slope in either direction. The Kentucky term of "approximate the general nature of the premining topography" is, according to the State, consistent with the intent of SMCRA (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary is persuaded by Kentucky's argument and, therefore, finds 405 KAR 16:190E, section 2(1) no less effective than 30 CFR 816.102(a).

13.11 As discussed in Finding 13.27 of the October 22, 1980, Federal Register (45 FR 69950), 405 KAR 16:200E, Section 1 was disapproved because it allowed for a seeding exemption which the

Secretary believed needed further explanation. 405 KAR 16:200E, section 1 has been revised by deleting section 1(2)(a) and adding a new paragraph (c) as follows: "(c) Subject to the approval of the Department, small incidental areas related to the fulfillment of the post-mining land use may be exempted from the revegetation standards where no adverse environmental impact will occur if the exemption is granted." The State offered the example of a salt area where vegetation was trampled by cattle under a grazing post-mining land use (see "Response to October 1980 Findings", Administrative Record KY–413).

The Secretary finds that the type of discretion Kentucky provides for in this language is no less effective than federal requirements. Therefore, 405 KAR 16:200, Section 1 is approved.

13.12 Finding 13.28 of the October 22, 1980, **Federal Register** (45 FR 69951) stated that 405 KAR 16:200E and 18:200E, Section 1 were inconsistent with 30 CFR 816.111(b) and 817.111(b) because, in the case of a cropland postmining land use, the state regulations failed to require that vegetative cover protect against erosion or be of the same seasonal variety. Kentucky has revised the regulations to include consideration of soil erosion. However, Kentucky argues that the successful planting of normally grown crops and normal husbandry practices should fulfill the requirement for soil stabilization if one acknowledges that most crops are not capable of soil stabilization (see "Response to October 1980 Findings", Administrative Record KY–413).

The Secretary agrees that cropland is a viable post-mining land use and that some soil erosion is inherent in agricultural activities. Since Kentucky has included a provision for temporary vegetation where necessary and requires normal husbandry practices, the Secretary finds that the Kentucky rules are now no less effective than the federal requirements.

13.13 As discussed in Finding 13.30 of the October 22, 1980 **Federal Register** (45 FR 69951), 405 KAR 16:200 and 18:200, section 6 were previously found inconsistent with 30 CFR 816.116 and 817.116 because the State allowed for technical standards for ground cover other than those developed by USDA or USDI. The revised regulation allows for the Director of OSM to approve any technical standards developed by the State. Until such time as state technical guides are submtted to and approved by the Director, 405 KAR 16:200E section 6(1) requires that State officials use USDA or USDI guidelines if reference areas are not used. The Secretary, therefore, finds the state regulations no less effective than the federal requirements.

13.14 As discussed in Finding 13.31 of the October 22, 1980, **Federal Register** (45 FR 69951), 405 KAR 16:200E, section 6(2)(b) was previously disapproved because the State added the word "substantially" before "augmented seeding, fertilization * * *" in specifying when the period of extended responsibility under bonding begins. The regulation has not been changed, but the Secretary now believes it is no less effective than 30 CFR 816.116 based on Kentucky's explanation. For further discussion refer to Finding 18.4 which deals more directly with the bond liability period.

13.15 In Finding 13.33 of the October 22, 1980, **Federal Register** (45 FR 69951), the Secretary found that the federal regulations, 30 CFR 816.116(d) and 817.116(d), require that standards to measure success of revegetation be met for five full years, while Kentucky regulations, 405 KAR 16:200E, section 6(4) and 18:200E, section 6(4), require that the standards be met during the last three years of the five-year period of liability.

The Secretary believes that this finding has been resolved. The logic and approach of Kentucky's explanation is correct (see "Response to October 1980 Findings", Administrative Record Ky–413). 30 CFR 816.116(d) was not remanded by Judge Flannery as the result of the litigation challenging the regulations, *In re: Permanent Surface Mining Regulation Litigation*, No. 79–1144, U.S.D.C. D.C. However, § 816.116(b) was remanded and the reason for the remand applies equally to both sections. Kentucky is measuring a five-year period beginning with the initial establishment of vegetation, but is only measuring the on-site results against the standards during the third, fourth, and fifth years. Since vegetation needs some time to become established, it is more important for the vegetation to meet the standards during the last portion of the five-year period. Kentucky's approach is reasonable and effective. The Secretary finds the regulations in question no less effective than the federal counterpart.

13.16 Finding 13.35 of the October 22, 1980, **Federal Register** (45 FR 69951), stated 405 KAR 16:210E and 18:220E, section 2 did not require that the post mining land use be compatible with surrounding areas, and that it make allowances for damages resulting from previous improper management (not specifically provided by the federal regulations, 30 CFR 816.133(b) and 817.133(b)). In the "Response to October 1980 Findings" (Administrative Record Ky–413), Kentucky has explained that 405 KAR 16:210E and 18:220E, section 2 apply only when the approved post-mining land use is the same as the pre-mining land use. This resolves the issue of compatibility with surrounding areas. Kentucky's response also clarifies that the DNREP's interpretation of "irreparable damage" is consistent with the federal regulations. The term has been interpreted by OSM to allow the regulatory authority to consider the "extent and reversibility of damage" (preamble to federal regulations, March 13, 1970, **Federal Register**, 44 FR 15243). The Kentucky regulations in question are found to be no less effective than the federal requirements.

13.17 Finding 13.36 of the October 22, 1980, **Federal Register** (45 FR 69951) questioned 405 KAR 16:010E, section 7 and 18:010E, section 5 (2) and (3) because they do not require that the permittee's notice of cessation of operations beyond 30 days include a statement of environmental monitoring plans and efforts that will continue during the temporary cessation as do federal regulations 30 CFR 816.131(a) and 817.131(a).

In the "Response to October 1980 Findings" (Administrative Record KY–413), DNREP has explained that the inspection generated by the notice will be used to ensure that reclamation is contemporaneous, as required, and that treatment and monitoring facilities will continue to function. The Secretary finds that, based upon the Department's interpretation of the notice provision and its explanation that the notice will generate a field inspection, the provisions in 405 KAR 16:010E, section 7 and 18:010E, section 5(2) are no less effective than the federal requirements.

The second part of the October 22, 1980, finding concerns 405 KAR 16:010E, section 7(2), and section 5(2) of 405 KAR 18:010E, which require only that the operator "prevent unreasonable adverse effects upon the environment." Kentucky has revised these regulations by replacing the above phrase with "comply with all applicable conditions of the permit." These regulations are now no less effective than federal requirements.

13.18 Finding 13.40 of the October 22, 1980, **Federal Register** (45 FR 69952), identified 405 KAR 18:070E, section 1(1)(a) and 18:090E, section 1 as inconsistent with 30 CFR 817.42 and 817.46 because the state regulations failed to properly state the conditions under which drainage does not have to be passed through a sediment pond or

treatment facility. Kentucky revised its regulations so that the only substantive difference between the state and federal regulations is that the state will allow mixed drainages from underground and surface mines to be exempted from treatment whereas the federal regulations do not allow mixed drainages to be exempted. However, the state regulations require the operator to demonstrate that each drainage meets the applicable water quality standards before being mixed. Therefore, the Secretary finds 405 KAR 18:070E, section 1 and 18:090E, section 1 no less effective than the federal requirements.

13.19 Finding 13.44 of the October 22, 1980, Federal Register (45 FR 69952), identified 405 KAR 18:110E, section 1(3) as less stringent than 30 CFR 817.52(a)(3) because the Kentucky regulation did not require that the results of hydrologic tests demonstrate compliance with criteria specified in 30 CFR 817.50. The federal regulation at 30 CFR 817.52(a)(3) refers to § 817.50 which is an error. 30 CFR 817.52(a)(3) addresses ground water monitoring while § 817.50 relates to the control of discharge from an underground mine. In addition, the Secretary believes that the primary purpose of 30 CFR 817.52(a)(3) is to give the regulatory authority the discretionary power to require specialized monitoring, and the state regulation achieves this purpose. The Kentucky regulation avoids the questionable reference and is no less effective than its federal counterpart. The October 22, 1980 finding (13.44) was unnecessary and 405 KAR 18:110, section 3 is approved as written.

13.20 405 KAR 18:060, section 7 was previously disapproved (see Finding 13.45 of the October 22 Federal Register, 45 FR 69952) because it did not specify that water discharged into an underground mine: "Continue as a controlled and identifiable flow and is ultimately treated by an existing treatment facility", as does 30 CFR 817.55. As stated in the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky feels that the federal statement is ambiguous and that the intent of 30 CFR 817.55 is fulfilled by the other requirements of section 7: "(2) that the discharge to other underground workings be controlled; (3) that the discharge meet the effluent limitations for pH and suspended solids except under certain conditions; (4) that the resulting discharge, if any, from the underground workings to surface waters not cause violations of effluent limitations or water quality standards (and, therefore, must be treated if necessary to prevent such adverse effects on surface waters), and the probable locations of eventual discharge to surface waters, if any, be identified; and (5) that the discharges minimize disturbances to the hydrologic balance."

The Secretary finds that Kentucky has interpreted the federal regulation correctly, and, therefore, finds 405 KAR 18:060, section 7 no less effective than 30 CFR 817.55.

13.21 In the October 22, 1980, Federal Register (45 FR 69952), 405 KAR 18:210E, section 2 was identified in the Federal Register as being less stringent than 30 CFR 817.122 concerning public notice to property owners and residents within the area above the underground workings. The federal regulation requires that a six-month notice be given to property owners when underground mining will occur beneath their residences, whereas the Kentucky regulation requires only a three-month notice. Kentucky stated that its regulation is consistent with the intent of the federal regulation, i.e. to provide adequate notice to property owners and residents without placing an unreasonable burden on the operator (see "Response to October 1980 Findings", Administrative Record KY–413).

The Secretary is persuaded by Kentucky's argument that three months' notice will be as valuable to surface owners because a notice given three months in advance could be more specific and will give the surface owner adequate time in which to react. Therefore, the Secretary finds 405 KAR 18:210E, section 2 no less effective than the federal regulations.

13.22 As discussed in Finding 13.48 of the October 22, 1980, Federal Register (45 FR 69952), 405 KAR 18:220E, section 4(8) was previously found to be inconsistent with 30 CFR 817.133(c) because the state regulations appeared to allow for the determination of the post-mining land use to be delayed until near the end of the life of the mine. The State has explained that its permitting requirements do, in fact, require that a post-mining land use be approved before a permit is issued, but that 405 KAR 18:220E, section 4(8) is worded to allow for the post-mining land use to be changed as a permit revision (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary agrees that a change in post-mining land use is allowable as a permit revision in accordance with 30 CFR 788.12 and 788.15. 405 KAR 18:220E, section 4(8) is found to be no less effective than the federal requirement.

13.23 Finding 13.49 of the October 22, 1980, Federal Register, identified 405 KAR 20:030E, section 1(1) as being inconsistent with 30 CFR 819.11(a) pertaining to auger mining. The Kentucky regulation appeared to allow the applicant to avoid provisions of the federal regulations requiring undisturbed areas of coal to be left in unmined sections for future entryways for underground mining. The state regulation also omitted the requirement that distances between undisturbed areas of coal greater than 2,500 feet must be approved by the regulatory authority. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky has submitted to the Secretary the explanation that 405 KAR 20:030E, section 1(1) would allow the applicant to designate specific areas where he/she plans to develop future entryways so that the Department can approve those specific areas as the areas not to be disturbed by auger mining. Further, Kentucky has stated that this procedure is only applicable when the applicant will be doing both the underground mining and the auger mining. Since the federal regulation is intended to maximize coal production by guaranteeing access for future underground mines, the State's system of allowing the operator, who will conduct underground mining, to select his own entryways is logical and effective. Regarding the omission of the requirement for regulatory authority approval of distances greater than 2,500 feet between undisturbed areas, Kentucky has amended its regulation by adding the required phrase "and approved by the Department". The Secretary has reviewed Kentucky's explanation of, and amendment to, 405 KAR 20:030E, and finds the regulation to be no less effective than the federal regulation.

13.24 As discussed in Finding 13.50 of the October 22, 1980, Federal Register (45 FR 69953), the Secretary disapproved 405 KAR 20:060E because it did not contain criteria for spoil placement on pre-existing benches as set forth in 30 CFR 826.16. 405 KAR 20:060E was also lacking provisions similar to 30 CFR 826.15(c) which limit land disturbance above the highwall. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky has pointed out that other sections, specifically 405 KAR 16:130E and 18:130E, section 5 contain criteria for spoil placement on pre-existing benches. As for the omission of criteria for disturbing the area above the highwall, section 3, of 405 KAR 20:060E has been amended by adding language substantially identical to 30 CFR 826.15(c). The Secretary finds that the sections referenced in the

Kentucky response document and the amendments made by Kentucky to 405 KAR 20:060E are no less effective than the federal regulations.

13.25 The Secretary notes that section 2(2)(d) of 405 KAR 16:130E and 18:130E allow for alternative materials to be used to fill underdrain systems "if the applicant demonstrates through detailed engineering analysis to the satisfaction of the Department that the alternative materials will provide for adequate long-term capacity for drainage at the site." The federal regulations at 30 CFR 816.72 and 817.72 specify the type rock allowed for fills. There are no provisions for alternatives.

Kentucky stated that its intent is to "allow use of materials other than natural stone, but such materials would be required to be non-acid forming, non-toxic forming and non-slaking. Synthetic materials which met these requirements would be permissible. Also, properly designed pipe drains could be used in lieu of natural stone drains * * *." (See February 12, 1982, letter from DNREP, Administrative Record No. Ky–438).

The Secretary believes alternative materials, limited by the Kentucky policy, would provide environmental protection and assure safety equal to that required by the federal regulations. Therefore, the Secretary finds section 2(2)(d) of 405 KAR 16:130E and 18:130E no less effective than 30 CFR 816.72 and 817.72.

13.26 As discussed in Finding 13.34 of the October 22, 1980, **Federal Register** (45 FR 69951), 405 KAR 16:200E, Section 7(3) and 18:200E, section 7(3) are inconsistent with 30 CFR 816.117(c)(2) and 817.117(c)(2). The state regulations allow stocking and groundcover to approximate that on reference areas or *"as approved in the mining and reclamation plan as appropriate for the approved postmining land use"*. The emphasized phrase provides discretion not found in the federal rules, and the state has failed to identify the standards it would use to approve stocking in the plan. Therefore, the Secretary finds 405 KAR 16:200E, section 7(3) and 18:200E, section 7(3) inconsistent with federal requirements. Approval of the Kentucky program is conditioned upon the state's use of reference areas until such time as the state develops, and OSM approves, standards for use in stocking plans involving wildlife management, recreation, shelter belts and forest uses other than commercial forest.

13.27 405 KAR 16:090E and 18:090E section 5(5) are less effective than 30 CFR 816.46(i) and 817.46(i) because the Kentucky regulations allow DNREP to approve sedimentation ponds designed without emergency spillways. The federal regulations require emergency spillways in all cases to prevent overtopping and damage to the embankment if the principal spillway fails to perform properly.

The Secretary acknowledges that there are situations where the pond could be safely designed without the emergency spillways, but believes the standards the state will use in approving such ponds must be approved as part of the state program. An example of the standards which would be acceptable have been furnished to Kentucky by OSM. Program approval is conditioned upon Kentucky's amending its program to provide standards acceptable to the Secretary for the design of sedimentation ponds without emergency spillways. Program approval is further conditioned upon Kentucky's not using its authority to approve sedimentation ponds designed without emergency spillways until Secretarial approval of the above program amendment.

*Finding 14*

In accordance with 30 CFR 732.15(b)(2), the Secretary finds that the Kentucky program demonstrates that the DNREP can implement, administer, and enforce a permit system consistent with Subchapter G of 30 CFR Chapter VII. The description of the permit system is found in the narrative section entitled, "State Section 731.14(g)(1), (9), and (10)." The permit system descriptions are acceptable. The state legislative authority relating to permitting is discussed in Finding 4, above. Kentucky incorporated provisions of 30 CFR Chapter VII, Subchapter G, in 40 KAR Chapter 8. Significant issues discovered during the review of Kentucky regulations corresponding to Subchapter G of 30 CFR Chapter VII are as follows:

14.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several state regulations to be substantially identical to their federal counterpart. For this reason, the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** are no longer present: 14.2, 14.3, 14.5, 14.6, 14.7, 14.12, 14.14, 14.15, 14.21, 14.22, 14.23, 14.29, 14.32, and 14.33.

14.2 As discussed in Finding 14.1 of the October 22, 1980, **Federal Register**, the Kentucky regulatory program was found to be lacking provisions similar to 30 CFR 770.12(c) which requires that the program demonstrate coordination of review and issuance of permits with other applicable federal acts. Sections 731.14(g) (9) and (10) of the state program narrative description have been revised to list the state and federal agencies with which the issuance of permits is to be coordinated along with the federal acts enumerated in 30 CFR 770.12. The revisions, combined with the language in 405 KAR 8:010E section 8(7) and section (9) which require notification and an opportunity for review and comment by all appropriate agencies, make the program no less effective than 30 CFR 770.12.

14.3 Section 4 of 405 KAR 8:030E and 8:040E was previously found to be inconsistent with 30 CFR 778.15(b) and 782.15(b). The Kentucky regulation provides that where the private mineral estate to be mined has been severed from the private surface estate, the applicant must provide "a copy of the document of conveyance that grants or reserves the right to extract the coal by surface mining methods." Section 510(b)(6) of SMCRA contains specific criteria for evidence of the right to mine. See Finding 14.4, 45 FR 69953.

Kentucky responds that its regulation is consistent with the Act and the Federal regulations, because of the wording of its regulation and the interpretation given under Kentucky law to the "broad-form" deed.

The Secretary is satisfied that the Kentucky regulation is no less effective than the Federal regulation. The Federal regulation requires that where the proposed operation involves severed estates, the applicant must provide: (1) A written consent by the surface owner, (2) A copy of the document of conveyance expressly granting the right to extract the coal by surface mining methods, or (3) Where that right is not expressly granted, documentation that under applicable State law the conveyance permits the applicant to extract coal by surface mining methods. Under Kentucky law, the conveyance of mineral rights by means of so called "broad-form" deeds is held to confer the right to extract coal by surface mining methods. *Jenkins v. DePoyster*, 299 Ky. 500, 186 S.W. 2d. 14, 15 (1945). The broad-form deed is the deed-form widely used in Kentucky. Consequently, the Kentucky regulation need not distinguish between those situations where the conveyance expressly grants or reserves the right to extract coal and where the conveyance merely conveys the right to the minerals. As for Kentucky's not including a specific provision for the alternative of written surface owner consent, such a provision is implicit in the Kentucky rule. If the broad-form deed has not been used, the applicant would have to submit the written consent of the surface owner.

14.4 Finding 14.8 of the October 22, 1980, **Federal Register** (45 FR 69954),

identified 405 KAR 8:030E section 23(1)(d) and 8:040E section 23(1)(d) as being inconsistent with 30 CFR 779.24(g) and 783.24(g), respectively. The federal regulations require maps to show the locations of water supply intakes for current users of "surface water flowing into, out of, and within a hydrologic area defined by the regulatory authority," whereas the Kentucky regulations require maps showing the locations of water supply intakes for current users of surface waters only "within a hydrologic area defined by the Department." In the "Response to October 1980 Findings" (Administrative Record Ky–413), Kentucky has stated that its regulations are consistent with the intent of 30 CFR 779.24(g) and 783.24(g) because the Kentucky regulations require that the Department define a hydrologic area on a case-by-case basis for purposes of showing hydrologic intakes. Furthermore, the limitation for showing the locations of water supply intakes for only the hydrologic area prevents confusion, as the term "into" the hydrologic area could be interpreted to require that all intakes upstream from the hydrologic area be shown. Upstream intakes are not of concern since the water at these intakes cannot be affected by the proposed mining operations. The term "out of" the hydrologic area can be interpreted to require that all intakes located downstream from the hydrologic area be shown. Kentucky states that, without some limitation on the necessary downstream extent within which intakes must be shown, it would extend downstream indefinitely. When such a downstream limit is set, an actual area has been defined by the Department within which intakes must be shown.

The Secretary acknowledges that the federal regulations do not define how far upstream or downstream water supply intakes must be shown and that the hydrologic area definition is within the regulatory authority's discretion in any event. Since Kentucky has stated its intent is to more clearly define what intakes must be considered where the federal regulations are ambiguous and much discretion is left to the regulatory authority, the Secretary finds 405 KAR 8:030E, section 23(1)(d), and 8:040E, section 23(1)(d), no less effective than the federal requirements.

14.5 The Secretary previously found section 25(2) of 405 KAR 8:030E and 8:040E less stringent than 30 CFR 780.12(b) and 784.12(b) because the federal regulations require both design and performance standards to be met on existing structures requiring modifications, whereas the state regulations require only performance standards to be met (see Finding 14.9 of the October 22, 1980, **Federal Register**, 45 FR 69954).

The Secretary recognizes that a modification to an existing structure is only required in those situations where the structure is not already meeting a performance standard. The requirement that an existing structure meeting a performance standard need not be reconstructed was clarified in the permanent program regulation litigation, Memorandum Opinion of May 16, 1980 at 53. Logically, if a minor modification can be made to the structure that would prevent violation of performance standards, the environment will be protected to the same degree as a major reconstruction to meet design requirements intended to prevent violation of performance standards. Therefore, the Secretary finds the State regulations no less effective than federal requirements.

14.6 In Finding 14.10 of the October 22, 1980, **Federal Register**, the Secretary found that 405 KAR 8:030E, section 25(2)(c) and 8:040E, section 25(2)(c) give DNREP the discretion to require permittee monitoring of existing, non-conforming structures during and after reconstruction, while 30 CFR 780.12(b)(3) and 784.12(b)(3) require monitoring in all cases. In the original finding, the Secretary stated that he was not persuaded that monitoring was ever unnecessary. Kentucky, however, wanted to retain the flexibility to require monitoring or not to require monitoring on a case-by-case basis.

The Secretary acknowledges that, except for water quality monitoring required for the operation as a whole under 30 CFR 816.52 and 817.52 (405 KAR 16:110E and 18:110E), the monitoring requirements for an existing structure are not specified in the federal regulations and are to be determined by the regulatory authority.

The Secretary is now satisfied that Kentucky's approach will be no less effective than the federal requirement. Kentucky will require monitoring except where determined unnecessary (see "Response to October 1980 Findings") (Administrative Record KY–413). If monitoring is necessary in all cases, then Kentucky is bound to require it in all cases. If experience shows that monitoring is not necessary in some cases, however, the flexibility Kentucky desires will have been justified.

14.7 The Secretary previously found Section 24 405 KAR 8:030E and 8:040E inconsistent with 30 CFR 780.14(b) and 784.14(b) because the state regulations fail to require that the mining plan map show features adjacent to the permit area (see Finding 14.11 of the October 22, 1980, **Federal Register** (45 FR 69954)). However, the U.S. District Court for the District of Columbia has suspended the use of the term "mine plan area," Memorandum Opinion of February 26, 1980 at 36; 14 ERC 1083, 1097. The Secretary is, therefore, satisfied that KAR need not contain references to the "mine plan area." KAR 8:030E, section 24 and 8:040E, Section 24 are thus consistent with 30 CFR 780.14(b) and 784.14(b), as modified by the Court's ruling.

14.8 As discussed in Finding 14.13 of the October 22, 1980, **Federal Register** (45 FR 69956), 405 KAR 8:030E, section 34(1)(a)(3) was found inconsistent with 30 CFR 780.25(a)(1)(iii) because the state regulation did not appear to require the information to "assess the hydrologic impact of the structure" of plans for ponds, impoundments, banks, dams, and embankments. Kentucky has revised its regulations to refer to the determination of probable hydrologic consequences and has pointed out that the assessment of hydrologic consequences is covered by 405 KAR 8:030E, section 12(2). The Secretary believes 405 KAR 8:030E, section 35, as revised, when considered with section 12, requires the assessment of the hydrologic impact of any structures. Therefore, the Secretary finds the State regulations no less effective than the federal requirements.

14.9 Under Finding 14.16 of the October 22, 1980, **Federal Register**, the Secretary found 405 KAR 8:040E, Section 13(1)(a)(3) less stringent than 30 CFR 783.14(a)(1)(iii) because the state regulation did not require a description of the compaction and erodibility factors in relation to the physical characteristics of each stratum of the overburden. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky states that this information would only be useful for strata which are to be used for topsoil substitution since compaction and erodibility potential of only the eventual *surface* materials will affect stability against erosion, infiltration/runoff characteristics, and revegetation success. Therefore, Kentucky has revised topsoil substitution performance standards at 405 KAR 16:050E, Section 2(5)(a)(1) and 18:050E, section 2(4)(a)(1) to require evaluation of compaction and erodibility potential only for all strata which are to be substituted for topsoil.

The Secretary believes that Kentucky is technically correct and, therefore, finds 405 KAR 8:040E no less effective than the federal regulations.

14.10 As discussed in Finding 14.17 of the October 22, 1980, **Federal Register** (45 FR 69955), 405 KAR 8:040E, Section 23(2)(e) was found less stringent than 30 CFR 783.25(f) because the state regulation omits the requirement to portray the area and vertical extent of aquifers and seasonal differences of head in different aquifers in cross-sections and contour maps when subsurface water will be encountered. Kentucky believes other regulations (i.e., 405 KAR 8:040E, section 14) give DNREP the authority to require that information when necessary and has pointed out that there is an inconsistency between the federal regulations on surface mining, 30 CFR 779.25(f), and underground mining, 30 CFR 783.25(f), on this issue (see "Response to October 1980 Findings", Administrative Record KY–413).

The Secretary recognizes that the inconsistency between 30 CFR 779.25(f) and 30 CFR 783.25(f), regarding the level of detail required in maps to describe aquifers, raises some questions as to what should be the minimum requirements. The purpose of the information required by 30 CFR 779.25(f) and 783.25(f) is to "establish the premining subsurface hydrologic regime, to determine changes that mining would cause to the hydrologic balance, to help plan corrections for adverse impacts and to set standards for postmining groundwater flows" (44 FR 15045, March 13, 1979). This is similar to the requirements of 30 CFR 779.15 and 783.15 (State counterparts 405 KAR 8:030E and 8:040E, section 14) which is intended to require a "full description of the ground water hydrology" (44 FR 15033, March 13, 1979).

Considering 405 KAE 8:040E, section 14 and 8:040E, Section 23 together, the Secretary concludes that the State regulations require sufficient information to assess the impacts of mining on the hydrologic regime even though the level of detail for the mapping of the aquifer may be somewhat less than required by 30 CFR 78.25(f). As noted by Kentucky, the detail required by the State for underground mines is similar to the detail required for surface mines in the federal regulations. Further, the preamble for 30 CFR 779.15 states that the "regulatory authority, therefore, will have broad discretion in determining the types and level of detail which it needs with respect to marginal aquifers" (44 FR 15034, March 13, 1979). Therefore, the Secretary finds 405 DAR 8:040E, Section 23 no less effective than federal requirements.

14.11 Finding 14.18 of the October 22, 1980, Secretarial Findings Document, 45 FR 69955, erroneously concluded that 405 KAR 8:040 Section 25 (now 405 KAR 8:040 section 23) was inconsistent with 30 CFR 783.25 in that the state regulation omitted a provision comparable to 30 CFR 783.25(h) on the location of previously mined areas within the permit area. The latter federal provision had been remanded by the United States District Court, *In re: Permanent Surface Mining Regulation Litigation*, No. 79–1144, slip. op. at 14–16 (D.D.C. May 16, 1980). 405 KAR 8:040E section 23, is therefore, no less effective than 30 CFR 783.25 in this respect.

14.12 In Finding 14.19 of the October 22, 1980, **Federal Register** (45 FR 69955), the Secretary identified 405 KAR 8:040E, section 23(2)(h) as being inconsistent with 30 CFR 783.25(i). On August 4, 1980, 30 CFR 783.25 (c), (h), and (i) were suspended. Therefore, there is no remaining inconsistency and the Secretary approves 405 KAR 8:040E, section 23(2)(h).

14.13 In Finding 14.24 of the October 22, 1980, **Federal Register** (45 FR 69955), the Secretary found 405 KAR 8:060E, sections 6(1)(b)(1) and 6(2)(d)(1) inconsistent with 30 CFR 785.16(b)(1) and (c)(4)(i) for two reasons which are addressed as follows:

(a) The federal regulations allow a steep slope approximate original contour (AOC) variance if watershed control will be improved compared to the premining condition. The State regulation allows a variance if watershed control will be improved compared to the postmining condition had there been restoration.

In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky argues that, given that the land will be mined whether or not the variance is allowed, it is more logical to compare the probable postmining conditions and to select the one which is least likely to worsen watershed conditions. The State argues that comparing the two hypothetical postmining conditions, which differ only in slope, is more logical than comparing the postmining condition to the premining condition which differs in erodibility permeability, vegetative cover, etc.

Kentucky further states, "It is inconceivable to Kentucky that the Secretary would interpret SMCRA to deny a landowner a desired AOC variance by requiring watershed improvement over conditions (premining) which have in fact been removed from consideration by the initial decision to mine the land. SMCRA does not require that watershed improvement be demonstrated as a precondition to mining and returning to AOC. Thus, the only equitable criterion for watershed conditions is that the variance not serve to worsen watershed conditions as compared to returning to AOC."

The Secretary agrees with Kentucky's interpretation of SMCRA. Therefore, the State regulations in question are found to be no less effective than the federal requirements.

(b) The State regulations consider an increase in streamflow that would benefit users at times when streams are normally low as watershed improvement, whereas the federal regulations do not mention this as an alternative. In the original finding the Secretary expressed concern that such a change might also cause additional flooding and other problems at times of high flow. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky points out that improved vegetative growth and increased infiltration rates which are sometimes associated with mining are conditions which tend to produce decreased peak flows and increased low flows.

The Secretary believes Kentucky is technically correct and, therefore, finds the regulations in question no less effective than the federal requirements.

14.14 The Secretary previously disapproved 405 KAR 8:050E, section 3(2) because it omitted a provision comparable to 30 CFR 785.17(b)(9) which requires prime farmland to be returned to equivalent levels of yield as non-mined prime farmland of the same soil type (see Finding 14.25, October 22, 1980, **Federal Register** (45 FR 69956). Kentucky has not revised its regulations, but considers this requirement to be a performance standard rather than a permitting requirement and, therefore, has placed the provision at 405 KAR 20:040E, section 1(3). The Secretary finds that Kentucky regulations, when considered as a whole, are no less effective than the federal requirements and, therefore, approves 405 KAR 8:050E, section 3(2).

14.15 405 KAR 8:010E, section 8(8,) was identified by Finding 14.27 of the October 22, 1980, **Federal Register** (45 FR 69956), as less stringent than 30 CFR 786.11(d) because the Kentucky regulation did not specify when the applicant must file a copy of the application in a local public office for public inspection.

In the "Explanation for Recent Revisions" (Administrative Record KY–413), Kentucky explains that its

regulations provide that the last newspaper notice of the application must appear after the applicant receives notice from DNREP that the application is complete. Since the regional office of the Bureau of Surface Mining Reclamation and Enforcement is the public office where, the application is filed, the Kentucky system will insure that the public will always have access to a complete application. Therefore, the Secretary finds 405 KAR 8:010E, section 8(8) no less effective than 30 CFR 786.11(d).

14.16 In Finding 14.30 of the October 22, 1980, Federal Register, the Secretary identified three problems with 405 KAR 8:010E, section 15 as it related to existing structures because of references to 405 KAR 7:040 which was considered inconsistent with 30 CFR 786.21. These problems have been resolved as follows:

(a) The Secretary was concerned that the State regulations provided for compliance with only performance standards whereas the federal regulations require compliance with both design and performance standards when modifying an existing structure. The Secretary now concurs that modifying an existing structure to meet performance standards is no less effective than meeting design standards. For further discussion see Finding 14.5 of this decision.

(b) The Secretary previously found 405 KAR 7:040 section 5(2)(c)(1) inconsistent with 30 CFR 786.21(a)(2)(iii) because the State section allows for more than the federally-imposed six-month time limit for modification of existing structures. In the "Response to October 1980 Findings" (Administrative Record KY–413), Kentucky has indicated that deviation from the six-month time limit would only be allowed for exceptional cases where DNREP makes a specific determination that a longer period is necessary because of the scope and nature of the reconstruction. The State has also pointed out that this is a one time problem that will cease to exist after mines started under the interim program terminate.

For the truly exceptional cases where the reconstruction could not be corrected in six months, the only difference between the State and Federal regulations is that the Federal regulations would result in the issuance of a violation notice and establishment of an abatement period, whereas the State would specify a correction period during the permit approval. Since the Federal regulations would allow for a reasonable abatement period after a violation is issued, the actual effect of the State regulations will be similar if the state will, as stated by DNREP, exercise its discretion only for those cases where reconstruction would be impossible within the six-month period. The potential abuse of the discretion will be monitored as a part of Federal oversight. Under these circumstances the Secretary believes the State regulation is no less effective than 30 CFR 786.21.

(c) The Secretary previously found 405 KAR 7:040E, section 4(2)(c)(3) inconsistent with 30 CFR 786.21 because the State section did not require monitoring in all cases when an existing structure was modified. The Secretary now concurs that Kentucky regulations which provide for monitoring when necessary are no less effective than the federal requirements. (See also Finding 14.10 of this Notice.)

14.17 In Finding 14.31 of the October 22, 1980, Federal Register (45 FR 69956), the Secretary previously determined 405 KAR 8:010E, section 16(4) to be inconsistent with 30 CFR 786.23(e) because the State failed to require that notices be simultaneously delivered to relevant parties. The State has indicated that it could not guarantee simultaneity but did change 405 KAR 8:010E, Section 23 to provide that all parties would have 30 days to respond from the time they receive such notice (see "Response to October 1980 Findings", Administrative record KY–413). The Secretary finds that the regulations, as amended, are no less effective than the requirement of the federal regulation.

14.18 405 KAR 8:030E and 8:040E, section 15(2)(b) are inconsistent with 30 CFR 779.16 and 783.16 with regard to the surface water quality parameters required to be identified as part of the permit application. The state regulations give the regulatory authority the discretion to delete all of the listed parameters except total dissolved solids (or specific conductance) and total suspended solids. The federal regulations require information on the listed parameters for all permits.

The Secretary is concerned that the authority to delete certain water quality parameters could result in an inadequate analysis of the effect of the mining on the receiving stream. Each parameter listed in the federal regulations was selected because it was a direct requirement of the Act or was a historical problem associated with mining (see Preamble to 30 CFR 779.16, March 13, 1979, Federal Register, 44 FR 15034 and 15035). The analysis of these parameters is necessary to determine if compliance with existing effluent limitations will prevent material damage to the receiving stream or if more stringent measures are necessary. This analysis is especially critical for consideration of storm flow conditions when effluent standards for a sedimentation pond are relaxed.

As part of a program resubmission modification (Administration Record KY–438), Kentucky argues that such discretion should be considered no less effective than the federal regulations for two basic reasons. First, the State believes SMCRA intended regulatory authorities to have flexibility to match the regulatory requirements for protecting the hydrologic balance to local conditions. Second, the State believes their guidelines would require all the listed elements except for existing operations, and Kentucky provides technical rationale as to why certain deletions should be allowed for existing operations.

In order to support the contention that the Act intended to give the states flexibility to establish hydrologic requirements, Kentucky quoted the following section from the Act's legislative history:

> "For (the) most critical areas (with) uncertain fragile hydrologic settings, the bill sets standards that are imperative to begin to assure that adverse impacts to the hydrologic balances are not irreparable * * * It is anticipated that the state regulatory authorities will strengthen such provisions and require whatever measures are necessary to meet local conditions." (H.R. Rep. No. 95–218, 95th Congress, First Session (1977) p. 110.)

Kentucky argues that the Act does not specify particular parameters which must be used to characterize the adverse effects of mining and state that, "it could be argued that the parameters of pH, specific conductance and total suspended solids would be sufficient to address the water quality categories of acid and toxic mine drainage, dissolved solids (mineralization) and suspended solids." However, Kentucky recognizes that in many cases these minimum requirements would be insufficient for a proper evaluation of adverse impacts.

Kentucky states that it has guidelines which specify the water quality parameters which must be addressed by the applicant, and further that the only requirements which have been deleted are dissolved iron, dissolved manganese and sulfate for existing underground mines and preparation plants. However, the guidelines were not submitted as part of the program, and Kentucky has not stated that the parameters listed in its explanation will be required as a matter of policy.

The Secretary basically agrees with the State's interpretation of the legislative history except that he believes that the flexibility desired by

the State is obtainable through the state program approval process. The Secretary does not believe Congress intended the State to have unlimited flexibility to delete all parameters on a case-by-case basis.

The explanation submitted by Kentucky does not actually commit the State to limiting the deletion of water quality parameters to the situations discussed in the explanation. The guidelines mentioned in the explanation have been submitted to OSM for informal review but the drafts and OSM's comments on the drafts have not been incorporated into the administrative record since a final guideline was not submitted, nor required, as part of the program resubmission.

The Secretary concurs that the deletion of dissolved manganese, dissolved iron, and sulfate from the list of required parameters for existing operations producing no significant new surface disturbance is no less effective than the federal regulations for the following reasons given by the state: "Since (1) existing operations should have previous knowledge of, and experience with, any treatment requirements for iron and manganese; (2) rates of mineralization have likely stabilized at many older existing underground mines and coal preparation plants; (3) premining planning cannot be done for existing disturbed acres to reduce the rate of mineralization; and (4) such operations generally create less disturbed material than surface mines."

Based on this explanation, the Secretary believes that he could approve the State's regulations if Kentucky submits a clear policy statement indicating that the deletions allowed in the regulations would only be exercised for dissolved manganese, dissolved iron and sulfate for existing operations not expected to create significant new surface disturbance. Either a regulatory change or a policy statement, as discussed, is required as a condition of program approval. The State may elect to submit additional material, such as its final hydrology guidelines, to support further flexibility for deletion of parameters in certain situations. However, until such time as the Secretary approves the circumstances for which further deletions may be made, the state must not use its authority to delete parameters other than dissolved manganese, dissolved iron, and sulfate for existing operations not expected to create significant new surface disturbance. The state may also delete the parameters of temperature, alkalinity, dissolved manganese and sulfate for any operation since these parameters are not specifically required by the Federal regulations.

14.19 The Secretary finds that the Kentucky program does not adequately demonstrate that the State meets the requirements of 30 CFR 771 and SMCRA section 502(d) regarding the time limits for receiving and processing permanent program permit applications for existing operations. The Secretary recognizes that Kentucky is in a unique situation because of the large number (3500) of applications relating to existing operations expected during the first eight months of primacy, which would preclude the meeting of the statutory deadline of eight months for reviewing all applications. Therefore, the Secretary must consider the State's plan for receiving and reviewing applications to determine if it is a good faith effort to meet the intent of SMCRA. The regulatory requirements relating to this process are described in 405 KAR 8:010E section 2 and section 16, and the state plan for processing the surge of applications is described in the narrative titled "Kentucky's Plan for Transition to Primacy" (Administrative Record KY-438).

The Kentucky program has a two step process where the operator must provide preliminary data as a "transition application" during the first two months of primacy and then must complete his application by the eighth month of primacy. The Secretary interprets SMCRA as allowing existing operators to continue mining past eight months after primacy if they make a good faith effort to submit an application during the first two months of primacy and work within a reasonable schedule to complete the application, if the application is determined to be incomplete. Given the large number of anticipated applications in Kentucky, the Secretary is persuaded of the necessity for a preliminary application followed by a complete application since all operators are to be made aware that the application must be complete by the eighth month.

However, the Kentucky plan does not specify when the State will finish its completeness determinations for existing operations. An incomplete application could wait in a backlog of applications for months. In addition, the State plan shows that priority will be given to processing applications for new operations. Although the plan indicates that a low number (100) of new permits is expected during the first 20 months of primacy, the Secretary is concerned that processing of the new permits could preclude processing of the other applications as required by SMCRA section 502(d). This concern would become manifest if the number of new permits expected in the program plan is underestimated.

The Secretary recognizes that the State is trying to balance its time requirements for processing new applications with the eight month deadline for permit review established in section 502(d) of SMCRA. Given Kentucky's circumstances, the Secretary believes that a goal of 20 months from primacy for processing the applications for operations continuing under interim permits is reasonable. However, to ensure that the goals for receipt and review of complete applications are not pushed forward indefinitely because of work on new applications, the Secretary is requiring, as a program condition, that the State submit a plan which includes: (1) A process for prompt completeness determinations by DNREP on full applications from existing operators expecting to continue mining past the eighth month of primacy; (2) assurances that operators who have not submitted complete applications by eight months after primacy will be immediately advised that they may not continue mining until a permit is approved; (3) a policy that applications for new operations will not be given priority for processing over applications for existing operations which are continuing under interim program permits when such existing mine applications are one year old or older.

*Finding 15*

In accordance with 30 CFR 732.15(b)(3), the Secretary finds that the Kentucky program demonstrates that the Kentucky DNREP can regulate coal exploration consistent with 30 CFR Parts 776 and 815. The State's authority is discussed in Findings 1, 2 and 4, above. Kentucky has incorporated the provisions of 30 CFR Parts 776 and 815 into portions of 405 KAR 8:020E and 20:020E. The narrative description of the state systems is found in the narratives entitled "State section 731.14(g)(1)" and "State section 731.14(g)(8)". Significant issues underlying this finding are as follows:

15.1 The Secretary previously found 405 KAR 8:020E, section 2(3)(a) to be inconsistent with 30 CFR 776.12(b)(1) because the State section did not require posting of the notice of the exploration application at a public office (Finding 15.1, October 22, **Federal Register**, 45 FR 69956). However, Kentucky has brought to the attention of the Secretary 405 KAR 8:020E, section 2(3)(a) which requires the applicant to publish a

newspaper notice of the application. The Secretary concurs that this advertisement will provide the notice necessary to give the public the opportunity for comment on the application. Therefore, 405 KAR 8:020E, section 2(3)(a) is found to be no less effective than the intent of 30 CFR 776.12(b)(1).

15.2 The Secretary previously found the State program narrative description for 731.14(g)(1) and 731.14(g)(2) inconsistent with the regulatory requirements because the narrative description misstated the number of days for public comment on an application. The program narrative sections have been revised to correct these discrepancies and the Secretary finds them acceptable.

*Finding 16*

In acccordance with 30 CFR 732.15(b)(4), the Secretary finds that the Kentucky program demonstrates that the Kentucky DNREP can regulate the extraction of coal incident to Government-financed construction consistent with 30 CFR Part 707. Legislative authority is discussed under Finding 1. State regulations consistent with 30 CFR Part 707 are found in portions of 405 KAR 7:030.

The Secretary previously questioned 405 KAR 7:030, section 3 because it appeared to allow all reclamation work under Title IV of SMCRA (abandoned mine land (AML) reclamation fund) to be exempted from the environmental protection performance standards. This finding is resolved by a policy statement from DNREP as explained in Finding 1.2 above.

*Finding 17*

In accordance with 30 CFR 732.15(b)(5), the Secretary finds that the Kentucky program demonstrates, except as noted below, that the Kentucky DNREP can enter, inspect and monitor all coal exploration and surface coal mining and reclamation operations consistent with section 517 of SMCRA and Subchapter L of 30 CFR Chapter VII. The State's legislative authority is discussed under Finding 2. Provisions of 30 CFR Chapter VII, Subchapter L are incorporated in 405 KAR 12:010E, 12:020E and 12:030E. The description of the State's inspection system is found in the narratives entitled "State section 731.14(g) (4)–(7) and 15". Significant issues discussed during the review of the Kentucky program corresponding to Subchapter L of 30 CFR Chapter VII are as follows:

17.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several State program sections to be substantially identical to their federal counterparts. For this reason, the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** have been resolved: 17.1, 17.3, 17.4, 17.5 and 17.6.

17.2 The Secretary previously found 405 KAR 12:010E, Section 3(2) inconsistent with 30 CFR 840.11(d)(2) because the State section did not specify that inspections would be made without prior notice. (See Finding 17.2, October 22, 1980, **Federal Register**, 45 FR 69957.) Kentucky has clarified that it is the State's policy to conduct unannounced inspections (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary therefore, finds 405 KAR 12:010E, Section 3, as stringent as the federal requirement.

17.3 405 KAR 12:010E, section 3(5)(a), differs from 30 CFR 840.11 concerning the frequency of inspections. The Kentucky regulation provides that monthly partial inspections will continue at a site until after DNREP determines that the permit area is sufficiently stable with respect to mass stability, erosion, revegetation, water quality and other reclamation requirements so that the quarterly complete inspections will provide adequate inspection. The regulation further provides that this determination will not be made until at least after the end of Phase I reclamation, which is defined in 405 KAR 10:040E, Section 2, as after an area has been backfilled, regraded and seeded. The federal regulations state that the regulatory authority shall conduct at least one partial inspection per month and one complete inspection per calandar quarter. However, the Secretary agrees that monthly inspections are not necessary on sites which have been stabilized and are pending bond release. The Kentucky system allows the regulatory authority to concentrate its inspection efforts on sites with a higher potential for problems than the stabilized areas. The Secretary finds the Kentucky provisions no less effective than the federal requirements.

17.4 The Secretary notes that the Kentucky program provides that only inspectors who obtain the rank of principal inspector or above are empowered to write cessation orders for practices creating an imminent danger. (See Finding 2.5 in the Response to October 1980 Findings, Administrative Record KY–413.) In response to questions by OSM relating to the State's capability to immediately issue cessation orders, the State submitted a list (Administrative Record KY–438) showing that, at present, approximately 66% of its inspectors have the title of "principal" or above, and that these people are evenly distributed among the regional offices. This information insures that Kentucky can, as stated in its program, immediately dispatch a principal inspector to a site if an inspector who is not empowered to write a cessation order discovers a possible imminent danger. Therefore, the Secretary finds that the Kentucky program adequately demonstrates that Kentucky can issue cessation orders in accordance with section 521 of SMCRA.

17.5 405 KAR 12:030 is inconsistent with 30 CFR 842 because the State has deleted all provisions for citizens' access to the minesites. Kentucky maintains that SMCRA does not require that citizens be able to accompany state inspectors on the mine site and that citizens would still have access to mine sites with federal inspectors (see "Explanation of Recent Revisions", Administrative Record KY–413).

As a requirement for program approval, the State must demonstrate that they have regulations consistent with those promulgated by the Secretary (SMCRA Section 503(a)(7)). Therefore, program approval is conditioned upon promulgation of regulations providing citizen access to mine sites in accordance with 30 CFR Part 842.

*Finding 18*

In accordance with 30 CFR 732.15(b)(6), the Secretary finds that the Kentucky program demonstrates, except as noted below, that DNREP can implement, administer and enforce a system of performance bonds and liability insurance consistent with the requirements of Subchapter J of 30 CFR Chapter VII. Legislative authority related to bonding is considered in Finding 4. The description of the proposed system for bonding and insurance is located in the narrative entitled "State section 731.14(g)(3)". Significant issues discovered during the review of the Kentucky program corresponding to Subchapter J of 30 CFR Chapter VII are as follows:

18.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several State program sections to be substantially identical to their federal counterparts. For this reason the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** have been resolved: 18.3, 18.9, 18.12, 18.13, 18.14, 18.17, 18.19, and 18.20.

18.2 As discussed in Finding 18.1 of the October 22, 1980, **Federal Register** (45 FR 69957), the Secretary found

Kentucky's definition of "self-bond" in 405 KAR 7:020E, section 1 inconsistent with 30 CFR 800.5. Kentucky has decided to delete self bonding as an option and has amended the regulations accordingly. Therefore, the previous finding has been resolved. The elimination of self bonding regulations also resolves Finding 18.7 of the October 22, 1980, **Federal Register** (45 FR 69958).

18.3 The Secretary previously found 405 KAR 10:060E, which applied to long-term facilities such as underground mines, inconsistent with 30 CFR Part 801 because the state regulation did not consider surface construction related to subsidence control or measures for mine drainage treatment (see Finding 18.4, October 22, 1980, **Federal Register**, 45 FR 69958). Kentucky has deleted all of 405 KAR 10:060E on the basis of OSM's decision to suspend substantial portions of 30 CFR 801 (see December 7, 1981, **Federal Register**, 46 FR 59934–59936). The Secretary finds the remaining sections of 405 KAR Chapter 10 apply to both surface mines and long-term facilities even though the State regulations no longer distinguish between the two. The State regulations are, therefore, no less effective than federal requirements.

18.4 As discussed in Finding 18.5 of the October 22, 1980, **Federal Register** (45 FR 69958), the Secretary previously found KAR 10.020E, section 3 less stringent than 30 CFR 805.13, as the addition of the word "substantially" in front of the phrase "augmented seeding" appeared to change the intended meaning of 30 CFR 805.13. The October 22, 1980, finding requested that Kentucky specify what husbandry practices would be permissible, and thus would not extend the period of bond liability.

The purpose of 30 CFR 805.13, as set forth in the preamble to the regulation (45 FR 52310, August 6, 1980) is to distinguish between normal conservation practices which do not extend a period of bond liability and augmented conservation practices which require an extension of the liability period. Kentucky interprets augmented seeding, fertilizing and irrigation to mean *any* such action taken after the initial planting. However, § 805.13 is intended to allow corrective action and associated reseeding or other husbandry practices necessitated by corrective actions without requiring re-initiation of the bond liability period. Kentucky considers it unnecessary to specify what constitutes selective husbandry practices beyond its standard of "substantially augmented seeding, fertilization, irrigation, or other work," and considers minor augmentations to constitute the "normal conservation practices" provided for in § 805.13(b)(3). Thus, minor augmentations are all those which are not substantial. (See "Response to October 1980 Findings", Administrative Record Ky–413.) The Secretary agrees that minor augmentation by seeding, fertilizing, and irrigation is a normal conservation practice, and finds Kentucky's regulation no less effective than the federal requirements.

18.5 As discussed in Finding 18.6 of the October 22, 1980, **Federal Register** (45 FR 69959), the Secretary found the bond adjustment provisions of Kentucky's program less stringent than § 805.14. Kentucky has revised 405 KAR 10:020E, section 1(4), to include a factor for past changes in the cost of performing reclamation (historical cost factor) when calculating the initial amount of the bond. Also, Kentucky has revised 405 KAR 8:010E, section 19(1)(a) to include a provision for bond re-evaluation at the time of the permit review. Changes in the mining operation or reclamation plan will require a permit revision (405 KAR 8:010E section 2). Any changes in the cost of reclamation above the "historical cost factor" will be covered by 405 KAR 10:020E, section 4, which provides for an adjustment of the bond amount when the cost of reclamation, restoration, or abatement work changes substantially. 405 KAR 10:020E, section 4 differs from 30 CFR 805.14 as the costs changes must be substantial before causing the bond to be adjusted. However, because of the above cited revisions, Kentucky's program is no less effective than the federal regulation in providing for bond adjustments as conditions or costs change.

18.6 The Secretary previously disapproved 405 KAR 10:030E, section 2 as it did not require the collateral supporting a collateral bond to be valued at its current market value rather than its face value, as required by 30 CFR 806(f)(2). (See Finding 18.8, October 22, 1980, 45 FR 69958.) Under Kentucky's present definition of collateral bonds, supporting collateral is limited to "cash, negotiable certificates of deposit or an irrevocable letter of credit." 405 KAR 7:020E(19). The market value of each of these types of collateral is its face value. Kentucky has deleted any negotiable bonds from its definition of acceptable collateral bonds, thus eliminating the use of any collateral for which fair market value is a factor. Therefore, the Secretary finds 405 KAR 10:030E, section 2 no less effective than the Federal requirements.

18.7 In Finding 18.5 of the October 22, 1980, **Federal Register** (45 FR 69959), the Secretary found 405 KAR 10:040E less stringent than 30 CFR 807.11(f)(5) as the state section contained no provision for notification to local government bodies of a decisison to release a bond and the right to request a hearing. Kentucky has revised 405 KAR 10:040E, section 1(5)(b) to include notice to the County Judge-Executive. The Secretary finds that this action resolves the previous concern.

18.8 As discussed in Finding 18.11 of the October 22, 1980, **Federal Register** (45 FR 69959), the Secretary previously questioned 405 KAR 10:040E, section 2 because it did not contain sufficient criteria to assure that no increment was prematurely released from the permit area. The State has completely revised its bonding regulations, and has included language similar to 30 CFR 807.12 (b) and (e) as requested by the Secretary. The main difference remaining between the state and the federal regulations is that 405 KAR 10:040E, section 3 allows each bond increment to be treated independently and deleted from the permit area after final release on the increment, whereas 30 CFR 807.12(c) specifies that the increment not be released from the permit area separately from the last remaining increment.

However, the Secretary finds the State requirements no less effective than the federal requirements because of the additional safeguards that the State has established for the increments. 405 KAR 10:010E, section 3(3)(a) provides that, "where the approved postmining land use is of such a nature that successful implementation of the postmining land use capacity depends upon an area being integrally reclaimed then that area must be contained within a single increment". Further, 405 KAR 10:040E, section 2(3) provides that, "the Department shall not release any liability under performance bonds applicable to a permit if such release would reduce the total remaining liability * * * to an amount less than that necessary for the Department to complete the approved reclamation plan, achieve compliance with the requirements of KRS 350, Title 405 * * * and abate any significant harm * * * which might occur prior to the release of all performance bond liability for the permit area". The State also requires in 405 KAR 10:010, section 3(3)(d) that the increment boundaries be physically marked on the site.

The state provisions require the regulatory authority to determine that the units are independent at the

initiation of the bond and before the increment is released from the permit area. The State regulations would assure that an increment is not released from the permit area if the increment was not self-supporting or if it had a potential impact on the remaining area. Therefore, the Secretary finds that 405 KAR 10:040E, section 3 is no less effective than 30 CFR 807.12(c).

18.9 As discussed in Finding 18.16 of the October 22, 1980, **Federal Register** (45 FR 69959) 405 KAR 10:050E section 2 was previously found inconsistent with 30 CFR 808.12 (a)(4) and (b) because the State regulations failed to include language requiring the regulatory authority to pursue bond forfeitures through all levels of appeal. To resolve this issue Kentucky submitted a policy statement explaining that an Order of Forfeiture becomes final after the opportunity for an administrative hearing, and that such an order would be diligently pursued through the courts if necessary (See February 12, 1982, letter from DNREP, Administrative Record Ky 438). The Secretary believes the policy statement resolves the previous concerns, and finds 405 KAR 10:050E, section 2 no less effective than the federal requirements.

18.10 The narrative under State program § 731.14(g)(3) was previously disapproved because the bond computation formula shown in the narrative yielded maximum per acre bond amounts that were unrealistically low. (See Finding 18.18, October 22, 1980, **Federal Register**, 45 FR 69959). The revised program submission deletes the previous formula but the State has assured the Secretary that a new formula will be developed to establish sufficient bond amounts. The Secretary believes that the actual formula or other internal guidelines used to establish bond amounts are not required as part of the narrative description and 30 CFR 731.14. The Secretary accepts the State's explanation that a formula will be used and considers verification of the adequacy of the formula an oversight function. State program narrative § 731.14(g)(3) is, therefore, approved except as related to cumulative bonding as discussed in Finding 18.11.

18.11 In Finding 18.21 of the October 22, 1980, **Federal Register** (45 FR 69961), concern was expressed that Kentucky might have such a large backlog of pending bond forfeiture actions that DNREP might not be able to effectively implement a bond forfeiture system under primacy. In a letter dated February 12, 1982 (Administrative Record Ky 438), DNREP explained that the backlog has been reduced and organizational and manpower changes have been made to eliminate this problem. The Secretary believes the explanation given adequately resolves the previous concerns.

18.12 The Secretary notes that 405 KAR 10:040E section 1 differs from 30 CFR 807.11(f) because the State regulations fail to clearly state that a requested hearing on a bond release decision would be held before the actual release is made. However, a policy statement submitted by DNREP clarified that releases will not be made prior to the completion of the hearing process. (See February 12, 1982, letter from DNREP, Administrative Record KY–413.) As clarified by this policy statement, the Secretary finds 405 KAR 10:040E section 1 no less effective than 30 CFR 807.11(f).

18.13 The Secretary notes that Kentucky has deleted regulatory references similar to 30 CFR 806.12(g) which specify the maximum amount a bank can extend on a letter of credit. As part of the program resubmission, Kentucky includes KRS 304.5–120, which places statutory limits on letters of credit. The Secretary finds the limitations imposed by the Kentucky statute are no less effective than the federal regulations at 30 CFR 806.12(g) in preventing banks from being overextended through letters of credit.

18.14 The Secretary finds 405 KAR 10:040, section 1(7) inconsistent with SMCRA section 519 because the State regulations allow for a bond-crediting procedure under their cumulative bonding system that does not provide for adequate public participation. Kentucky provides an operator with the opportunity for a hearing on a bond crediting decision but fails to provide such an opportunity to others with a legal interest which may be affected. Kentucky maintains that its bond credit is not a bond release since no actual section of the permit is released from liability even though the part of the bond amount originally applicable to one section of the permit is "credited" to another section (see 18.11 under the "Response to October 1980 Findings", Administrative Record KY–413).

The Secretary is not persuaded by Kentucky's argument that a credit is not a release. Section 519(c) of SMCRA refers to releases "in whole or in part" of reclaimed areas covered by a "bond or deposit thereof". SMCRA section 519 does not limit bond release procedures to a release of bond liability but consistently refers to release of all or part of the bond. The Secretary finds no substantive difference between a release under section 519 of SMCRA and a credit under Kentucky regulations. Approval of the Kentucky program is conditioned upon the State enacting regulations including public participation requirements consistent with section 519 of SMCRA or deleting the cumulative bonding system.

*Finding 19*

In accordance with 30 CFR 732.15(b)(7), the Secretary finds that the Kentucky program demonstrates, except as noted below, that the State has sufficient provisions for civil and criminal sanctions for violations of State law, regulations and conditions of permits and exploration approvals consistent with Section 518 of SMCRA. Legislative authority relating to enforcement is discussed in Finding 2. Regulatory provisions related to Section 518 of SMCRA are found in 405 KAR 7:090E. The State's system for implementing these sanctions is described in the narrative entitled "State section 731.14(g)(4)–(7) and (15)". Significant issues discovered during the review of the systems and regulations pursuant to SMCRA section 518 are as follows:

19.1 In response to findings published in the October 22, 1980, **Federal Register**, the State has changed several program sections to be substantially identical to their federal counterparts. For this reason, the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** have been resolved: 19.1, 19.3, 19.4, 19.5, and 19.6.

19.2 In Finding 19.2 of the October 22, 1980, **Federal Register** (45 FR 69961), the Secretary previously found the Kentucky program insufficient because it failed to establish a procedure for the assessment of civil penalties. In the program resubmission the State has included guidelines which will be used in the assessment of civil penalties. Since the State's law and regulations are in accordance with section 518(a) of SMCRA, the Secretary believes the guidelines provide sufficient procedural guidance for assessment. The Secretary finds that the Kentucky program is no less effective than the federal requirements for assessing civil penalties.

19.3 405 KAR 7: 090E section 3 differs from 30 CFR 845 because the Kentucky regulation provides that the Department send its notice of a proposed civil penalty assessment following the issuance of the final notice of inspection of noncompliance rather than following the initial issuance of the notice or order as in 30 CFR 845.17(b). As explained in the "Explanation for

Recent Revisions" (Administrative Record KY–413), Kentucky believes its method is more practical than the federal procedure, which often requires a reassessment after all relevant facts pertaining to the violation are known. Under the Kentucky system, the civil penalty assessment process would not begin until the final determination as to abatement had been made. At most, the process would be initiated 30 days after a violator had failed to abate a violation. In this manner the Department would always know the total amount to be assessed before sending its notice of proposed penalty assessment. The Secretary concurs with Kentucky's rationale, and finds 405 KAR 7:090E section 3 no less effective than the federal requirements.

*Finding 20*

In accordance with 30 CFR 732.15(b)(8), the Secretary finds that the Kentucky program demonstrates that the State can issue, modify, terminate and enforce notices of violation, cessation orders and show cause orders in accordance with section 521 of SMCRA and Subchapter L of 30 CFR Chapter VII. Legislative authority relating to Section 521 of SMCRA is discussed under Finding 2. Provisions of 30 CFR Chapter VII, Subchapter L are incorporated in 405 KAR 12:010E, 12:020E, and 12:030E. The description of the State's system for issuing enforcement notices is contained in the narrative entitled "State section 731.14(g)(4–7) and (15)". Significant issues raised during the review of Kentucky narrative and regulations are as follows:

20.1 In response to the findings published in the October 22, 1980, **Federal Register**, the State has changed several program sections to be substantially identical to their federal counterparts. For this reason, the Secretary finds that Findings 20.1 and 20.3 of the October 22, 1980, **Federal Register** have been resolved.

20.2 Finding 20.2 of the October 22, 1980, **Federal Register** (45 FR 69961), identified 405 KAR 12:020E, Section 2 as being inconsistent with 30 CFR 843.12(a) because the State section does not exempt violations creating an imminent danger from a notice of violation (NOV). The federal regulation requires a cessation order for a violation creating an imminent danger. Kentucky has explained that in order to have a standard record-keeping device for their computer, a notice of non-compliance *and* a cessation order for imminent danger will be issued. Issuing both citations fits the State scheme of using inspections of non-compliance to follow up all enforcement orders of the Department (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary finds the Kentucky procedure no less effective than the federal regulations.

20.3 In Finding 20.4 of the October 22, 1980, **Federal Register** (45 FR 69961), the Secretary expressed concern that in Kentucky's system description under State program § 731.14(g)(5), there was no provision for State inspectors to vacate a notice of non-compliance. Seemingly, the only way Kentucky could remedy a violation issued in error would be a formal hearing, which the Secretary felt would be cumbersome and inconsistent with 30 CFR Part 843. Kentucky has informed the Secretary that the Director of Operations and Enforcement is authorized by regulation to vacate, without a formal hearing, a notice or order upon written recommendation of the inspectorand the regional administrator (see "Response to October 1980 Findings", Administrative Record No. KY–413). The Secretary finds Kentucky's system to be no less effective than 30 CFR 843.

*Finding 21*

In accordance with 30 CFR 732.15(b)(9), the Secretary finds that the Kentucky program demonstrates that the State can designate areas as unsuitable for surface coal mining consistent with 30 CFR Chapter VII, Subchapter F. Kentucky incorporated provisions of Subchapter F in 405 KAR Chapter 24. The State's description of the proposed system for designating lands unsuitable is located in the narrative entitled, "State Program § 731.14(g)(11)." The State has sufficient legislative authority to accomplish this requirement. Significant issues raised during the review of the Kentucky regulations are analyzed as follows:

21.1 In response to findings made in the October 22, 1980, **Federal Register**, the State has changed several State program sections to be substantially identical to the federal counterparts. For this reason, the Secretary finds that the problems raised by the following findings from the October 22, 1980, **Federal Register** have been resolved: 21.1, 21.2, 21.3, 21.6 and 21.7.

21.2 405 KAR 24:030E section 4(1) provides that a person petitioning to have an area designated as unsuitable for surface mining will not be notified of permit applications received that include any of the area covered in the petition until such time as the petition is determined to be complete. A previous finding noted that the Kentucky regulation did not agree with 30 CFR 764.15(a)(6), which seemingly requires that a petitioner be notified of relevant permit applications without regard to the completeness of the petition. See Findings 21.5, 45 FR 69961.

Kentucky responds by referring to the completeness requirements described in 30 CFR 764.13(b) and 764.15(a)(1) and the reference to frivolous petitions in 30 CFR 764.15(a)(3). Kentucky insists that it should have "reasonable administrative discretion" to await these completeness and frivolity determinations before it undertakes the potentially burdensome notification procedures required in the subject regulation. Kentucky insists that no prejudice would result to the petitioner from its proposed procedure, as the public notice requirements in 30 CFR 786.11(a) and its parallel provision, 405 KAR 8:010E section 8, provide a minimum of four notices in a local newspaper of general circulation, which enables a petitioner to identify relevant permit applications and file objections as appropriate.

30 CFR 764.15 and the Kentucky counterpart, 405 KAR 24:030E section 3 and section 4 address the concept of a "complete" petition. Each establishes that upon the receipt of a petition the first order of business for the regulatory authority is the determination of the petition's completeness. This determination is to be made in less than 30 days from the receipt of the petition. By the end of that period the petitioner is to be notified by certified mail whether the petition is complete.

Kentucky's desire not to start notifying petitioners of applications filed until the completeness determination has taken place does not render the Kentucky program deficient. As stated above, the permit application regulations in 30 CFR 786.11(a) and the parallel Kentucky provision, 405 KAR 8:010E section 8, require four consecutive weekly notices published in the newspaper of largest bonafide circulation in the county where the proposed surface coal mining and reclamation operation is to be located. That notice is to include a map or description which clearly shows or describes the exact location and boundaries of the proposed area so as to enable interested parties readily to identify the proposed permit area. This notification enables a truly interested petitioner to apprise him or her of relevant permit applications. The requirement in 30 CFR 764.15(a)(6), therefore, does not represent the petitioner's sole source of notification of relevant pending permit applications. Kentucky's requirement that the petitioner take it upon him or her to keep apprised, through alternative means provided, of relevant permit

applications filed during the short period between the time the petition is filed and the time the agency has determined an application to be complete is not onerous.

Noteworthy is that one of the requirements for completeness in both the Kentucky and the Federal regulations is that the petitioner provide the location and size of the area covered by the petition. Certainly, the State should be given a reasonable amount of time to determine whether the petitioner has met this requirement before its obligation to notify the petitioner of applications pertaining to the same area is triggered. Otherwise, the State would be in the contradictory position of being required to notify a petitioner of permit applications pertaining to the petition area when perhaps the petitioner has not even identified the area petitioned or may have done so inadequately.

In sum, the question is one of adequacy of notice; whether under the Kentucky program adequate notice is provided to the petitioning party. Given the short period involved and the ready availability of other means by which the petitioner could apprise him or herself of competing permit applications, the Kentucky regulation is no less effective than the Federal regulation.

21.3 The Secretary notes that Kentucky has included a provision in 405 KAR 24:020E, section 3(3) requiring notarization of petitioners' signatures on lands unsuitable petitions. Although the federal regulations are silent with regard to notarization, the Secretary does not believe the added State requirement is unreasonable and, therefore, finds the provision no less effective than federal requirements.

21.4 405 KAR 24:030E, section 3(6) allows the filing of a petition to designate an area, for which a permit application has been filed, at any time up to the end of the public comment period on that permit application. However, Kentucky does not provide that the public comment period would extend to the informal conference as provided in 30 CFR 764.15(a)(7). The Secretary believes that some cut-off is necessary in order to facilitate an orderly permit review process. Without a cut-off, petitions could indefinitely delay a final decision on the permit. While the time period allowed by Kentucky is not identical to the federal requirement, it is not unreasonable. Kentucky has provided that the time period during which a petition can be filed terminates at the end of the public comment period regardless of whether an informal conference has been requested. In those cases where an informal conference is not requested, the Kentucky provision allows a time period identical to the federal provision. Kentucky's effort to provide a process which balances the desire of the regulatory authority to have a permit review process which is more easily managed, is administratively efficient and still allows an adequate opportunity for public participation is found to be no less effective than 30 CFR 764.15(a).

21.5 The Secretary notes that 405 KAR 24:030E section 4(3) includes a provision requiring the State to include a petitioner's name and address in a newspaper notice on a lands unsuitable designation request. At this time, the Secretary has no reason to object to such a provision.

21.6 405 KAR 24:030E, section 7(3) differs somewhat from 30 CFR 764.17(b). While the Federal regulation provides that all parties be notified by certified mail of a hearing on a petition to designate lands unsuitable, the Kentucky regulation provides for notification by certified mail to the principal participants and by regular mail to all others.

Kentucky believes that its proposal would provide adequate notice to interested parties, pointing out that regular mail is a recognized, valid method of service in legal proceedings. Kentucky cites its own rule of civil procedure and *Daniel v. Michigan Mutual Liability Company*, 88 F. Supp. 339 (W.D. Ky. 1950).

The rules covering service of process in formal adjudicatory proceedings are designed to be fair and efficient. One would not expect that such service would be inferior to that required in regulatory administrative proceedings. Certainly, any valid system of notification must represent a weighing of the expenses involved, along with the advantages and disadvantages of each method, in an attempt to achieve the best service reasonably possible. Kentucky appears to have struck a proper balance. Certified mail only helps to assure the sender that the recipient has received the item sent. Assuming a participant or other interested party in a petition proceeding provides a valid address, both the regulatory authority and the party should be permitted to rely on regular mail.

21.7 The Secretary notes that 405 KAR 24:030, section 2(2) omits the requirement in 30 CFR 762.5 that substantial legal and financial commitments for exemption of an area from a "lands unsuitable" designation be based on investments made on the basis of a long term coal contract. The Kentucky regulation still specifies that acquiring the coal or the right to mine will not alone constitute substantial legal and financial commitments. The Secretary agrees that a long term coal contract is only one way of many to show substantial commitments. Therefore, the Secretary finds 405 KAR 24:030, section 2(2) no less effective than federal requirements.

21.8 The Secretary notes that the Kentucky regulation 405 KAR 24:030E section 8(7) provides that the decision of the Secretary of the regulatory authority on a petition to designate lands unsuitable for surface mining may be appealed and that such a proceeding will be conducted according to rules applicable to adjudicatory hearings. The federal regulation (30 CFR 764.17) provides for only a legislative-type hearing.

Kentucky points out that the adjudicatory hearing provided for in the Kentucky regulation is an addition to, rather than a substitute for, the legislative-type hearing from which the appeal is taken. Kentucky states that the appeal will not stay the effect of the decision made by the department following the legislative-type hearing, and the adjudicatory hearing will serve only to provide a record for purposes of the appeal. Kentucky emphasizes that the adjudicatory hearing, as such, will permit the introduction of new information not properly considered at a legislative-type hearing but which may nonetheless be relevant. The State stresses that the nature of the legislative hearing will not be affected by the adjudicatory proceeding, as the department will defend the agency's decision at the adjudicatory hearing. Kentucky insists that the petition process will not be chilled by the appellate procedures provided. (See February 12, 1982, letter, Administrative Record Ky–438.)

While Judge Flannery's February 26, 1980 decision (Round I) upholds the regulation in 30 CFR 764.17, it also acknowledges that a State may provide "additional procedural safeguards" beyond the legislative-type hearing. *In Re: Permanent Surface Mining Regulation Litigation*, 14 ERC 1083, 1093 n. 14 (1980). The Kentucky provision may be viewed as providing such an additional safeguard. The Kentucky regulation is not intended to weaken or alter the fundamentally legislative nature of the petition process, and it does not have that effect. To the contrary, it strengthens and insures the validity of that process. Significantly, the Kentucky procedure is in the first instance a purely legislative one, and the provisions for adjudicatory proceedings are triggered only if a party chooses to appeal the initial

determination. Then, by providing for an adjudicatory hearing at the appellate level, it allows the regulatory authority to meet those "unusual circumstances" referred to in the Flannery decision, *id.*, where the legislative-type procedure is inadequate or inappropriate. It would not seem that participants in the petition process would be averse to the Kentucky procedure. Under the Kentucky regulation, the unsuccessful party still has a second opportunity to obtain administrative relief, but this represents no burden or expense to the winning party, as the State shoulders the burden of defending the agency's decision. On the whole, the Kentucky procedure appears designed to assure a full and fair consideration of all matters relevant to the petition. Thus, while Kentucky's petition process does not mirror the federal regulation, it is no less effective in meeting the requirements of the regulations.

*Finding 22*

In accordance with 30 CFR 732.15(b)(10), the Secretary finds that the Kentucky program demonstrates that the State provides for adequate public participation in the development, revision, and enforcement of state regulations and that the State program is, except as noted below, consistent with the public participation requirements of SMCRA and 30 CFR Chapter VII. Provisions for public participation in the development and revision are discussed in the narrative entitled "State Program § 731.14(g)(14)". The legislative authority for public participation is discussed in Finding 1.

The Secretary finds that there are inconsistencies between state and federal public participation requirements relating to enforcement during implementation of the program. These deficiencies are discussed under Findings 1.3, 17.5, 18.4, 27.4 and 27.5.

*Finding 23*

In accordance with 30 CFR 732.15(b)(11), the Secretary finds that the Kentucky program demonstrates that the State can monitor, review and enforce the prohibition against indirect or direct financial interests in coal mining operations by the employees of the state regulatory authority consistent with the requirements of Subchapter A of 30 CFR Chapter VII. The state description of the proposed system for monitoring, reviewing and enforcing the prohibition against indirect or direct financial interest in coal mining operations by the employees of the state regulatory authority is located in the narrative entitled, "State Program § 731.14(g)(12)". Kentucky has the legislative authority under KRS 350.460 to restrict financial interests. Implementation of the provisions of 30 CFR Part 705 is accomplished by DNREP policy directives.

In Findings 23.1 and 23.2 of the October 22, 1980, **Federal Register** (45 FR 69962), the Secretary found the State program insufficient because it did not contain regulations relating to conflict of interest. Kentucky has stated that its policy memoranda on this subject, which are substantially identical to 30 CFR Part 705, are enforceable against employees, and that actual regulations are unnecessary (see "Response to October 1980 Findings", Administrative Record KY–413). The Secretary is persuaded by Kentucky's assertion and further notes that the State has been successfully enforcing its conflict of interest provisions under the interim program without regulations. Therefore, the Secretary finds that the program contains conflict of interest provisions that are no less effective than 30 CFR Part 705.

*Finding 24*

In accordance with 30 CFR 732.15(b)(12), the Secretary finds that Kentucky has sufficient legislative authority to require the training, examination, and certification of persons engaged in or responsible for blasting. The State program need contain only sufficient legal provisions to allow promulgation of rules in accordance with section 719 of SMCRA until such time as the federal rules on blaster certification are promulgated.

*Finding 25*

In accordance with 30 CFR 732.15(b)(13), the Secretary finds that the Kentucky program demonstrates that the State can provide for a Small Operators Assistance Program (SOAP) consistent with the requirements of 30 CFR Part 795. The State has adequate legislative authority to implement the SOAP. The proposed system described in the narrative entitled, "State § 731.14(g)(16)" is also adequate. Regulations implementing 30 CFR Part 795 are contained in 405 KAR 7:080E, which are found to be no less effective than federal requirements. The State has changed several program sections to be substantially identical to the federal counterparts in response to findings made in the October 22, 1980, **Federal Register**. For this reason, the Secretary finds that Findings 25.1, 25.2 and 25.3 of the October 22, 1980, **Federal Register** have been resolved.

*Finding 26*

In accordance with 30 CFR 732.15(b)(14), the Secretary finds that the Kentucky program provides, through KRS 350.990(7), for the protection of State employees of the regulatory authority in accordance with the protection afforded federal employees under section 704 of SMCRA.

*Finding 27*

In accordance with 30 CFR 732.15(b)(15), the Secretary finds that the Kentucky program demonstrates, except as noted below, that the DNREP has an administrative and judicial review process in accordance with Sections 525 and 526 of SMCRA and Subchapter L of 30 CFR Chapter VII. Legislative authority corresponding to sections 525 and 526 of SMRCA are discussed under Finding 1. The State's description of the proposed system for administrative and judicial review is located in the narrative entitled "State § 731.14(g)(4–7) and (15)." Kentucky regulations related to administrative and judicial review are found in 405 KAR 7:090E. Significant issues raised during the review of the regulations related to administrative and judicial review are as follows:

27.1 In response to the findings published in the October 22, 1980, **Federal Register**, Kentucky has revised several program sections to be substantially identical to the Federal counterparts. For this reason, the Secretary finds that the problems identified in the following findings from the October 22, 1980, **Federal Register** have been resolved: 27.1, 27.2, 27.4, 27.5, 27.6, 27.7, 27.8, 27.9, 27.10, 27.11, 27.12(a), 27.12(d), 27.13, and 27,15,

27.2 In Finding 27.3 of the October 22, 1980, **Federal Register**, the Secretary noted that the Kentucky provisions for an informal conference for bond release under 405 KAR 7:090E section 4 are inconsistent with 30 CFR 807.11(e). Kentucky has clarified that it does not intend to provide for the informal conference for bond release which is considered optional for State programs (see "Response to October 1980 Findings," Administrative Record No. KY–413). The Secretary concurs that the informal conference is optional, and finds that the concerns raised by the previous findings are resolved.

27.3 In Finding 27.12(c) of the October 22, 1980, **Federal Register** (45 FR 69963), the Secretary found that the program lacked provisions consistent with 43 CFR 4.1295 and 4.1296, regarding the award of costs and expenses in administrative hearings and the review of such awards. The State amended its

rules at 7:090E section 12(6) to comply with 43 CFR 4.1295 relative to awards. However, the State asserts that a system of internal appeal of awards as prescribed by 43 CFR 4.1296 is not necessary because any person aggrieved by an award decision may appeal pursuant to KRS 224.085 to the Franklin Circuit Court (see "Response to October 1980 Findings," Administrative Record No. KY–413). The Secretary finds that an appeal to the Circuit Court is no less effective than the federal requirements, and finds the issues raised by previous Finding 27.12(c) resolved.

27.4 As discussed in Finding 27.14 of the October 22, 1980, **Federal Register** (45 FR 69963), the Secretary previously found that the State had no procedural regulations comparable to 43 CFR 4.1109 (service), 4.1130 *et seq.* (discovery), 4.1155 (burden of proof in civil penalty proceedings), and 4.1171 (burden of proof in review of section 521 notices or orders). Kentucky has attempted to correct these deficiencies by adding a provision to 405 KAR 7:090E, section 5(5)(a) specifying that, "the pertinent provisions of the Kentucky rules of civil procedure shall apply to cases before the Department." However, the State program does not demonstrate which rules are pertinent. The Secretary finds, therefore, that the State program is still insufficient in this area. Correction of this deficiency is required as a condition of approval.

27.5 As discussed in Finding 27.12(b) and (e), of the October 22, 1980, **Federal Register** notice, Kentucky did not include a standard for the award of costs and expenses consistent with 43 CFR 4.1294. The State regulations provide only that awards be assessed within the sound discretion of the hearing officer. Kentucky has amended 405 KAR 7:090E section 12 to provide for the award of costs and expenses "as Secretary deems proper." In contrast, 43 CFR 4.1294 specifies who is required to pay the costs, and what showing is necessary to receive an award.

The Secretary finds that Kentucky regulation 405 KAR 7:090E section 12 is less effective than 43 CFR 4.1294 in providing standards for awards of costs and expenses consistent with the intent of section 525(e) of SMCRA. Approval of the Kentucky program is conditioned upon revisions to the program which correct this deficiency.

*Finding 28*

In accordance with 30 CFR 732.15(b)(16), the Secretary finds that the Kentucky program demonstrates that the State can coordinate with and provide documents and other information to the Office of Surface Mining under the provisions of 30 CFR Chapter VII. There is nothing in the Kentucky legislation which would prohibit dissemination of information to OSM. Further, the State regulations on permitting in 405 KAR Chapter 8 specifically provide for permit information to be provided to OSM. There is also nothing in 405 KAR Chapter 10 on bonding or Chapter 12 on inspections which restricts coordination with OSM. The State has corrected the previously identified deficiency (see Finding 28, October 22, 1980, **Federal Register**, 45 FR 69964), concerning the lack of the Director of OSM's approval authority on experimental practices by adding a provision requiring such approval to 405 KAR 7:060E section 2.

*Finding 29*

In accordance with 30 CFR 732.15(c), the Secretary finds that there are no other laws or regulations in addition to those discussed in the preceding findings which would preclude implementation of SMCRA and 30 CFR Chapter VII.

*Finding 30*

In accordance with 30 CFR 732.15(d), the Secretary finds that the DNREP and other agencies having a role in the State program will have sufficient legal, technical and administrative personnel and sufficient funding to implement, administer and enforce the provisions of the State program.

In response to questions on Kentucky's staffing and budget in Finding 30 of the October 22, 1980 **Federal Register** (45 FR 69963), Kentucky assured the Secretary that it intends to adjust personnel as each need becomes apparent during the implementation of the program. Based on this assurance the Secretary accepts Kentucky's staffing and budget plan.

**Disposition of Agency and Public Comments**

Comments have been accepted and considered on Kentucky's program resubmission of December 30, 1981 (Administrative Record KY–413) and information provided by Kentucky in connection with a reopened public comment period. The majority of the public comments were submitted by a collection of the following organizations as a group: Appalachian Research and Defense Fund of Kentucky, Appalachia Speak Out, the Citizens Group of the Kentucky Primacy Task Force, the Cumberland Chapter of the Sierra Club and the Kentucky Conservation Committee. Several individual commenters either endorsed the comments made by this group or made specific comments very similar to certain comments by the group. In addressing the comments made by the group and endorsed by individuals the Secretary has identified the commenter as ARDFK *et al.* Comments from groups or agencies are identified by name but names of individuals have not been used. Comments are organized into the following seven groups: General, Permitting, Bonding, Performance Standards, Public Participation, Inspection and Enforcement, and Lands Unsuitable.

**General**

1. ARDFK *et al.* asserted that the State definition of coal processing plant found at 405 KAR 7:020, section 1(17) is inconsistent with section 701(28) of SMCRA, defining surface coal mining operations. The Secretary finds that the State definition is, on its face, consistent with the 30 CFR 701.5 definition of coal processing plant. In its permanent program submission in the explanations for recent revisions DNREP sets forth its interpretation of the definition, which excludes from DNREP regulation off-site facilities which crush but do not separate impurities. The Secretary is currently evaluating the Department's policy regarding processing facilities subject to OSM regulation, but is not in the position to disagree with Kentucky's interpretation at this time. If the State's interpretation is in disagreement with the Department's final policy determination, then a modification of the State's interpretation will be required.

2. ARDFK *et al.* objected to Kentucky's definition of "Best Technology Currently Available (BTCA)" which deletes the phrase found at 30 CFR 701.5 that reads: "but in no event result in contributions of suspended solids in excess of requirements set by applicable State or Federal Laws * * *" The commenter maintained that the legislative history makes it clear that mining operations must not go forward unless all applicable water quality standards are achieved.

The Secretary does not believe the deletion of the phrase weakens the Kentucky regulations. Kentucky still requires that BTCA "* * * prevent, to the extent possible, additional contributions of suspended solids * * *" This general requirement in the definition is in addition to the specific performance standards which specify the minimum acceptable level of contributions. For example: 405 KAR 16:070, section 1(g) states that, "Discharges of water from areas disturbed by surface mining activities

shall at all times be in compliance with all applicable federal and state water quality standards including the effluent limitation guidelines for coal mining promulgated by the U.S. EPA in 40 CFR 434." The Secretary believes the change in the definition is largely editorial.

3. ARDFK *et al.* commented that Kentucky should be required to include a reference to physical conditions in the definitions of "toxic forming materials" and "toxic mine drainage" as does 30 CFR 701.5. The commenter stated that, "toxicity, although a chemical condition has discernible direct and indirect physical impact on biota and water uses".

As indicated in Finding 12.4, the Secretary believes the deletion of the word "physical conditions" as used in the federal regulations makes the intent of the requirement more clear. Toxicity is indeed a chemical condition and the elimination of the word physical does not mean that a physical effect, such as death caused by a chemical condition, would not be considered. It does, however, make it clear that these terms relate to conditions which are chemically induced, such as acidity, rather than physically induced, such as sedimentation. The Secretary can think of no examples under mining conditions where toxic forming materials or toxic mine drainage would create a physical condition which would not be covered by Kentucky regulations.

4. ARDFK *et al.* commented that the provisions at 405 KAR 7:11OE, Section 2, that allow DNREP to suspend regulations without soliciting public input, violates the intent of SMCRA section 102(i) and K.R.S. Chapter 13.

The Secretary does not agree that the suspension of regulations violates SMCRA section 102, and notes that OSM itself has suspended regulations prior to public review. The key point is that public participation is provided for in subsequent revisions to the suspended sections, and that these revisions are timely. In the "Explanation for Recent Revisions" (Administrative Record KY–413) Kentucky acknowledged that a suspension would have to be coordinated with an amendment to the state program. The State must demonstrate adequate public participation for a program amendment so the Secretary believes the public participation requirements of SMCRA are not circumvented. The Secretary believes a judgment as to the effect of K.R.S 13 on the State's regulation is beyond the scope of this decision.

5. Several commenters were concerned with the potential for poor performance by DNREP after primacy, and cited instances where the regulatory authority did an adequate job in the past. No action can be taken in regard to these comments. The Secretary cannot consider past performance in evaluating a program submission. Section 503 of SMCRA specifically requires only that the states demonstrate, "the capability of carrying out the provisions of this Act * * *" As discussed in the preamble to 30 CFR Chapter VII (44 FR 14946–14947), a State's past history of administration is not considered a fair indicator of its future abilities under the federal legislation, and past performance would have to be judged on factors which may not necessarily relate to a state's future intentions or capabilities (44 FR 14961).

6. The U.S. Fish & Wildlife Service made some general comments relative to program implementation, which do not require consideration during the program decision. These comments have been furnished to the State for later reference.

7. ARDFK *et al.* stated that Kentucky's program does not adequately demonstrate that Kentucky has sufficient staffing for hearing officers, attorneys and inspectors. The commenter noted that the program contained even less information than the original submission which was found to be insufficient in the area of staffing. Specifically the commenter pointed out the following concerns:

(a) The costs and logistics of the hearing process have not been described. There is no information on: (1) Conflict of Interest provisions for local hearing officers, (2) Qualifications for local hearing officers, (3) Pay scale and funding for local hearing officers, (4) Provisions for terminating services for local hearing officers, and (5) Possible interplay between the hearing officers and the enforcement branch of DNREP which would eliminate the independence of hearing officers.

(b) The program is vague concerning the number of attorneys who will be available for surface mining matters. Attorneys listed in the program work in a Division that handles more than coal related programs, and they have been historically backlogged in mining cases.

(c) Since the original submission, the number of inspections which the state has shown an individual inspector is expected to accomplish in one month has gone from 34 to 41. This increase grossly underestimates the additional requirements of the permanent program. The state inspector needs do not address follow-up inspections, citizen complaints and other permit related inspections such as pre-mine bond release and exploration. The commenter further cited the OSM staffing study referenced in Finding 30 of the October 22, 1980, **Federal Register** (44 FR 69964) that calculated state inspector needs at a minimum of 223.

(d) The modification (Administrative Record KY–438) to the resubmission (Administrative Record KY–413) makes significant reductions to the manpower originally proposed in the resubmission without any explanation. The estimated need for inspectors, which the commenter maintains is inadequate, will not be reached until after July 1983. This fact indicates that Kentucky will fall short of even minimal compliance with mandatory inspections. The program mentions a 225% increase in permit workload but the eventual manpower increase in permit review is not proportional, and a significant proportion of the increase is delayed until after July 1983.

The Secretary recognizes that there may be some short-term staffing problems at the initiation of primacy. However, as stated in Finding 30, Kentucky has agreed to adjust its staffing as needs are determined. Staffing will be monitored in oversight.

8. The Fish and Wildlife Service (FWS) furnished a Biological Opinion pursuant to section 7 of the Endangered Species Act which stated that the program was not likely to jeopardize the continued existence of endangered or threatened species or result in the adverse modification of their critical habitat. However, the FWS recommended OSM work with Kentucky to develop procedures for on-site inspections of the area with regard to endangered species since the Federal regulations, requiring a Fish and Wildlife Plan (30 CFR 779.20 and 780.16) were remanded. FWS also advised that its Biological Opinion extended only to the approval of the program and another Biological Opinion was needed for OSM's oversight program.

OSM is presently developing regulations to replace the remanded 30 CFR 779.20 and 780.16 and full promulgation along with the subsequent amendment to Kentucky's program may eliminate some of the FWS's concern. Pending this revision the Secretary will request that OSM work with Kentucky to insure that the State is meeting its responsibilities for protection of endangered and threatened species as set out in the Kentucky program.

The FWS comments will also be considered in the development of an oversight plan.

**Permitting**

1. ARDFK *et al.* stated that the state program was inconsistent with 30 CFR 786.11(d) and SMCRA section 507 and

513 with regard to the local filing of permit applications and publication of Notices of Intent to mine. The commenters had several specific concerns which have been separately considered as follows:

(a) ARDFK *et al.* stated that the application must be filed locally in the county which is the situs of the proposed operation. The Kentucky program requires that the application be filed at the "appropriate" Regional office of the Bureau where mining is proposed to occur. This concept was approved in the initial decision (45 FR 69940–69969) regarding the Kentucky program, and has not been reconsidered in this decision. For a complete discussion of the issue, refer to the response to comment B–10 in the October 29, 1980 Federal Register (45 FR 71593–71594).

(b) The commenter maintained that the Kentucky program did not demonstrate clearly that the applicant be responsible for filing at a local office as required by section 507(e) of SMCRA. Although the Kentucky program makes the regulatory authority responsible for the local filing, the Secretary does not believe the intent of SMCRA has been violated. The applicant is still responsible for filing the application in a system which will result in filing at the mining locality. The Secretary does not consider this as materially different than specifically requiring that the applicant file locally.

(c) The commenter objected to the language in the Kentucky regulations which would allow the applicant to begin the newspaper notices before the application was determined complete as long as the last notice appears after the completeness determination [405 KAR 8:010E, section 8(2)]. The Secretary believes the State regulatory language will achieve the same result as 30 CFR 786.11(d) in meeting the requirements of SMCRA section 513. The federal regulations specify that the applicant begin his notification upon the filing of a complete application but does not specify if, how, or when a completeness determination by the regulatory authority would affect the process. The Kentucky scheme of interjecting a formal completeness determination into the review process is descretionary to the state, and clarifies that the public will have the opportunity to review an application that has formally been deemed complete by the regulatory authority (1) at least 30 days before the end of the public comment period, and (2) after four consecutive weeks notice that the application is available for review in the Regional office.

(d) The commenter states that the regulations do not require the operator to update the application with any revisions or changes. The Secretary interprets the requirement in 405 KAR section 8(8), which requires the application to be available at the regional office, to include all sections of the application including updates and copies of written objections. This requirement will be monitored as an oversight function.

2. ARDFK *et al.* requested that clarification be made regarding 405 KAR 8:010E, section 23 to ensure that new areas which are added to the permit by amendment are treated as new permits except for bookkeeping purposes. The commenters maintained that this was necessary to insure that new areas do not relate back to the existing permit date for the purposes of grandfathering under section 522 (a)(6) and (e) of SMCRA. The commenters were also concerned that the process consider the new area both separately and as a part of the existing permit, and that bond be set at a minimum of $10,000 for the new area.

The Secretary believes the requirement in Kentucky's regulations that the "new area shall be subject to all procedures and requirements applicable to applications for original permits under this title" would exclude grandfathering based on the existing permit date. The new area's relationship to the existing permit should be considered in the permit decision regardless of whether it is added under the same permit number or is treated as a new permit. Therefore, the Secretary does not consider any special language necessary with regard to protection of the environment. The question of bonding is addressed in comment No. 4 under "Bonding" below.

3. ARDFK *et al.* objected to 405 KAR 8:010E, section 20 claiming it allows for incidental boundary revisions in excess of that intended by Congress and allows for other significant revisions without adequate notice.

The Secretary disagrees with the comment, and believes that the State has taken a reasonable approach to defining what requirements will apply to revision requests as required by section 511(a)(2) of SMCRA. Kentucky is not proposing to allow operators to add up to five acres of coal removal area "without new bonds, plans or public participation" as asserted in the comment.

Kentucky divides revisions into "major revisions" and "minor revisions". The permittee must submit all necessary plans and any additional bond for either type of revision. For "major revisions", *all* public participation rights are made available. For "minor revisions", notice to persons who may be adversely affected will be given by DNREP, such persons will be able to file written objections, and administrative and judicial review rights are available. Thus, even for "minor revisions", public participation rights are available. The only major omission is the right to informal conferences.

The 5 acre-10% limit on incidental boundary revisions is found in the subsection on "major revisions". Virtually all of 405 KAR 8:010E is made applicable to such revisions. The only portions not made applicable are the compliance history provisions, which would have been covered in the initial permit application.

The commenter was also concerned with the manner in which both the state and federal provisions should be interpreted. Section 511(a)(3) of SMCRA and 405 KAR 8:010E, section 20(4) both state that any extension to the area covered by a permit must be made by application for a new permit "except for incidental boundary revisions". The point is that any boundary revisions under these provisions must, in fact, be *incidental to* whatever revision in mining or reclamation operations the permittee is seeking.

"Incidental", does not mean "inconsequential" or "insignificant". It means secondary in importance to, but necessary or useful in achieving some other primary objective. The primary objective cannot be extension of the permit area. If it is, section 511(a)(3) and 405 KAR 8:010E, section 20(4) require a new permit application. If there is some other primary objective, however, and some revision of the permit boundary will be necessary to achieve that objective, then such a boundary revision could be considered under these sections.

4. ARDFK *et al.* objected to KAR 8:030 section 2(4) and 8:040, section 2(4) on the ground that section 507(b)(3) of SMCRA requires a listing of all previous mining permits held by the applicant, whereas KAR limits the list to permits held within the five years preceding the date of the new application. Kentucky argues that its provisions are as effective as their federal counterparts—30 CFR 778.13(d) and 782.13(d)—since the five-year period preceding the new application should adequately represent the applicant's compliance history. (See "Explanation for Recent Revisions", Administrative Record KY–413.) The Secretary agrees with Kentucky.

Congress recognized in SMCRA sections 507 (b)(4), (5), 510(c) that an applicant's compliance history beyond the recent past was of little value in

predicting the applicant's probable future compliance record. The five-year period preceding the new application date should be a sufficient guide for this purpose.

5. ARDFK *et al.* asserted that Kentucky's proposal for receiving and processing transition permits violates the 2 month/8 month deadlines established in section 502(d) of SMCRA. According to the commenter, the proposal would almost assure last minute, rubber-stamp approval of permits. The transition application, which must be submitted within the first 2 months of primacy, is insufficient to constitute an application under Section 507(a) of the Act. The commenter requested that Kentucky by required to submit a system which (1) sets priorities for certain types of surface coal mining operations with the goal of requiring a staggered submittal of complete permanent program permit applications, and (2) provides a date certain, not to exceed 12 months from primacy, for issuance of all permits. The commenter was also concerned that permit processing not detract from enforcement staff responsibilities.

As indicated by Finding 14.19, the Secretary has similar concerns with Kentucky's process for the transition of existing operations into the permanent program requirements. The Secretary believes it would be difficult for Kentucky to enforce a requirement for certain operators to submit applications before other operators. However, if operators are made aware that permit applications must meet a finding of actual completeness, rather than a finding of a good faith effort to complete, by the eighth month of primacy, it is likely that more timely and complete applications will be made. The Secretary also believes that it will be impossible for Kentucky to set an absolute date to stop repermitting without creating a situation conducive to last minute rubber stamping of inadequate applications. However, if Kentucky must prioritize processing of the applications so that excessively delayed actions would prohibit processing of new applications the pressure from industry would insure that Kentucky act prudently. The Secretary agrees with ARDFK's assessment of the problems, but has established other solutions as program conditions. The commenter's concern with staff is considered in Finding 30.

6. ARDFK *et al.* asserted that the discretion provided in section 15(2)(b) of 405 KAR 8:030E and 8:040E regarding background data on water quality was too open-ended. As indicated by Finding 14.18, the Secretary agrees with the commenter and is requiring correction of this deficiency as a condition of program approval.

7. The Mine Safety and Health Administration (MSHA) mentioned that one section of the Kentucky program, 405 KAR 7040E section 5(1), did not properly refer to MSHA determination of hazard potential. The regulation questioned was approved in the initial submission and is not being reconsidered at this time. However, the Secretary believes the concern raised by MSHA is adequately covered by several other references to MSHA approval found at other sections of the regulations such as 8:030E section 2(6) and 16:100E section 1(1)(e).

8. The Advisory Council on Historic Preservation contended that the program did not contain sections comparable to 30 CFR 770.12(c) which provides for coordination with section 106 of the National Historic Preservation Act, or 30 CFR 810.2(h) which requires that programs provide for protection of historic land. The Council stated that 405 KAR 8:030E section 11(2) and 405 KAR 8:040E section 11(2) inadequately limited historic considerations to the review of only available data and that 405 KAR 8:030E section 30 and 8:040E section 30 limit consideration to only those properties that are on the National Register and publicly owned.

Because of the above issues, the Council contends that the program does not comply with the November 1980 Programmatic Memorandum of Agreement (PMOA) among the Council, OSM and the National Conference of State Historic Preservation Officers. OSM has not implemented the PMOA because it would require OSM to exceed its authority under SMCRA section 522(2)(3). OSM has contacted the council about renegotiating the PMOA. In any event, the Secretary finds that the Kentucky State program and its requirements are no less effective than 30 CFR Chapter VII in providing for the protection of cultural and historic resources.

9. The Bureau of Mines stated that the Kentucky program's provisions for small operator assistance extended to operators mining up to 200,000 tons, which exceeded the 100,000 ton Federal limit. The Secretary finds that the State has not exceeded the Federal limit for its financial assistance program comparable to 30 CFR Part 795 as indicated by 405 KAR 7:080E and the narrative at State program § 731.14(g)(16). The State does provide for special assistance (non-financial) for operators mining less than 200,000 tons per year in the permit review process as indicated by 405 KAR 8:010, section 13. However, the special review provisions do not violate any federal requirements.

**Bonding**

1. ARDFK *et al.* objected to provisions in Kentucky's bonding regulations which allow each increment to stand on its own rather than being applicable to the entire permit area as in by 30 CFR 800.11(b)(1) and SMCRA section 509(a). In support of their position, the commenter quoted a portion of section 509(a) which states, "the applicant shall file * * * a bond for performance * * * conditional upon faithful performance of all requirements of this Act *and the permit*" (emphasis added by commenter).

The Secretary disagrees with the commenter's interpretation of SMCRA section 509. The section quoted by the commenter goes on to state "the bond shall cover that area of land within the permit area upon which the operator will initiate * * *. As succeeding increments * * * the permittee shall file * * * an additional bond to cover such increments * * *." SMCRA does not require bond increments to cover the entire permit area.

The Secretary has found the State provisions no less effective than the federal regulations because of the additional safeguards the state regulations contain in relation to deleting an increment from the permit area. See Finding 18.8.

2. ARDFK *et al.* stated that 405 KAR 10:020E, Section 4 violated SMCRA sections 509, 519 and 503 by providing that the public be excluded from bond release decisions which involved reductions in acreage which has not been affected by a surface mine. The commenter believed areas such as buffers or drainage areas should not be deleted merely because the area is not to be mined.

The Secretary does not agree that a bond reduction caused by a deletion of acreage is subject to the release procedures of SMCRA section 509. 405 KAR 10:020E, section 4 allows bond reduction without public participation only on areas which have not yet been affected by the operation. In addition to coal removal areas, drainage areas, buffers, or any area affected by the operation could not be deleted. The reduction is akin to a withdrawal of part of the area to be considered for mining and there will be no reclamation work for the public review.

3. ARDFK *et al.* stated that Kentucky has not modified its regulations regarding bond adjustment where the

cost of future reclamation work changes. The Secretary assumes the commenter is referring to 405 KAR 10:020E, section 4, which is discussed in Finding 18.5 of this notice. As stated in that finding, the primary difference between the state and federal regulations is that the state regulations do not require a change unless there is a substantial difference in the bond and the newly estimated cost to reclaim. The Secretary does not believe this results in a material difference in the regulations since the cost of reclamation is, at best, an estimate and, in practice, no regulatory authority will begin the process of adjustment unless the change in estimates is significant.

4. ARDFK *et al.* maintained that 405 KAR 10:020E, section 2, which allows new areas to be added to the permit without a $10,000 minimum bond on the new areas, violated the provisions of SMCRA section 509(a), 506(d)(2) and 511(a)(3). As the commenter interprets SMCRA, any extension of a permit area requires a new permit and each new permit requires a $10,000 minimum bond.

The Secretary disagrees with the commenter. SMCRA section 506(d)(2) and 511(a)(3) speak consistently to extensions of an existing permit being subject to the "full standards applicable to new applications * * *." The Secretary interprets SMCRA as allowing for extensions of permit boundaries under an existing permit so long as the new areas are subject to the same review procedures and performance standards as a new permit. The permit area, including the old and new area collectively, would be subject to section 509(a) of the Act which provides that, "in no case shall the bond for the entire area under one permit be less than $10,000". In addition, Kentucky has stated as part of its program submission that, except in these instances when the amendment would cover an acre or two, it is probable that the bond for the new area would be greater than $10,000. (See "Explanation for Recent Revisions", Administrative Record KY–413.) The State is required to establish an adequate bond under 405 KAR 10:020E, section 1, and the Secretary does not believe the intent of SMCRA is being violated by the exclusion of extension areas from a $10,000 bond limitation.

5. ARDFK *et al.* objected to the Kentucky regulations for bond "crediting" without public participation. The Secretary agrees with the comment and has requested correction of this deficiency as a condition of program approval (see Finding 18.14).

6. ARDFK *et al.* commented that the State's failure to define "substantially" as used before "augmented seeding fertilization * * *" concerning the triggering anew the five/ten year period of liability under the bond in 405 KAR 10:020E, section 3 is in direct conflict with the provisions of SMCRA section 515(b)(2). As indicated by Finding 18.4, the Secretary believes the intent of the word "substantially" has been adequately addressed in the State program.

7. ARDFK *et al.* asserted that Kentucky's explanation of how it would eliminate its existing backlog of bond forfeiture cases was inadequate. The commenter stated that DNREP had 136 outstanding forfeiture actions unresolved for pre-January 1, 1981 revocations. The commenter pointed out that this related to inadequate attorney staffing.

The Secretary recognizes that the State's situation in regard to delayed actions on bond forfeitures is less than ideal, but believes the explanation submitted by Kentucky shows that progress toward elimination of the problem is being made (see Finding 18.11). In addition, it is possible that the need for bond forfeiture actions will be reduced by the higher bond amounts set under the permanent program. Under the permanent program, abandonment of a site may be more costly to an operator than performing reclamation, because the operator's cost to reclaim would be less than his cost of defaulting on a bond.

8. ARDFK *et al.* stated that the regulations on bonding should clearly specify that a bond release will not occur until after notice and opportunity for a hearing. The commenter asserted that the policy statements submitted by DNREP which specified that bond release would not occur until after the hearing were insufficient.

As indicated by Finding 18.12, the Secretary believes the policy statement is sufficient to clarify the intent of the regulations. To release the bond prior to the notice and opportunity for a hearing would also violate the provisions of KRS 350.093 which addresses the opportunity for a hearing on "the proposed bond release."

**Performance Standards**

1. ARDFK *et al.* commented that the Kentucky regulations dropped the requirement of 30 CFR 816.71(a)(3) which requires controlled placement of spoil which ensures "(3) that the land mass designated as the disposal areas is suitable for reclamation and revegetation compatible with the natural surroundings". Upon examination, the Secretary finds that the State has not deleted the requirement, but has moved it from the regulation dealing with initial spoil placement (405 KAR 16:130E, Section 1(1)) to the regulation dealing with the final configuration of the fill (405 KAR 16:130E, Section 1(7)). The movement of this requirement is logical since it is the final fill configuration which relates most closely to compatibility with the natural surroundings.

2. ARDFK *et al.* objected to Kentucky's deletion of the requirement that a qualified registered engineer certify the plan for removal of burned coal processing waste (405 KAR 16:140E, Section 6 and 18:140E, section 6). The Secretary finds that the Kentucky program makes a distinction between plans "prepared" by an engineer and those "certified" by an engineer. The Kentucky regulations at 405 KAR 7:040E, section 10 establish specific criteria by which a certification means that the plans must be certified to be in accordance with the requirements of KRS 350 and the regulations. When the Kentucky regulations require that a plan only be "prepared" by an engineer, the engineer still must certify that the work is in accordance with sound engineering practice, but there is no requirement that he/she be aware of KRS 350 or Kentucky regulations. Since there are no statutory or regulatory standards for burned waste utilization, a certification under the Kentucky regulatory language of 405 KAR 7:040E, section 10 would be inappropriate. This issue was discussed with state officials at a December 31, 1981, meeting (Administrative Record KY-412) on a draft state document.

3. ARDFK *et al.* objected to Kentucky regulatory language at 405 KAR 16:190E, section 3 and 18:190E, section 3, which would allow treatment of acid and toxic-forming material as an alternative to covering such material. This provision of the Kentucky program was approved in the initial decision (45 FR 69940–69969) regarding the Kentucky program and has not been reconsidered in the decision.

4. ARDFK *et al.* questioned Kentucky's deletion of all references to reconstruction in the regulations dealing with roads. Although the federal regulations on roads, 30 CFR 816.150–.176 and 817.150–.176 have been remanded, the deletion of the word reconstruction was discussed with state officials at a meeting (Administrative Record KY-412) with OSM on a draft document. The State explained that any reconstruction, including roads, was covered under its regulations on existing structures, 405 KAR 7:040E, section 4. The Secretary, therefore, believes ARDFK's concern that roads are

exempted from reconstruction because the word reconstruction does not appear in 405 KAR 16:220E and 18:220E has been resolved by the State.

5. ARDFK *et al.* objected to the Kentucky regulations regarding disposal of excess spoil which waive the twenty (20) foot maximum terrace width in all cases (405 KAR 16:130E, section 1(8) and 18:130E, section 1(8)) ARDFK *et al.* point out that the federal regulations (30 CFR 816.102(b)(1) and 816.71(H)) only allow terracing widths to be greater when specifically approved by the regulatory authority based on the necessity for stability, erosion control, etc.

The Secretary does not believe the state's regulatory waiver of the 20 foot maximum terrace width results in a substantive difference between the state and federal regulations. In the federal regulations, the terrace width limitation can indeed be waived by the regulatory authority when necessary for stability, erosion control or roads in the approved post mining land use. The Kentucky language requires that terraces be necessary to control erosion and enhance stability, and be specifically approved by the regulatory authority. No safety factors or other requirements are reduced. The decision on terrace widths is to be based on sound engineering practices, and is a discretionary decision for the regulatory authority in both the Kentucky and the federal regulations.

6. ARDFK *et al.* objected to the changes Kentucky made from its previous submission in the area of sedimentation pond storage volume (405 KAR 16:090E, section 2 and 18:090E, section 2). The federal requirements on design storage volume (30 CFR 816.46(b) and 817.46(b)) have been suspended (44 FR 77452) and the Secretary is, therefore, unable to require more in the Kentucky rules on this issue at this time.

7. ARDFK *et al.* stated concern that Kentucky's deletion of the requirements for an emergency spillway for all sedimentation ponds (405 KAR 16:09)E and 18:090E, sections 5(3)(5)), could lead to loss of pond performance and difficulty in enforcement of design criteria. The Secretary agrees with this comment and will require changes in Kentucky's program to correct the deficiency (see Finding 13.27 above).

8. ARDFK *et al.* stated that the 405 KAR 7:040E, section 4 and 16:220E, 16:250E, 18:230E and 18:260E were less effective than federal regulations because the state regulations fail to require that a non-conforming structure be reconstructed to meet both design as well as performance standards. The Secretary disagrees with the comment and believes meeting a performance standard is no less effective than meeting a design criteria in these cases. See Findings 14.5 and 14.16 for further discussion.

9. ARDFK *et al.* commented that 405 KAR 16:120E, section 4(5) and 18:220, section 4(5) are inconsistent with 30 CFR 816.133(c)(5) and SMCRA section 515(c)(3)(vi) and (vii) because the state regulations do not require that the postmining land use plan be designed to assure conformity with accepted standards for "vegetative cover and esthetic design". The Secretary does not believe the language in the Kentucky regulations is substantially different than the federal requirements. The language in the state regulations virtually mirrors the SMCRA section quoted by the commenter, requiring that postmining land use plans be "designed by a registered engineer in conformance with professional standards established to assure the stability, drainage, and configuration necessary for the intended use of the site". Vegetative cover and esthetic design are not items that would be covered by an engineer's certification, and Kentucky's deletion of these items from this particular section is logical. The requirement that vegetative cover be supportive of the postmining land use is specifically required in 405 KAR 16:200E and 18:200E. Esthetic design is a very subjective and unenfoceable term, and its exclusion from the state regulations will not result in a detectable difference in mine reclamation.

10. ARDFK *et al.* questioned 405 KAR 16:130E and 18:130E, sections 2(2)(c) and 2(2)(d) because these regulations appear to allow the regulatory authority discretion to approve: (1) Inappropriate materials for underdrains, and (2) Inadequate sized underdrains. The commenter maintained that the limitations on the material for underdrains should be mandated by regulations rather than the policy statement submitted by DNREP. ARDFK *et al.* also made specific suggestions as to what must be considered in any engineering analysis for the size of underdrains.

The Secretary does not believe a regulatory change is necessary. The DNREP policy statement explains that alternative materials would not be approved that are acid forming, toxic forming or slaking. The policy statement clarifies the State's provision allowing only alternative materials which meet the same performance criteria as the type of rock described in 30 CFR 816.72 and 817.72 (see Finding 13.25). As to the size of the drain material, the Secretary believes that Kentucky's variance from the minimum size, based on an engineering analysis to assure long-term capacity for drainage, is no less effective than the federal requirements. The commenter contended that any variance should consider the substitute's capability to support the fill in a stable condition and prevent filtration of water into the spoil in addition to providing adequate long-term drainage. The Secretary believes "long-term drainage" is a broad term that will encompass consideration of fill stability and toxic drainage if properly administered by the regulatory authority. (See Finding 13.7.)

11. ARDFK *et al.* objected to the provisions in 405 KAR 16:130E and 18:130, sections 2(3), which allow the regulatory authority to grant exemptions to the four foot lift limitation in valley and head-of-hollow fills. The commenter maintained that the four foot lift design standard was not arbitrary and ensured enforceability. The lack of identification in the program of specific data on which the variance would be made and Kentucky's previous history of "end dumping" problems were also cited by the commenter.

As discussed in Finding 13.8, the Secretary believes that these concerns have been resolved by Kentucky's interpretation of its rules. The Secretary has not requested that Kentucky identify the specific data that would be required before the variance would be granted because this level of detail is not considered necessary as part of a program review. The State is not waiving any performance standards, and the Secretary considers the appropriateness of the engineering analysis that results in the waiver of the design standard to be a case-by-case decision by the State which will be considered in oversight.

12. ARDFK *et al.* object to 405 KAR 18:190E, section 2 because it allowed a variance from the requirement that the operator regrade and backfill the face up for a deep mine where the fill has stabilized and revegetated. Since the federal regulation, 30 CFR 817.102, which requires backfilling of face up areas, has been remanded for the purposes of consideration of fill stabilization (see 45 FR 51547–51549), the Secretary cannot ask the state to make a change at this time.

13. Two commenters presented technical data to show that the satisfaction of both 405 KAR 16:060E, Section 6, dealing with recharge phenomenon, and 405 KAR 16:130E, section 1(6), dealing with slope stability, are technically impossible in certain steep slope mining situations. The Secretary disagrees and finds that the requirements of concern to the

commenters are essentially identical to the requirements of 30 CFR 816.51 and 816.71(f).

14. Two commenters questioned the hydrologic monitoring frequency of the program in general, and recommended that coal companies be forced to use automatic type samplers. The Secretary finds that federal regulations at 30 CFR 816.52 and 817.52 allow the regulatory authority discretion in determining the frequency of monitoring.

15. Two commenters contended that the premining data base collection methodology for hydrologic calculations was inadequate. The commenters believed that more than six months was necessary because of natural inconsistencies. The commenter also recommended that certain areas be preserved and used for long-term determinations of hydrologic consequences.

The Secretary believes the commenter's concerns are beyond the scope of this decision. The state regulations (405 KAR 8:030 and 8:040 sections 15 and 32) requiring hydrologic information are, except as described in Finding 14.18, consistent with the federal regulations. The adequacy of state decisions under these requirements will be considered in oversight, but the Secretary presently finds no inconsistencies between the program and any current federal requirements.

16. The Tennessee Valley Authority (TVA) believed that both the Secretary's concerns expressed in Finding 14.24 of the October 22, 1980, Federal Register and the State's counter arguments expressed in the program resubmission relating to AOC variances had merit. TVA recommended that Kentucky and OSM consider the use of numeric models to evaluate the impact of AOC variances on a given watershed. As explained in Finding 14.13 of this notice, the Secretary has approved the State requirements.

17. One commenter stated that 405 KAR 16:050E, section 2 should be revised to insure that qualified people are used to gather the samples for tests on material to be substituted for topsoil. The Secretary agrees that qualified people should be used, but notes that the requirements in the state regulations are essentially the same as those in 30 CFR 816.22. Therefore, no changes in the state program are required.

18. One commenter stated that the Kentucky regulations did not properly consider the unique physiographic differences between Western Kentucky and Eastern Kentucky. The State has primary responsibility for developing regulations to meet unique differences within its boundaries (see SMCRA section 101(f)). At any time, the State can develop additional regulations to address such differences if Kentucky believes changes are needed. These changes must then be submitted to OSM as program amendments pursuant to 30 CFR 732.17.

**Public Participation**

1. ARDFK *et al.* asserted that KRS 350.250 fails to provide for intervention by the Secretary of DNREP as a matter of right. The commenter implied that intervention by the Secretary of the Interior was also required as a matter of maintaining uniformity of regulation among the states. As discussed in detail under Finding 1.3(c), the Secretary believes that intervention by the Secretary of the Interior is not a state program requirement. Intervention by DNREP is being required as a program condition.

2. ARDFK *et al.* asserted that the Kentucky provision on intervention (405 KAR 7:090E, Section 11) grants more discretion to the hearing officer in the area of "intervention of right" than is allowed under 43 CFR 4.1110. The State rule allows the hearing officer to consider the adequacy of representation of the proposed intervenor by existing parties in all cases where the Federal rule does not. The Secretary does not believe the State rule will lead to the exclusion of citizens from administrative actions. Rather, the State rule is intended to provide the hearing officer the discretion to limit parties whose claims would be merely duplicative. Therefore, the Secretary believes that the operation of 405 KAR 7:090E, Section 11 will be no less effective than 43 CFR 4.1110.

3. ARDFK *et al.* asserted that no state counterpart to 43 CFR 4.1103, "eligibility to practice" provisions, exist and that meaningful access might be denied citizens who are unable to retain counsel. The Secretary is not persuaded that such would be the case under the Kentucky regulations. For example, 405 KAR 7:090E, section 5(6)(a) provides that a party to a hearing *may* be represented by counsel and 405 KAR 7:090E, section 5(6)(b) provides that a party *may* conduct cross-examinations. The Secretary can find nothing in the Kentucky regulations to suggest that only lawyers would be allowed to represent parties. The Secretary assumes that the Kentucky regulations are not inconsistent with the practice of *pro se* representation, and thus finds the Kentucky regulations acceptable.

4. Appalachian Alliance commented that the program narrative is deficient for failure to detail how citizen complaints will be addressed. State program narrative § 731.14 (g)(4–7)(15) clearly describes the mechanisms and rights for complaints during mining. State program narrative § 731.14(g)(1) and (g)(8) describe the procedures for citizen input into the permitting and bonding processes. More detailed information on how each complaint is handled is not considered necessary.

5. ARDFK *et al.* stated that Kentucky's hearings provisions were inadequate because they lacked procedural regulations comparable to 43 CFR 4, particularly in the area of discovery. As indicated in Finding 27.4, the Secretary concurs with the comment and is requiring correction of this deficiency as a condition of approval.

6. ARDFK *et al.* commented that KRS 350.250 is inconsistent with SMCRA section 520 because the State statute requires persons bringing an action to compel performance by regulatory authority personnel of non-discretionary duties to make such demands under oath. This issue was considered in the initial decision and the oath concept was considered acceptable. For a discussion of this question refer to the Secretary's response to comment No. A-7 beginning on page 71591 of the October 29, 1980, Federal Register.

7. ARDFK *et al.* objected to the lack of standards in the program for the award of costs and expenses in administrative cases consistent with the criteria set forth in 43 CFR 4.1294. The commenter presented detailed rationale as a counter argument to the statements made by DNREP in the "Response to October 1980 Findings" (Administrative Record Ky–413). As discussed in Finding 27.5, the Secretary agrees with the commenter and is requiring correction of this deficiency as a condition of approval.

8. ARDFK *et al.* asserted that KRS 350.250(a)(2) is more restrictive than SMCRA section 520(a)(2) because the State statute limits the right of citizen suits to "citizen of this Commonwealth" rather than "any person having an interest which is or may be adversely affected". As indicated by Finding 1.3(a), the Secretary concurs with the commenter and is requiring correction of this deficiency as a condition of program approval.

9. ARDFK *et al.* commented that KRS 350.250 did not contain the "savings clause" found at section 520(e) of SMCRA. As indicated by Finding 1.1, the Secretry believes the legal opinion furnished with the resubmission adequately resolves this concern.

10. ARDFK *et al.* asserted that KRS 350.250(3) fails to clearly provide for an action for damages for violations of the

Act consistent with section 520(f), and for injunctive relief consistent with section 520(a)(1). The commenter provided a detailed counterargument to the legal opinion furnished by DNREP on this issue. As discussed in Finding 1.3(b), the Secretary agrees with the commenter and is requiring correction of this deficiency as a program condition.

**Inspection and Enforcement**

1. ARDFK *et al.* asserted that Kentucky should be required to include provisions in its regulations for citizen access to minesites. As indicated in Finding 17.4, the Secretary agrees with the comment and is requiring correction of this deficiency as a program condition.

2. ARDFK *et al.* commented that State regulations unduly restrict citizen participation in inspection and enforcement activities (see 405 KAR 12:030 which covers "Public participation in inspection and enforcement" as per 405 KAR 12:010, section 6). The latter section restricts public participation to "any person having an interest which is or may be adversely affected". The commenter argues that section 521(a) of SMCRA specifies that an inspection shall be conducted when "any person" provides information giving rise to a "reason to believe" that a violation exists. Under SMCRA, the commenter continues, "any person" who furnishes information which prompts an inspection shall be allowed to accompany the inspector during the inspection. SMCRA does not require the person giving information to have any specific attributes, e.g., an interest that is or may be affected. Section 521(d) of SMCRA requires that state regulatory programs contain enforcement provisions which, "contain the same or similar procedural requirements" as the federal program. 30 CFR 840.15 requires that state regulatory programs provide for public participation in enforcement activities consistent with section 842. this section requires that any "citizen may request a(n) * * * inspection * * * by furnishing to an authorized representative reason to believe that a violation exists * * *."

The Secretary agrees with the commenter the Federal regulations require a state program to contain certain public participation requirements in inspection and enforcement activities. The Kentucky program is not necessarily inconsistent with federal requirements. The Kentucky regulatory section entitled, "public participation in inspection and enforcement", 405 KAR 12:030, is no less effective than the comparable Federal regulations. The Secretary reads 405 KAR 12:010, section 6 as not limiting public participation, but rather as creating an additional category of persons who may participate in Kentucky's program.

The commenter goes on to state that "any person" should also be able to participate in a review of the adequacy of an inspection and a review of a decision not to inspect. 30 CFR 842.14 and 842.15 state that, "any person who is or may be adversely affected" may participate in a review of the adequacy of an inspection or a review of a decision not to inspect. These provisions are made a State program requirement by 30 CFR 840.15. Kentucky's regulations are consistent, therefore, with 30 CFR 842.14 and 842.15.

3. ARDFK *et al.* stated that the Kentucky program did not demonstrate that cessation orders could be immediately issued upon finding in imminent danger by inspectors in the field because only some inspectors will be empowered to issue such orders. The Secretary believes Kentucky has adequately addressed this concern, as indicated by Finding 17.5.

4. ARDFK *et al.* stated that KRS 350.032(2) is inconsistent with SMCRA section 526(c) because the State statute does not set forth all criteria for granting temporary relief. The commenter presented its rationale and cited some examples of Kentucky case history as an argument to the legal opinion furnished by DNREP. As indicated by Finding 1.4, the Secretary agrees with the commenter and will require correction of this deficiency as a program condition.

**Lands Unsuitable**

1. ARDFK, *et al.* commented that Kentucky's requirements at 405 KAR 24:020E, section 3(7), concerning allegations and supporting evidence, are too stringent. Specifically, the commenters assert that the language, "Allegations of fact and supporting evidence * * * shall be specific as to the petitioned area * * *", will exclude the use of more general scientific evidence, which may be pertinent to the petitioned area, but which refers to a more general area. According to the commenter, this would increase the threshold burden of petitioning beyond those in section 522 of SMCRA.

The Secretary agrees with the commenter to the extent that information of a general but pertinent nature cannot be excluded from the petition review process. The Secretary believes, however, that the commenters have chosen a very narrow interpretation of the Kentucky language, i.e. Kentucky does not intend to limit its review only to that information which has been gathered from the petitioned area. On the contrary, the State intends a broader and more reasonable interpretation which would include review of data gathered external to the petitioned area, but which is pertinent to reaching a decision on unsuitability. For example, the State would consider mining/soils studies external to the petitioned areas provided the petitioner would clearly demonstrate that the soils are physical and chemically similar to those of the petitioned area and that mining activities could cause similar effects. In this example, the supportive evidence is based on data gathered from the petitioned area but, nevertheless, is specific to the area because of the conclusions which it can support.

2. ARDFK *et al.* objected to the State's definition of Substantial Legal and Financial Commitments (SLFC) at 405 KAR 24:030E, section 2(2), which excludes the requirement of 30 CFR 762.5 that SLFC be based on a long-term coal contract. The commenter cited the following sections from the Act's legislative history to support the position that a long-term coal contract is a prerequisite to SLFC:

1. The designation process is not intended to be used as a process to close existing mine operations, although the area in which such operations are located may be designated with respect to future mines. The committee recognized that an existing mine might not be one actually producing coal, because it was in a *substantial* state of development to coal production. Thus the meaning of existing operations is extended to include operations for which there are "substantial legal and financial commitments". H. Rep. No. 95–218, 95th Congress, First Session 94–95 (1977).

2. The phrase "substantial legal and financial commitments" in the designation section and other provisions of the Act is intended to apply to situations where, on the basis of a long-term coal contract, investments have been made in powerplants, railroads, coal handling and storage facilities and other capital-intensive activities. The committee does not intend that mere ownership or acquisition costs of the coal itself or the right to mine it should constitute "substantial legal and financial commitments". H. Rep. No. 95–218 *supra*, at 95; H. Rep. No. 94–986, 94th Congress, Second Session, 47 (1976).

The Secretary does not agree with the commenter's interpretation of these references. These portions of the legislative history must be read together as they actually appear in the House Report. Accordingly, the first paragraph states that the Act intends to protect, from the designation process, those operations which are in a substantial state of development. "Substantial state of development" is the emphasis of this

paragraph without any regard to the existence of long-term coal contracts. Read in this context, the second paragraph serves only to establish two extremes where SLFC may be found and not found, respectively. Thus, in situations where, on the basis of a long-term coal contract, investment has been made in capital-intensive activities, e.g., powerplants and railroad, SLFC clearly exists. On the other hand, where the operator has only the "mere ownership or acquisition costs of the coal itself or the right to mine", then SLFC clearly does not exist.

As stated in Finding 21.7, the Kentucky regulation is, at the very least, as effective as the federal regulation. The Secretary's definition of SLFC merely parrots the legislative history while the Kentucky regulation attempts to provide guidelines for determining SLFC in those situations between the two extremes spelled out in the legislative history.

3. ARDFK *et al.* objected to 405 KAR 24:030E, section 3(6) because it allows a cut-off of the deadline for submitting a petition to designate lands unsuitable at the close of the period for filing written comments and objections on a permit rather than at the close of any informal conference. As stated in Finding 21.4, the Secretary believes that the Kentucky still provides ample time for a petition submission before a permit is issued, and has found the Kentucky provision no less effective than 30 CFR 764.15(a)(7).

4. ARDFK *et al.* objected to the provisions of 405 KAR 24:020E, sections 3(3) and 4(3) requiring notarized signatures as part of a petition. The commenter asserts that Congress showed a "marked dislike" for requiring citizens to exercise their rights under oath, and cited the removal by the House committe of such language from SMCRA section 520 (a section not here at issue). The commenter further maintained that the oath would serve no useful purpose as it would be impermissible to prosecute a petitioner for falsely swearing to matters contained in a petition.

As indicated in Finding 21.3, The Secretary disagrees with the commenter. Section 518(g) of SMCRA provides criminal sanctions for knowingly making false statements. The Kentucky statute has a counterpart to section 518(g), i.e., KRS 350.990(7). Provisions to assure accurate and truthful information are, therefore, not inconsistent with SMCRA, and the kentucky provisions are as effective as those in SMCRA in insuring this end.

5. ARDFK *et al.* objected to the provisions of 405 KAR 24:030E section 8(7) which states: "any person having an interest which is or may be adversely affected by the department's final decision under subsection (6) of this section may request a formal hearing under 405 KAR 7:090E".

The commenter maintains that this regulation is an attempt to remove the public from the lands unsuitable decision process because: (1) The regulation includes those affected by a designation decision but not those affected by a termination decision; (2) Temporary relief could conceivably be granted, suspending the petition and allowing permitting; (3) What is ultimately appealed to the Franklin Circuit Court will be the artificial record of the adjudicatory hearing rather than the real record consisting of the transcript, the petition and pertinent data and analysis developed by DNREP; and (4) The only proper vehicle for "rehearing" a designation and allowing new evidence is a petition to terminate designation as specified by 30 CFR 764.13(c).

As indicated by Finding 21.8, the Secretary does not agree that the hearing provisions will reduce public participation in the petition process. As to the first two points in the comment, the Secretary finds nothing in the regulation which would exclude a termination decision from the hearing process or allow temporary relief in violation of KRS 350.610(8). The Secretary does not agree that the record from the hearing under 405 KAR 7:090E will be less than complete for purposes of the appeal to the Franklin Circuit Court as asserted by the commenter's third contention. As to the question of the proper vehicle for "rehearing" a designation decision, the Secretary considers the State procedures to be an "additional procedural safeguard" as further discussed in Finding 21.8.

**Background on Conditional Approval**

The Secretary is fully committed to two key aims which underlie SMCRA. SMCRA calls for comprehensive regulation of the effects of surface coal mining on the environment and public health and safety and for the Secretary to assist the states in becoming the primary regulators under the Act. To enable the states to achieve that primacy, the Secretary has undertaken many activities, of which several are particularly noteworthy.

The Secretary has worked closely with several state organizations, such as the Interstate Mining Compact Commission, the Council of State Governments, the National Governors Association and the Western Interstate Energy Board. Through these groups OSM has frequently met with state regulatory authority personnel to discuss informally how SMCRA should be administered, with particular reference to unique circumstances in individual states. Often these meetings have been a way for OSM and the states to test new ideas and for OSM to explain portions of the federal requirements and how the states might meet them.

The Secretary has dispensed over $8.5 million in program development grants and over $54.8 million in initial program grants to help the states to develop their programs, to administer their initial programs, to train their personnel in the new requirements, and to purchase new equipment. In several instances OSM detailed its personnel to states to assist in the preparation of their permanent program submissions. OSM has also met with individual states to determine how best to meet SMCRA's environmental protection standards.

Equally important, the Secretary structured the state program approval process to assist the states in achieving primacy. He voluntarily provided his preliminary views on the adequacy of each state program to identify needed changes and to allow them to be made without penalty to the state. The Secretary adopted a special policy to insure that communication between him and the states remained open and uninhibited at all times (44 FR 54444; September 19, 1979). This policy was critical to avoiding a period of enforced silence between OSM and a state after the close of the public comment period on its program and has been a vital part of the program review process.

The Secretary has also developed in his regulations the critical ability to conditionally approve a state program. Under 30 CFR 732.13 of the Secretary's regulations, conditional approval gives full primacy to a state even though there are minor deficiencies in a program. This power is not expressly authorized by SMCRA; it was adopted through the Secretary's rulemaking authority under 30 U.S.C. 201(c), 502(b), and 503(a)(7).

SMCRA expressly gives the Secretary only two options—to approve or disapprove a state program. Read literally, the Secretary would have no flexibility; he would have to approve those programs that are letter perfect and disapprove all others. To avoid that result and in recognition of the difficulty of developing an acceptable program, the Secretary adopted the regulation providing the authority to conditionally approve a program.

Conditional approval has a vital effect for programs approved in the Secretary's

initial decision. It results in the implementation of the permanent program in a state months earlier than might otherwise be anticipated. It also avoids the costly and cumbersome problem of implementing federal programs where the state submittal was deficient in only minor respects. While this may not be significant in states that already have comprehensive surface mining regulatory programs, in many states earlier implementation will initiate a much higher degree of environmental protection. It also implements the rights SMCRA provides to citizens to participate in the regulation of surface coal mining through soliciting their views at hearings and meetings and enabling them to file requests to designate lands as unsuitable for mining if they are fragile, historic, critical to agriculture, or simply cannot be reclaimed to their prior productive capability.

The Secretary considers three factors in deciding whether a program qualifies for conditional approval. First is the state's willingness to make good faith efforts to effect the necessary changes. Without the state's commitment, the option of conditional approval may not be used.

Second, no part of the program can be incomplete. As the preamble to the regulations states, the program, even with deficiencies, must "provide for implementation and administration for all processes, procedures, and systems required by SMCRA and these regulations" (44 FR 14961, March 13, 1979). That is, a state must be able to operate the basic components of the permanent program: the designation process; the permit and coal exploration systems; the bond and insurance requirements; the performance standards; and the inspection and enforcement systems. In addition, there must be a functional regulatory authority to implement the other parts of the program. If some fundamental component is missing, conditional approval may not be granted.

Third, the deficiencies must be minor. For each deficiency or group of deficiencies, the Secretary considers the significance of the deficiency in light of the particular state in question. Examples of deficiencies that would be minor in virtually all circumstances are correction of clerical errors and resolution of ambiguities.

Other deficiencies require individual consideration. An example of a deficiency that would most likely be major would be a failure to allow meaningful public participation in the permitting process. Although this would not render the permit system incomplete, because permits could still be issued, the lack of any public participation could be such a departure from a fundamental purpose of SMCRA that the deficiency would probably be major.

The granting of conditional approval is not and cannot be a substitute for the adoption of an adequate program. The federal regulation, 30 CFR 732.13(i), gives the Secretary little discretion in terminating programs where the state, in the Secretary's view, fails to fulfill the conditions. The purpose of the conditional approval authority is to assist states in achieving compliance with SMCRA, not to excuse them from compliance.

**The Secretary's Decision**

As indicated above, under "Secretary's Findings", there are minor deficiencies in the Kentucky program which the Secretary requires to be corrected. In all other respects, the Kentucky program meets the criteria for approval. The deficiencies identified in the findings are summarized below and an explanation is given to show why the deficiency is minor, as required by 30 CFR 732.13(i).

1. As discussed in Finding 13.26, Kentucky submitted a regulation which gives the regulatory authority total discretion in approving stocking and ground cover rates on noncommercial forest land as an alternative to reference areas. This deficiency is minor since the state has agreed to use reference areas until its technical standards for the discretionary decisions are developed and approved by OSM.

2. As discussed in Finding 17.5, Kentucky regulations do not provide for citizens to accompany an inspector onto a minesite. This deficiency is minor since citizen visits are not frequent. Also Kentucky has agreed to an administrative policy to allow citizens to accompany inspectors during the period the State has to amend the program.

3. As discussed in Finding 18.14, Kentucky's cumulative bonding system does not provide adequate public participation in the bond crediting process. This deficiency is considered minor since Kentucky has agreed not to use this process during the period the State has to amend this provision. The State has two other bonding methods, bonding of the entire permit and incremental bonding, which are now available.

4. As discussed in Finding 27.4, the Kentucky program fails to specify what rules of civil procedure shall apply to hearings before DNREP. This deficiency is considered minor because the State has procedures for hearings. In addition, the State has agreed to develop guidelines as effective as 43 CFR Part 4 for use until regulations can be enacted. Therefore, few, if any, affected citizens would be unaware of or unable to exercise their rights at administrative hearings.

5. As discussed in Finding 1.3(a), the Kentucky statute excludes citizens of other states, foreign corporations, aliens and possibly even domestic corporations from its citizens suit provisions. This deficiency is minor since those persons who cannot gain access through the state court system can utilize their rights under SMCRA section 520 in federal court. Therefore, during the time allowed for the state to correct its statute, no person who has an interest which may be adversely affected will be denied his/her rights.

6. As discussed in Finding 1.3(b), the Kentucky statute fails to include citizen suit provisions which would allow two causes of action (one to compel compliance through injunctive relief and one for monetary damages) against a violator. This deficiency is minor since those persons who might be denied the two causes of action or suite against a government agency have access to the federal court system under Section 520 of SMCRA. Therefore, during the time allowed for the State to correct its statute, no person who has an interest which may be adversely affected will be denied his/her rights.

7. As discussed in Finding 1.3(c), the Kentucky statute fails to provide for intervention by DNREP in citizen suits as a matter of right. This deficiency is considered minor since, in all likelihood, DNREP will be cited as a third party at the outset of any suit involving a violation of Kentucky's surface mining laws or regulations. Further, it is extremely unlikely that DNREP will be excluded from any suit in which it wishes to intervene.

8. As discussed in Finding 1.4, the Kentucky statute does not set forth standards for State courts granting temporary relief. This deficiency is considered minor since temporary relief is still available through the courts, and although the standards are different than those in SMCRA, relief cannot be granted without consideration of the merits of the case. During the time given for the state to correct its statute there will likely be few, if any, cases where temporary relief will be granted under the existing state law which would not have been granted under the criteria in SMCRA.

9. As discussed in Finding 13.27, the Kentucky regulations allow DNREP the discretion to exclude emergency

spillways from the design requirements for sedimentation ponds. This deficiency is considered minor since the state has agreed not to use this discretion until such time as the standards for approval of ponds without emergency spillways are developed by Kentucky and approved by the Secretary.

10. As discussed in Finding 14.18, the Kentucky regulations provide DNREP with more discretion to delete the requirements for permit information on surface water quality parameters than allowed by the corresponding federal regulation. This deficiency is considered minor since Kentucky has agreed not to use this discretion except for parameters and circumstances which are approved by OSM.

11. As discussed in Finding 27.5, the Kentucky regulations fail to set standards for the award of costs and expenses in administrative proceedings. This deficiency is minor because the State has agreed to establish the standards by policy until such time as regulations can be promulgated. In the short time given to the State to develop the policy statement, it is unlikely that parties would be denied the proper award of costs and expenses.

12. As discussed in Finding 14.19, the Kentucky program does not demonstrate that the State will meet the requirements of section 502(d) of SMCRA regarding the time limits for receipt and review of permit applications. This deficiency is minor because Kentucky has agreed to provide a compliance plan acceptable to the Secretary before the concerns identified by the Secretary would become relevant.

Given the nature of the deficiencies set forth in the Secretary's findings and their magnitude in relation to all the other provisions of the Kentucky program, the Secretary of the Interior has concluded that they are minor deficiencies. Accordingly, the program is eligible for conditional approval under 30 CFR 732.13(i) because:

1. The deficiencies are of such a size and nature as to render no part of the Kentucky program incomplete;

2. All other aspects of the program meet the requirements of SMCRA and 30 CFR Chapter VII;

3. These deficiencies, which will be promptly corrected, will not directly affect environmental performance at coal mines;

4. Kentucky has initiated and is actively proceeding with steps to correct the deficiencies; and

5. Kentucky has agreed, by letter dated April 7, 1982, to correct the regulation deficiencies by October 31, 1983, and the statutory deficiencies by May 1, 1984. Further, DNREP has agreed to develop civil procedure guidelines by December 31, 1982, standards for awards of costs and expenses in administrative proceedings by July 31, 1982, and modifications to the permit review process by July 31, 1982.

Accordingly, the Secretary is conditionally approving the Kentucky program. If regulations correcting the deficiencies are not promulgated by October 31, 1983, if State legislation correcting the statutory deficiencies is not enacted by April 30, 1984, if standards for awards of costs and expenses in administrative proceedings are not developed by July 31, 1982, and if civil procedure guidelines are not developed by September 30, 1982, the Secretary will take appropriate steps under 30 CFR Part 733 to terminate the State program. This conditional approval is effective on publication in the **Federal Register**. Beginning on that date, the Kentucky Department for Natural Resources and Environmental Protection shall be deemed the regulatory authority in Kentucky and all Kentucky surface coal mining and reclamation operations on non-federal and non-Indian lands and all coal exploration on non-federal and non-Indian lands in Kentucky shall be subject to the permanent regulatory program.

On non-federal and non-Indian lands in Kentucky, the permanent regulatory program consists of the State program approved by the Secretary. Following this approval, in accordance with section 523(c) of SMCRA, Kentucky may elect to enter into a cooperative agreement with the Secretary to provide for state regulation of surface coal mining and reclamation operations on Federal lands within the State.

The Secretary's approval of the Kentucky program relates at this time only to the permanent regulatory program under Title V of SMCRA. The approval does not constitute approval of any provisions related to implementation of Title IV under SMCRA, the abandoned mine lands reclamation program. In accordance with 30 CFR Part 884, Kentucky may submit a state reclamation plan now that its permanent program has been approved. At the time of such a submission, all provisions relating to abandoned mine lands reclamation will be reviewed by officials of the Department of the Interior.

### List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Therefore, 30 CFR Chapter VII is amended by adding a new Part 917 as set forth herein.

Dated: April 13, 1982.

**James G. Watt,**

*Secretary of the Interior.*

## PART 917—KENTUCKY

Sec.

917.1 Scope.
917.10 State regulatory approval.
917.11 Conditions of State regulatory approval.

**Authority:** Pub. L. 95–87, Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. 1201 *et seq.*)

### § 917.1 Scope.

This Part contains all rules applicable only within Kentucky that have been adopted under the Surface Mining Control and Reclamation Act of 1977.

### § 917.10 State regulatory program approval.

The Kentucky State program, as submitted on February 29, 1980, as amended and clarified on June 12, 1980, as resubmitted on December 30, 1981, and clarified in material submitted February 12 and 18, and in an April 7, 1982 letter to the Director of OSM is conditionally approved, effective on May 18, 1982. Beginning on that date, the Department for Natural Resources and Environmental Protection shall be deemed the regulatory authority in Kentucky for all surface coal mining and reclamation operations and all exploration operations on non-federal and non-Indian lands. Only surface coal mining and reclamation operations on non-federal and non-Indian lands shall be subject to the provisions of the Kentucky permanent regulatory program. Copies of the approved program, together with copies of the letter of the Department for Natural Resources and Environmental Protection agreeing to the conditions of 30 CFR 917.11, are available at:

Administrative Record Room, Office of Surface Mining, Room 5315, 1100 "L" Street, NW., Washington, D.C.

Administrative Record Room, Office of Surface Mining, 530 South Gay Street, SW., Suite 500, Knoxville, Tennessee 37902

Bureau of Surface Mining Reclamation and Enforcement, Capitol Plaza Tower, Sixth Floor, Frankfort, Kentucky 40601

### § 917.11 Conditions of State regulatory program approval.

The approval of the Kentucky State program is subject to the state revising its program to correct the deficiencies listed in this section. The program revisions may be made, as appropriate, to the statute, to the regulations, to the

program narrative, or by means of a legal opinion. This section indicates, for the general guidance of the State, the component of the program to which the Secretary recommends the change be made.

(a) The approval found in § 917.10 will terminate on October 31, 1983, unless Kentucky submits to the Secretary by that date, copies of promulgated regulations eliminating the discretionary stocking plan approval for noncommercial forest land or otherwise amends its program to set standards for stocking when the post mining land use is forest land other than commercial forest. Furthermore, pending completion of the above, Kentucky must utilize the reference areas concept for these areas or the approval will terminate immediately.

(b) The approval found in § 917.10 will terminate on October 31, 1983, unless Kentucky submits to the Secretary by that date, copies of promulgated regulations or otherwise amends its program to provide for citizens to accompany state inspectors onto a mine site. Furthermore, pending completion of the above, Kentucky must allow citizens to accompany inspectors as an administrative policy or the approval will terminate immediately.

(c) The approval found in § 917.10 will terminate on October 31, 1983, unless Kentucky submits to the Secretary by that date, copies of promulgated regulations to provide adequate public participation in the cumulative bond crediting process. Furthermore, pending completion of the above, Kentucky may not use its authority to approve bond crediting or the approval will terminate immediately.

(d) The approval found in § 917.10 will terminate on December 31, 1982, unless Kentucky submits to the Secretary by that date, copies of guidelines of civil procedure which are no less effective than those at 43 CFR 4 for use in administrative hearings. Furthermore, the State must submit copies of promulgated regulations or otherwise amend its program by October 31, 1983, to provide for civil procedures which are no less effective than those at 43 CFR 4 or the approval will terminate on that date.

(e) The approval found in § 917.10 will terminate on May 1, 1984, unless Kentucky submits to the Secretary by that date copies of enacted legislation which creates a right of action in accordance with section 520(a) of SMCRA for any person having an interest which is or may be adversely affected.

(f) The approval found in § 917.10 will terminate on May 1, 1984, unless Kentucky submits to the Secretary by that date copies of enacted legislation in accordance with section 520 of SMCRA which specifically creates two causes of action against a violator (one to compel compliance through injunctive relief and one for monetary damages).

(g) The approval found in § 917.10 will terminate on July 31, 1982, if a legal opinion is to be submitted, or on May 1, 1984, unless Kentucky submits to the Secretary by that date copies of enacted legislation, or otherwise amends its program to provide for intervention in citizen suits by DNREP as matter of right in accordance with SMCRA section 520.

(h) The approval found in § 917.10 will terminate on May 1, 1984, unless Kentucky submits to the Secretary by that date copies of enacted legislation which sets forth standards for State courts granting temporary relief in accordance with SMCRA section 526(c).

(i) The approval found in § 917.10 will terminate on October 31, 1983, unless Kentucky submits to the Secretary by that date copies of promulgated regulations, or otherwise amends its program to provide standards acceptable to the Secretary for the design of sedimentation ponds without emergency spillways. Furthermore, pending completion of the above, Kentucky may not use its authority to approve sedimentation ponds designed without emergency spillways.

(j) The approval found in § 917.10 will terminate on October 31, 1983, unless Kentucky submits to the Secretary by that date copies of promulgated regulations, or otherwise amends its program to limit DNREP's authority to delete water quality parameters from the permit information to circumstances approved by OSM. Furthermore, pending completion of the above, Kentucky must not use its authority for parameter deletion other than for dissolved iron for existing operations not expected to create significant new surface disturbance, and for dissolved manganese, temperature, alkalinity and sulfate for any operation or the approval will terminate immediately.

(k) The approval found in § 917.10 will terminate on July 31, 1982, unless Kentucky submits to the Secretary by that date a policy statement establishing standards no less effective than those at 43 CFR 4.1294 for the award of costs and expenses in administrative proceedings. Furthermore, the state must submit by October 31, 1983, copies of promulgated regulations establishing standards of costs and expense no less effective than those at 43 CFR 4.1294 or approval will terminate on that date.

(l) The approval found in § 917.10 will terminate on July 31, 1982, unless Kentucky submits to the Secretary by that date a plan from DNREP which includes: (1) a process for prompt completeness determination of applications from existing operators expecting to continue mining past the eighth month of primacy; (2) assurances that operators who do not have complete applications eight months after primacy will be immediately advised that they may not continue mining until a permit is approved; (3) a policy that applications for new areas will not be given priority for processing over applications for existing operations which are continuing under the interim program when such existing mine applications are one year or older.

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**30 CFR Part 917**

## Approval of the Abandoned Mine Reclamation Plan for the State of Kentucky Under the Surface Mining Control and Reclamation Act of 1977

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Final rule.

**SUMMARY:** On June 4, 1981, the State of Kentucky 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 Assistant Secretary for Energy and Minerals of the Department of the Interior has determined that the Kentucky Abandoned Mine Reclamation Plan meets the requirements of both SMCRA and the Secretary's Regulations. Accordingly, the Assistant Secretary has approved the Kentucky Plan.

Final promulgation of this rule has been delayed because Kentucky did not have an approved State Regulatory Program under Title V of SMCRA and was enjoined from submitting its program. Under section 405(c) of the SMCRA, the Secretary cannot approve a State abandoned mine reclamation program unless that State has an approved State regulatory program

pursuant to section 503 of the SMCRA. The State of Kentucky received such approval on April 13, 1982.

**EFFECTIVE DATE:** This approval is effective May 18, 1982.

**ADDRESSES:** Copies of the full text of the Kentucky Reclamation Plan are available for review during regular business hours at the following locations:

Kentucky Department of Natural Resources and Environmental Protection, Frankfort, Kentucky 40601
Office of Surface Mining, Region II, 530 Gay Street, Suite 500, Knoxville, Tennessee 37902

**FOR FURTHER INFORMATION CONTACT:** Don Willen, Chief, Division of Abandoned Mine Lands, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Ave., NW., Washington, D.C. 20240, Telephone (202) 343–7951.

**SUPPLEMENTARY INFORMATION:**

### General Background of Abandoned Mine Lands Program

Title IV of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*, establishes an abandoned mine land reclamation program for the purpose of reclaiming and restoring land 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 of State a 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 the 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 49947, 49949, October 25, 1978). Under those regulations the Director of the Office of Surface Mining is required to review the plan and solicit and consider comments of other Federal agencies and the public. If the plan is disapproved the State may resubmit a revised reclamation plan at any time.

Upon approval of the State reclamation plan by the Secretary, the State may submit to the Office, on an annual basis, a grant application for funds to be expended in that State on specific reclamation projects. These funds are necessary to implement the State reclamation plans as approved. The annual grant requests are 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 to 30 CFR Chapter VII. Subchapter T consists of Parts 900 through 950. Provisions relating to Kentucky are found in 30 CFR Part 917.

### Background on the Kentucky Abandoned Mine Plan Submission

On April 23, 1979, a cooperative agreement between the Kentucky Department for Natural Resources and Environmental Protection and the OSM was approved. The purpose of this agreement was to assure that information required for the preparation of the Kentucky Abandoned Mine Reclamation Plan would be assembled.

On June 4, 1981, Kentucky submitted its proposed State Abandoned Mine Land Reclamation Plan to OSM.

On August 19 and 27, 1981, representatives of the Kentucky Department of Natural Resources and Environmental Protection met with OSM to discuss amendments and modifications to the proposed Plan.

On August 31, 1981, the Kentucky Department of Natural Resources provided errata to be appended to each section of the Plan. These pages contain the amendments and modification to the original Plan resulting from public comments and the discussion between the Kentucky Department of Natural Resources and OSM. The necessary changes have been incorporated into the Kentucky Reclamation Plan and therefore comply with the requirement that the policies and procedures to be followed by the agency be incorporated into the State Reclamation Plan.

All documents mentioned above are available for public inspection at OSM and the Kentucky Department of Natural Resources at the addresses listed above under "Addresses." Notice of receipt of the submission initiating plan review was published August 6, 1981 (45 FR 40047–40049). The announcement requested public comments. It was determined by the OSM Regional Director that a public hearing was not necessary because the public had been provided adequate notice and opportunity to be heard on the Plan, and further that the record did not reflect any major unresolved controversy.

On October 6, 1981, the OSM Regional Director and on December 24, 1981 the Assistant Director for Program Operations and Inspection recommended to the Director of OSM that the Secretary approve the Kentucky Reclamation Plan.

### Assistant Secretary's Findings

1. In accordance with section 405 of SMCRA the Assistant Secretary finds that Kentucky has submitted a Plan for reclamation of abandoned mines and has the ability and necessary State legislation to implement the provisions of Title IV of SMCRA.

2. The Assistant Secretary has determined, pursuant to 30 CFR 884.14 that:

(a) The Department of Natural Resources of the State of Kentucky has the legal authority, policies and administrative structure necessary to carry out the Plan;

(b) The plan meets all the requirements of 30 CFR Chapter VII, Subchapter R;

(c) The State has an approved regulatory program; and

(d) The Plan is in compliance with all applicable State and Federal laws and regulations.

3. The Assistant Secretary has solicited and considered the views of other Federal Agencies having an interest in the Plan as required by 30 CFR 884.14(a)(2). These agencies include the USDA Forest Service (USFS), the Soil Conservation Service (SCS) and the US Fish and Wildlife Service (FWS).

### Disposition of Comments

The comments received on the Kentucky Reclamation Plan during the public comment period raised the issues listed below, which were considered in the Secretary's evaluation of the Kentucky Plan as indicated.

1. The FWS recommended that a section be added to the State Plan outlining how OSM and the Commonwealth of Kentucky plan to

meet their section 7 obligations and the June 10, 1980, Memorandum of Understanding (MOU) for the protection of listed species.

The State has subsequently modified Chapter 5 of the Plan to address the question of interagency coordination as well as providing for a future MOU with FWS to address the issue of protecting listed species.

2. FWS recommended that in Chapter 5, page 4–2, ranking factors be developed for threatened and endangered species or they should be incorporated in the existing ranking factors under parameter categories 4, 7, 8, and 9. OSM's response is that the Plan adequately addresses threatened and endangered species. No modification of the Plan is considered necessary.

3. FWS suggested that in Chapter 7, page 7–2, "a provision be provided to waive a lien if endangered and threatened species would be benefited." OSM's response is that a provision already exists in its regulations (30 CFR 882.13) and Kentucky's Plan for waiver of liens when the greater public interest is served by a project. These provisions protect endangered and threatened species and are considered to be in the greater public interest. No additional action is, therefore, necessary.

4. FWS suggested that, since in Chapter 10, page 10–5 of the Plan, expertise from other State and Federal agencies will be used for reclamation assistance as the need arises, a cooperative agreement or MOU be prepared to facilitate this use. OSM agrees with this suggestion. The State has incorporated this change into the Plan by errata and will negotiate agreements with other agencies as the need arises.

5. FWS suggested that in Chapter 10 of the Plan, positions entitled "Reclamation Inspector" and "Environmental Specialist I" include specific duties concerning endangered and threatened species. It was further suggested that the position of "Wildlife Biologist" should include certain endangered and threatened species duties, particularly that of determining impacts of abandoned mine lands and proposed reclamation projects on endangered and threatened species.

The first part of the suggestion has been incorporated into the Plan by errata. The second part of the sugggestion was deemed unnecessary by OSM because fish and wildlife considerations are already adequately addressed by the State.

6. FWS suggested that in Chapter 12, the environmental assessment should be completed prior to pre-construction conferences. This comment was not acted upon because environmental assessments are required by the National Environmental Policy Act and must be complied with prior to issuance of a grant. The Plan is in compliance with this comment.

7. FWS made the following recommendations on Chapter 16:

(a) Page 16–3, environmental damage, line 3—add "include adverse impacts on endangered and threatened species" after "loss of fish and wildlife habitat."

(b) Page 16–5, problems with acid mine drainage—add:"a statement of the problems should include fish and wildlife and endangered and threatened species."

(c) Page 16–6 and 16–7, problems with unvegetated areas—add: "a statement should include endangered and threatened species."

(d) Page 16–10, problems with fires—add: "a statement should include endangered and threatened species."

(e) Page 16–13 and 16–14, problems with surface subsidence—add " a statement should address endangered and threatened species, particularly the blocking of caves or mine shafts utilized by listed bats."

These recommendations have been incorporated into Chapter 16 of the State Plan by errata.

9. FWS recommended that the fish and wildlife and endangered and threatened species characteristics of the coalfields discussed in Chapter 17 of the Plan should be included or referenced. The State has incorporated additional material into the proposed Plan in compliance with the recommendation by errata of Chapter 17.

10. FWS commented that all tables in Chapter 21 should distinguish those species that occur on the Federal list of endangered and threatened species and those that are on the State list. The State has modified the Plan to include the recommendations of FWS by errata to Chapter 21.

11. FWS recommended certain additions to the fish and wildlife file in the State Plan. The State has subsequently modified Chapter 21 of the Plan accordingly.

12. The USFS recommended that national forest land should be eligible for Abandoned Mine Land Reclamation funds where conditions warrant, and suggests that grants for treatment of national forest land should be available to them through State programs and from the Office of Surface Mining. OSM agrees with the recommendation. The State has modified the Plan by errata of Chapter 5. The modification provides for future cooperation between the State, Forest Service and OSM through agreements or Memoranda of Understanding.

13. The USFS commented that coordination is needed between State and USFS in relation to acquisition of private land and disposition of acquired land and rights of entry § 884.113–C–6) for intermingled lands within the National Forest and Purchase Unit boundaries. See OSM's comment on item 11. OSM responded by stipulating that no modification is necessary to the Plan for the same reason as noted in item 11 above.

14. The USFS commented that it would be appropriate for their Berea Research Center to participate in research and demonstration projects particularly on national forest land. The State has modified their Plan to provide for future cooperative procedures between the State and USFS.

15. The USFS commented that the Redbird Purchase Unit discussed in Chapter 19, page 16, is referred to as a recreational area which could be misleading, and pointed out that the Redbird Purchase Unit was established and is managed for multiple resources use and watershed protection. The State modified its Plan incorporating the recommendation by errata to Chapter 19.

16. The USFS noted that on page 4–3 of the State Plan, the significance of public property, including Federal lands, should be highlighted in the ranking factors given on page 4–3 of the Plan. OSM is satisfied that this comment is adequately covered in the Site Score Sheet (Figure 4–1, page 4–2) under the "Existing Site Parameters/ Socioeconomic/Number of People Affected," category. No changes are necessary in the plan.

17. The USFS commented that consideration should be given to weighing the "collective impacts" on downstream values and that these values be based on watershed data rather than site-specific data. OSM's response is that the subject "collective impacts" is sufficient, as written and allows the State the flexibility to consider broader factors. No modification of the Plan is necessary to implement this recommendation.

18. The USFS commented that a better measure to evaluate vegetative cover on page 4–12 would be desired land use rather than merely percent of cover. The State agrees to consider this approach in its future program; however, no modification of the Plan is necessary to implement this recommendation.

19. The USFS commented that recreational use on page 4–13 should be evaluated based on total recreation

need whether local or from other areas. The State has modified the Plan to accommodate this comment.

20. The USFS recommended that high priority should be given to public property (discussed on page 4–14 of Plan) since it involves public moneys and is there for public use and production of resources. See OSM response to USFS recommendation in item 16.

21. The USFS recommended that when considering permanent project maintenance cost (page 4–19), priorities should be weighed when the landowner is willing to accept long-term maintenance responsibility. "This would prevent high priority projects from being foregone because of permanent maintenance even though someone was willing to accept this responsibility." OSM's response is that modification to the Plan is unnecessary since flexibility already exists to consider this possibility.

22. USFS commented that the Director of the Kentucky Division of Forestry should be included as a permanent member of the Kentucky Advisory Committee for the Abandoned Mine Reclamation Program under page 5–1 of the Plan because forestry will be a major land use in reclaiming land, particularly in Eastern Kentucky. OSM has determined that the State has already made provision for coordination through an interagency coordination agreement. All applicable agencies will be coordinated with on a site- or issue-specific basis. This comment does not necessitate a modification to the Plan.

23. The USFS recommended that on page 5–3, reference should be made to coordinate efforts with OSM with large acreages of abandoned mined land occurring on Federally administered land. The State has modified the Plan by the errata of Chapter 5 which provides for agreements to be made between OSM, the State and USFS for the purpose of accomplishing reclamation.

24. The USFS suggested that to insure that reclaimed lands are put under intensive protection and management and insure that public funds used in reclamation work would not be wasted, consideration be given in Section 6 to purchase tracts of private land intermingled with national forest and transferred or sold to the United States for administration and managment if legally possible. OSM has determined that no modification of the Plan is necessary. This recommendation may be accomplished under cooperative agreements or procedures developed by the State.

25. The USFS suggested that the Daniel Boone National Forest be included in section 17 of the Plan because of the amount of land involved (670,000 acres) and the significance of the economic benefits it provides to the area and the long-term resource production that will be produced on the land. The State has modified its Plan by submission of errata on Chapter 17.

26. The SCS commented that on page 5–3 it is implied that 121 conservation districts were developed in 1940. This statement should state that the districts were probably developed over a period of years during the 1940's decade. The State has corrected the Plan by submitting errata to Chapter 15.

27. The SCS commented that Chapter 16 might be improved by inclusion of more description of natural soils of the eastern and western coalfields and more complete discussion or description of soil conditions of abandoned mine land. Adequate classification, analysis and treatment of soil conditions are critical in the establishment of vegetation during reclamation. OSM disagreed with this comment for the following reasons: (1) Abandoned mine reclamation seldom occurs on natural soils. The actual condition on past mine sites often has no relationship to surrounding soil conditions because of the severe disturbances resulting from total soil intermixing and subsequent structureless conditions, and (2) Soil Conservation Service publications describe such sites only as mined land with no attempt at further description. OSM has determined, therefore, that further description of soils of abandoned mine lands would be impossible and would serve no purpose. No modification of the Plan was considered necessary.

28. The SCS commented that excessive reference is made in Chapter 21 to prior flora conditions not in existence now. This information detracts from easy recognition of present day conditions. OSM has determined that the descriptions contained in flora data of Chapter 21 are those of ecological plant communities based on climax vegetation. Species of prior undisturbed conditions are the key species to the classification and are properly used as such. No further modification of the Plan is considered necessary as a result of this comment.

29. The FWS suggested that the State should point out the adverse impacts on the Big South Fork National River and recreation area resulting from abandoned mine lands within this region on page 17–6 of the Plan. The State has modified the Plan to accommodate this recommendation.

30. The FWS commented that on page 18–1, Tables 18–1 and 2 and the narrative concerning Tables 18–1 and 2 entitled "Acreage of Abandoned Lands" show that not all of the acres listed are high priority. Some of these lands may later be determined to be acceptable in their current state of condition or may require very limited efforts to correct specific problems. The State has modified the Plan to accommodate the above concern with the errata of Chapter 19.

31. The FWS suggested that information concerning the State's commitment to use an EA for examining environmental consequence of projects be highlighted by including it under a separate heading "Environmental Assessments." OSM agrees that the FWS suggestion is desirable; however, there is no requirement in SMCRA for this action. No modification to the Plan is required.

32. The FWS commented that the Department of Fish and Wildlife Resources has the primary responsibility for fisheries and wildlife resources within the State and should either supply or be provided an opportunity to concur with any information which pertains to its area of responsibility (page 21–86). OSM's response is that Chapter 5 of the Plan adequately covers coordination on wildlife matters. No further modification of the State Plan is necessary.

**Additional Findings**

The Office of Surface Mining has examined this rulemaking under section 1(b) of Executive Order No. 12291 (February 17, 1981), and determined that, based on available quantitative data, it does not constitute a major rule. The reasons underlying the determination on the Kentucky Reclamation Plan are as follows:

1. Approval will not have an effect on the costs or prices to consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and

2. Approval will not have adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

This rulemaking has been examined pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Office of Surface Mining has determined that the rule will not have significant economic effect on a substantial number of small entities. The reason for this determination is that approval will not have demographic effects, direct costs, information collection and

recordkeeping requirements, indirect costs, nonquantifiable costs, competitive effects, enforcement costs or aggregate effects on small entities.

The Assistant Secretary has determined that the Kentucky Abandoned Mine Plan will not have a significant effect on the quality of the human environment because the decision relates to policies, procedures and organization of the State's Abandoned Mine Plan. Therefore, under the Department of the Interior Manual DM 516.2.3(A)(1), the Assistant Secretary's decision on the Kentucky Plan is categorically excluded from the National Environmental Policy Act requirement. As a result, no environmental assessment (EA) or environmental impact statement (EIS) has been prepared on this action. It should be noted that a programmatic EIS was prepared by OSM in conjunction with the implementation of Title IV. Also, an EA or an EIS will be prepared for the approval of grants for the abandoned mine lands reclamation projects under 30 CFR Part 886.

This approval is effective upon publication. The good cause for making this rule effective upon date of publication is: (1) OSM desires to minimize the time between the approval of the Title V regulatory programs and Title IV State reclamation programs; and (2) grants are pending approval of the Title IV plan and OSM wishes to expedite grant assistance to States to initiate needed reclamation work as required by the Act.

**List of Subjects in 30 CFR Part 917**

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: April 13, 1982.

**J.R. Harris,**

*Director, Office of Surface Mining.*

Dated: April 13, 1982.

**Daniel N. Miller, Jr.,**

*Assistant Secretary-Energy and Minerals.*

Therefore, Part 917 is amended by adding § 917.20 to read as follows:

## PART 917—KENTUCKY

**§ 917.20 Approval of the Kentucky Abandoned Mine Reclamation Plan.**

The Kentucky Abandoned Mine Reclamation Plan as submitted on June 4, 1981, is approved. Copies of the approved program are available at the following locations:

Office of Surface Mining Reclamation and Enforcement, Region II, 503 Gay Street, Suite 500, Knoxville, Tennessee 37902

Kentucky Department of Natural Resources and Environmental Protection, Frankfort, Kentucky 40601

Adminsitrative Record, Office of Surface Mining Reclamation and Enforcement, Room 5315, 1100 "L" Street NW., Washington, D.C. 20240

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Part III

# Department of the Interior

## Office of Surface Mining and Reclamation and Enforcement

## Permanent Regulatory Program; General Requirements for Coal Exploration

## DEPARTMENT OF THE INTERIOR

### Office of Surface Mining and Reclamation and Enforcement

### 30 CFR Parts 701, 772, 776, and 815

### Permanent Regulatory Program; General Requirements for Coal Exploration

**AGENCY:** Office of Surface Mining Reclamation and Enforcement, Interior.

**ACTION:** Proposed rule.

**SUMMARY:** The Office of Surface Mining Reclamation and Enforcement (OSM) proposes to revise rules governing coal exploration. The proposed rules would amend the coal exploration permit requirements and performance standards. Most of the changes are needed to eliminate counterproductive or burdensome rules. The proposal would require notices of intention to conduct exploration to be filed only by persons whose activities may substantially disturb the natural land surface rather than by all persons conducting coal exploration. Also included are proposed changes to the definitions of "coal exploration" and "substantially disturb."

**DATES:**

*Written comments:* Accepted until further notice.

*Public hearings:* Held on request only, on June 16, 1982, at 9:00 a.m. (local).

*Public meetings:* Scheduled on request only.

**ADDRESSES:**

*Written comments: Hand-deliver* to the Office of Surface Mining, U.S. Department of the Interior, Administrative Record (TSR–27), Room 5315, 1100 L Street, NW., Washington, D.C.; or *mail* to the Office of Surface Mining, U.S. Department of the Interior, Administration Record (TSR–27), Room 5315L, 1951 Constitution Avenue, NW., Washington, DC 20240.

*Public hearings:* Washington, D.C.—Department of the Interior Auditorium, 18th and C Streets, NW.; Pittsburgh, Pa.,—William S. Moorehead Federal Building, Room 2212, 1000 Liberty Ave.; and Denver, Colo.—Brooks Tower, 2d Floor Conference Room, 1020 15th Street.

*Public meetings:* OSM offices in Washington, D.C.; Charleston, W. Va.; Knoxville, Tenn.; Indianapolis, Ind.; Pittsburgh, Pa.; and Denver, Colo.

**FOR FURTHER INFORMATION CONTACT:**

*Public hearings and information:* Jerry R. Ennis, Office of Surface Mining, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; 202–343–7887.

*Public meeting:* Jose del Rio, 202–343–4022.

**SUPPLEMENTARY INFORMATION:**

I. Public Commenting Procedures.
II. Bankground.
III. Discussion of Proposed Rules.
IV. Procedural Matters.

## I. Public Commenting Procedures

*Written Comments*

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanations in support of the commenter's recommendations. Commenters are requested to submit five copies of their comments (see "Addresses"). Comments received at locations other than Washington, D.C., will not necessarily be considered or be included in the Administrative Record for the final rulemaking. The comment period will remain open until the close of the comment period on the draft environmental impact statement that will consider this proposed rule.

*Public Hearings*

Persons wishing to comment at the public hearings should contact the person listed under "For Further Information Contact" by the close of business *three working days* before the date of the hearing. If no one requests to comment at a public hearing at a particular location by that date, the hearing will not be held. If only one person requests to comment, a public meeting, rather than a public hearing, may be held and the results of the meeting included in the Administrative Record.

Filing of a written statement at the time of the hearing is requested and will greatly assist the transcriber. Submission of written statements in advance of the hearing will allow OSM officials to prepare appropriate questions.

Public hearings will continue on the specified date until all persons scheduled to comment have been heard. Persons in the audience who have not been scheduled to comment and wish to do so will be heard following those scheduled. The hearing will end after all persons scheduled to comment, and persons present in the audience who wish to comment, have been heard.

*Public Meetings*

Persons wishing to meet with representatives to discuss these proposed rules may request a meeting at any of the OSM offices listed in "Addresses" by contacting the person listed under "For Further Information Contact."

All such meetings are open to the public and, if possible, notices of meetings will be posted in advance in the Administrative Record room (1100 L St.). A written summary of each public meeting will be made a part of the Administrative Record.

## II. Background

Section 512 of the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 *et seq.* (the Act), sets forth the notice and reclamation requirements for the conduct of coal exploration operations on non-Federal lands. That section requires that each State and Federal program must insure that coal exploration operations that substantially disturb the natural land surface are conducted in accordance with rules issued by the regulatory authority.

Section 512(a) of the Act provides that, at a minimum, the rules shall include (1) the requirement that prior to conducting any exploration under that section, any person must file with the regulatory authority notice of intention to explore and such notice shall include a description of the exploration area and the period of supposed exploration, and (2) provisions for reclamation in accordance with the performance standards in Section 515 of the Act of all lands disturbed in exploration, including excavations, roads, drill holes, and the removal of necessary facilities and equipment.

Although the filing of a notice of intention is required for activities substantially disturbing the natural land surface, the Act does not require regulatory authority approval of exploration that removes less than 250 tons of coal. However, Section 512(d) of the Act provides that no operator shall remove more than 250 tons of coal pursuant to an exploration permit without the specific written approval of the regulatory authority.

On March 13, 1979, OSM issued rules (44 FR 14901) governing coal exploration notice and permit requirements, 30 CFR Part 776, and coal exploration performance standards, 30 CFR Part 815. This proposed rulemaking would revise the existing rules applicable to coal exploration operations and redesignate Part 776 as Part 772.

In August 1981, the preproposal draft was distributed to interested parties for comment and review. Several States and industry groups have provided written comments, which have been considered in the development of this proposal.

## III. Discussion of Proposed Rules

*Definition of Coal Exploration*

The term "coal exploration" is defined in existing § 701.5 as the field gathering of (a) surface or subsurface geologic, physical, or chemical data by mapping, trenching, drilling, geophysical, or other techniques necessary to determine the quality and quantity of overburden and coal of an area; and (b) the gathering of environmental data to establish the conditions of an area before beginning surface coal mining and reclamation operations.

OSM is proposing a new more easily understood definition of coal exploration in § 701.5. Under the proposal, coal exploration would mean the gathering of data, through drilling, excavation, or other field activities, on the physical and chemical characteristics of coal deposits, overburden, or the strata below the coal deposits; on the hydrologic conditions associated with coal deposits; or on related environmental conditions.

OSM is proposing to continue to include both core drilling and the collection of environmental data in the definition of coal exploration. (See prior preamble discussion, 44 FR 14927 (March 13, 1979).) However, under the rule proposed today, these activities would be subject to the minimum Federal requirements only if they will result in a substantial disturbance of the natural land surface. Comments are specifically requested on the need to include the collection of data on environmental resources within the definition of coal exploration.

*Definition of Substantially Disturb*

OSM is proposing a new definition in § 701.5 of the term "substantially disturb," for purposes of coal exploration. The existing rule defines substantially disturb, for purposes of coal exploration, to include activities such as blasting, mechanical excavation, drilling or altering coal or water exploratory holes or wells, construction of roads and other access routes, and the placement of structures, excavated earth, or other debris on the surface of the land, which significantly impact upon and, air, or water resources. OSM's experience has been that certain activities, such as core hole drilling or the collection of environmental data, do not in and of themselves result in significant impacts. These activities generally result in a significant disturbance only in conjunction with the construction of access roads, or sediment ponds, or with other activities that, where combined, result in a significant surface disturbance. Unfortunately, the existing rule has been misinterpreted by some persons to apply to all drilling operations regardless of whether the operation involved actually resulted in a significant disturbance to the natural land surface.

To clarify this definition, the proposed rule would not specifically refer to blasting, drilling, mechanical excavation, or placement of structures. Rather, the proposed definition would include any coal exploration activity that resulted in a significant impact on land or water resources, including the removal of vegetation, topsoil, or overburden. By relating the definition of substantially disturb to the removal of vegetation, topsoil, or overburden, the definition would also be more closely alined with the general definition of a disturbed area. The proposed rule would continue to specify the construction of roads or other access routes as activities that may result in a significant impact, since these activities are frequently associated with environmental problems resulting from coal exploration. The proposed rule would also separately specify that the placement of excavated earth or waste materials on the natural land surface would be a substantial disturbance, since these activities also would likely have a significant impact on the natural land surface, without necessarily being associated with the excavation or removal of surface materials.

The existing definition of substantially disturb specifically includes reference to air resources, together with land and water resources, as a measure of significant impacts. The proposed rule would eliminate the reference to air resources. OSM is not aware of any coal exploration activities that have a significant impact on air resources and, for purposes of simplicity and clarity, would delete the reference as unnecessary.

Finally, the proposed definition would provide that all exploration activities during which more than 250 tons of coal will be removed is to be considered a substantial disturbance. This would be consistent both with Section 512(d) of the Act, which requires regulatory authority approval of such activities, and with the significant impacts that actually result from such activities.

*Redesignation of Part 776*

As part of an overall effort to group related CFR parts together, OSM is proposing to redesignate Part 776 as Part 772. The proposed substantive changes in the redesignated part are described below.

*Scope, Objectives, and Responsibilities*

Existing §§ 776.1, 776.2, and 776.3 set forth the general scope, objectives, and responsibilities, respectively, of existing Part 776. Proposed Part 772 would not contain a specific section entitled "Responsibilities" because the substantive requirements of the proposed rules delineate with adequate specificity the respective obligations of the regulatory authorities and the persons conducting coal exploration activities. Similarly, there is no need for a separate section containing the objectives of the part. Thus, the scope and purpose of proposed Part 772 would be set forth in one short section, proposed § 772.1, providing that the part establishes the requirements and procedures applicable to the development of regulatory programs for regulation of coal exploration operations on non-Federal lands outside of the permit area.

*Notice of Intention for Exploration Removing Less Than 250 Tons*

Existing § 776.11(a) requires any person who intends to conduct coal exploration during which less than 250 tons will be removed in the area to be explored, prior to conducting the exploration, to file a written notice of intention with the regulatory authority. This requirement is imposed in the existing rule regardless of whether the exploration will substantially disturb the natural land surface. This broad notice requirement was upheld in *In re: Permanent Surface Mining Regulation Litigation,* Civil Action No. 79–1144 (D. D.C. February 26, 1980) at p. 33.

Some commenters on the preproposal draft suggested that notices of intention to conduct exploration should only be required when a substantial disturbance is contemplated because only exploration which substantially disturbs the natural land surface subjects the exploration operation to the performance standards of Part 815.

OSM agrees that it may not be necessary, and may be overly burdensome, to require every person who conducts a coal exploration activity to file a notice of intent regardless of whether a substantial disturbance will occur. Thus, OSM is proposing that only persons who will engage in exploration activities which may substantially disturb the natural surface of the land would be required to file a notice of intent to conduct exploration. If such a rule were adopted, States could continue to require notices of all coal exploration activities under § 732.15(b)(3) which allows State coal exploration rules to be

more stringent than OSM's rules. However, States could implement the proposed rule by setting standards, consistent with the definition in § 701.5, as to activities that would or would not substantially disturb the natural land surface. Adoption of the proposal should ease the paperwork burden associated with the existing filing requirement, but would continue to provide a level of protection for the environment. The proposed rules would be in accordance with the Act because the Act does not mandate persons conducting exploration to provide notices of intention for operations that will not substantially disturb the natural land surface.

Comments are requested on the relative merit of the proposal as compared to the existing broader notice requirement.

*Contents of Notice of Intention*

Existing § 776.11(b) contains detailed information that has to be in a notice of intention. Two of these requirements, a map of the exploration area and a statement describing the person's right to enter the exploration area for purposes of exploration, were struck down in *In re: Permanent Surface Mining Regulation Litigation,* Civil Action No. 79–1144 (D. D.C. May 16, 1980) at p. 54. These were held to be beyond the authority of the act for activities that do not require regulatory authority approval.

The required contents of a notice of intention to conduct exploration activities would be set forth in proposed § 772.11(b). In accordance with the May 16, 1980, district court decision referred to above, the proposal would neither require the submission of a map of the exploration area nor a description of the legal basis of the right to enter for exploration. At the option of the person conducting the exploration, a map could be submitted, rather than a narrative description, to satisfy the requirement for a description of the exploration area. The proposal would also require the notice to include a description of the practices that will be followed to protect the environment and to reclaim the area from adverse impacts of the exploration activities.

*Approval for Exploration Removing More Than 250 Tons*

Any person who intends to conduct coal exploration activities that will remove more than 250 tons from the exploration area must obtain prior written approval from the regulatory authority. Existing §§ 776.12, 776.13, and 776.14 specify the application and approval process, including detailed information submission requirements, notice and comment procedures, and required findings for approval, including a finding of compliance with applicable performance standards of Part 815.

Under proposed § 772.12, persons conducting coal exploration activities that will remove more than 250 tons of coal would continue to have to receive prior approval from the regulatory authority. Proposed § 772.12(a) would require such persons to obtain an exploration permit. The required application information in proposed § 772.12(b) would be similar to that of existing § 776.12(a). Unlike the existing rule, the description would not be required to contain cross-references to the required map; the places eligible for, but not on, the National Register of Historic Places; or information pertaining to fish and wildlife habitats. As a result of the February 26, 1980, district court decision, cited to previously, information pertaining to fish and wildlife habitats cannot be required to be in surface mining permit applications. In addition, while the proposal would continue to require a narrative description of the methods and equipment used in conducting the exploration, it would not specify particular activities to be included in the description, as is currently required in existing § 776.12(a)(3)(ii). A map and a description of the basis of the right to enter would continue to be required in the exploration permit application because these would aid the regulatory authority in making the required findings. The May 16, 1980, district court decision invalidated these latter requirements only for situations not requiring prior approval. The information to be contained in the map has been rewritten to provide clarity. As a new requirement suggested by a commenter on the preproposal draft, the applicant would have to include the reason why removal of more than 250 tons may be necessary for exploration.

*Notice and Opportunity for Comment*

Existing § 776.12(b), providing for notice and opportunity to comment on exploration applications, would be renumbered as § 772.12(c). Existing § 776.12(b)(1) requires a person who is seeking regulatory authority approval for exploration activities to post public notice of the filing of an application with the regulatory authority at a public office in the vicinity of the proposed exploration area. OSM believes that the current requirement may be inadequate to ensure that interested persons receive actual notice of the pending application. Thus, proposed § 772.11(c) would require that the applicant place public notice of the filing in a newspaper of general circulation in the vicinity of the exploration area.

*Findings and Terms for Approval*

Section 776.13 is proposed to be renumbered as § 772.12(d), but it would remain unchanged in substance and would continue to set forth the necessary findings and terms for approval of an exploration application, including compliance with the performance standards of Part 815.

*Notice of Decision*

Existing § 776.14, pertaining to notice of decision and right of review, would become § 776.12(e). The existing provision requires written notice of the decision to the applicant and appropriate local government officials. It also requires the regulatory authority to provide public notice of the decision in a newspaper of general circulation in the vicinity of the exploration area. The proposal would require commenters on the application also to be notified in writing of the decision on the application. OSM believes it more important to require a newspaper notice while there is still an opportunity to comment on the application, rather than after the decision is made. Thus, as described above, OSM would require a newspaper notice of the filing of the application. However, once a decision has been made, public notice would only be required to be posted at a public office in the vicinity of the proposed exploration operations.

*Compliance With Performance Standards*

The proposal would renumber existing § 776.15 as § 772.13. Under proposed § 772.13(a), any person who conducts coal exploration activities which remove more than 250 tons or which otherwise substantially disturb the natural land surface would continue to have to comply with the performance standards of Part 815. The requirement of existing § 776.11(c) would thus be continued.

*Requirements for Commercial Sale*

Existing § 815.17, setting forth the requirements for commercial sale of coal extracted during exploration operations, would be retitled and moved to Part 772 as proposed § 722.14. The substance of the section would remain unchanged except to clarify that a surface coal mining and reclamation operations permit woud be needed for the commercial sale of coal extracted during exploration operations.

*Public Availability of Information*

Existing § 776.17 would be renumbered as § 772.15. Proposed § 772.15 has been rewritten in clearer and more concise language, but without intended change in substance.

*Revision of Performance Standards*

Part 815 sets forth the permanent program performance standards for coal exploration. The specific performance standards applicable to coal exploration operations that substantially disturb land surfaces (including operations which remove more than 250 tons) are contained in § 815.15.

*Scope, Objectives, and Responsibilities of Part 815*

Existing §§ 815.1, 815.2, and 815.11 set forth the scope, objectives, and general responsibilities, respectively, under Part 815. For the same reasons described above that §§ 776.2 and 776.3 would not be repromulgated, OSM is proposing to remove §§ 815.2 and 815.11. In addition, the language in § 815.1 describing the scope of Part 815 would be shortened, without an intended change of legal effect.

*Required Documents*

Existing § 815.13 would be revised to provide clarity, without an intended change in meaning.

**Section 815.15**

*Fish and Wildlife Protection*

Existing § 815.15(a), which sets forth the protection for fish, wildlife, and other related environmental values and areas, would be amended by specifying habitats that cannot be disturbed during exploration rather than by referencing the provisions § 780.16(b). The level of protection for these habitats would not be changed.

*Measurement of Environmental Characteristics*

Existing § 815.15(b) requires operators to measure "important environmental characteristics of the exploration area during the operations * * *" OSM is proposing to remove this requirement because it is too vague to be enforceable and is not deemed necessary to the program. A request to collect and measure such information could be imposed by the regulatory authority in specific instances if deemed necessary to ensure compliance with any of the performance standards which require protection of important environmental characteristics during coal exploration.

If existing § 815.15(b) were to be removed, then existing § 815.15(c), (d), (e), (f), (g), (h), (i), (j), and (k) would be redesignated as § 815.15(b), (c), (d), (e), (f), (g), (h), (i), and (j), respectively.

*Roads*

The existing performance standards for roads used in exploration are set forth in § 815.15(c). Existing § 815.15(c)(1) provides that vehicular travel on ungraded and unsurfaced roads must be limited to that which is absolutely necessary. Section 815.15(c)(2) provides that new exploration roads must meet the requirements of the general roads rules. Exploration roads used less than 6 months are to comply with the provisions of §§ 816.170 through 816.176; those roads used longer than 6 months must comply with §§ 816.150 through 816.166. However, currently there are no general roads performance standards in effect because, as a result of the May 16, 1980, district court decision referred to above, OSM suspended §§ 816.150 through 816.176 (45 FR 51547, August 4, 1980).

Existing § 815.15(c)(3) provides that existing roads used for coal exploration must meet all applicable laws and rules governing roads. When they are significantly altered or if they contribute suspended solids to streamflow or runoff, such roads must also meet certain requirements prohibiting stream diversions and otherwise protecting water. If such new altered roads are to remain after exploration, they must meet the general roads rules (which were suspended).

None of the specific requirements of existing § 815.15(c) would appear in the corresponding provision of the proposal, § 815.15(b). Instead, the proposal would conform to a new set of performance standards for roads which are currently being developed in a separate rulemaking. The new set of performance standards that an exploration road would have to satisfy would depend upon whether the exploration road would be considered "ancillary" or "primary." Ancillary roads would be those used infrequently and for short durations of time. Primary roads would be those frequently used for access, coal hauling, and other purposes during substantial periods of time. In general, the performance standards and reclamation requirements for primary roads would be more rigorous than those for ancillary roads. A detailed description of these standards appears in the recently published notice proposing the roads performance standards (47 FR 16592, April 16, 1982).

The proposed regulatory language in this rule, which references the new sections in Part 816 proposed in the roads rule, will not be adopted until after the Part 816 performance standards are adopted in final form. Specifically, proposed § 815.15(b) would provide that roads used for coal exploraton must comply with § 816.180 (the proposed performance standards for ancillary roads) if the roads are determined to be ancillary or must comply with §§ 816.150 through 816.156 (the proposed performance standards for primary roads) if the exploration roads are determined to be primary roads.

*Unchanged Performance Standards*

Existing § 815.15(d), requiring approximate original contour (AOC) restoration after exploration, would remain unchanged in proposed § 815.15(c). Similarly, existing § 815.15(e), requiring topsoil removal, storage, and distribution, would remain unchanged in proposed § 815.15(d). Existing § 815.15(h), requiring the casing and sealing of exploration holes would be revised for clarity, but without intended change of legal effect in proposed § 815.15(g). Existing § 815.15(i), requiring prompt removal of facilities and equipment no longer needed for exploration, would remain unchanged in proposed § 815.15(h) except for the deletion of the superfluous word "quality" currently contained in the phrase "environmental quality data."

*Revegetation*

Existing § 815.15(f), which requires prompt revegetation, would be rewritten for clarity in proposed § 815.15(e). It would adopt the language of Section 515(b)(19) of the Act and require recovery of a diverse, effective, and permanent vegetative cover. For a fuller discussion of the meaning of those terms, see OSM's proposed rule on revegetation appearing in the March 23, 1982, **Federal Register** (47 FR 12596). The separate references in existing § 815.15(f)(1) to preexploration and postexploration land use of land used for intensive agriculture would be amended to reflect OSM's belief that exploration activities are not expected to change land uses.

*Stream and Flow Diversion*

Existing § 815.15(g) is the exploration performance standard for diversions of overland flows and streams. It does not allow diversion of ephemeral, intermittent, or perennial streams with the exception of small and temporary diversions of overland flow of water around new roads, drill pads, and support facilities. Diversions of overland flow must be done in a manner that (1) prevents erosion; (2) to the extent possible using the best technology

currently available, prevents additional contributions of suspended solids to streamflow or runoff outside the exploration area; and (3) complies with all other applicable State or Federal requirements.

The corresponding provision in the proposal, § 815.15(f), would allow diversion of streams, as well as the diversion of overland flow. Such diversions would be permitted if allowed by the regulatory authority in accordance with the performance standards for such diversions in Part 816. Existing § 816.43 contains the performance standards for diversions of overland flow and ephemeral streams. Proposed § 815.15(f)(1) would reference existing § 816.43 except for § 816.43(f) that sets forth specific diversion design criteria. Similarly, proposed § 815.15(f)(2) would reference the requirements of existing § 816.44, the perennial and intermittent stream diversion performance standards. Existing § 816.44(b)(2), containing design criteria for perennial and intermittent stream diversions, would not be referenced in the proposal. The diversion design criteria would not be included so as to provide flexibility for persons to meet exploration performance standards.

*Hydrologic Balance*

Existing § 815.15(j) requires exploration to be conducted in a manner which minimizes disturbance of the prevailing hydrologic balance and requires sediment control measures such as those listed in § 816.45 or sedimentation ponds which comply with § 816.46. It also provides that the regulatory authority may specify additional measures which must be adopted by the person engaged in coal exploration.

The corresponding provision in the proposal, § 815.15(i), would continue the requirement to minimize disturbance of the hydrologic balance and would reference §§ 816.41, 816.42, and 816.47, in addition to §§ 816.45 and 816.46.

*Toxic- or Acid-Forming Materials*

Existing § 815.15(k), requiring that toxic- or acid-forming materials must be handled and disposed of in accordance with §§ 816.48 and 816.103, would be revised in proposed § 815.15(j) to reference the standards of § 816.50 also.

## IV. Procedural Matters

*National Environmental Policy Act*

OSM has prepared an Environmental Assessment (EA) of the cumulative impacts on the human environment of this rulemaking and related rulemakings under the Act. This cumulative EA is on file in the OSM Administrative Record office at the address listed in the "**ADDRESSES**" section of this preamble. OSM is also preparing a Supplemental Environmental Impact Statement that will consider this proposed rule. (See 47 FR 18920, May 3, 1982.)

*Executive Order 12291*

The Department of the Interior has determined that this document is not a major rule and does not require a regulatory impact analysis under Executive Order 12291.

*Regulatory Flexibility Act*

These rules have also been examined pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and OSM has determined that the proposed rule does not have significant economic impact on a substantial number of small entities. The proposed rule is expected to ease the regulatory burden on small coal operators by requiring from them notices of intent only when their exploration activities may substantially disturb the natural land surface. Currently, all persons who conduct exploration activities are required to file a notice of intent to explore.

*Federal Paperwork Reduction Act*

The information collection requirements in existing 30 CFR Part 776 were approved by the Office of Management and Budget (OMB) under 44 U.S.C. 3507 and assigned a new clearance number 1029–0033 on April 1, 1981. This approval was identified in the "Note" paragraph at the introduction to Part 776 under the old number R0603 (B–190462). OSM is proposing to remove the "Note" paragraph and to codify the OMB approvals for the existing requirements under a new § 772.10. The information required by Part 772 is being collected to meet the requirements of Section 512(a) of the Act, which provides that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with exploration rules. This information will be used to give the regulatory authority a sufficient baseline upon which to assess the impact of the proposed operation during the permanent regulatory program. The obligation to respond is mandatory.

**List of Subjects**

*30 CFR Part 701*

Coal mining, Law enforcement, Surface mining, Underground mining.

*30 CFR Parts 772 and 776*

Coal mining, Reporting requirements, Surface mining, Underground mining.

*30 CFR Part 815*

Coal mining, Surface mining.

Accordingly, 30 CFR Parts 701, 772, 776, and 815 are proposed to be amended as set forth below.

Dated: April 28, 1982.

**William P. Pendley,**

*Acting Assistant Secretary, Energy and Minerals.*

## PART 701—PERMANENT REGULATORY PROGRAM

1. Section 701.5 is amended by revising the definitions of the terms "coal exploration" and "substantially disturb" to read as follows:

**§701.5 Definitions.**

* * * * *

*Coal exploration* means the gathering of data, through drilling, excavation, or other field activities, on the physical and chemical characteristics of coal deposits, overburden, or the strata below the coal deposits; on the hydrologic conditions associated with the coal deposits; or on related environmental conditions.

* * * * *

*Substantially disturb* means, for purposes of coal exploration, to significantly impact land or water resources by such activities as the removal of vegetation, topsoil, or overburden; and construction of roads or other access routes; or the placement of excavated earth or waste material on the natural land surface, and includes all exploration activities during which more than 250 tons of coal will be removed.

* * * * *

2. Part 772 is added to read as follows:

## PART 772—REQUIREMENTS FOR COAL EXPLORATION

Sec.

772.1 Scope and purpose.
772.10 Information collection.
772.11 Notice requirements for exploration removing less than 250 tons.
772.12 Permit requirements for exploration removing more than 250 tons.
772.13 Coal exploration compliance duties.
772.14 Requirements for commercial sale.
772.15 Public availability of information.

**Authority:** Pub. L. 95–87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*).

**§ 772.1 Scope and purpose.**

This part establishes the requirements and procedures applicable to the development of regulatory programs for regulation of coal exploration operations on non-Federal lands outside of the permit area.

**§ 772.10 Information collection.**

The information collection requirements contained in §§ 772.11, 772.12, and 772.14(b) have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029–0033. The information is being collected to meet the requirements of Section 512(a) of the Act which provides that coal exploration operations which substantially disturb the natural land surface be conducted in accordance with exploration rules. This information will be used to give the regulatory authority a sufficient baseline upon which to assess the impact of the proposed operation during the permanent regulatory program. The obligation to respond is mandatory.

**§ 772.11 Notice requirements for exploration removing less than 250 tons.**

(a) Any person who intends to conduct coal exploration outside a permit area during which less than 250 tons of coal will be removed and which may substantially disturb the natural land surface shall, prior to conducting the exploration, file with the regulatory authority a written notice of intention to explore.

(b) The notice shall include—

(1) The name, address, and telephone number of the person seeking to explore;

(2) The name, address, and telephone number of the representative who will be present at and responsible for conducting the exploration activities;

(3) A narrative description or a map of the exploration area;

(4) A statement of the period of intended exploration; and

(5) A description of the practices that will be followed to protect the environment and reclaim the area from adverse impacts of the exploration activities.

**§ 772.12 Permit requirements for exploration removing more than 250 tons.**

(a) *Exploration permit.* Any person who intends to conduct coal exploration outside a permit area during which more than 250 tons of coal will be removed shall, prior to conducting the exploration, submit an application and obtain the written approval, in an exploration permit, from the regulatory authority.

(b) *Application information.* Each application for an exploration permit shall contain, at a minimum, the following information:

(1) The name, address, and telephone number of the applicant.

(2) The name, address and telephone number of the representative who will be present and responsible for conducting the exploration activities.

(3) A narrative description of the proposed exploration area.

(4) A narrative description of the methods and equipment to be used to conduct the exploration and reclamation.

(5) An estimated timetable for conducting and completing each phase of the exploration and reclamation.

(6) The estimated amounts of coal to be removed and a description of the methods to be used to determine those amounts.

(7) A statement of why extraction of more than 250 tons of coal is necessary for exploration.

(8) A description of cultural or historical resources listed on the National Register of Historic Places and known archeological resources located within the proposed exploration area.

(9) A description of the measures to be used to comply with the applicable requirements of Part 815 of this chapter.

(10) The name and address of the owner of record of the surface land and of the subsurface mineral estate of the area to be explored.

(11) A map at a scale of 1:24,000 or larger, showing the areas of land to be substantially disturbed by the proposed exploration and reclamation. The map shall specifically show existing roads, occupied dwellings, bodies of surface water, and pipelines; proposed location of trenches, roads, and other access routes and structures to be constructed; the location of proposed land excavations; the location of exploration holes or other drilled holes or underground openings; and the location of excavated earth or waste materials disposal areas.

(12) If the surface is owned by a person other than the applicant, a description of the basis upon which the applicant claims the right to enter that land for the purpose of conducting exploration and reclamation.

(c) *Public notice and opportunity to comment.* Public notice of the application and opportunity to comment shall be provided as follows:

(1) Within such time as the regulatory authority may designate, the applicant shall provide public notice of the filing of the application with the regulatory authority in the newspaper of general circulation in the vicinity of the proposed exploration area.

(2) The public notice shall state the name and business address of the person seeking approval, the date of filing the application, the address of the regulatory authority where written comments on the application may be submitted, the closing date of the comment period, and a description of the general area of exploration.

(3) Any person whose interest is or may be adversely affected has the right to file written comments on the application within reasonable time limits.

(d) *Decisions on application for exploration removing more than 250 tons.*

(1) The regulatory authority shall act upon a complete application within a reasonable period to time.

(2) The regulatory authority shall approve a complete application filed in accordnace with this part if it finds, in writing, that the applicant has demonstrated that the exploration and reclamation described in the application—

(i) Will be conducted in accordance with this part, Part 815 of this chapter, and the applicable provisions of the regulatory program;

(ii) Will not jeopardize the continued existence of an endangered or threatened species listed pursuant to Section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533) or result in the destruction or adverse modification of critical habitat of those species; and

(iii) Will not adversely affect any cultural resources or districts, sites, buildings, structures, or objects listed on the National Register of Historic Places, unless the proposed exploration has been approved by both the regulatory authority and the agency with jurisdiction over such resources.

(3) Terms of approval issued by the regulatory authority shall contain conditions necessary to ensure that the exploration and reclamation will be conducted in compliance with this part, Part 815 of this chapter, and the regulatory program.

(e) *Notice and hearing.* (1) The regulatory authority shall notify the applicant, the appropriate local government officials, and other commenters on the application, in writing, of its decision on the application. If the application is disapproved, the notice to the applicant shall include a statement of the reason for disapproval. Public notice of the decision on each application shall be posted by the regulatory authority at a public office in the vicinity of the proposed exploration operations.

(2) Any person whose interest may be adversely affected by a decision of the regulatory authority pursuant to Paragraph (d)(1) of this section has the opprtunity for administrative and judicial review as set forth in Part 787 of this chapter.

**§ 722.13 Coal exploration compliance duties.**

(a) All coal exploration and reclamation activities that substantially disturb the natural land surface or that remove more than 250 tons of coal shall be conducted in accordance with the coal exploration requirements of this part, Part 815, and the regulatory program, and any exploration permit conditions imposed by the regulatory authority.

(b) Any person who conducts any coal exploration in violation of the provisions of this part, Part 815 of this chapter, or the regulatory program shall be subject to the provisions of Section 518 of the Act, Subchapter L of this chapter, and the applicable inspection and enforcement provisions of the regulatory program.

**§ 772.14 Requirements for commercial sale.**

Any person who extracts coal for commercial sale during coal exploration operations must obtain a surface coal mining and reclamation operations permit for those operations from the regulatory authority under Part 771 of this chapter. No surface coal mining and reclamation operations permit is required if the regulatory authority makes a prior determination that the sale is to test for coal properties necessary for the development of surface coal mining and reclamation operations for which a permit application is to be submitted at a later time.

**§ 772.15 Public availability of information.**

(a) Except as provided in Paragraph (b) of this section, all information submitted to the regulatory authority under this part shall be made available for public inspection and copying at the local offices of the regulatory authority closest to the exploration area.

(b) The regulatory authority shall keep information confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and the regulatory authority determines that the information concerns trade secrets or is privileged commercial or financial information relating to the competitive rights of the persons intending to conduct coal exploration.

(c) Information requested to be held as confidential under Paragraph (b) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded both persons seeking and opposing disclosure of the information.

## PART 776—GENERAL REQUIREMENTS FOR COAL EXPLORATION—[REMOVED]

3. Part 776 is removed.

## PART 815—PERMANENT PROGRAM PERFORMANCE STANDARDS—COAL EXPLORATION

4. Section 815.1 is revised to read as follows:

**§ 815.1 Scope and purpose.**

This part sets forth performance standards required for coal exploration which substantially disturbs the natural land surface.

**§§ 815.2 and 815.11 [Removed]**

5. Sections 815.2 and 815.11 are removed.

6. Section 815.13 is revised to read as follows:

**§ 815.13 Required documents.**

Each person who conducts coal exploration which substantially disturbs the natural land surface (including exploration which removes more than 250 tons of coal) while in the exploration area shall have available the required notice of intention to explore or exploration permit for review by the authorized representative of the regulatory authority or OSM upon request.

7. Section 815.15 is revised to read as follows:

**§ 815.15 Performance standards for coal exploration.**

The performance standards in this section are applicable to coal exploration which substantially disturbs the natural land surface (including exploration which removes more than 250 tons of coal).

(a) Habitats of unique or unusually high value for fish, wildlife, and other related environmental values, including critical habitats of threatened or endangered species and critical habitats of species protected by State or Federal law, shall not be disturbed during coal exploration.

(b) All roads used for coal exploration shall comply with the provisions of § 816.180 of this chapter when determined to be ancillary roads or §§ 816.150 through 816.156 of this chapter when determined to be primary roads.

(c) If excavations, artificial flat areas, or embankments are created during exploration, these areas shall be returned to the approximate original contour promptly after such features are no longer needed for coal exploration.

(d) Topsoil shall be removed, stored, and redistributed on disturbed areas as necessary to assure successful revegetation or as required by the regulatory authority.

(e) All disturbed areas shall be revegetated in a manner that encourages prompt revegetation and recovery of a diverse, effective, and permanent vegetative cover. Revegetation shall be in accordance with the following:

(1) All disturbed lands shall be seeded or planted to the same seasonal variety native to the disturbed area. If the land use of the exploration area is intensive agriculture, planting of the crops normally grown will meet the requirements of this paragraph.

(2) The vegetative cover shall be capable of stabilizing the soil surface in regards to erosion.

(f)(1) Diversions of overland flows and ephemeral streams shall be made in accordance with paragraphs (a) through (e) of § 816.43 of this chapter.

(2) Diversions of perennial or intermittent streams shall be made in accordance with Paragraphs (a), (b)(1), (c), (d), and (e) of § 816.44 of this chapter.

(g) Each exploration hole, borehole, well, or other exposed underground opening created during exploration shall be reclaimed in accordance with §§ 816.13, 816.14, and 816.15 of this chapter.

(h) All facilities and equipment shall be removed from the exploration area promptly when they are no longer needed for exploration, except for those facilities and equipment that the regulatory authority determines may remain to—

(1) Provide additional environmental data;

(2) Reduce or control the on- and offsite effects of the exploration activities; or

(3) Facilitate future surface mining and reclamation operations by the person conducting the exploration under an approved permit.

(i) Coal exploration shall be conducted in a manner which minimizes disturbance of the prevailing hydrologic balance in accordance with §§ 816.41, 816.42, 816.45, 816.46, and 816.47 of this chapter. The regulatory authority may specify additional measures which shall be adopted by the person engaged in coal exploration.

(j) Toxic- or acid-forming materials shall be handled and disposed of in accordance with §§ 816.48, 816.50, and 816.103 of this chapter. The regulatory authority may specify additional measures which shall be adopted by the person engaged in coal exploration.

**§ 815.17 [Removed]**

8. Section 815.17 is removed.

(Pub. L. 95–87, 30 U.S.C. 1201 *et seq.*)

[FR Doc. 82–13445 Filed 5–17–82; 8:45 am]
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federal register

Tuesday
May 18, 1982

Part IV

# Office of Management and Budget

## Cumulative Report on Rescissions and Deferrals

## OFFICE OF MANAGEMENT AND BUDGET

### Cumulative Report on Rescissions and Deferrals

May 1, 1982.

This report is submitted in fulfillment of the requirements of Section 1014(e) of the Impoundment Control Act of 1974 (Public Law 93–344). Section 1014(e) provides for a monthly report listing all budget authority for this fiscal year with respect to which, as of the first day of the month, a special message has been transmitted to the Congress.

This report gives the status as of May 1, 1982 of twenty-six rescission proposals and 243 deferrals contained in the first eleven messages of FY 1982. These messages were transmitted to the Congress on October 1, 20, 23, and 29, and November 6, and 13, 1981, January 22, February 8, and 19, March 18, and April 23, 1982.

**Rescissions (Table A and Attachment A)**

Two rescission proposals totaling $235.7 million are currently pending before the Congress. Table A summarizes the status of rescissions proposed by the President as of May 1, 1982 while Attachment A shows the history and status of each rescission proposed during FY 1982.

**Deferrals (Table B and Attachment B)**

As of May 1, 1982, $3,128.1 million in 1982 budget authority was being deferred from obligation and another $5.4 million in 1982 obligations was being deferred from expenditure. Attachment B shows the history and status of each deferral reported during FY 1982.

**Information from special messages**

The special messages containing information on the rescissions and the deferrals covered by the cumulative report are printed in the **Federal Registers** of:

Vol. 46, No. 194, FR p. 49793, Wednesday, October 7, 1981
Vol. 46, No. 206, FR p. 52289, Monday, October 26, 1981
Vol. 46, No. 210, FR p. 54259, Friday, October 30, 1981
Vol. 46, No. 212, FR p. 54691, Tuesday, November 3, 1981
Vol. 46, No. 218, FR p. 55905, Thursday, November 12, 1981
Vol. 46, No. 223, FR p. 57019, Thursday, November 19, 1981
Vol. 47, No. 18, FR p. 4021, Wednesday, January 27, 1982
Vol. 47, No. 28, FR p. 6193, Wednesday, February 10, 1982
Vol. 47, No. 37, FR p. 8145, Wednesday, February 24, 1982
Vol. 47, No. 57, FR p. 12751, Wednesday, March 24, 1982
Vol. 47, No. 82, FR p. 18301, Wednesday, April 28, 1982

**David A. Stockman,**

*Director.*

BILLING CODE 3110-01-M

ATTACHMENT A - STATUS OF RESCISSIONS - FISCAL YEAR 1982 AS OF 05/06/82 16:05

| AS OF MAY 1, 1982 AMOUNTS IN THOUSANDS OF DOLLARS AGENCY/BUREAU/ACCOUNT | RESCISSION NUMBER | AMOUNT PREVIOUSLY CONSIDERED BY CONGRESS | AMOUNT CURRENTLY BEFORE THE CONGRESS | DATE OF MESSAGE MO DA YR | AMOUNT RESCINDED | AMOUNT MADE AVAILABLE | DATE MADE AVAILABLE MO DA YR |
|---|---|---|---|---|---|---|---|
| FUNDS APPROPRIATED TO THE PRESIDENT | | | | | | | |
| International Development Assistance | | | | | | | |
| Functional development assistance program BA | R82- 4 | | 8,129 | 2 8 82 | | 8,129* | 4 23 82 |
| Sahel development program BA | R82- 5 | | 2,500 | 2 8 82 | | 2,500* | 4 23 82 |
| FUNDS APPROPRIATED TO THE PRESIDENT TOTAL BA | | | 10,629 | | | 10,629 | |
| DEPARTMENT OF AGRICULTURE | | | | | | | |
| Extension Service | | | | | | | |
| Extension service BA | R82- 6 | | 2,000 | 2 8 82 | | 2,000* | 4 26 82 |
| DEPARTMENT OF AGRICULTURE TOTAL BA | | | 2,000 | | | 2,000 | |
| DEPARTMENT OF COMMERCE | | | | | | | |
| National Oceanic and Atmospheric Administration | | | | | | | |
| Coastal zone management BA | R82- 7 | | 12,000 | 2 8 82 | | 12,000* | 4 26 82 |
| Coastal energy impact fund BA | R82- 8 | | 7,000 | 2 8 82 | | 7,000* | 4 26 82 |
| DEPARTMENT OF COMMERCE TOTAL BA | | | 19,000 | | | 19,000 | |
| DEPARTMENT OF DEFENSE - MILITARY | | | | | | | |
| Procurement | | | | | | | |
| Aircraft procurement, Air Force BA | R82- 1 | 65,700 | | 10 23 81 | | 65,700 | 12 14 81 |
| Missile procurement, Air Force BA | R82- 2 | 22,500 | | 10 23 81 | | 22,500 | 12 14 81 |
| DEPARTMENT OF DEFENSE - MILITARY TOTAL BA | | 88,200 | | | | 88,200 | |
| DEPARTMENT OF EDUCATION | | | | | | | |
| Office of Elementary and Secondary Education | | | | | | | |
| Compensatory education for the disadvantaged BA | R82- 9 | | 411,933 | 2 8 82 | | 411,933* | 4 26 82 |
| Special programs and populations BA | R82-10 | | 65,600 | 2 8 82 | | 65,600* | 4 26 82 |
| Indian education BA | R82-11 | | 6,255 | 2 8 82 | | 6,255* | 4 26 82 |

ATTACHMENT A - STATUS OF RESCISSIONS - FISCAL YEAR 1982 AS OF 05/06/82 16:05

| AS OF MAY 1, 1982 AMOUNTS IN THOUSANDS OF DOLLARS AGENCY/BUREAU/ACCOUNT | RESCISSION NUMBER | AMOUNT PREVIOUSLY CONSIDERED BY CONGRESS | AMOUNT CURRENTLY BEFORE THE CONGRESS | DATE OF MESSAGE MO DA YR | AMOUNT RESCINDED | AMOUNT MADE AVAILABLE | DATE MADE AVAILABLE MO DA YR |
|---|---|---|---|---|---|---|---|
| Office of Special Education and Rehab. Services | | | | | | | |
| Education for the handicapped | | | | | | | |
| BA | R82-12 | | 258,572 | 2 8 82 | | 258,572 * | 4 26 82 |
| Rehabilitation services and handicapped research | | | | | | | |
| BA | R82-13 | | 91,171 | 2 8 82 | | 91,171 * | 4 26 82 |
| Office of Vocational and Adult Education | | | | | | | |
| Vocational and adult education | | | | | | | |
| BA | R82-14 | | 105,741 | 2 8 82 | | 105,741 * | 4 26 82 |
| Office of Postsecondary Education | | | | | | | |
| Student financial assistance | | | | | | | |
| BA | R82-15 | | 141,500 | 2 8 82 | | 141,500 * | 4 26 82 |
| Higher and continuing education | | | | | | | |
| BA | R82-16 | | 42,739 | 2 8 82 | | 42,739 * | 4 26 82 |
| Office of Educational Research and Improvement | | | | | | | |
| Libraries | | | | | | | |
| BA | R82-17 | | 22,110 | 2 8 82 | | 22,110 * | 4 26 82 |
| Departmental management | | | | | | | |
| Educ. res. & train. overseas (spec. for. curr.) | | | | | | | |
| BA | R82-18 | | 80 | 2 8 82 | | 80 * | 4 26 82 |
| Office of Bilingual Educ. & Minority Lang. Affairs | | | | | | | |
| Bilingual education | | | | | | | |
| BA | R82-19 | | 11,504 | 2 8 82 | | 11,504 * | 4 26 82 |
| DEPARTMENT OF EDUCATION TOTAL BA | | | 1,157,205 | | | 1,157,205 | |
| DEPARTMENT OF ENERGY | | | | | | | |
| Energy Programs | | | | | | | |
| Energy conservation | | | | | | | |
| BA | R82-20 | | 20,000 | 2 8 82 | | 20,000* | 4 26 82 |
| DEPARTMENT OF ENERGY TOTAL BA | | | 20,000 | | | 20,000 | |
| DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT | | | | | | | |
| Housing Programs | | | | | | | |
| Subsidized housing programs | | | | | | | |
| BA | R82-21 | | 9,399,789 | 2 8 82 | | 5,999,789* | 4 26 82 |
| BA | R82-21A | | -3,400,000 | 4 23 82 | | | |
| Solar Energy and Energy Conservation Bank | | | | | | | |
| Assistance for solar and conserv. improvements | | | | | | | |
| BA | R82-22 | | 21,850 | 2 8 82 | | 21,850* | 4 26 82 |
| DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT TOTAL BA | | | 6,021,639 | | | 6,021,639 | |
| DEPARTMENT OF LABOR | | | | | | | |
| Mine Safety and Health Administration | | | | | | | |
| Salaries and expenses | | | | | | | |
| BA | R82-23 | | 4,095 | 2 8 82 | | 2,095* | 4 26 82 |
| BA | R82-23A | | -2,000 | 2 19 82 | | | |

ATTACHMENT A - STATUS OF RESCISSIONS - FISCAL YEAR 1982 AS OF 05/06/82 16:05

| AS OF MAY 1, 1982 AMOUNTS IN THOUSANDS OF DOLLARS AGENCY/BUREAU/ACCOUNT | RESCISSION NUMBER | AMOUNT PREVIOUSLY CONSIDERED BY CONGRESS | AMOUNT CURRENTLY BEFORE THE CONGRESS | DATE OF MESSAGE MO DA YR | AMOUNT RESCINDED | AMOUNT MADE AVAILABLE | DATE MADE AVAILABLE MO DA YR |
|---|---|---|---|---|---|---|---|
| DEPARTMENT OF LABOR | | | | | | | |
| TOTAL BA | | | 2,095 | | | 2,095 | |
| DEPARTMENT OF TRANSPORTATION | | | | | | | |
| Federal Highway Administration | | | | | | | |
| Highway-related safety grants | | | | | | | |
| BA | R82-24 | | 9,623 | 2 8 82 | | 9,623* | 4 26 82 |
| DEPARTMENT OF TRANSPORTATION TOTAL BA | | | 9,623 | | | 9,623 | |
| OTHER INDEPENDENT AGENCIES | | | | | | | |
| Corporation for Public Broadcasting | | | | | | | |
| Public broadcasting fund | | | | | | | |
| BA | R82- 3 | | 20,500a | 11 6 81 | | | |
| National Foundation on the Arts and Humanities | | | | | | | |
| Institute of Museum Services: Program operations | | | | | | | |
| BA | R82-25 | | 10,877 | 2 8 82 | | 10,877* | 4 26 82 |
| Postal Service | | | | | | | |
| Payment to the Postal Service Fund | | | | | | | |
| BA | R82-26 | | 215,230 | 3 18 82 | | | |
| OTHER INDEPENDENT AGENCIES TOTAL BA | | | 246,607 | | | 10,877 | |
| TOTAL BA | | 88,200 | 7,488,798 | | | 7,341,268 | |

* This item is still under consideration by the Congress, but the amounts were made available upon expiration of the 45-day clock.

a. This is a proposal to rescind FY 1983 funds.

END OF REPORT

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|---|
| EXECUTIVE OFFICE OF THE PRESIDENT | | | | | | | | | |
| White House Office | | | | | | | | | |
| Salaries and Expenses | BA | D82- 27 | 366 | | 10 20 81 | -366 | | | |
| Special Assistance to the President | | | | | | | | | |
| Salaries and Expenses | BA | D82- 28 | 28 | | 10 20 81 | -28 | | | |
| Council of Economic Advisers | | | | | | | | | |
| Salaries and Expenses | BA | D82- 86 | 32 | | 10 23 81 | -32 | | | |
| Council on Envir. Quality & Office of Envir. Qual. | | | | | | | | | |
| Salaries and Expenses | BA | D82- 29 | 9 | | 10 20 81 | -9 | | | |
| Office of Policy Development | | | | | | | | | |
| Salaries and Expenses | BA | D82- 30 | 45 | | 10 20 81 | -45 | | | |
| National Security Council | | | | | | | | | |
| Salaries and Expenses | BA | D82- 31 | 62 | | 10 20 81 | -62 | | | |
| Office of Administration | | | | | | | | | |
| Salaries and expenses | BA | D82- 32 | 139 | | 10 20 81 | -139 | | | |
| OMB, Office of Fed. Procurement Policy | | | | | | | | | |
| Salaries and expenses | BA | D82- 33 | 24 | | 10 20 81 | -24 | | | |
| Office of Science and Technology Policy | | | | | | | | | |
| Salaries and expenses | BA | D82- 34 | 30 | | 10 20 81 | -30 | | | |
| Office of the U.S. Trade Representative | | | | | | | | | |
| Salaries and expenses | BA | D82- 35 | 78 | | 10 20 81 | -78 | | | |
| EXECUTIVE OFFICE OF THE PRESIDENT TOTAL | BA | | 813 | | | -813 | | | |
| FUNDS APPROPRIATED TO THE PRESIDENT | | | | | | | | | |
| Appalachian Regional Development Programs | | | | | | | | | |
| Appalachian regional development programs | BA | D82- 1 | 15,000 | | 10 1 81 | | | | |
| | BA | D82- 1A | | | a 1 22 82 | | | | |
| | BA | D82- 1B | | | a 2 8 82 | | | | 15,000 |
| Disaster Relief | | | | | | | | | |
| Disaster relief | BA | D82-158 | 7,000 | | 10 29 81 | -7,000 | | | |
| | BA | D82-159 | 138,000 | | 10 29 81 | -138,000 | | | |
| International Security Assistance | | | | | | | | | |
| Foreign military credit sales | BA | D82-222 | 680,000 | | 2 8 82 | -480,000 | | | 200,000 |
| Economic support fund | BA | D82-219 | 1,756,980 | | 1 22 82 | -1,604,775 | | | 152,205 |
| Military assistance | BA | D82-223 | 129,512 | | 2 8 82 | -68,000 | | | 61,512 |
| FUNDS APPROPRIATED TO THE PRESIDENT TOTAL | BA | | 2,726,492 | | | -2,297,775 | | | 428,717 |
| DEPARTMENT OF AGRICULTURE | | | | | | | | | |
| Office of the Secretary | | | | | | | | | |
| Office of the Secretary | BA | D82-160 | 29 | | 10 29 81 | -29 | | | |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|
| Agricultural Research Service | | | | | | | | |
| Agricultural research service | | | | | | | | |
| BA | D82-161 | 1,813 | | 10 29 81 | -1,813 | | | |
| Cooperative State Research Service | | | | | | | | |
| Cooperative state research service | | | | | | | | |
| BA | D82-162 | 2,790 | | 10 29 81 | -2,790 | | | |
| Extension Service | | | | | | | | |
| Extension service | | | | | | | | |
| BA | D82-163 | 1,990 | | 10 29 81 | -1,990 | | | |
| National Agricultural Library | | | | | | | | |
| National agricultural library | | | | | | | | |
| BA | D82-164 | 93 | | 10 29 81 | -93 | | | |
| Statistical Reporting Service | | | | | | | | |
| Statistical reporting service | | | | | | | | |
| BA | D82-165 | 198 | | 10 29 81 | -198 | | | |
| Agricultural Cooperative Service | | | | | | | | |
| Agricultural cooperative service | | | | | | | | |
| BA | D82-166 | 39 | | 10 29 81 | -39 | | | |
| Office of Internat. Cooperation and Development | | | | | | | | |
| Scientific activities overseas | | | | | | | | |
| BA | D82-167 | 700 | | 10 29 81 | -700 | | | |
| Rural Electrification Administration | | | | | | | | |
| Rural electr. and telephone revolving fund | | | | | | | | |
| BA | D82-169 | 49,368b | | 10 29 81 | -49,368 | | | |
| Foreign Assistance Programs | | | | | | | | |
| Expenses, P.L. 480 | | | | | | | | |
| BA | D82- 36 | 25,696 | | 10 20 81 | -25,696 | | | |
| Agricultural Stabilization & Conservation Service | | | | | | | | |
| Dairy and beekeeper indemnity programs | | | | | | | | |
| BA | D82- 88 | 28 | | 10 23 81 | -28 | | | |
| Agricultural conservation | | | | | | | | |
| BA | D82- 87 | 8,600 | | 10 23 81 | -8,600 | | | |
| Emergency conservation program | | | | | | | | |
| BA | D82-168 | 1,400 | | 10 29 81 | -1,400 | | | |
| Farmers Home Administration | | | | | | | | |
| Salaries and expenses | | | | | | | | |
| BA | D82-171 | 526 | | 10 29 81 | -526 | | | |
| Rural housing for domestic farm labor | | | | | | | | |
| BA | D82-173 | 1,750 | | 10 29 81 | -1,750 | | | |
| BA | D82-224 | 10,728 | | 2 8 82 | | | | 10,728 |
| Mutual and self-help housing | | | | | | | | |
| BA | D82-174 | 490 | | 10 29 81 | -490 | | | |
| Rural water and waste disposal | | | | | | | | |
| BA | D82-170 | 8,680 | | 10 29 81 | -8,680 | | | |
| Rural community fire protection grants | | | | | | | | |
| BA | D82-172 | 490 | | 10 29 81 | -490 | | | |
| Agricultural credit insurance fund | | | | | | | | |
| BA | D82-175 | 1,316 | | 10 29 81 | -1,316 | | | |
| Rural development insurance fund | | | | | | | | |
| BA | D82-176 | 21,000 | | 10 29 81 | -21,000 | | | |
| Soil Conservation Sevice | | | | | | | | |
| Watershed and flood prevention operations | | | | | | | | |
| BA | D82- 89 | 8,926 | | 10 23 81 | -8,926 | | | |
| Animal and Plant Health Inspection Service | | | | | | | | |
| Animal and plant health inspection service | | | | | | | | |
| BA | D82- 90 | 4,125 | | 10 23 81 | -4,125 | | | |
| Buildings and facilities | | | | | | | | |
| BA | D82-177 | 236 | | 10 29 81 | -236 | | | |
| Agricultural Marketing Service | | | | | | | | |
| Payments to States and possessions | | | | | | | | |
| BA | D82-178 | 210 | | 10 29 81 | -210 | | | |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|---|
| Food and Nutrition Service | | | | | | | | | |
| Food program administration | BA | D82-209 | 487 | | 11 6 81 | -487 | | | |
| Child nutrition programs | BA | D82-210 | 472 | | 11 6 81 | -472 | | | |
| Special supplemental food programs (WIC) | BA | D82-211 | 13,831 | | 11 6 81 | -13,831 | | | |
| Forest Service | | | | | | | | | |
| State and private forestry | BA | D82- 92 | 776 | | 10 23 81 | -776 | | | |
| | BA | D82-179 | 657 | | 10 29 81 | -657 | | | |
| Agricultural research | BA | D82- 91 | 1,348 | | 10 23 81 | -1,348 | | | |
| National forest system | BA | D82- 93 | 12,516 | | 10 23 81 | -12,516 | | | |
| | BA | D82-180 | 1,059 | | 10 29 81 | -1,059 | | | |
| Construction and land acquisition | BA | D82- 94 | 6,693 | | 10 23 81 | -6,693 | | | |
| Timber salvage sales | BA | D82- 2 | 6,723 | | 10 1 81 | | | | |
| | BA | D82- 2A | | 561 | 1 22 82 | | | | 7,284 |
| Rangeland improvements | BA | D82- 96 | 109 | | 10 23 81 | -109 | | | |
| Acquisition of lands to complete land exchanges | BA | D82- 95 | 6 | | 10 23 81 | -6 | | | |
| Expenses, brush disposal | BA | D82- 3 | 49,349 | | 10 1 81 | | | -948 | |
| | BA | D82- 3A | | a | 4 23 82 | | | | 48,401 |
| DEPARTMENT OF AGRICULTURE TOTAL | BA | | 245,247 | 561 | | -178,447 | | -948 | 66,413 |
| DEPARTMENT OF COMMERCE | | | | | | | | | |
| General Administration | | | | | | | | | |
| Participation in U.S. expositions | BA | D82- 4 | 507 | | 10 1 81 | -32 | | | 475 |
| Bureau of the Census | | | | | | | | | |
| Periodic censuses and programs | BA | D82-225 | 1,015 | | 2 8 82 | | | | 1,015 |
| Economic and Statistical Analysis | | | | | | | | | |
| Salaries and expenses | BA | D82- 97 | 420 | | 10 23 81 | -420 | | | |
| Economic Development Administration | | | | | | | | | |
| Economic development assistance programs | BA | D82- 98 | 38,855 | | 10 23 81 | -38,855 | | | |
| Minority Business Development Agency | | | | | | | | | |
| Minority business development | BA | D82- 99 | 857 | | 10 23 81 | -857 | | | |
| | BA | D82-226 | 5,000 | | 2 8 82 | | | | 5,000 |
| United States Travel Service | | | | | | | | | |
| Salaries and expenses | BA | D82-181 | 287 | | 10 29 81 | -287 | | | |
| National Oceanic and Atmospheric Administration | | | | | | | | | |
| Operations, research, and facilities | BA | D82-100 | 12,891 | | 10 23 81 | -12,891 | | | |
| Construction | BA | D82- 5 | 2,000 | | 10 1 81 | | | | |
| | BA | D82- 5A | | a | 1 22 82 | | | | 2,000 |
| National Telecom. and Information Admin. | | | | | | | | | |
| Salaries and expenses | BA | D82-101 | 277 | | 10 23 81 | -277 | | | |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|
| DEPARTMENT OF COMMERCE | | | | | | | | |
| TOTAL BA | | 62,109 | | | -53,619 | | | 8,490 |
| DEPARTMENT OF DEFENSE-MILITARY | | | | | | | | |
| Procurement | | | | | | | | |
| Shipbuilding and conversion, Navy | | | | | | | | |
| BA | D82-227 | 1,275,000 | | 2 8 82 | | | | 1,275,000 |
| Military Construction | | | | | | | | |
| Military construction, all services | | | | | | | | |
| BA | D82- 6 | 38,837 | | 10 1 81 | | | | |
| BA | D82- 6A | | 14,101 | 1 22 82 | | | | |
| BA | D82- 6B | | 714,785 | 2 8 82 | -476,355 | | 39,510 | 330,878 |
| Family Housing, Defense | | | | | | | | |
| Family housing, Defense | | | | | | | | |
| BA | D82- 7 | 1,992 | | 10 1 81 | -1,992 | | | |
| DEPARTMENT OF DEFENSE-MILITARY | | | | | | | | |
| TOTAL BA | | 1,315,829 | 728,886 | | -478,347 | | 39,510 | 1,605,878 |
| DEPARTMENT OF DEFENSE-CIVIL | | | | | | | | |
| Cemeterial Expenses, Army | | | | | | | | |
| Salaries and expenses | | | | | | | | |
| BA | D82- 37 | 85 | | 10 20 81 | -85 | | | |
| Corps of Engineers | | | | | | | | |
| General investigations | | | | | | | | |
| BA | D82- 38 | 2,068 | | 10 20 81 | -2,068 | | | |
| Construction, general | | | | | | | | |
| BA | D82- 39 | 14,284 | | 10 20 81 | -14,284 | | | |
| General expenses | | | | | | | | |
| BA | D82- 40 | 370 | | 10 20 81 | -370 | | | |
| Special recreation use fees | | | | | | | | |
| BA | D82- 41 | 59 | | 10 20 81 | -59 | | | |
| Soldiers and Airmen s Home | | | | | | | | |
| Operation and maintenance | | | | | | | | |
| BA | D82- 42 | 63 | | 10 20 81 | -63 | | | |
| Wildlife Conservation, Military Reservations | | | | | | | | |
| Wildlife conservation, all services | | | | | | | | |
| BA | D82- 8 | 597 | | 10 1 81 | -8 | | 8 | |
| BA | D82- 8A | | 433 | 1 22 82 | | | | 1,030 |
| DEPARTMENT OF DEFENSE-CIVIL | | | | | | | | |
| TOTAL BA | | 17,526 | 433 | | -16,937 | | 8 | 1,030 |
| DEPARTMENT OF ENERGY | | | | | | | | |
| Energy Programs | | | | | | | | |
| Fossil energy R&D | | | | | | | | |
| BA | D82-105 | 14,769 | | 10 23 81 | -14,769 | | | |
| BA | D82-236 | 44,883 | | 3 18 82 | | -44,883 | | |
| Fossil energy construction | | | | | | | | |
| BA | D82- 9 | 135,000 | | 10 1 81 | | -135,000 | | |
| Gen. science & research-plant & capital | | | | | | | | |
| BA | D82-102 | 1,682 | | 10 23 81 | -1,682 | | | |
| Energy supply R&D-operating expenses | | | | | | | | |
| BA | D82-103 | 49,393 | | 10 23 81 | -49,393 | | | |
| BA | D82-228 | 4,000 | | 2 8 82 | | | | 4,000 |
| BA | D82-228A | | a | 3 18 82 | | | | |
| Energy supply R&D-plant and capital equip. | | | | | | | | |
| BA | D82-104 | 11,949 | | 10 23 81 | -11,949 | | | |
| Energy conservation | | | | | | | | |
| BA | D82-106 | 14,007 | | 10 23 81 | -14,007 | | | |
| Strategic Petroleum Reserve | | | | | | | | |
| BA | D82- 10 | 8,000 | | 10 1 81 | | | | |
| BA | D82- 10A | | 52,860 | 2 8 82 | -8,000 | | | 52,860 |
| Energy information administration | | | | | | | | |
| BA | D82-107 | 2,042 | | 10 23 81 | -2,042 | | | |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS / AGENCY/BUREAU/ACCOUNT | | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|---|---|
| Economic regulation | BA | D82-108 | 2,436 | | | 10 23 81 | -2,436 | | | |
| Federal Energy Regulatory Commission | BA | D82-109 | 490 | | | 10 23 81 | -490 | | | |
| Geothermal resources development fund | BA | D82-110 | 18 | | | 10 23 81 | -18 | | | |
| DEPARTMENT OF ENERGY TOTAL BA | | | 288,669 | 52,860 | | | -104,786 | -179,883 | | 56,860 |
| DEPARTMENT OF HEALTH AND HUMAN SERVICES | | | | | | | | | | |
| Health Services Administration | | | | | | | | | | |
| Health Services | BA | D82- 11 | 1,508 | | | 10 1 81 | | | | 1,508 |
| Indian health services | BA | D82-212 | 10,950 | | | 11 6 81 | -10,950 | | | |
| Centers for Disease Control | | | | | | | | | | |
| Preventive Health Services | BA | D82-213 | 791 | | | 11 6 81 | -791 | | | |
| Alcohol, Drug Abuse & Mental Health Administration | | | | | | | | | | |
| Construction & renovation, St. Elizabeths Hospital | BA | D82- 12 | 11,500 | | | 10 1 81 | | | | |
| | BA | D82- 12A | | | a | 1 22 82 | | | | 11,500 |
| Office of Assistant Secretary for Health | | | | | | | | | | |
| Health services management | BA | D82-214 | 1,142 | | | 11 6 81 | -1,142 | | | |
| Special foreign currency program | BA | D82- 13 | 7,000 | | | 10 1 81 | | | | |
| | BA | D82- 13A | | | a | 1 22 82 | | | | 7,000 |
| Health Care Financing Administration | | | | | | | | | | |
| Program management | BA | D82-215 | 420 | | | 11 6 81 | -420 | | | |
| Social Security Administration | | | | | | | | | | |
| Refugee assistance | BA | D82- 43 | 10,000 | | | 10 20 81 | -10,000 | | | |
| Cuban and Haitian entrants, reception & process. | BA | D82- 44 | 4,900 | | | 10 20 81 | -4,900 | | | |
| | BA | D82- 44A | | | a | 1 22 82 | | | | |
| Cuban and Haitian entrants, domestic asst. | BA | D82- 45 | 37,000 | | | 10 20 81 | | | | |
| | BA | D82- 45A | | 11,398 | | 1 22 82 | -48,398 | | | |
| Limitation on administrative expenses | BA | D82-237 | 9,600 | | | 3 18 82 | | | | 9,600 |
| Human Development Services | | | | | | | | | | |
| Work incentives | BA | D82-216 | 10,523 | | | 11 6 81 | -10,523 | | | |
| DEPARTMENT OF HEALTH AND HUMAN SERVICES TOTAL BA | | | 105,334 | 11,398 | | | -87,124 | | | 29,608 |
| DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT | | | | | | | | | | |
| Housing Programs | | | | | | | | | | |
| Subsidized housing programs | BA | D82-182 | 79,218 | | | 10 29 81 | -79,218 | | | |
| Payments for operation of low income housing | BA | D82-183 | 102,452 | | | 10 29 81 | -102,452 | | | |
| Housing for the elderly or handicapped | BA | D82-111 | 14,294 | | | 10 23 81 | -14,294 | | | |
| Solar Energy and Energy Conserv. Bank | | | | | | | | | | |
| Assist. for solar and conserv. improvements | BA | D82-184 | 3,500 | | | 10 29 81 | -3,500 | | | |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|
| Community Planning and Development | | | | | | | | |
| Community development support assistance | | | | | | | | |
| BA | D82-112 | 61,589 | | 10 23 81 | -61,589 | | | |
| Urban development action grants | | | | | | | | |
| BA | D82-113 | 8,412 | | 10 23 81 | -8,412 | | | |
| Rehabilitation loan fund | | | | | | | | |
| BA | D82-185 | 26,959 | | 10 29 81 | -26,959 | | | |
| Neighborhoods, Vol. Assoc. & Consumer Prot. | | | | | | | | |
| Housing counseling assistance | | | | | | | | |
| BA | D82- 46 | 207 | | 10 20 81 | -207 | | | |
| Policy Development and Research | | | | | | | | |
| Research and technology | | | | | | | | |
| BA | D82- 47 | 420 | | 10 20 81 | -420 | | | |
| Fair Housing and Equal Opportunity | | | | | | | | |
| Fair housing assistance | | | | | | | | |
| BA | D82- 48 | 96 | | 10 20 81 | -96 | | | |
| Management and Administration | | | | | | | | |
| Salaries and expenses | | | | | | | | |
| BA | D82-186 | 3,590 | | 10 29 81 | -3,590 | | | |
| DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT | | | | | | | | |
| TOTAL BA | | 300,737 | | | -300,737 | | | |
| DEPARTMENT OF THE INTERIOR | | | | | | | | |
| Bureau of Land Management | | | | | | | | |
| Acquisition, construction and maintenance | | | | | | | | |
| BA | D82- 49 | 121 | | 10 20 81 | -121 | | | |
| Range improvements | | | | | | | | |
| BA | D82-114 | 237 | | 10 23 81 | -237 | | | |
| Bureau of Reclamation | | | | | | | | |
| Loan program | | | | | | | | |
| BA | D82-115 | 792 | | 10 23 81 | -792 | | | |
| Construction program | | | | | | | | |
| BA | D82-116 | 4,603 | | 10 23 81 | -4,603 | | | |
| General investigations | | | | | | | | |
| BA | D82-117 | 944 | | 10 23 81 | -944 | | | |
| Operations and maintenance | | | | | | | | |
| BA | D82-118 | 64 | | 10 23 81 | -64 | | | |
| General administrative expenses | | | | | | | | |
| BA | D82-119 | 353 | | 10 23 81 | -353 | | | |
| Office of Water Research & Technology | | | | | | | | |
| Salaries and expenses | | | | | | | | |
| BA | D82-120 | 600 | | 10 23 81 | -600 | | | |
| U.S. Fish and Wildlife Service | | | | | | | | |
| Resource management | | | | | | | | |
| BA | D82-121 | 5,815 | | 10 23 81 | -5,815 | | | |
| Construction and anadromous fish | | | | | | | | |
| BA | D82- 50 | 392 | | 10 20 81 | -392 | | | |
| National Park Service | | | | | | | | |
| Urban park and recreation grants | | | | | | | | |
| BA | D82-125 | 1,400 | | 10 23 81 | -1,400 | | | |
| BA | D82-238 | 858 | | 3 18 82 | | | | 858 |
| Operation of the National Park Service | | | | | | | | |
| BA | D82-122 | 5,216 | | 10 23 81 | -5,216 | | | |
| John F. Kennedy Center for the Performing Arts | | | | | | | | |
| BA | D82-124 | 40 | | 10 23 81 | -40 | | | |
| Construction | | | | | | | | |
| BA | D82-123 | 5,207 | | 10 23 81 | -5,207 | | | |
| Land and water conservation fund | | | | | | | | |
| BA | D82-126 | 16,256 | | 10 23 81 | -16,256 | | | |
| BA | D82- 14 | 30,000 | | 10 1 81 | | | | |
| BA | D82- 14A | | a | 2 8 82 | | | | 30,000 |
| BA | D82-239 | 2,821 | | 3 18 82 | | | | 2,821 |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|---|
| Historic preservation fund | | | | | | | | | |
| | BA | D82-218 | 108 | | 11 13 81 | -108 | | | |
| | BA | D82-240 | 781 | | 3 18 82 | | | | 781 |
| Geological Survey | | | | | | | | | |
| Surveys, investigations and research | | | | | | | | | |
| | BA | D82- 51 | 9,019 | | 10 20 81 | -9,019 | | | |
| Exploration of National Petroleum Res. in Alaska | | | | | | | | | |
| | BA | D82- 52 | 80 | | 10 20 81 | -80 | | | |
| Payments from proceeds, sale of water | | | | | | | | | |
| | BA | D82- 15 | 45 | | 10 1 81 | | | | 45 |
| Office of Surface Mining Reclam. and Enforcement | | | | | | | | | |
| Regulation and technology | | | | | | | | | |
| | BA | D82- 53 | 1,245 | | 10 20 81 | -1,245 | | | |
| Bureau of Mines | | | | | | | | | |
| Drainage of anthracite mines | | | | | | | | | |
| | BA | D82- 16 | 991 | | 10 1 81 | | | | |
| | BA | D82- 16A | | | 2 8 82 | | | | 991 |
| Mines and minerals | | | | | | | | | |
| | BA | D82- 54 | 2,600 | | 10 20 81 | -2,600 | | | |
| Bureau of Indian Affairs | | | | | | | | | |
| Operation of Indian programs | | | | | | | | | |
| | BA | D82-127 | 16,607 | | 10 23 81 | -16,607 | | | |
| Construction | | | | | | | | | |
| | BA | D82-128 | 148 | | 10 23 81 | -148 | | | |
| Road construction | | | | | | | | | |
| | BA | D82-129 | 279 | | 10 23 81 | -279 | | | |
| Office of Territorial Affairs | | | | | | | | | |
| Administration of territories | | | | | | | | | |
| | BA | D82- 55 | 2,439 | | 10 20 81 | -2,439 | | | |
| Trust territory of the Pacific Islands | | | | | | | | | |
| | BA | D82- 56 | 2,068 | | 10 20 81 | -2,068 | | | |
| Office of the Solicitor and Office of the Secy | | | | | | | | | |
| Departmental management | | | | | | | | | |
| | BA | D82-130 | 414 | | 10 23 81 | -414 | | | |
| Youth conservation corps | | | | | | | | | |
| | BA | D82-131 | 2,494 | | 10 23 81 | -2,494 | | | |
| DEPARTMENT OF THE INTERIOR TOTAL BA | | | 115,037 | | | -79,541 | | | 35,496 |
| DEPARTMENT OF JUSTICE | | | | | | | | | |
| General Administration | | | | | | | | | |
| Salaries and expenses | | | | | | | | | |
| | BA | D82-187 | 250 | | 10 29 81 | -250 | | | |
| | BA | D82-188 | 196 | | 10 29 81 | -196 | | | |
| United States Parole Commission | | | | | | | | | |
| Salaries and expenses | | | | | | | | | |
| | BA | D82-189 | 60 | | 10 29 81 | -60 | | | |
| Legal Activities | | | | | | | | | |
| Salaries and expenses, Antitrust Division | | | | | | | | | |
| | BA | D82-190 | 81 | | 10 29 81 | -81 | | | |
| Salaries and expenses, Foreign Claims Settl. | | | | | | | | | |
| | BA | D82-191 | 12 | | 10 29 81 | -12 | | | |
| Federal Prison System | | | | | | | | | |
| Buildings and facilities | | | | | | | | | |
| | BA | D82-192 | 1,922 | | 10 29 81 | -1,922 | | | |
| | BA | D82- 17 | 2,700 | | 10 1 81 | | | | |
| | BA | D82- 17A | | | 2 8 82 | | | | 2,700 |
| Office of Justice Assist., Res., and Statistics | | | | | | | | | |
| Law enforcement assistance | | | | | | | | | |
| | BA | D82-193 | 10,729 | | 10 29 81 | -10,729 | | | |
| DEPARTMENT OF JUSTICE TOTAL BA | | | 15,950 | | | -13,250 | | | 2,700 |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

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|---|---|---|---|---|---|---|---|---|---|
| DEPARTMENT OF LABOR | | | | | | | | | |
| Employment and Training Administration | | | | | | | | | |
| Employment and training assistance | | | | | | | | | |
| | BA | D82-194 | 407,670 | | 10 29 81 | -407,670 | | | |
| | BA | D82-229 | 88,543 | | 2 8 82 | | | | 88,543 |
| | BA | D82- 18 | 49,881 | | 10 1 81 | -49,881 | | | |
| Occupational Safety and Health Admin. | | | | | | | | | |
| Salaries and expenses | | | | | | | | | |
| | BA | D82-195 | 8,500 | | 10 29 81 | -8,500 | | | |
| DEPARTMENT OF LABOR TOTAL | BA | | 554,594 | | | -466,051 | | | 88,543 |
| DEPARTMENT OF STATE | | | | | | | | | |
| Administration of Foreign Affairs | | | | | | | | | |
| Emergencies in dipl. and consular service | | | | | | | | | |
| | BA | D82- 58 | 84 | | 10 20 81 | -84 | | | |
| Acquis., oper. and main. of buildings abroad | | | | | | | | | |
| | BA | D82- 57 | 514 | | 10 20 81 | -514 | | | |
| International Commissions | | | | | | | | | |
| Salaries and expenses | | | | | | | | | |
| | BA | D82- 59 | 80 | | 10 20 81 | -80 | | | |
| Construction | | | | | | | | | |
| | BA | D82- 60 | 20 | | 10 20 81 | -20 | | | |
| American sections, internat. commissions | | | | | | | | | |
| | BA | D82- 61 | 25 | | 10 20 81 | -25 | | | |
| Other | | | | | | | | | |
| Emergency refugee and migration assistance fund | | | | | | | | | |
| | BA | D82- 19 | 35,043 | | 10 1 81 | | | | |
| | BA | D82- 19A | | 100 | 1 22 82 | | | | 35,143 |
| Migration and refugee assistance | | | | | | | | | |
| | BA | D82-241 | 40,000 | | 4 23 82 | | | | 40,000 |
| | BA | D82-242 | 10,000 | | 4 23 82 | | | | 10,000 |
| U.S. bilateral science and technology agreements | | | | | | | | | |
| | BA | D82-230 | 1,000 | | 2 8 82 | | | | |
| | BA | D82-230A | | 1,000 | 4 23 82 | | | | 2,000 |
| DEPARTMENT OF STATE TOTAL | BA | | 86,766 | 1,100 | | -723 | | | 87,143 |
| DEPARTMENT OF TRANSPORTATION | | | | | | | | | |
| Federal Aviation Administration | | | | | | | | | |
| Civil supersonic aircraft development termination | | | | | | | | | |
| | BA | D82- 20 | 3,446 | | 10 1 81 | -3,400 | | | 46 |
| Facilities & equip. (Airport & airway trust fund) | | | | | | | | | |
| | BA | D82- 21 | 185,783 | | 10 1 81 | | | | |
| | BA | D82- 21A | | 164,730 | 1 22 82 | | | | 350,513 |
| Federal Railroad Administration | | | | | | | | | |
| Commuter rail transfer | | | | | | | | | |
| | BA | D82-243 | 37,500 | | 4 23 82 | | | | 37,500 |
| Grants to National Railroad Passenger Corp. | | | | | | | | | |
| | BA | D82-217 | 93,400 | | 11 6 81 | -12,740 | -80,660 | | |
| Maritime Administration | | | | | | | | | |
| Ship construction | | | | | | | | | |
| | BA | D82-231 | 10,000 | | 2 8 82 | | | | 10,000 |
| Research and Special Programs Administration | | | | | | | | | |
| Research and special programs | | | | | | | | | |
| | BA | D82-220 | 1,050 | | 1 22 82 | | | | 1,050 |
| DEPARTMENT OF TRANSPORTATION TOTAL | BA | | 331,179 | 164,730 | | -16,140 | -80,660 | | 399,109 |

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|---|---|---|---|---|---|---|---|---|---|
| DEPARTMENT OF THE TREASURY | | | | | | | | | |
| Office of the Secretary | | | | | | | | | |
| International affairs | BA | D82-196 | 109 | | 10 29 81 | -109 | | | |
| Office of Revenue Sharing | | | | | | | | | |
| Salaries and expenses | BA | D82-197 | 26 | | 10 29 81 | -26 | | | |
| State and local government fiscal assistance fund | BA | D82- 22 | 109,738 | | 10 1 81 | -4,122 | | 676 | 106,292 |
| | O | D82- 23 | 6,287 | | 10 1 81 | | | | |
| | O | D82- 23A | | 14,635 | 3 18 82 | -19,477 | | 3,937 | 5,382 |
| Federal Law Enforcement Training Center | | | | | | | | | |
| Construction | BA | D82- 24 | 4,200 | | 10 1 81 | | | | 4,200 |
| Salaries and expenses | BA | D82-198 | 240 | | 10 29 81 | -240 | | | |
| Bureau of Government Financial Operations | | | | | | | | | |
| New York City loan guarantee program | BA | D82-199 | 16 | | 10 29 81 | -16 | | | |
| Chrysler Corporation loan guarantee program | BA | D82-200 | 23 | | 10 29 81 | -23 | | | |
| Bureau of Alcohol, Tobacco and Firearms | | | | | | | | | |
| Salaries and expenses | BA | D82-201 | 1,039 | | 10 29 81 | -1,039 | | | |
| Bureau of the Mint | | | | | | | | | |
| Expansion and improvements | BA | D82-132 | 70c | | 10 23 81 | | | -70 | |
| Internal Revenue Service | | | | | | | | | |
| Payment where energy credit exceeds liab. for tax | BA | D82-202 | 8 | | 10 29 81 | -8 | | | |
| DEPARTMENT OF THE TREASURY TOTAL BA | | | 115,469 | | | -5,583 | | 606 | 110,492 |
| DEPARTMENT OF THE TREASURY TOTAL O | | | 6,287 | 14,635 | | -19,477 | | 3,937 | 5,382 |
| ENVIRONMENTAL PROTECTION AGENCY | | | | | | | | | |
| Research and development | BA | D82-133 | 1,889 | | 10 23 81 | -1,889 | | | |
| Abatement, control and compliance | BA | D82-134 | 8,062 | | 10 23 81 | -8,062 | | | |
| Buildings and facilities | BA | D82-135 | 69 | | 10 23 81 | -69 | | | |
| Hazardous substance response trust fund | BA | D82-136 | 3,360 | | 10 23 81 | -3,360 | | | |
| | BA | 0000 | | | | | | | |
| ENVIRONMENTAL PROTECTION AGENCY TOTAL BA | | | 13,380 | | | -13,380 | | | |
| NATIONAL AERONAUTICS & SPACE ADMINISTRATION | | | | | | | | | |
| Construction of facilities | BA | D82-137 | 2,800 | | 10 23 81 | -2,800 | | | |
| | BA | 0000 | | | | | | | |
| NATIONAL AERONAUTICS & SPACE ADMINISTRATION TOTAL BA | | | 2,800 | | | -2,800 | | | |
| VETERANS ADMINISTRATION | | | | | | | | | |
| Medical and prosthetic research | BA | D82-138 | 2,583 | | 10 23 81 | -2,583 | | | |

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|---|---|---|---|---|---|---|---|---|---|
| Medical admin. and misc. operating expenses | BA | D82-139 | 921 | | 10 23 81 | -921 | | | |
| Construction, major projects | BA | D82-140 | 91,300 | | 10 23 81 | | -33,800 | | 57,500 |
| | BA | D82-141 | 7,877 | | 10 23 81 | -7,877 | | | |
| Construction, minor projects | BA | D82-142 | 907 | | 10 23 81 | -907 | | | |
| | BA | 0000 | | | | | | | |
| VETERANS ADMINISTRATION TOTAL BA | | | 103,588 | | | -12,288 | -33,800 | | 57,500 |
| OTHER INDEPENDENT AGENCIES | | | | | | | | | |
| ACTION | | | | | | | | | |
| Operating expenses, domestic programs | BA | D82- 62 | 2,896 | | 10 20 81 | -2,896 | | | |
| Administrative Conference of the U. S. | | | | | | | | | |
| Salaries and expenses | BA | D82-143 | 16 | | 10 23 81 | -16 | | | |
| Advisory Committee on Federal Pay | | | | | | | | | |
| Salaries and expenses | BA | D82-144 | 4 | | 10 23 81 | -4 | | | |
| Arms Control and Disarmament Agency | | | | | | | | | |
| Arms control and disarmament agency | BA | D82- 63 | 282 | | 10 20 81 | -282 | | | |
| Board for International Broadcasting | | | | | | | | | |
| Salaries and expenses | BA | D82- 64 | 252 | | 10 20 81 | -252 | | | |
| Comm. for the Purchase From the Blind | | | | | | | | | |
| Salaries and expenses | BA | D82- 65 | 10 | | 10 20 81 | -10 | | | |
| District of Columbia | | | | | | | | | |
| Loans for capital outlay | BA | D82-232 | 38,832 | | 2 8 82 | | | | 38,832 |
| Equal Employment Opportunity Commission | | | | | | | | | |
| Salaries and expenses | BA | D82-145 | 3,000 | | 10 23 81 | -3,000 | | | |
| Federal Emergency Management Agency | | | | | | | | | |
| State and local assistance | BA | D82-205 | 1,814 | | 10 29 81 | -1,814 | | | |
| National flood insurance fund | BA | D82-203 | 7,140 | | 10 29 81 | -7,140 | | | |
| | BA | D82-204 | 358,860 | | 10 29 81 | -358,860 | | | |
| General Services Administration | | | | | | | | | |
| Consumer information center | BA | D82- 68 | 26 | | 10 20 81 | -26 | | | |
| Nat. Archives & Records Service-operating | BA | D82- 66 | 140 | | 10 20 81 | -140 | | | |
| Federal Property Resources Service-operating | BA | D82- 67 | 748 | | 10 20 81 | -748 | | | |
| Automated Data & Telecom. Service-operating | BA | D82-206 | 120 | | 10 29 81 | -120 | | | |
| Advisory Commission on Intergovt. Relations | | | | | | | | | |
| Salaries and expenses | BA | D82- 69 | 10 | | 10 20 81 | -10 | | | |
| Delaware River Basin Commission | | | | | | | | | |
| Salaries and expenses | BA | D82- 70 | 2 | | 10 20 81 | -2 | | | |
| Contribution to the Del. River Basin Comm. | BA | D82- 71 | 4 | | 10 20 81 | -4 | | | |

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|---|---|---|---|---|---|---|---|---|---|
| Interstate Commission on the Potomac River Basin | | | | | | | | | |
| Contrib. to Interst. Comm. on Potomac Riv. Basin | BA | D82- 72 | 1 | | 10 20 81 | -1 | | | |
| Susquehanna River Basin Commission | | | | | | | | | |
| Salaries and expenses | BA | D82- 73 | 1 | | 10 20 81 | -1 | | | |
| Contrib. to the Susquehanna River Basin Comm. | BA | D82- 74 | 1 | | 10 20 81 | -1 | | | |
| International Communication Agency | | | | | | | | | |
| Salaries & expenses | BA | D82- 75 | 4,680 | | 10 20 81 | -4,680 | | | |
| Center for cul. and tech. exch. bet. east & west | BA | D82- 76 | 125 | | 10 20 81 | -125 | | | |
| Interstate Commerce Commission | | | | | | | | | |
| Salaries and expenses | BA | D82-146 | 648 | | 10 23 81 | -648 | | | |
| Japan-U.S. Friendship Commission | | | | | | | | | |
| Japan-U.S. Friendship Commission trust fund | BA | D82- 77 | 34 | | 10 20 81 | -34 | | | |
| Marine Mammal Commission | | | | | | | | | |
| Salaries and expenses | BA | L82- 78 | 11 | | 10 20 81 | -11 | | | |
| National Capital Planning Commission | | | | | | | | | |
| Salaries and expenses | BA | D82-207 | 19 | | 10 29 81 | -19 | | | |
| National Foundation on the Arts & Humanities | | | | | | | | | |
| Nat. endowment for the arts: sal. & expenses | BA | D82-147 | 11,208 | | 10 23 81 | -11,208 | | | |
| Nat. endowment for the human.: sal. and expenses | BA | D82-208 | 5,892 | | 10 29 81 | -5,892 | | | |
| Nat. endowment for the human.: matching grants | BA | D82-148 | 2,628 | | 10 23 81 | -2,628 | | | |
| National Mediation Board | | | | | | | | | |
| Salaries and expenses | BA | D82- 79 | 58 | | 10 20 81 | -58 | | | |
| National Science Foundation | | | | | | | | | |
| Research and related activities | BA | D82- 80 | 19,924 | | 10 20 81 | -19,924 | | | |
| Scientific activities overseas | BA | D82- 81 | 59 | | 10 20 81 | -59 | | | |
| Science and engineering educ. activities | BA | D82- 82 | 2,623 | | 10 20 81 | -2,623 | | | |
| Neighborhood Reinvestment Corporation | | | | | | | | | |
| Payment to Neighborhood Reinvest. Corp. | BA | D82- 83 | 181 | | 10 20 81 | -181 | | | |
| Pennsylvania Avenue Development Corporation | | | | | | | | | |
| Salaries and expenses | BA | D82-149 | 15 | | 10 23 81 | -15 | | | |
| Public development | BA | D82-150 | 239 | | 10 23 81 | -239 | | | |
| Land acquisition and development fund | BA | D82-151 | 42 | | 10 23 81 | -42 | | | |
| | BA | D82- 25 | 30,896 | | 10 1 81 | -10,000 | | | |
| | BA | D82- 25A | | a | 2 8 82 | | | | 20,896 |
| Selective Service System | | | | | | | | | |
| Salaries and expenses | BA | D82- 84 | 192 | | 10 20 81 | -192 | | | |
| Small Business Administration | | | | | | | | | |
| Salaries and expenses | BA | D82-152 | 3,137 | | 10 23 81 | -3,137 | | | |
| Business loan and investment fund | BA | D82-233 | 2,500 | | 2 8 82 | | | | 2,500 |

ATTACHMENT B - STATUS OF DEFERRALS - FISCAL YEAR 1982 AS OF 05/05/82 16:43

| AMOUNTS IN THOUSANDS OF DOLLARS<br>AGENCY/BUREAU/ACCOUNT | | DEFERRAL NUMBER | AMOUNT TRANSMITTED ORIGINAL REQUEST | AMOUNT TRANSMITTED SUBSEQUENT CHANGE | DATE OF MESSAGE MO DA YR | CUMULATIVE OMB /AGENCY RELEASES | CONGRESSIONALLY REQUIRED RELEASES | CUMULATIVE ADJUSTMENTS | AMOUNT DEFERRED AS OF 5-1-82 |
|---|---|---|---|---|---|---|---|---|---|
| Surety bond guarantees revolving fund | | | | | | | | | |
| | BA | D82-154 | 373 | | 10 23 81 | -373 | | | |
| | BA | D82-234 | 3,000 | | 2 8 82 | | | | 3,000 |
| Lease guarantees revolving fund | | | | | | | | | |
| | BA | D82-153 | 67 | | 10 23 81 | -67 | | | |
| Smithsonian Institution | | | | | | | | | |
| Museum programs and related research | | | | | | | | | |
| | BA | D82-155 | 231 | | 10 23 81 | -231 | | | |
| Restoration and renovation of buildings | | | | | | | | | |
| | BA | D82-156 | 145 | | 10 23 81 | -145 | | | |
| Motor Carrier Ratemaking Study Commission | | | | | | | | | |
| Salaries and Expenses | | | | | | | | | |
| | BA | D82- 26 | 150 | | 10 1 81 | | | | 150 |
| Pres. Com. for the Study of Ethical Probs. in Med. | | | | | | | | | |
| Salaries and expenses | | | | | | | | | |
| | BA | D82-221 | 262 | | 1 22 82 | | | | 262 |
| Tennessee Valley Authority | | | | | | | | | |
| Tennessee Valley Authority fund | | | | | | | | | |
| | BA | D82-157 | 2,321 | | 10 23 81 | -2,321 | | | |
| United States Railway Association | | | | | | | | | |
| Payments for purchase of Conrail securities | | | | | | | | | |
| | BA | D82-235 | 84,500 | | 2 8 82 | | | | 84,500 |
| Water Resources Council | | | | | | | | | |
| Water resources planning | | | | | | | | | |
| | BA | D82- 85 | 42 | | 10 20 81 | -42 | | | |
| OTHER INDEPENDENT AGENCIES | | | | | | | | | |
| TOTAL | BA | | 590,361 | | | -440,221 | | | 150,140 |
| TOTAL | BA | | 6,991,880 | 959,968 | | -4,568,562 | -294,343 | 39,176 | 3,128,119 |
| TOTAL | O | | 6,287 | 14,635 | | -19,477 | | 3,937 | 5,382 |

a. This report was transmitted solely to reflect technical adjustments to the previous report.

b. Off-budget.

c. This deferral was reported in error. Funds for this budget account were not withheld.

END OF REPORT

[FR Doc. 82-13429 Filed 5-17-82; 8:45 am]
BILLING CODE 3110-01-C

federal register

Tuesday
May 18, 1982

Part V

# Federal Communications Commission

## Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 73, 74, 76, and 78

[BC Docket No. 78-253; FCC 82-107]

### An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** This action amends the Commission's rules to include a new low power television service. The service will: (1) Permit a fuller utilization of the broadcast spectrum, (2) allow broadcasting to maximize its potential to meet the needs of consumers, and (3) open the regulatory doors to purveyors of alternative technologies. The action is necessary to resolve the issues of multiple ownership, comparative procedures and technical standards, as well as permitting program origination and/or subscription service via TV translator.

**DATE:** Effective June 17, 1982.

**FOR FURTHER INFORMATION CONTACT:** Molly Pauker, Broadcast Bureau, (202) 632-6460.

**SUPPLEMENTARY INFORMATION:**

**List of Subjects**

*47 CFR Parts 73 and 74*

Communications equipment, Television.

*47 CFR Part 76*

Cable television.

*47 CFR Part 78*

Cable television, Communications equipment.

In the matter of an inquiry into the future role of low power television broadcasting and television translators in the National Telecommunications System, BC Docket No. 78-253.

**Report and Order—Proceeding Terminated**

Adopted: March 4, 1982.

Released: April 26, 1982.

By the Commission: Chairman Fowler dissenting in part and issuing a statement in which Commissioner Dawson joins; Commissioner Washburn dissenting in part and issuing a statement; Commissioners Fogarty and Rivera issuing separate statements.

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1. We have before us a document that culminates a lengthy proceeding in which we have considered authorization of a low power television service. This service in many ways is the logical extension of the existing translator service, which was authorized as a rebroadcast service in 1956.[1] However, our decision today to permit far greater program flexibility than we ever have permitted on translators also may be viewed as inaugurating a new broadcast service. In today's telecommunications environment, we are witnessing the rapid development of a multitude of new and competitive technologies designed to deliver entertainment and information services to the public. The low power service will permit fuller utilization of the broadcast spectrum in service to those ends. It is fitting that we engage in initiatives that will allow broadcasting to maximize its potential to meet the needs of consumers as we also open the regulatory doors to purveyors of alternative technologies that will attempt competitively to meet similar needs.

**I. History of BC Docket No. 78-253**

2. A television translator is a broadcast station, operating at relatively low power, that receives a television signal on one channel, amplifies it and retransmits it on another channel. Over 3,000 translators are licensed today, under Subpart G of Part 74 of the Commission's Rules. 47 CFR 74.701 *et seq.* The development of the present translator service previously has been detailed in several places in this docket, most notably in Appendix B of the Notice of Inquiry,[2] in the Report and Recommendations in the Low Power Television Inquiry ("Staff Report"),[3] paragraphs 11 through 46, and briefly, in the Notice of Proposed Rule Making ("Notice"),[4] paragraphs 9 through 21. Therefore, we shall not reiterate this history here, but instead direct interested persons to the above-referenced documents for more detailed information. We do note that in the annals of the translator service one may find several examples of waivers authorizing program origination (via video casette) and subscription service, the principal modes of operation that the Commission has proposed to permit generally via rule change, in the instant proceeding.[5] These instances have illustrated the viability of a low power service substantially as proposed, though on a limited scale, and, as such, may be considered significant elements in the record of this proceeding.

3. This proceeding was initiated with a Notice of Inquiry in 1978. Citing various recent study reports, petitions and suggestions urging an expanded role for television translators, the inquiry posed the fundamental question: "what role may low power television stations and translator stations play in delivering programming to the public." [6] Comments were requested on six "decision criteria" as the framework for initial policy development:

1. Public need for program diversity;
2. Spectrum requirements;
3. Interference to communications services;
4. Media competition and economic impact;
5. Low power/translator economic viability and ownership; and
6. Impact on Commission resources and service implementation delays.

68 F.C.C. 2d at 1536. These areas continue to be the major concerns in this proceeding. Resolution of these basic issues, which the rule making record provides, informs our determination of whether there should be a low power service and what it should look like.

4. The inquiry was concluded two years after its commencement, with the introduction into the record of the Staff Report and adoption of the Notice. The Staff Report documents the approximately 100 comments and reply comments filed in response to the Notice of Inquiry and also contains detailed staff analysis of the present television translator service and the potential for its expanded use as an originating

[1] *Report and Order*, Docket No. 11611, FCC 56-44 (1956).

[2] 68 F.C.C. 2d 1525 (1978).

[3] Couzens, M., *et al.*, U.S. Government Printing Office No. 721-146/134 (September 9, 1980).

[4] 45 FR 69178 (published October 17, 1980).

[5] *See, e.g.*, Unalaska School District (BPTTV-4857) and City of St. Paul (BPTTV-4858), Report No. 11887, October 25, 1973; Leeco TV, Inc., 9 F.C.C. 2d 1028 (1967).

[6] 68 F.C.C. 2d 1525, 1527 (1978).

broadcast service. The Report addresses and recommends an approach toward numerous aspects of the proposed low power service, within the framework of the six decision criteria. It also contains a report prepared under a Commission contract that describes the development of prototype low-powered television operations in the United States and Canada.

5. The Staff Report served as a backdrop for the contemporaneous Notice of Proposed Rule Making, which sought comment on a series of fairly explicit proposals for a new low power service.[7] The Notice proposed generally that translators be permitted to originate programming and/or operate subscription service to any degree. It proposed that low power stations be permitted to operate on any available VHF or UHF channel on a secondary, noninterfering basis to full-service stations, at powers of up to 100 watts VHF (in certain instances) and 1,000 watts UHF. It proposed relaxation of Commission rules relating to program content and would tailor program-related statutory requirements to the limited technical capacity of the station. Finally, the Commission proposed to continue authorizing translator stations, including applications for translators seeking low power features on a waiver basis, during the pendency of the rule making. Interim grants would be conditioned upon the outcome of the rule making. Where the outcome of an application would depend upon an issue to be resolved in the rule making, such as comparative criteria, action would be deferred until the conclusion of the rule making. The rationale for this was that to stop processing applications in the conventional translator service, whose merit already was amply proved, would disserve the public, but that to refuse to consider applications seeking low power features would encourage disingenuous translator applications from parties whose real interest was low power operation.

6. The interim processing policy cannot be deemed successful in facilitating prompt implementation of the service.[8] Nevertheless, it highlighted the importance of the sixth decision criterion, in paragraph 3, *supra*, providing an invaluable indication of the potential demand for the service and an object lesson regarding the necessity for additional administrative and technical refinements in the proposals that could not have been anticipated without practical experience. The notion of interim processing itself was controversial, spawning two lawsuits. In Little Rock Television Company, et al. v. FCC, 646 F. 2d 1271 (8th Cir. 1981) *per curiam*, the court dismissed, on grounds of jurisdiction and ripeness, a challenge to the Commission's extension of a cut-off date.[9] In Corporation for Public Broadcasting v. FCC, No. 81-1075, the United States Court of Appeals for the District of Columbia Circuit was asked to adjudicate the claim that interim allocation of spectrum for low power stations prejudices noncommercial applicants, who require more time to secure funding for applications than do their commercial counterparts. The suit was dismissed at the request of the petitioner in October, 1981.

7. In addition to the court challenges, the unexpectedly large number of interim applications filed brought to the Commission's attention a technical inadequacy in the low power proposal. The existing rules, amendment of which was not proposed, prohibit translator-to-translator interference, but essentially leave the judgment as to whether a proposed translator is mutually exclusive with existing translators or other applications to engineering discretion.[10] This approach was sufficient for the largely rural translator service, where mutually exclusive applications were unusual and the relatively low volume of applications permitted extensive manual analysis. However, during the pendency of the rule making, over 7,000 applications were filed.[11] Many of these were in major markets and were obviously mutually exclusive with each other, but without precise translator-to-translator exclusivity standards that permit automated analysis, it was impossible formally to determine mutual exclusivity. To remedy this, a Further Notice of Proposed Rule Making was issued, augmenting the technical proposals in the Notice with a prohibited contour overlap mode of processing that can be substantially automated.[12]

8. The United States Congress also involved itself with the administrative dilemma posed by the great number of applications filed. The Omnibus Budget Reconciliation Act of 1981 amended Section 309 of the Communications Act to permit random selection among competing telecommunications facilities applicants.[13] This was intended as an alternative to time-consuming comparative hearings:

> The conferees are particularly concerned with the delay that will result if comparative proceedings are used to award licenses for low power television service. The Commission has already received over 5,000 applications, most of which are, or will be mutually exclusive with other applications. Unless alternate procedures are devised, the Commission will have a geometric increase in comparative hearings and many years of delay in action on these applications. The conferees note that a matter such as this is ideally suited for the application of random selection procedures. By authorizing the Commission to apply random selection to any license application already submitted, but not yet designated for hearing, it will be possible to process low power television applications rapidly on a random selection basis.

Omnibus Budget Reconciliation Act of 1981, Conference Report, H.R. Rep. No. 97-208, 97th Cong. 1st Sess. (July 29, 1981), at 898. In accordance with the Congressional authorization, we commenced rule making seeking public comment upon general proposals for implementation of a random selection system with preferences for underrepresented groups or individuals.[14] The proceeding was terminated on February 8, 1982, with the Commission's conclusion that, on the basis of the record adduced, it would not be feasible to implement a system of random selection within the constraints of the legislative provisions.[15]

9. We have received numerous comments and reply comments on both the Notice and the Further Notice, as well as comments in the lottery proceeding relating to low power

[7] The proposals will be addressed specifically below.

[8] To date, approximately sixty-five interim translator grants have been made in the continental United States, eight including a waiver for low power features. Over one hundred additional interim grants have been made for low power operations in the State of Alaska.

[9] A cut-off date is the deadline for filing petitions to deny and competing applications with respect to applications previously published on a cut-off list of applications ready and available for processing.

[10] Each translator application is examined on a case-by-case basis; separate calculations are performed regarding other authorized spectrum users to which the proposed facility could cause interference. Fixed coordination distances or protected contours are not utilized between translators; rather, engineering assessment of each particular case is relied upon.

[11] When it became clear that the existing method of processing was inadequate to deal with this magnitude, the Commission stopped accepting additional applications, except in areas where the need for service outweighed the administrative burdens. See, Memorandum Opinion and Order, 46 FR 26062 (published May 11, 1981).

[12] 46 FR 42478 (published August 21, 1981).

[13] Pub. L. No. 97-35, 95 Stat. 736 (August 13, 1981).

[14] Notice of Proposed Rule Making, In the Matter of Amendment of Part 1 of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings, Gen. Docket No. 81-768, FCC 81-524, 46 FR 58110 (published November 30, 1981).

[15] Report and Order, Gen. Docket No. 81-768, adopted February 8, 1982, 47 FR 11886 (published March 19, 1982).

application processing.[16] From the voluminous record developed to date and the practical experience we have gleaned via the interim processing policy, we have been able to distill the following regulations for a low power television service. We believe the rules set out below will fulfill the multiple goals of satisfying public demand, protecting the rights of other broadcasters and affected telecommunications services, not prohibitively burdening Commission administrative resources and generally furthering our current regulatory policies and those established by Congress.

## II. Overview

10. The basic issue presented in this proceeding simply is: should there be a low power service? This question must be addressed in several levels, both theoretical and practical. As the recent past has shown, we also must consider the relatively great administrative resource impact that implementation of the low power service will have upon the Commission. This is a particularly significant consideration, in light of present budgetary constraints that mandate austerity at the Commission. Nevertheless, weighing all the factors, we are convinced that the benefits of the low power service will outweigh its costs to the public. The most persuasive evidence for this conclusion are the pleadings comprising the record. The comments overwhelmingly favor institution of the low power service. As the comment summary reveals, a variety of modifications to our initial proposal are suggested. Among them are some proposals with which we are in accord; these are reflected in the rules and policies promulgated herein, which, it will be noted, do not in every instance track our initial proposals. Other comments propose changes in our proposals that, on consideration, we find unrealistic or impracticable, or simply not in accord with our policy goals. Nevertheless, the record adduced in response to the Notice airs thoroughly the major issues in this rule making and contains commentary representing a variety of interests. What is most noteworthy is the paucity of direct opposition to the concept of a low power television service.

11. Our first decision criterion was "public need for program diversity." It is self-evident that additional stations will provide additional programming. How "different" this additional programming will be is not readily determinable; however, the analysis in our Radio Deregulation proceeding provides a basis for the inference that provision of additional outlets can act as an incentive for licensees to provide program diversity. Report and Order, Deregulation of Radio, 84 F.C.C. 2d 968, 1981. In addition, we believe that the record evidences a public desire for additional television service, as well as a belief that low power stations can provide diverse programming. We have concluded, however, that the specific nature of the programming is properly left to the licensees' discretion, based upon the mandates of the marketplace.

12. Local programming usually has been an important service objective in the broadcast services (*see*, Sixth Report and Order, Docket Nos. 8736, 8975, 9175 and 8976, 41 F.C.C. 148 (1952)), an objective that the low power service is particularly suited to carry out. The comments are in accord on this issue; however, they differ in their recommendations as to how we might achieve this objective. In our deliberations, the issue becomes: acknowledging the public desire for additional television stations with the potential to provide diverse or local program service, what should be the Commission's role in determining the precise nature of the program service?

13. In general, we are reluctant to mandate that particular kinds and amounts of programming be aired, substituting our decision for market mechanisms. First and foremost, to do so would run afoul of the discretion we must afford to the program decisions of licensees, under the First Amendment to the Constitution and our long line of precedent upholding that discretion. *See, e.g.*, Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1976). Second, even where we perceive a need to adopt a hands-on policy toward low power program content, we historically have found less intrusive means of effectuating that policy. The law constrains us to choose the least drastic means of achieving even a legitimate governmental purpose that has the incidental effect of intruding upon protected freedoms. *See*, Shelton v. Tucker, 364 U.S. 479 (1960); U.S. v. O'Brien, 391 U.S. 367 (1968). In the past, we have sought to achieve programming objectives by means of more or less content-related regulations, such as ascertainment. *See*, Report and Order, Primer on Ascertainment of Community Problems by Broadcast Applicants, 27 F.C.C. 2d 650 (1971). As the radio service became more directly responsive to consumer demands, however, we found it unnecessary to continue to impose this obligation on licensees. *See*, Deregulation of Radio, 84 FCC 2d 968 (1981); *reconsid. denied*, 87 FCC 2d 797 (1981).

14. In our deliberations, we remain mindful of the fact that, while low power television indeed is a broadcast service, its technical and operational differences from full service television inform different sets of regulatory decisions. Title III of the Communications Act sets out the basic precepts of broadcast regulation, but affords the Commission considerable latitude in their interpretation and application.[17] Generally, our broadcast rules and policies proceed from the assumption that broadcast stations serve the public interest when they meet the programming needs and interests of all elements of the community. The Commission has attempted to achieve its regulatory objectives regarding programming by both content and structural rules. However, in light of the nature of the low power service, particularly the small and undefined coverage areas of low power stations, a concern that all elements of the larger community be provided with program service is not present. In addition, it is likely that low power stations will have to be very directly responsive to the interests of local consumers, to assure economic viability. In light of these factors, it is our judgment that minimal regulation of low power television is in the public interest notwithstanding the fact that it is a broadcast service.

15. We carefully have considered the option of imposing no regulatory mechanisms, direct or indirect, and instead relying exclusively upon market forces to achieve diversity of programming. (This approach seems suited to the low power service, in which we have proposed, and will apply, only minimal restrictions upon the free transferability of stations.) Further, low power stations may be constructed, and presumably transferred, at relative low costs, and their small coverage areas lend themselves to programming to suit discrete groups in a community. In this environment, where licensees are likely

[16] A summary of comments is attached hereto as Appendix D.

[17] For example, subscription radio operation using an FM subcarrier has been treated as a hybrid broadcast service and, on that basis, been exempted from statutory provisions otherwise applicable to broadcast services. See, KMLA Broadcasting Corp. v. Twentieth Century Cigarette Vendors Corp., 264 F. Supp. 35 (C.D. Cal. 1967); Greater Washington Educational Telecommunications Association, Inc., 49 FCC 2d 948 (1974). And the legal appendix to the staff report Policies for Regulation of Direct Broadcast Satellites (DBS), F. Setzer, *et al.*, FCC, Office of Plans and Policy (October, 1980), raises the question of whether subscription television is properly considered a broadcast service.

to be directly responsive to audience desires, we believe there lies a very good possibility of consumer sovereignty. Thus, if the market works to establish consumer preferences, we must ask if anything is to be gained by imposing regulations designed to achieve those same ends. The Commission need engage in this sort of intervention only when factors exist that significantly impede consumers from influencing program fare. On the basis of the rulemaking record in this proceeding, we find no likelihood that such a market failure will occur. In addition, we are reluctant to burden an untried service with regulations that could prove unnecessary. Accordingly, we resolve our first decision criterion with the conclusion that the low power service, as authorized herein, is likely to provide program service that is responsive to public demand without the necessity of regulatory intervention by the Commission.[18]

16. Another issue that is critical to our conclusions is what might be considered the opportunity cost of low power, in terms of utilization of spectrum. That is, what are the legitimate, competing claims to the spectrum we have proposed for low power stations, and to what extent will they be precluded by the authorization of the low power service? Our second and third decision criteria, spectrum requirements and interference to communications services, focus upon this issue. A good deal of commentary was devoted to these questions, primarily from other users or would-be users of the frequencies that would be used by low power licensees. Full service television stations are the primary users of the radio frequencies at issue. Many voice the concern that low power stations will be permitted to encroach upon their primary status. Land mobile services share some of the channels at issue with television stations. Their representatives also fear encroachment by low power users. Another concern, raised in the Notice, is the possible use of auxiliary broadcast services by low power licensees, and the possible scarcity of television microwave spectrum that could result. The availability of frequencies for television microwave uses may be essential to continued local coverage, both for full service and originating low power stations. Although we received little commentary on this issue, we believe it warrants consideration as a primary spectrum management concern arising from the low power proposal. Finally, cable systems, at various points in the distribution system, and multipoint distribution services, at the converters that provide the TV input signals, make use of TV broadcast frequencies. Because this use of spectrum does not require radiation of signals on frequencies allocated for broadcast use and operates on a nonpreclusion basis to broadcast stations, it has not been necessary to license it. Although cable and microwave operators generally have been able to use available television channels without interference to the primary users, they have evinced concern that authorization of low power stations will preclude them from spectrum that heretofore has been available for their use.

17. Our evaluation of the record and the technical questions involved in these issues has convinced us that we are not faced with an either/or situation, in terms of spectrum utilization. First and foremost, we intend to maintain the secondary spectrum priority of low power stations, a policy that assures protection from interference to full service stations. Secondary spectrum priority has two aspects: Low power stations may not cause objectionable interference to existing full service stations, and low power stations must yield to facilitate increases of existing full service stations or to new full service stations where interference occurs. A similar policy holds true where land mobile services currently share primary use of some UHF spectrum with full service television. In paragraphs 24 through 46, *infra*, we have defined the parameters under which we will authorize low power stations in relation to land mobile and full service stations, and thereby have defined criteria for predicting objectionable interference. We also have come to believe that auxiliary services used by low power stations and the other auxiliary broadcast services can coexist, as discussed in paragraph 47, *infra*. Finally, we believe that cable and MDS systems will be able to adapt to an environment in which low power stations use the radio spectrum. These services' use of broadcast frequencies is subject to nonpreclusion of all other authorized broadcast users. We are convinced, though, that the likelihood of interference problems arising warrants a minor change in the policy proposed in the Notice with respect to cable systems. *See*, paragraph 45, *infra*.

18. In brief, we have concluded that the competing uses for television spectrum all may be accommodated, in varying degrees. However, we also recognize that this spectrum is becoming crowded, and, with the exception of full service stations, whose primary use of this spectrum is assured, no one set of interests can receive all they have sought. We believe that this is a situation in which it is feasible and indeed desirable to attempt to partially satisfy all competing claims, and it is well within our discretion to do so. *See*, Goodwill Stations, Inc. v. FCC, 325 F. 2d 637 (D.C. Cir. 1963); Coastal Bend Television Co. v. FCC, 234 F. 2d 686, 690 (D.C. Cir. 1956); Loyola University, et al v. FCC, Nos. 80–1824 and 80–2018, *slip op.* (D.C. Cir., January 26, 1982).

19. Our fourth and fifth decision criteria, media competition and economic impact and low power/translator economic viability and ownership, are interrelated to a large degree, and are amenable only to speculation until the service is operational. The record does not contain convincing evidence that the low power service could have a competitively destructive impact on existing broadcast, cable or microwave stations. Nor does it contain convincing assurance of the viability of the low power service. Indeed whether low power will be viable at all appears more uncertain than whether it will pose an undesirable competitive threat to existing facilities. For this reason, we have structured our ownership criteria to permit existing licensees to engage in low power ventures within the limits imposed by the comparative criterion favoring diversification of broadcast interests. To the extent that this may preclude new entrants later, the value to be gained from permitting experienced broadcasters to develop the service initially is believed to outweigh the possible loss of new entrants. In sum, we believe that the balance we have struck will foster a low power service that can grow to provide program alternatives to full service stations and cable systems in a manner that increases competition in the marketplace and thus enhances the telecommunications service available to the public.

20. We already have alluded to our sixth decision criterion, impact upon Commission resources and service implementation delays. This has proved to be the most criticial and troublesome element of all. Throughout this proceeding, we have struggled to solve

[18] We recognize, of course, that the Commission's ownership rules also are intended to influence programming content because a paramount purpose of structural regulations is to assure a variety of viewpoints in any informational programming provided by licensees. Public interest considerations relating to the imposition of ownership rules in the low power service are discussed separately at paragraphs 19 and 78 through 90, *infra*.

the dilemma posed by the early deluge of applications. Indeed, our experience with interim applications has been invaluable in informing our deliberations regarding the administrative tools required for implementation of the low power service. Our solution to this dilemma is detailed in paragraphs 51 thorugh 74, *infra*. Briefly, we are not now proposing to lift the freeze on new applications that was imposed on April 9, 1981.[19] Before considering termination of the freeze, we shall identify applications that are mutually exclusive with applications that already have been cut off,[20] place them on a "B" cut-off list, process those applications and either grant or designate them for hearing, as circumstances dictate. This processing will occur in several phases, beginning with the most rural applications. *See*, Appendix E. The cases will be set for hearings as our resources permit. When the processing of the currently cut-off applications is completed, the Commission will publish cut-off lists of applications on file that were neither mutually exclusive with applications on the existing cut-off lists nor cut off at the time of the freeze. The freeze will be lifted for acceptance of applications in competition with those on cut-off lists, and processing will continue in the manner described above.

21. The hearing process obviously will be time-consuming. When and if a system of random selection is instituted for choosing among competing broadcast applications, it, of course, will be applied to low power. Until such time, it would behoove competing applicants to settle their conflicts privately and resolve mutual exclusivities prior to hearing. We strongly encourge plans that involve time-sharing and pooling resources, which could be especially beneficial in light of the fact that low power is a new service whose viability is as yet undetermined. We shall make every effort to rule promptly on all settlements among competing applicants, under Section 311 (c) or (d) of the Communications Act of 1934, as amended, and §§ 73.3525 and 73.3568 of our rules. The use of largely paper hearings should shorten the time until authorization considerably. We are reallocating our staff resources to the extent possible to process the backlog and new applications expeditiously, within existing budgetary limitations.

22. We recognize that the hearing process can be needlessly cumbersome, particularly in a secondary service. However, we have not been able to develop acceptable alternative procedures within current legislative constraints. We have attempted to devise somewhat streamlined comparative hearing procedures. Furthermore, we intend to restrict the types of pleadings and issues we shall entertain during this abbreviated hearing process, to a degree consistent with the nature of the low power service. *See*, paragraphs 65 through 68, *infra*. We continue to believe that both a lottery and modification of the hearing process may be essential to improving our efficiency with reduced staff; however, we do not believe this proceeding is the appropriate vehicle in which to modify all our practices and procedures that may affect other broadcast services, particularly in light of the functional differences between full service and low power stations.[21] As we have indicated, we are making every effort to expedite the processing of low power applications, both with increased staff resources and computer capacity. However, some of this burden quite properly falls upon the applicants. If, given the strong incentive to settle privately or opt for paper hearings, we still are confronted with thousands of competing applicants insistent on hearings, we cannot promise prompt authorizations. The Commission is committed to elimination of the backlog; but we have discovered no magic formula for this.

23. Our conclusion that low power applications should be processed similarly to other broadcast applications is related to a broader policy issue: to what extent should the rules for low power stations diverge from the analogous rules for other broadcast facilities? As stated above, this proceeding is not intended to set broadcast policy generally. In some instances, however, low power can provide a useful test case for more general deregulatory initiatives. On the other hand, there are other areas where we believe it is more sensible to decide a particular issue in a separate proceeding designed to air all aspects of that issue alone. For example, it has come to our attention that some low power applications propose a teletext service. Because we are looking into the advisability of teletext-related service generally, (*see*, Notice of Proposed Rule Making, Amendment of Part 73 to Authorize Transmission of Teletext by TV Stations, BC Docket No. 81–741, 46 FR 60851 (published December 14, 1981)), the issue of whether the same or different rules for teletext should apply to low power stations, on account of their singular service capability, will be resolved in our separate proceeding on teletext. Finally, while we have several "unregulatory" initiatives underway, and a number of additional ones are contemplated, we do not intend to dispense with rule making and enact them in the low power context, rather than awaiting the results of the separate proceedings in question. We do intend, however, to resume acceptance of applications for experimental stations that propose novel uses of low power technology, at such time as we have eliminated the present processing backlog and otherwise lifted the freeze on acceptance of new applications.[22]

### III. Issues Relating to Channel Allocation

24. *Spectrum Priority.* Although some parties urge us to do otherwise, it is our firm intention that low power stations remain secondary, in terms of spectrum priority. While we agree with parties averring that low power stations can provide needed and meaningful service, we point out that the coverage obligations to which we subject full service stations specifically are designed to ensure maximum service to the public, beyond what we shall require of low power. This fact, we believe, constrains us to ensure the continued primacy of full service stations by emphasizing the secondary status of low power stations. We also emphasize, though, that while the rules for the low power service are intended to protect the public's expectation of service from full service stations, we do not intend to cater to full service licensees' unreasonable fears of competition from low power stations, and fetter the low power service for that reason. We believe low power can provide competition that stimulates the entire telecommunications marketplace.

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[19] Because we are deciding not to abrogate the freeze herein, the several pending petitions for reconsideration of the freeze will be dismissed, as will pending requests for waiver of the freeze that do not raise a novel and compelling public interest ground for waiver in a particular unique situation.

[20] The pre-freeze cut-off lists were published at 45 FR 70974 (October 17, 1980); 45 FR 8114 (December 9, 1980); and 46 FR 12852 (February 18, 1981).

[21] We are committed generally to reduction or elimination of unnecessary regulations, *see, e.g.*, Report and Order, Deregulation of Radio, 84 F.C.C. 2d 968 (1981); *reconsid. denied*, 87 F.C.C. 2d 797 (1981); Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM, and Television Licensees, 46 FR 26236 (published May 11, 1981). It goes without saying that any proceedings that accomplish this task with respect to relevant rules will apply to the low power service.

[22] We stopped accepting applications for such experimental stations on April 24, 1980. *See*, Public Notice, FCC 80–282, April 29, 1980.

25. The record indicates that not all parties share a common understanding of the concept of secondary spectrum priority. Under the Commission's present rules (§ 74.703) and the Notice of Proposed Rule Making, secondary status means (1) a low power station will not be authorized where there is a possibility of objectionable interference to an existing full service station, under the standards prescribed herein; (2) an authorized low power station that causes objectionable interference to an existing full service station is responsible for eliminating the interference, or the low power station must cease operation; (3) an existing low power station that would cause interference in connection with a proposed increase or modification of facilities of an existing full service station or in connection with a proposed new full service station is responsible for eliminating the interference, or the low power station must cease operation. These are the rules under which low power stations will operate. The notification and reporting provisions in § 74.703 (c) and (d) will continue to apply with the one modification proposed in the Notice and advocated by Citizens Communications Center, the National Telecommunications and Information Administration and the National Translator Association, to wit, that low power stations need not cease operation until they have been proved by the complaining party to be the cause of the interference complained of, but they must cooperate fully in tests to determine the cause of interference and remain willing to cease operation at the request of the Commission.[23] "Interference" as it is used in this context is discussed in the following paragraphs, to facilitate a common understanding among all parties of when interference will be predicted to occur.

26. In agreement with parties urging that we develop more detailed interference prediction criteria, we proposed desired-to-undesired (D/U) signal ratios to define the relative signal strengths of the dominant and interfering signals, both in the low power-to-full service and low power-to-low power contexts. After evaluation of the comments received in response to the Further Notice, we remain convinced that a modified prohibited contour overlap standard is the preferable method of predicting interference, in order to promote spectral efficiency. We therefore delete from our rules the UHF spacing requirements of § 74.702(c). We do note that, making a few conservative assumptions, a set of mileage requirements can be derived. While processing will be based on prohibited overlap criteria contained in the rules, detailed calculations are not required of the applicant and unless an unusually high power (greater than 20 kW UHF ERP or 100 watts VHF ERP) or antenna height (greater than 500 feet above average terrain) is anticipated, applications meeting the following full spacings should have no conflicts with full service stations:

| Full service station ie— | |
|---|---|
| VHF | |
| Co-channel non-offset | 210 miles. |
| Co-channel offset | 150 miles. |
| ±1 Channel | 90 miles. |
| UHF | |
| Co-channel non-offset | 210 miles. |
| Co-channel offset | 150 miles. |
| ± channel | 75 miles. |
| ±2, 3, 4, 5 channels | 20 miles. |
| ±7 channels | 60 miles. |
| −14 channels | 70 miles. |
| −15 channels | 75 miles. |

In many cases, prohibited overlap processing will allow grant of applications at smaller mileage separations. However, applicants are reminded that applications not meeting the prohibited overlap standards will be returned, so, particularly in areas where low power demand exceeds available spectrum, the proposed technical facilities should be carefully selected. Because of uncertainties inherent in predicting propagation, variations in equipment characteristics and the fact that we are, in essence, attempting to add a significant number of additional stations to a long-established allocations scheme, instances of interference from, to and between low power stations may occur. Indeed, in certain circumstances, there may be a potential for significant interference. We have attempted to adopt criteria that strike a balance between concerns over interference and a desire to maximize the benefits of a new service. As low power stations are authorized, and cases of interference are called to our attention, it is our intent to identify categories where it may be appropriate to refine our criteria to take into account special circumstances, such as overwater paths or superrefraction and ducting, in which we would want to be more restrictive in low power authorizations. Intensified efforts also are underway by propagation scientists and engineers at the Commission, NTIA/ITS, other agencies and private organizations to improve the accuracy of propagation predictions in general and to develop practical criteria that can be incorporated into Commission deliberations and assignment decisions. For example, the Commission's Office of Science and Technology has an on-going project in cooperation with NTIA/ITS to collect propagation data in Southern California where superrefraction has created problems for a number of years. Data collection is scheduled to continue through October, 1982, leading to development of a more realistic propagation model for that area.

27. *Distance Separations.* Some parties asked that we retain the UHF separations, add VHF separations and/or adopt mileage separations to govern between low power stations, or that we promulgate a table of assignments for low power. We decline to do either, for several reasons. These approaches do not comport with the secondary nature of low power stations. They are less spectrally efficient than the prohibited contour overlap standards we have proposed. Finally, we believe a table of assignments would represent an unnecessarily rigid approach in a demand-driven service where we are fostering marketplace sovereignty. In the words of Gammon and Grange, "Communities need not rely on the Commission's clouded crystal ball for an access to spectrum space, but on market forces which will result in an efficient and quick allocation of spectrum space." [24] Within the constraints necessarily imposed by our prohibitions upon objectionable interference, which will be strictly enforced, we believe the public interest best will be served by our permitting applicants to locate their stations and configure their service areas as market conditions dictate. The mandates of Section 307(b) of the Communications Act are fulfilled by virtue of the fact that most channel availabilities for low power exist outside the major markets. In addition, we shall process rural applications before urban, at least until the present backlog is significantly reduced. *See,* Appendix E. This will have the effect of providing service where it arguably is most needed. Beyond this, we do not believe that fair and efficient spectrum

[23] Several parties, including Citizens Communications Center and United Auto Workers, ask that the Commission give favorable consideration to the existence of a low power station that would be precluded by a full service application, where this situation arises. We are reluctant to do so. Where possible, the low power licensee on an allocated channel is free to propose to upgrade its service by filing a competing full service application; however, as it is integral to the concept of a secondary service that it yield to a mutually exclusive primary service, we shall not take low power stations into account in authorizing full service stations, and we urge low power applicants to consider this fact when they select channels.

[24] Gammon and Grange comments at 10.

allocation can be furthered significantly by our engineering an elaborate allocation plan for stations that have no coverage requirements and whose continued existence is uncertain in light of their secondary status.

28. *Noncommerical channel reservations.* Similar reasoning applies to channel reservations for noncommerical low power stations, advocated by the corporation for Public Broadcasting, the Public Broadcasting Service and the National Assocation of Public Television Stations, among others. Indeed, the entire notion of noncommerical operation is called into question in this service, as discussed in paragraphs 71 and 72, *infra.* The request for reserved channels is premised on the difficulty noncommerical applicants have in obtaining financing. The theory is based upon spectrum scarcity, that is, because it takes them longer to secure funding, there may be no more channels left by the time noncommerical applicants are ready to apply. However, there still are reserved channels available for full service stations in many markets, which, we believe, fulfills the overall plan for allocation of public stations embodied in the Sixth Report and Order, supra. Moreover, in recognition of the often disadvantaged financial status of all noncommercial stations, Congress directed the Commission to explore alternative funding sources for public stations. Public Broadcasting Amendments Act of 1981, Pub. L. No. 97–53, 95 Stat. 736, sections 1221–1234 (August 13, 1981). In light of this initiative, and the fact that the Commission is not requiring public low power stations to operate without advertising, we believe it is unnecessary to reserve channels for noncommercial low power stations. Channel reservation comports with neither or overall approach to low power noncommercial operation nor with the secondary status of all low power stations. Indeed, we are herein adopting our proposal to eliminate the preference for educational rebroadcast on reserved channels, which gives noncommercial translators an absolute priority over commercial ones on reserved channels. *See,* 23 R.R. 2d 1504, 1508 (1971).[25]

29. *Channel Selection.* We have received comments from many parties asking that we preclude low power use of certain channels or bands, in order to secure that spectrum for a competing use. For example, the National Cable Television Association, representing cable interests, would have low power limited to UHF channels; various land mobile concerns want Channels 4, 5, 7 and 14 through 20 to be unavailable to low power stations. As we have stated, we are aware of the competing uses for the television spectrum. However, we do not intend to engage in spectrum reallocation in this proceeding. Low power is a broadcast use; as such, it is entitled to use the radio frequencies allocated for television broadcast use, subject to the constraints imposed by its secondary priority. We are confident that the desired-to-undesired frequency ratios we are adopting are adequate to protect the primary users of this spectrum. Therefore, we shall permit low power applicants to select any channel between 2 and 69, subject to our technical rules, including land mobile protection as discussed in paragraph 46, *infra.*[26] We are not requiring certification that the channel selected is the one least likely to cause interference of the channels available. We do caution, however, that low power use of certain channels (principally 4, 5, 6, 7, 13, 14 through 21 and 69) may be subject to interference from authorized land mobile, point-to-point or FM stations; the rules we are adopting are not designed to protect low power stations from this. Prudence would suggest choosing a different channel where possible, but we shall not adopt a rule requiring this. Neither will we require an applicant filing a mutually exclusive application to certify that no other channel is available in the market,[27] because we recognize that other factors, such as site availability, may influence choice of channel, particularly in a service where stations have small coverage areas and where viability is uncertain.[28]

30. To provide maximum flexibility in channel selection, we are adopting our proposal to eliminate § 74.732(d), which prohibits VHF translators from all-UHF markets and, § 74.732(e)(1) and (2), which has the effect of prohibiting UHF stations from operating VHF translators on unassigned channels in distant markets. It is possible that the addition of a number of UHF low power stations will further the goal of UHF comparability; however, we do not see additional VHF low power stations generally as posing a significant enough competitive threat to UHF full service facilities to justify restricting VHF low power stations geographically.[29] Finally, we are eliminating our current prohibition on use of the fifteen-mile rule, § 73.607(b), embodied in § 74.702(b)(2) and (g), because elimination of the preference in § 74.703(a) for 1,000 watt UHF translators on assigned channels renders this prohibition meaningless.

31. *Maximum Power Limits.* We have reviewed the comments regarding the power limits proposed for low power stations. A number of parties urge the Commission to permit higher power on low power stations, either across the board or on a waiver basis. Others advise against this, on the grounds that the likelihood of interference, both to full service stations and other low power stations, will increase with increased power. We are inclined to agree with this view. With one exception, it is our opinion that the power limits proposed in the *Notice* are adequate to ensure viable coverage areas for low power stations while restrictive enough to preclude undue interference under the technical standards adopted. We initially proposed to allow 100 watts VHF power in situations where both co-channel and adjacent channel mileage separations are met. Full service adjacent channel mileage separations allow substantial amounts of predicted interference, on the theory that viewers losing service will gain a replacement primary service, generally one closer to them and therefore more attuned to their local needs. We do not believe that secondary low power stations can provide an equivalent replacement service. Therefore, the power limit for low power stations will continue to be 10 watts VHF, except where a 100-watt station is proposed on an assigned channel;[30] and

[25] In the fall service context, these channels continue to be reserved for the exclusive use of noncommercial stations. *See,* § 73.606(a) of the rules.

[26] To effectuate this policy, we are amending § 74.702(c)(1) and (d) so as to eliminate priorities in UHF channel selection. Nevertheless, applications will not be accepted on channels where they cannot protect full service television stations, existing translators and land mobile allotments in the manner described in paragraphs 32 through 46.

[27] This has been advocated by Community Television Network.

[28] Indeed, it is possible to envision a situation in which a channel might be particularly desirable to an applicant on the basis of its unlikelihood of being affected by future full service stations. On the other hand, even in markets with a large number of low power channels available, a few particular channels might be attractive because they offer an opportunity for future upgrading to full service operation.

[29] Our belief is based upon the secondary status and limited coverage potential of low power stations. For similar reasons, we believe that only in rare instances will a party alleging adverse impact on a UHF station be able to make an initial showing warranting consideration of the issue in a hearing prior to the award of a low power construction permit. *See,* WFMY Television Corp., 59 F.C.C. 2d 1010 (1976) (limiting the applicability of the policy inunciated in Triangle Publications, Inc., 29 F.C.C. 315 (1960), *aff'd sub. nom.* Triangle Publications v. FCC, 1291 F. 2d 342 (D.C. Cir. 1961)); *and see,* paragraph 63, *infra.*

[30] This provision is in the current translator rules and has little or no negative impact on the coverage

Continued

1,000 watts UHF. We currently anticipate that we only would find it in the public interest to waive the power limits in extraordinary circumstances.

32. *Full Service Protected Contour.* The Further Notice indicated the Commission's intention to use the Grade B contour as the full service protected contour, but sought comment on the desirability and feasibility of attempting to protect service received from full service stations outside their Grade B contour. We received a good deal of thoughtful commentary on this matter. It is discussed in detail in the comment summary, Appendix D. Among parties advocating protection of all service received outside the full service Grade B contour are the Association of Maximum Service Telecasters, NAB, ABC and Storer. Cox suggests that one way of accomplishing this is to establish a full service contour seven dBu below the Grade B and require low power stations to protect that contour. This is the policy that the Commission adopted in Docket No. 20735, establishing that Channel 200 educational FM stations must protect the 40 dBu contour of Channel 6 television stations. *See,* Second Report and Order, Noncommercial Educational FM Broadcast Stations, 43 FR 39704, 39712, 39713 (1978); *but see* Second Further Notice of Proposed Rule Making, to be issued at a subsequent date. Others contend that service received outside the full service Grade B contour should be protected, but on a more flexible basis, giving the Commission room to evaluate the circumstances. Communications Investment Corporation suggests that the Commission prohibit low power stations from causing "significant degradation" of service beyond the full service Grade B contour, in terms of the number of households affected. American Christian Television Stations would have low power stations protect full service stations beyond the Grade B contour where they are "significantly viewed," as defined in § 76.54 of the rules. AGK asks that the Commission not license a low power station on possibly interfering channels in any community outside the Grade B contour of a full service station in cases where the community is within the area of dominant influence (ADI) of the full service station. CBS advocates requiring low power applicants to select the channel least likely to cause interference, and then protecting service beyond the full service Grade B contour on a complaint basis.

33. Other parties, including Spectra, Attaway and Community Media Network, aver that it is appropriate for low power stations to protect the Grade B contours of full service stations but no further. The National Translator Association agrees with this, except that NTA believes it is arbitrary to prohibit low power signals in areas where terrain prevents actual reception of a full service station within its Grade B contour. The Corporation for Public Broadcasting contends that it is unreasonable for low power stations to be required to protect the full service Grade B, because the Commission's present rules do not require full service stations to protect each other to their Grade B contours. Adding that low power stations are more likely to provide truly local service than are full service stations at the outer reaches of their field strength contours, CPB proposes the following full service contours to be protected by low power stations:

| Frequency | Protected contour |
|---|---|
| Low band VHF | 62 dBu. |
| High band VHF | 68 dBu. |
| UHF | 80 dBu. |

34. We have considered the various alternatives and believe that the following approach is the one that will best accommodate the competing interests and ensure maximum television service to the public. We agree that existing service from full service television stations should not be impaired. Notwithstanding inferences that may have been derived from paragraph 9 of the Further Notice, we do not intend to deviate from the basic thrust of our present translator interference rule, which states:

> An application for a new television broadcast translator station or for changes in the facilities of an authorized station will not be granted where it is apparent that interference will be caused * * * Interference will be considered to occur whenever reception of a regularly used signal is impaired by signals radiated by the translator, *regardless of the quality of such reception or the strength of the signal so used.* (Emphasis supplied.)

Section 74.703(a) and (b) of the rules. This means that any service from a full service station is to be protected from interference by a translator even beyond where the full service station provides reliable service or would be predicted to be received. However, as we stated in the Further Notice, because we are unable to process the great volume of applications manually, and in the interest of certainty among both applicants and the Commission, it is necessary that we use an objective standard for where we consider that it is "apparent that interference will be caused." We acknowledge that inherent in the definition of the Grade B contour is the fact that some locations outside the Grade B contour receive an acceptable signal, although the majority of locations do not. Conversely, inside the Grade B contour there are locations that do not receive an acceptable signal, although the majority of locations do. Because of the characteristics of TV frequency propagation and the unaccounted-for effects of terrain, this contour value and this procedure are not particularly useful for predicting service at particular locations. This also would be true of any other predicted contour we might choose to protect, a higher contour, as proposed by CPB, or a more conservative, lower contour, which Cox advocates. It is self-evident that, were we to protect full service to the 40 dBu contour, for example, we would provide somewhat greater assurance of continued reception of full service signals where they actually are received by listeners beyond the Grade B contour. However, this undoubtedly also would preclude low power from areas that are not able to receive even attenuated full service signals beyond the Grade B contour and that may not receive any off-air service at all without low power. We cannot generalize with any expectation of accuracy whether fewer or more people would receive fewer or more signals, as a result of our choosing a different protected contour for full service stations. We continue to believe that the Grade B contour offers the most realistic approximation of service received, and therefore is an appropriate standard to use in automating application processing.[31]

of full service stations. Continuing it is not expected to present significant problems, because there are few vacant VHF assignments and they tend to be in relatively isolated locations.

[31] It is within our discretion to adopt this contour as a processing standard, and even as an absolute protection standard. As we have said, "There is no rule of law or section of the Communications Act which affords broadcast stations protection against 'interference,' as that term is defined in the abstract without reference to the Commission's rules and regulations. Section 303(f) of the Act provides in pertinent part that the Commission shall 'make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations.' In this Section Congress has delegated to the Commission the authority to determine to what extent interference between broadcast and other radio stations shall be permitted to exist. The delegation is broad and leaves within the Commission's discretion, subject to the criterion of the public interest, convenience and necessity, not only the determination of what degree of interference between stations shall be considered excessive but also the methods by which such

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35. However, we shall continue our present policy to protect full service reception from impairment of the signal by translators.[32] If we receive a well-documented complaint that an authorized low power station impairs regular reception of a full service signal outside the full service Grade B contour, this could be a ground for corrective action against the low power licensee, depending upon an evaluation of the situation. This approach does not differ significantly from what we previously have done, under our existing rules.[33] Nor does it differ significantly from the approach we would take in the case of low power/full service interference anywhere. That is, we shall not knowingly authorize a low power station that would impair the reception of a full service station. Our mode of processing gives us a reasonable degree of certainty that this normally will not occur within the full service Grade B contour, and if it does, it will be the sole responsibility of the low power operator to correct the situation. On the other hand, because we have no record of where service is received outside the full service Grade B contour, we cannot take this into account in processing. As CBS recommends, we shall deal with such interference on a complaint basis, should the need arise.[34] We do not believe it is feasible to adopt CBS's other suggestion, that we require low power applicants to select the channel least likely to cause interference, essentially because this may be difficult to determine; furthermore, it should not be necessary, because our processing procedure will eliminate applications on channels where excessive interference is likely to be caused. However, our strict adherence to the secondary priority policy should be an incentive for low power applicants to endeavor to select channels with a minimal chance of future interference problems, the primary onus of which would fall upon thenselves.[35]

36. *Low Power Protested Contour.* The comments focused primarily on the proposed UHF Zone 1 protected contour of 84 dBu. Almost universally, this value was viewed as too high, protecting an area too limited to allow a station to be viable. It also is argued that many translators provide acceptable service to their communities, even where they do not provide a predicted 84 dBu signal. In addition, comments claim that many low power applications specifying existing TV towers as their transmitting site would not provide an 84 dBu signal to their city of license. Values of 70 dBu and 74 dBu most often are suggested as substitutes for the 84 dBu value. We believe that use of a 74 dBu protected contour is a reasonable compromise. A protected contour value of 74 dBu was proposed in the Further Notice for those parts of the country not in TV Zone 1 or FM Zone 1A. A couple of comments supported a zone system and suggested that the proposed UHF protected contour values in all parts of the country should be reduced by similar amounts. We are not convinced that the low power protected contour for UHF stations located outside of Zones 1 and 1A should be reduced below 74 dBu. In areas of scarce spectrum the effect of reducing the protected contour would be to lower the number of possible low power stations. This would be a restraint on the marketplace that we believe is unnecessary because the protected contour is part of a minimum protection standard. An applicant, except in most of the northeast and some urban areas, often can choose to exceed the minimum standard significantly. In areas where translators have flourished, these standards should prevent a newcomer from causing severe disruption of existing service. However, we expect that the vast majority of applicants in these areas will coordinate with each other and with existing operators and will take local factors (including terrain) into account in determining how close to a minimum standard they should apply to operate. In view of this, we believe that the 74 dBu protected contour is a reasonable

excessive interference shall be avoided." Memorandum Opinion and Order, Roy Hofheinz (KSOX), Harlingen, Texas, 9 R.R. 784c (1953).

[32] This raises an issue addressed by several parties, including the Association of Maximum Service Telecasters and General Electric Broadcasting Company. They suggest that we require low power applicants specially to notify nearby full service licensees of the filing of the application. We agree with the National Translator Association that the public notice the Commission gives by statute of the acceptance of all broadcast applications is sufficient to notify all possibly affected full service stations of the pendency of a low power application. We also will not require low power facilities to conduct field tests prior to final authorization; we believe that the entailment of secondary spectrum priority, that interfering stations cease operations on the Commission's request, will fulfill the same goal, and therefore a field test requirement is unnecessary and duplicative.

[33] *E.g.*, Tri-State Television Translators, Inc., Docket No. 17654, and Wellersburg TV, Inc., Docket No. 17655, 15 RR 2d 1300 (1969). In this case, VHF translator systems in the Cumberland, Maryland, area were causing interference to the off-air reception of Washington, Baltimore and Pennsylvania stations. Several local residents outside the Grade B contour of these stations were able to receive the signals. The expense of modifying the translators to non-interfering UHF channels would have been prohibitive for the community-supported systems. In weighing the equities, it was concluded that protection of the distant signal reception of a small minority who had similar programming available from other distant full service stations would not justify the resultant service loss to the greater number of translator homes, many of which would not otherwise receive television service, because they could not afford CATV.

[34] The individual circumstances of interference to a full service station beyond the Grade B contour vary so widely as to preclude any attempt to state hard and fast rules. In many circumstances, while reception may be possible, this service is relatively unimportant to viewers themselves because alternative signals are available to them—perhaps other full service television stations, translator service or cable service. While the varying circumstances require an *ad hoc* approach of case-by-case decision making, it may be useful to specify some of the factors that would influence our decision. We would view destruction of a viewer's only television service by a translator/low power station as extremely serious. Elimination of viewers' opportunity to view a particular television network signal also would be serious. As the service impaired becomes more redundant we would feel obligated to give more attention to the benefits obtained by the translator/low power service. We also would give less attention to interference received by viewers in special circumstances receiving a full service station that their neighbors do not receive, for example, reception caused by a viewer's location on the top of a hill or the installation of a receiving system far more sophisticated than that used by the viewer's neighbors. As our past precedents show, we also shall consider the value of the translator/low power service in terms of both the numbers served and the importance of this service to the viewers. Having discussed some of the factors we would consider in whether to terminate service by a translator/low power station we must emphasize that we expect to have to deal with very few situations of this nature. The translator service has a long history of operators successfully resolving interference problems by cooperative efforts with the viewers. We expect low power operators to continue this tradition. Translator and low power stations are secondary to full service stations, and we expect operators to engage in good faith efforts to resolve *all* complaints of interference to full service stations.

[35] This applies also to low power applicants that cause interference to existing translators. As we have indicated, we shall not authorize low power stations that do not meet our protection criteria to existing translators or low power stations. We have modified our low power protected contour to values that the record in this proceeding generally supports. If interference inside these protected contours results from a subsequent low power authorization and the stations involved cannot resolve the problem among themselves, the burden to correct the interference will be on the later entrant. We, of course, would expect the licensees to cooperate in resolving the problem; however, in view of the increasingly competitive nature of this service, we believe that a significant number of unresolved cases could reach the Commission. Therefore, we wish to establish now that, absent exceptional circumstances, we shall rely upon a "seniority system" for both VHF and UHF low power stations and translators. If both parties agree, we would permit two translator or low power stations to accept interference from each other, if there is no other way to authorize both and they create no additional interference to other authorized broadcast facilities. We shall not, however, permit a subsequent translator or low power station to cause interference to a currently existing translator, because this would result in destruction of existing service to the public, which is not in the public interest.

minimum standard. By adopting it for UHF stations in all parts of the country we are slightly simplifying the processing and conforming the UHF and VHF procedures. Based upon the comment record, we also are adopting the VHF protected contours as proposed.

37. *Terrain Shielding.* In our Notice, we proposed consideration of terrain shielding on a case-by-case basis. Although several comments contend that consideration of terrain is essential for a realistic authorization process, we believe that the overwhelming argument is presented by our experience with the interim applications. It is far beyond our staff capacity to evaluate individually thousands of terrain shielding claims. Also, we do not have in this proceeding sufficient information to adopt any standard method for computing a low power terrain correction factor. As indicated elsewhere in this document, we do not intend this proceeding to be the source of sweeping changes in broadcasting regulation. Therefore, the proper forum for considering a standard method of terrian correction is in a proceeding designed to deal with that subject.[36]

38. *Receiving Antenna Front-to-Back Ratio.* Some comments support consideration of front-to-back ratios in determining desired-to-undesired interference ratios. A larger number of comments oppose it and their arguments are persuasive. For example, the average antenna front-to-back ratios listed in the Further Notice were based on test range measurements and, particularly in rough terrain, it is unlikely that they would be equalled under normal reception conditions. Further, it was indicated that front-to-back ratios for individual antennas varied significantly from channel to channel and there is no reasonable procedure by which a consumer can identify the antenna that will perform best in their specific situation. In addition, a possible scenario is described where the undesired station is in the same direction as the desired low power station so there is no benefit from receiving antenna front-to-back ratio. Finally, at the low power protected contours we are adopting herein (*see*, paragraph 36, *supra*) acceptable reception will often be possible without an outside receiving antenna. For each of these reasons we feel that the traditional role of front-to-back ratios as a "safety factor" is appropriate in the low power service. By "safety factor" we mean it is a characteristic of receiving antennas that permits interference or ghosting to be eliminated in some instance, but we will not rely on it in determining where it is "apparent that interference will be caused."

39. *Offset Operation and Frequency Tolerances.* We are convinced by comment that carrier frequency offsets should be a permitted means of limiting or eliminating co-channel interference. To assure uniform, and we believe fair, treatment of applicants and licensees, we are adopting standards for low power offset operation. If an application proposes offset operation, an offset must be specified. The possible offsets are the same as those at which full service TV stations are authorized: Zero, at the standard carrier frequencies for the channel; plus, with carrier frequencies 10 kHz above the zero offset carriers; and minus, with carrier frequencies 10 kHz below the zero offset carriers. The frequency tolerance of a low power station operating with a specified offset will be ± kHz, the same as the full service TV station frequency tolerance. The frequency tolerance for stations without a specified offset will be the same as the current translator requirements. When two stations (both low power or one low power and one full service) are to operate with difference offsets (zero and plus, zero and minus, or plus and minus) the co-channel offset D/U ratio applies. When two stations are to operate with the same offset, or one or both stations do not specify an offset, the co-channel non-offset D/U ratio applies. *See*, paragraph 40, *infra.* Comments indicate that manufacturers are capable of producing equipment meeting the ± kHz frequency tolerance. Comments also convince us that even if only a small increase in equipment cost is involved, it is not justified for the vast majority of existing stations (and a significant number of proposed stations) that are located in rural areas where little or nothing would be gained by a tighter frequency tolerance.

40. *D/U Ratios.* We are adopting the desired-to-undesired ratios proposed in the Notice for UHF and in the Further Notice for VHF. No comments raised objections to the proposed values for VHF or the proposed co-channel values for UHF. In addition, no comments addressed the possibility raised in the Further Notice that low power to low power ratios could be different from low power to full service ratios. Lacking support or opposition, we are adopting the same ratios for predicting interference to either a low power or a full service station. Several parties note that the D/U ratios proposed in the Notice for adjacent channel and taboo channel relationships are mean receiver values from the 1974 Commission staff study [37] and they argue for a more conservative approach where the D/U ratios would represent a level of performance exceeded by 90% of the tested receivers. The Electronics Industries Association, Consumer Electronics Group, representing receiver manufacturers, suggests that more conservative ratios be used for a period of five years. EIA indicates that receivers have improved noticeably since the 1974 tests and that they will continue to improve. However, EIA argues that additional time is required for the newer, better receivers to represent a larger percentage of the sets being used. Because of the industry representative's comments on receiver improvements, and the eight years that have passed since the tests were completed, we are of the opinion that use of the proposed mean values is justified. Essentially, there are two reasons for this conclusion. On the basis of the above, we are convinced that most receivers currently in use actually perform better than the ratios indicate. In addition, we expect that, over the next few years, most new low power stations will exceed the protection criteria by a comfortable margin so there will be few, if any, problems of actual interference. Thus, some additional time will exist during which the average receiver is expected to improve. Finally, we do not wish to reduce the manufacturers' incentive to continue to improve those receiver characteristics that affect interference. Inferior receivers, as some point, will be exposed to undesired signals that will produce interference. We believe that this is preferable to adopting standards that protect inferior receivers, at a cost of reducing the number of low power stations that can exist.

41. *Circular Polarization.* In comments discussing transmitter output power, General Electric Company proposes that transmitters with twice the normally permitted power be allowed to feed a circularly polarized transmitting antenna. Circular polarization is a recognized means of improving

[36] For example, *see*, Report and Order, Docket Nos. 16004 and 18052, adopted May 29, 1975, which incorporated a terrain "roughness factor" into the FM and TV rules. However, *see also*, Stay, adopted April 28, 1977, 42 FR 25736 (May 19, 1977), where the Commission stayed indefinitely the effectiveness of the terrain roughness rules. We would expect that any general terrain correction factor that might be adopted would explicitly be extended to the low power service.

[37] W. K. Roberts and L. C. Middlekamp, A Study of the Characteristics of Typical Receivers Relative to the UHF Taboos, NITS PB-235 057 (June, 1974).

reception within a station's service area. It commonly is achieved by transmitting both a horizontally polarized and a vertically polarized component of the signal with a fixed phase relationship between the components. The addition of a vertical component does not increase the distances at which a station provides service or causes interference. Full service stations are permitted to transmit a vertically polarized component as long as it does not exceed the horizontal component in any direction. In the past, through a waiver process, translators have been allowed to transmit a circularly polarized signal. However, they have been required to use two transmitters or a transmitter with multiple final amplifier stages, and two transmission lines connecting the transmitters to the antennas. We believe that it is both reasonable and appropriate for us to amend our rules herein to permit low power circular polarization and to permit a higher transmitter power output when a circularly polarized antenna is used.

42. *Canadian and Mexican Notification.* A translator notification procedure has evolved for stations in the Canadian border area. Canada is notified of 1 watt VHF translators within 10 miles of the border, and 10 watt VHF translators and 100 watt UHF translators within 20 miles of the border. Because 100 watt VHF translators and 1,000 watt UHF translators have required a channel in the Table of Assignments, they have been coordinated if they were in the area covered by the full service TV Agreement, within 250 miles of the U.S.-Canada border. There is no established protocol for notifying Mexico of translators in the border area. The full service TV Agreements with Mexico require coordination of VHF stations within 250 miles of the border and UHF stations within 199 miles. We currently are formulating a procedure for both Mexican and Canadian notifications. Until new agreements are reached, low power authorizations in the border areas (except those that would not require notification under the above standards) will be conditioned on Canadian or Mexican concurrence.

43. *Cable Protection.* The National Cable Television Association, with Spectradyne, has voiced concern that low power stations could cause interference to cable systems at the headend antenna where TV rebroadcast signals are received, cable distribution systems and at subscribers' receivers. To protect cable, NCTA would have the Commission license low power stations only on UHF channels and put the burden of frequency coordination and correction of interference on the low power operator. The Association of Maximum Service Telecasters, the Corporation for Public Broadcasting, the National Translator Association and others oppose NCTA, arguing that the potential for interference to cable is not as serious as NCTA fears and that, in any case, cable's unregulated use of radio frequencies is predicated on its nonpreclusion of broadcast uses of the band. NTIA supports a scheme substantially similar to that proposed in the Notice, whereby the Commission would consider well-documented objections to low power applications based on potential headend interference, but that other low power/cable interference is to be solved between the parties, with primary responsibility for correction of cable-related problems on the cable operator. In the interest of spectral efficiency, we have decided not to limit low power to the UHF spectrum. We are aware that, on occasion, interference problems have arisen between cable and full service stations on VHF channels. However, we believe that it would be spectrally inefficient to preclude low power stations from the VHF band altogether, when there are many locations where this will not occur. We do not feel it necessary to restrict the low power operator's range of choice between VHF and UHF frequencies, which may depend on factors such as cost differential, channel availability and coverage potential.

44. We believe that, with one minor modification, the cable/low power interference rules originally proposed generally will be adequate to control potential interference problems with minimal disruption to existing service. The rules are as follows:

1. The low power station operator is strictly responsible for taking immediate corrective action when an interfering condition to any other service results from operation in violation of the Commission's technical standards, or from improper maintenance.[38]

2. The cable operator generally is responsible for correcting interference in the cable distribution system and at subscribers' sets.[39]

3. The Commission will not knowingly authorize a low power station that is likely to cause serious interference to reception at an existing cable television headend. If this does occur, the parties will be encouraged to settle the matter between themselves, in light of the Commission's first-come, first-served policy, that will favor the pre-existing service.

Because the Commission has no computer data base of cable headend locations and stations received, or of channels used elsewhere in the cable distribution system, we have no means of considering cable systems in our automated processing procedures. Where we receive documented submissions raising a substantial and material question that a proposed low power station will cause serious interference to a cable system, we shall designate the application for hearing, pursuant to Section 309 of the Communications Act.[40] However, as we have said, where an operational low power station causes interference to a pre-existing cable headend, we expect the parties to settle the dispute among themselves and come to the Commission only as a last resort. We would afford the earlier entrant, whether it be the cable system or the low power station, favorable consideration over the later one, and we would expect this to be a factor in their negotiations.

45. With respect to other interference problems, *e.g.*, "local pickup" interference at the television receiver, we do not find a sound basis for affording formal protection to cable systems in general.[41] Cable's use of radio frequencies is based on its nonpreclusion of broadcast uses; therefore there is no basis for affording cable such formal protection.[42] On the

[38] This provision applies not only to cable, but to all services.

[39] As discussed in paragraph 45, *infra*, we are persuaded that the special case of co-channel interference to the output of a set-top converter requires a different approach.

[40] *See*, H & B Communications Corporation v. FCC, 420 F. 2d 638 (D.C. Cir. 1969). However, as noted above, pre-grant hearings on cable/low power interference issues will be authorized only where CATV systems are able to show the potential for interference with sufficient certainty and specificity to warrant designation of the issue for hearing. *See*, Washoe County School District, File No. BPTTV-6096, FCC 81-533, released December 3, 1981; Capital Communications, Inc., File Nos. BPTTV-800311IC and BPTTV-800312IB, FCC 81-534, released December 4, 1981.

[41] Microband makes an argument for protection of Multipoint Distribution Service down-converters that operate on Channels 12 and 13. We believe the same rationale applies to MDS use of radio frequencies as to cable and, accordingly, we are not extending such protection, but expect the parties to any such disputes to settle them privately.

[42] *See, e.g.*, Memorandum Opinion and Order, Heart of Texas TV, 25 F.C.C. 2d 754 (1970); *reconsid. denied*, 27 F.C.C. 2d 205 (1971). While this case holds that cable systems must alter facilities to permit VHF translators, the text evinces the Commission's flexible approach, mandated in H & B Communications Corporation, *supra*, n. 39, of attempting to accommodate as many competing interests as possible in such situations. Accord, San Juan Nonprofit TV Association, 22 F.C.C. 2d 371 (1970).

other hand, we find merit in NCTA's contention that some interference problems may occur frequently and be expensive for cable operators to correct. Various means to alleviate interference from broadcast stations may be available to cable operators. In some instances, the cost of correction would not be prohibitive, and would more easily be borne by the cable operator. *See,* Oregon Broadcasting Company, 20 F.C.C. 2d 246 (1969). We also note that our decision to restrict VHF translators and low power stations to 10 watts except where a station is proposed on an assigned channel further will reduce the magnitude of the problem. In the Notice we proposed to allow 100 watt operation in any situtation where the co-channel, and adjacent channel full service mileage separations were met. As a result of our decision not to extend 100 watt operation beyond assigned channels, cable operators will no longer have to accept the consequences of 100 watt VHF translators or low power stations except in locations where they already were aware of the possibility of a VHF full service station. The comments have persuaded us that one additional circumstance, however, does require special consideration. Where a new translator or low power station will cause interference to the output channel of an existing cable converter, we believe that the cable system may deserve some protection. In view of the minimal preclusive impact this will have (foreclosing at most one VHF channel from local use by translators or low power stations), we find this a reasonable accommodation to make to a cable operator who already has gone to considerable effort to minimize the system's use of broadcast spectrum by using a converter. We believe that this possibility warrants extension of the "first in time, first in right" policy we are adopting with respect to headend interference. Not only will this achieve equity between the parties, more importantly, we believe that in this circumstance it best serves the public interest to protect an expectation of continued service that may have arisen over time, instead of permitting its degradation by a later entrant. Given the small number of cases in which this should occur, we believe that the best way to handle the situation is via documented objections filed by the cable operator operators to applications of translators or low power stations that will be both co-channel to the output channel of existing converters and close enough to generate local pick-up problems.[43] We continue to encourage private resolution of all cable/low power interference problems, informed by our policy to favor the earlier spectrum user in the headend or converter situations. Therefore, we are amending our rules explicitly to state that, in the event of cable/low power interference, the first user of the frequency, whether cable or low power, will have priority when interference precludes joint use in these two circumstances, and the later entrant will be responsible to correct the interfering condition. The cable operator will be responsible to correct all other interfering situations. *See,* Appendix A, § 74.703(d).

46. *Land mobile service.* The 1979 World Administrative Radio Conference recognized the potential for shared Land Mobile/Broadcast use of the frequencies between 512 and 806 MHz (TV channels 21 through 69). Assuming the WARC agreement is ratified by the U.S. Senate, the Commission will be permitted, if it wishes, to authorize both land mobile and broadcast stations in this spectrum. In this regard, we intend to implement procedures for the processing of LPTV applications that take into account the potential for such sharing in and near major urban areas where the greatest long-term needs for land mobile channels exist. Specifically, we shall examine all low power TV applications within at least a 100-mile radius of the ten largest U.S. metropolitan areas to determine what accommodation, if any, is possible if we decide to provide some land mobile spectrum, while, at the same time, not unduly diminishing the spectrum available for low power television. (We are most concerned with: Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C.) In effect, we shall attempt, through a staff study and our application processing procedures, to determine what impact additional land mobile sharing with low power TV has in these cities. Also with respect to land mobile operations, we note that a number of parties have decried the protection standards we proposed for land mobile systems now sharing VHF frequencies with broadcast users. The UHF taboos, however, still are a matter of study. Pending final resolution of this issue, we are inclined to adopt the standards proposed in the Notice for the protection of land mobile stations, with a few modifications urged in comments. We do not believe that these standards normally will result in interference, and we conclude that they are practicable, at least on a short-term basis. However, to the extent that interference does result, low power stations are being authorized on a secondary basis to all stations in existing primary allocations and must both correct whatever interference they cause or cease operation and accept whatever interference they receive from stations in the primary allocations. Also, to protect the Offshore Radio Telecommunications Service Operations on Channel 17, we are adopting somewhat more restrictive standards for low power stations in the Gulf of Mexico. We believe that this is possible without significantly reducing the area within which Channels 16, 17 and 18 can be used, because existing full service stations on related channels and the Channel 17 Houston land mobile allocation leave little of the Gulf area with these channels available. Further, the area where Channels 16, 17 and 18 otherwise might have been used are for the most part sparsely populated with a large number of other UHF channels available for low power use. Therefore, we are adopting rules prohibiting Channel 16, 17 and 18 low power stations in the following areas: (1) Channel 17 will not be available in the area south of 31° 30′ North Latitude, west of 86° 30′ West Longitude and east of 95° 30′ West Longitude; (2) Channels 16 and 18 will not be available in the area south of 30° 00′ North Latitude, west of 87° 00′ West Longitude and east of 95° 00′ West Longitude. A computer review of translator stations and applications and pending low power and translator applications disclosed only two on these channels within these areas, both for Channel 16 at Galveston, Texas. Because Galveston is 40 miles from Houston, within the Channel 17 land mobile protected contour, these applications cannot be granted, regardless of the ORTS protection standards. The Commission also is aware of two petitions for rulemaking, one filed by the Offshore Telephone Company (RM–3924) and the other by the Sheriff's Department of Los Angeles County (RM–3975), both requesting nonbroadcast use of portions of the UHF–TV broadcasting spectrum. Our action today could have a negative impact upon the possibility of a favorable outcome on either of these petitions. Based upon our initial analysis, it appears that some degree of sharing between the Offshore Telephone Company use of Channels 15 and 16 and

[43] Unlike consumer electronics products such as TV games and VCRs, cable coverters normally do not come with a switch to change the output between two adjacent channels. If they did, then the cable problem could be solved simply by switching to the channel unused by the translator or low power station.

low power TV may be possible. On the other hand, the mutual accommodation of the Sheriff's petition and low power TV seems to be considerably more difficult, if not impossible. Again this expectation is based on very preliminary analysis, and some possibilities for land mobile sharing still may exist even with significant development of low power TV. However, due to the strong public support and demand for low power TV, we do not consider it to be in the public interest to delay this proceeding to review further these two petitions, particularly because the Commission has not yet even determined whether petitioners have made a threshold showing warranting rulemaking. After further analysis has been completed, these petitions will be accommodated through separate proceedings and to the extent the Commission determines appropriate.

47. *Auxiliary Services.* The Notice proposed that low power stations have access to auxiliary broadcast frequencies, where available, for studio-to-transmitter links and remote broadcast pickups. Subparts D, E, F and H of Part 74 of the Rules cover these uses. Low power licensees are eligible for remote pickup broadcast station licenses, under Subpart D. Because in BC Docket No. 81–793 we are proposing to delete § 74.603(b), to eliminate use of aural microwave spectrum in connection with television transmissions, we shall not license this spectrum to low power licensees, until and unless resolution of Docket 81–793 permits. The present rules governing television translator microwave relays in Subpart F permit their use in connection with translators only to obtain permissible TV programming; the frequencies may not be used in connection with program origination. Television translator relays are accorded the lowest priority in use of the microwave frequencies under our present rules, *see,* § 74.602(h). As part of an originating broadcast service, low power stations should be directly eligible for television microwave assignments for STLs, intercity relay and/or TV pickups, and § 74.632(a) will be amended accordingly. The Commission recently initiated a proceeding to establish new licensing policies for television broadcast auxiliary stations, BC Docket No. 81–794.[44] The Notice of Proposed Rule Making in that docket encourages private frequency coordination in the assignment of television auxiliary microwave frequencies and proposes the establishment of priorities for such assignments. The Notice seeks comment on the proper place for low power stations in the hierarchy. Because there was little commentary on this issue in the instant proceeding, and because BC Docket No. 81–794 is intended to encompass the entire panoply of users of this spectrum, we shall defer any possible modification of the present priority afforded to television translator relays, and leave resolution of the priority of low power stations to BC Docket 81–794. Finally, we are amending § 74.832, Subpart H of the rules to make low power television licensees eligible for low power auxiliary stations,[45] as well as § 74.432(a), audio remote pickup stations.

## IV. Technical and Engineering Requirements

48. The Notice addressed a number of technical issues not strictly related to spectrum priority. See, Notice, paragraphs 63 through 67, 45 FR at 69188, 69189. We did not receive a great deal of commentary on this subject, possibly because we are maintaining rather than changing most of our current regulations in this area. Nevertheless, it remains our belief that the technical aspects of low power operation are critical to its success as a new broadcast service and to its coexistence with existing services. We emphasize that we shall require strict adherence to the technical standards, both interference-related and others, adopted herein for low power stations.

49. *Transmitter and Other Equipment Standards.* We are retaining § 74.750, which requires type acceptance of low power transmitters. Low power STV operations must use a Commission-approved encoding system. Section 74.736, which governs out-of-band emissions, will remain in force. Section 74.761, requiring frequency tolerance maintenance, will continue to be enforced. Where offset operation is proposed, transmitting equipment with the stability needed to meet a stricter frequency tolerance will be required. *See,* paragraph 39, *supra.* While we are amending § 74.734 to require an operator in attendance under some conditions (*see,* paragraph 95, *infra* ), we shall continue to enforce § 74.734(a)(6), which requires observation for ten continuous minutes per day of the off-air signal of translators employing modulators. We shall require the transmitting equipment used by low power stations to comply with those existing provisions of § 74.750 that relate to the prevention of interference. However, we are not adopting technical operating standards for the transmitted sync pulse and blanking wave forms, color burst or audio distortion. Our concern in regard to low power technical standards is primarily avoidance of objectionable interference. We would hope that marketplace considerations will provide additional incentive for low power licensees to maintain high quality signals for viewers.

## V. Applications

50. Form 346, as revised for use by both translator and low power applicants, continues to seek information regarding the citizenship, character and financial qualifications of the applicant, as well as technical aspects of the proposal, as enumerated in Section 308(b) of the Communications Act and our rules and regulations.[46] Without opining on their continued vitality, we shall continue to enforce the minimum qualifications to hold a broadcast license in the low power service, leaving the possible modification or curtailment of such qualifications to proceedings designed for that purpose, e.g., Notice of Inquiry, Gen Docket No. 81–500, 47 FR 40899 (August 13, 1981).[47] It goes without saying that we believe that the low power service is an ideal candidate for any modifications of qualifications that are accomplished in other proceedings. However, because the Commission intends to examine these issues in separate proceedings in the future, we shall not make changes at this time.

51. We also envision several simplifications in application processing procedures for low power applications. It is consistent with the spirit of Gen. Docket No. 79–137, Revised Procedures for the Processing of Contested

[44] FCC 81–537, released November 25, 1981.

[45] In this connection, we shall state here that we do not see the necessity of changing the name of the low power television service, as some parties have suggested, either because the term "low power" itself has a negative connotation or to avoid confusion with low power auxiliary stations. We believe a greater amount of confusion is likely to result from changing the name of the low power television service at this point.

[46] The information that will be required on revised Form 346 is attached as Appendix B. OMB approval must be obtained. Forms 347 and 348, the license and renewal forms, also will be revised to reflect the rule changes contained herein. Until the computer to be used in processing is operational, we shall continue processing rural, freeze-exempt applications manually. In order to facilitate these efforts, we have appended a request for a topographical exhibit to the application form. As indicated, this additional information may be supplied at the option of the applicant. However, it could considerably expedite the processing of the application.

[47] We are, however, simplifying the showing required to demonstrate financial ability to a certification requirement, in conformity with our practice with other broadcast applications.

Broadcast Applications, 72 F.C.C. 2d 202 (1979), and with the secondary nature of the low power service, that low power processing procedures be streamlined to the extent practicably possible. We emphasize, however, that we intend to maintain strict standards for acceptance of applications. A low power application must be complete and sufficient to be accepted for filing. Applications with blatant defects will be returned. This policy represents a departure from the standard set out in § 73.3564(a) of our rules, under which "substantially complete" applications are acceptable for filing. It resembles, rather, the acceptance criteria of Part 22 of our rules, which requires complete applications, and return of blatantly defective applications. *See, e.g.*, §§ 22.31(b)(2) and 22.32(b)(1) of the rules. Under our present broadcast rules, an application that is not grantable because it is incomplete still may be acceptable for filing, because it is not "patently defective" and it is "substantially complete." See, James River Broadcasting Corp. v. FCC, 399 F. 2d 585 (1968). On the other hand, clearly deficient applications may be returned. Henry M. Lesher, 41 R.R. 2d 1593 (1977). The Commission and the courts, in applying this standard, have emphasized that administrative fairness requires full notice to parties whose rights may be affected by our rules regarding what is required of them to comply. Where such notice is afforded, the Commission may require strict compliance. Ranger v. FCC, 297 F. 2d 240 (1961). It is open to us to modify our acceptability standards as they apply to low power and translator applications, so long as we do so explicitly and with good reason:

> There is also an interest in procedures and administrative techniques that enable the Commission to handle its work load efficiently, and with optimum use of limited administrative resources. Perhaps the Commission can accommodate the various interests by adopting administrative expedients that, for example, explicitly require all applications to be letter-perfect when filed.

Radio Athens, Inc. (WATH) v. FCC, 401 F. 2d 398 (D.C. Cir. 1968). We now do so, for the following reason. The Commission's limited resources and the large number of low power applications to be processed simply will not permit the staff to coach applicants in correcting defects or omissions in applications that have been filed, as sometimes has been the case in the past. Defective low power applications will be returned summarily, and if they are resubmitted with perfecting amendments, they will be placed at the end of the processing line, unless passage of a cut-off date precludes consideration altogether, in which case the resubmission will be returned. Because explicit notice of change in policy was not afforded in the Notice of Proposed Rule Making in this proceeding, pending applicants will have the opportunity to perfect their applications without loss of rights that arguably may have accrued during the ninety day amendment period discussed in paragraph 56, *infra*.

52. Once an application has been accepted for filing, it will be placed on a cut-off list, which will set the deadline for the filing of competing applications and petitions to deny. Applications received by the cut-off date that are accepted for filing will be examined for exclusivity, and those determined to be mutually exclusive with applications that appeared on the "A" cut-off list will be placed on a "B" cut-off list, that sets a deadline for petitions to deny; no competing applications may be filed to "B" list applications.

## VI. Comparative Procedures and Criteria

53. The Notice of Proposed Rule Making proposes the following system of comparative evaluation, to enable the Commission expeditiously to decide among competing applicants:

(1) Notification of mutual exclusivity to applicants;

(2) Thirty days for amendments to remove mutual exclusivity;

(3) Pre-designation conference among applicants and staff;

(4) Designation of mutual exclusivity and paper hearing concerning:

(a) Qualification issues;

(b) Technical aspects of the applications; and

(c) Claims to preference points.

(5) If no single applicant emerges victorious from the paper hearing, random selection among qualified applicants.

The Notice proposes the following comparative preference points:

(1) First applicant to file a complete and sufficient application;[48]

(2) Over fifty percent minority ownership; and

(3) Noncommercial applicant proposing noncommercial service to the general public.

The preferences would be cumulative and be worth one point each, so that a first-filed minority applicant would have two points and would win the frequency over a competing noncommercial applicant, for example. This comparative system contains three departures from our customary method of comparing mutually exclusive applications: a paper hearing would be held on designated issues intead of a hearing with oral testimony; there are only three comparative criteria, and they have yes-or-no answers; and a lottery would be used to decide among applications that are equal in comparative points. These modifications were intended to "avoid head-to-head competition among applicants, with its profound drain upon the resources of the parties and the administrative agency." Notice 45 FR at 69189.

54. These comparative criteria and procedures explicitly were proposed as a "first draft" in the Notice, and we promised to consider comments advancing other approaches. The comments addressing the comparative process are voluminous, with many opposing the notion of curtailed comparative procedures and others proposing much more elaborate preference systems, while applauding the basic concept. Among the many factors favoring abbreviated comparative procedures for low power applications are that low power is a secondary service; that prolonged and elaborate comparative proceedings may impose serious financial barriers for new entrants into the industry; that for a new service it is difficult to predict which comparative factors ultimately will be the most significant or desirable; that, without a prohibition on trafficking, stations may change hands soon after construction, mooting an elaborate preference system; and that the Commission simply does not have the resources promptly to handle the volume of comparative hearings required to resolve the plethora of mutually exclusive low power applications. We find these arguments convincing, and we think the solution is to have largely paper hearings among competing applications, as detailed below. We believe the modifications in our original proposals discussed in paragraphs 65 through 68, *infra*, take into account the somewhat contradictory goals of prompt authorizations and a time-consuming, comprehensive examination of all relevant information. In discussing the steps in the process, we shall address each of the proposals from the Notice in the order listed in paragraph 53 above.

55. *Notice of Exclusivity.* Applicants will be notified that their applications are mutually exclusive with a (or several) application(s) by their inclusion on a "B" cut-off list. Mutually exclusive applications will be designated for hearing. However, mutually exclusive applicants may, and are encouraged to,

[48] This preference would only be operative for applications filed after the close of the rule making.

cooperate in private settlement endeavors to remove mutual exclusivity. Applicants should explore various options, such as buying out a competing applicant or agreeing to a time sharing arrangement, keeping in mind that settlement agreements must be submitted for Commission approval, pursuant to Section 311 of the Communications Act, and that we are committed to expeditious processing of all settlement agreements that eliminate the necessity for comparative hearings. It will facilitate such efforts that the Commission does not consider changes in ownership or control of low power television applications to constitute a major change entailing competing applications, although these are subject to petitions to deny. *See,* paragraph 77, *infra.* Accordingly, applicants can alter their ownership structure via amendment without losing cut-off protection. We point out, however, that our policy prohibiting amendments affecting ownership that would result in comparative advantage after the "B" cut-off date has passed will apply in the low power context.

56. *Ninety Day Amendment Period.* All present applicants will be afforded a specific ninety day period during which they can amend to bring their applications into conformance with the final low power rules. On account of the large number of applications, we may, as resources permit, stagger our requests for amendments. This will be announced via public notice following the effective date of this Report and Order.[49] We have devised a phased approach to the processing of pending applications. *See,* Appendix E.

57. *General Processing Procedures.* Applications that are mutually exclusive with applications already on published "A" lists will be placed on "B" lists. These "B" lists will be published, and will afford applicants notice of their mutual exclusivity. After the deadline specified in the "B" list for filing amendments and petitions to deny has passed, the mutually exclusive applications will be processed. If the applicants are able to resolve their mutual exclusivity in a manner acceptable to the Commission, the resulting application can be processed to grant. However, if the parties are unable to resolve their exclusivity, the applications will be designated for hearing. After these mutually exclusive applications have been designated for hearing, the Commission will begin processing the remaining applications.

58. *Predesignation Conference.* We are not making the initially-proposed predesignation conference with staff a formal part of the comparative process, because we believe settlements and accommodations can be accomplished expeditiously without Commission intervention, and our limited staff resources better can be utilized elsewhere. In light of the delays that, to some extent, will be unavoidable, should competing applicants be unable to resolve their differences via private negotiation, we strongly encourage all groups of mutually exclusive applicants to cooperate in private settlement endeavors and particularly to explore the possibility of time-sharing arrangements.[50] As we have said, the Commission will attempt to consider settlement agreements submitted pursuant to Section 311 (c) and (d) of the Communications Act and §§ 73.3525 and 73.3568 of the rules in as expeditious a manner as possible. Indeed, such settlements will be given our highest priority and will be processed and granted before other pending applications, in the order in which the settlement agreements are received.

59. *Designation.* The designation orders will include issues raised in petitions to deny that raise substantial and material questions of fact that are in dispute and require a hearing for resolution. *See,* Section 309(e) of the Communications Act. These issues may include qualifications to hold a broadcast license under Section 308(b) of the Communications Act, as well as relevant comparative issues.

60. *Issues not appropriate for designation.* Because of the many differences between the low power television service and the existing full service television broadcast service, expecially the secondary status of low power stations and their small service areas, we intend to limit the number of issues considered in low power comparative hearings to only those truly relevant to the situation at hand. One of the perennial technical issues considered in traditional hearings among mutually exclusive television applicants has arisen under the aegis of Section 307(b).[51] When two competing applicants propose service areas that are to any degree different, the Commission traditionally has considered evidence on the amount of area and the population served by the competing applicants. This inquiry, undertaken in the interest of ensuring that the applicant proposing the most fair, efficient and equitable distribution of new service will predominate in the selection contest,[52] has been one of the most time consuming and litigated issues addressed in the hearing context.[53]

61. We shall not consider arguments directed to Section 307(b) of the Communications Act [54] in designating issues for low power applications, for several reasons. In the first place, the tiered processing program we are implementing (*see,* Appendix E) embodies a general Section 307(b) judgment that, of the 6,000 pending applications, those which fall within the most rural markets should be given priority over those proposing to serve more urban, and well-served, areas. We recognize that the rural authorizations may have a preclusive effect in more urban areas, and we believe that this is justified by the fact that the areas to which we are giving priority are more in need of service and that it represents fair and equitable spectrum allocation to favor them. Second, today's broadcast

[49] As part of this process, we wish applicants to ensure that they have provided appropriate antennas, with model numbers, a correct polar diagram, including the total polar plot, accurate overall height above ground of the antenna and altitude of ground above mean sea level figures and accurate coordinates for the site proposed, which must reasonably be believed to be available for their use. Inaccurate information on applications delays the entire processing endeavor, and, under our newly-adopted strict acceptance standards, will result in nonacceptance of future low power applications.

[50] *See,* Notice of Inquiry on Part-time Programming, 55 R.R. 2d 81 (1978); but see, Cosmopolitan Broadcasting Corp. v. FCC, —— F. 2d —— (D.C. Cir. 1982).

[51] 47 U.S.C. 307(b) provides that "[i]n considering applications for licenses, and modifications * * * thereof * * the Commission shall make such distribution of licenses * * * among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

[52] We note that at its meeting on September 17, 1981, the Commission directed its staff to include in its upcoming legislative amendments a proposal to delete Section 307(b) from the Communications Act "since fair and equitale distribution of radio and television service generally had been established nationwide." See, F.C.C. News, Report No. 5068, Mimeo 003451 (September 17, 1981).

[53] This may well be because a "Section 307(b)" preference is considered dispositive over applicants who do not receive this preference. See, e.g., FCC v. Allentown Broadcasting Corp., 349 U.S. 348, 12 R.R. 2019, 2021 (1955).

[54] In the Table services, TV and FM, the fairness of the allocation is dealt with primarily in conjunction with the rule making that amends the Table to reflect the frequency assignment. Applications filed under §§ 73.203(b) and 73.607(b), which permit construction of a radio or television station within ten or fifteen miles of the community of assignment, represent the only instances in which Section 307(b) issues generally arise in the application process. In AM radio, where there is no table of assignments, Section 307(b) issues more frequently arise in connection with competing applications. Clear resolution of the Section 307(b) issue in favor of one qualified applicant over another is dispositive, and no further comparison of applications is made. Low power resembles AM, in that there is no table of assignments, although AM is a primary service, unlike low power.

services may be considered quite mature, in a Section 307(b) sense. The Tables of Assignments for FM and television stations, §§ 73.202(b) and 73.606(b), and the allocation scheme for wide-area AM stations memorialized in § 73.22, are intended to fulfill the Commission's Section 307(b) mandate. *See,* Logansport Broadcasting Corporation v. FCC, 210 F. 2d 24 (D.C. Cir., 1954); *also see,* Loyola University, et al. v FCC, Nos. 80–1824 and 80–2018, *slip op.* (D.C. Cir., January 26, 1982). Finally, the existing array of television channel utilization will force low power into less well-served areas. The Television Table of Assignments distributed the available television allotments between large cities and less populated areas in a manner that balanced the natural gravitation of stations to large urban areas with high population densities with the need to reserve some spectrum capacity to serve the less profitable, low population density areas of the country. One result of this balanced distribution pattern is that in approximately the 50 largest markets no additional full-spaced television stations can be accommodated. Although the lower maximum transmitter power of low power stations will permit somewhat shorter coordination distances, this existing concentration of full service stations in and around the top 50 markets on every available channel will result in very few opportunities to add low power stations to locations that can serve the largest markets. Conversely, most of the locations where new low power stations can be spectrally accommodated will be outside of the top 50 markets, where the television band is not saturated. This is fortuitous in two respects. First, the lower construction and operation costs that will characterize low power stations promise to make their operation economically viable in areas with population insufficient to support a full service station. Second, and relevant to this discussion, this existing station distribution pattern, coupled with our requirement that low power stations protect the Grade B contours of all full service stations will result in the vast majority of low power authorizations being granted outside the top 50 markets. Thus, the assignment policies we are adopting for the low power service automatically will acccomplish the concern we formerly addressed in our Section 307(b) hearing contests.

62. Second, the basic regulatory structure of this new service makes the application of our full service station Section 307(b) practices inappropriate. As discussed above, we are not requiring low power licensees to serve a particular community, to maintain any specified programming format, or to retain ownership of the initial license for a fixed length of time. Furthermore, because of their secondary status, what service they do provide may be preempted by the addition of a full service station too close to permit simultaneous operation. Given these characteristics, the added delay in authorizing new low power stations, and the great cost of an expanded or otherwise unnecessary hearing to the applicant, the Commission, and ultimately the public, cannot be justified.

63. The courts have held that neither Section 307(b) nor our particular past applications express rigid and inflexible standards. The Commission has a great deal of discretion in solving problems attendant to its responsibilities for providing a "fair, efficient, and equitable distribution of radio services." Television Corporation of Michigan v. FCC, 294 F. 2d 730 (D.C. Cir. 1961); 21 R.R. 2107; Logansport Broadcasting Corp. v. United States, 210 F. 2d 24 (D.C. Cir. 1954), 10 R.R. 2008; Federal Radio Commission v. Nelson Brothers Broadcasting Bond and Mortgage Co., 289 U.S. 266 (1933); WBEN, Inc. v. United States, 396 F. 2d 60 (2nd Cir., 1968), *cert. denied,* 393 U.S. 914 (1968). For instance, the Court affirmed the Commission in its determination that every initial licensing proceeding in which mutually exclusive applicants propose different communities need not present a Section 307(b) issue. Huntington Broadcasting Co. v. FCC, 192 F. 2d 33 (D.C. Cir. 1951), 7 R.R. 2030. In the new service before us today, we believe the inevitable allocation of the majority of low power stations to locations away from the top 50 markets, coupled with the secondary nature of the service these licensees will provide, creates a situation where none of the mutual exclusivities created by competing low power and translator applicants present a meaningful Section 307(b) issue. Therefore, consideration of Section 307(b) issues are not, in this instance, in the public interest. We do not intend this to constitute a relaxation of our concern for the Section 307(b) mandate. We remain committed to Section 307(b) determinations in the primary broadcast services. However, we believe that implementation of the low power proposal takes cognizance of the existing distribution of services. We further believe that the allocation procedures in this Report and Order will reduce the costs to all parties—society generally, the applicants, and the Commission—while allowing for greater flexibility for the market to fine-tune allocations. In accordance with this policy, we also shall not consider *Berwick* or suburban community issues. *See,* Berwick Broadcasting Corp. v. FCC, 20 FCC 2d 393 (1969).

64. *UHF Impact.* We find it difficult to envision a situation in which a VHF low power station will cause a substantial economic threat to a full service UHF station. Because their spectrum priority is secondary, low power stations always remain vulnerable to new full service entrants or existing full service modifications on interfering channels. In addition, our limit on maximum output power and our contour overlap prohibitions both place limitations on the coverage potential of low power stations. The coverage area of a full service UHF station inevitably will be many times greater than that of a low power VHF station. Under these circumstances, we see little point in extending our UHF impact policy to the low power service. This is particularly true at a time when, as a result of Congressional and Commission efforts, as well as the workings of the marketplace, the increasing vitality of the UHF service generally is making our policies designed to protect UHF stations from competition less appropriate. *See, e.g.,* All-Channel Receiver Law, 47 U.S.C. 303(s); Report and Order, 21 FCC 2d 245 (1970); Report and Order, 62 FCC 2d 164 (1976); Final Report, UHF Comparability Task Force, Gen. Docket No. 78–391, P. Gieseler, *et al.,* FCC, Office of Plans and Policy (September, 1980), available from NTIS, Springfield, Virginia. Neither do we anticipate designating low power/CATV interference issues in many cases. See, Notes 39 and 41, *supra.* We also foresee few instances in which an allegation of harmful economic impact, made pursuant to Carroll Broadcasting Co. v. FCC, 258 F. 2d 440 (D.C. Cir. 1956), will meet the test of Section 309(e) and require designation for hearing, particularly in light of the secondary status and limited coverage potential of low power stations. Low power stations will have smaller coverage areas than full service stations. Therefore, their ability to garner advertising revenues on the basis of audience size will be less great. Similarly, their ability to divert revenues from existing full service stations will be limited. Finally, their secondary status, which makes their continued existence uncertain, could hinder their ability to sustain audience and advertisers. In light of these facts, we do not see a likelihood of many full service stations being able to document

a *prima facie* case that a low power station will so impair their ability to maintain its revenues that a net loss of public service programming will result. Today, where several full service television stations exist in many major markets, it is even less likely that a low power entrant will have an economic effect so severe as to result in loss of public service programming on all the full service stations. Our holding in Monroe County Board of Commissioners, 42 FCC 2d 683 (1979), that the "Carroll" doctrine should not apply to cable systems, is consistent with this belief and with the record adduced in the instant proceeding. Also see, Wrangell Radio Group, et al., 75 F.C.C. 2d 404, 407 (1980).[55]

65. *Hearing.* It is our intention to minimize the expense of establishing low power stations. This goal requires that we not subject applicants to long and costly comparative hearings. Moreover, if we flood the hearing process with numerous low power proceedings, we shall further delay the resolution of all other hearing proceedings including those involving construction permits for full service facilities. Therefore, it remains our intention to utilize a random selection process when and if that becomes practicable. Applicants for licenses in this service, therefore, are advised that their applications, if mutually exclusive with other applications, may be subject to revised processing procedures, standards and qualifications in connection with implementation of a system of random selection. At this point, however, we must utilize most of our existing hearing procedures. Nevertheless, we shall make certain modifications in those procedures in order to reduce or eliminate the number of days low power applicants will have to spend in the hearing room.

66. The comparative hearing process can be expensive and time-consuming.[56] For these reasons, we have studied steps that could be taken to minimize the expense and long delays normally inherent in comparative proceedings involving broadcast applicants. Our goal has been twofold: *First*, to assure that applicants are given an opportunity adequately an fairly to present their cases and, thus, to demonstrate why they are the "best" applicant within the context of the criteria established by the Commission; and second, to conclude the administrative process and provide service to the public as expeditiously as possible. We believe that we have identified several procedural actions that can facilitate this goal.

67. Based upon our review of our application processing and hearing procedures, we believe that it may be possible to shorten both the evidentiary and appellate aspects of the process through the use of a modified paper proceeding directly administered by the Commission.[57] Under the modified procedure set forth herein, the Commission *en banc* will receive the evidence and issue the final decision as to which applicant should be awarded the license.[58] Also, unlike in traditional hearings, the Broadcast Bureau will not appear as a party, unless otherwise ordered by the Commission. Instead, the Bureau will serve as advisors and staff support to the Commission with responsibility for reviewing and analyzing the pleadings and preparation of a draft of the final decision.

68. The Commission's low power application processing procedures call for the issuance of two cutoff lists: The "A" list invites competing[59] applications and the "B" list invites only petitions to deny. We shall begin the low power television comparative process upon issuance of a modified "B" list. This notice will include the hearing designation order and will set forth the standard comparative issues and the pleading schedule to be followed by applicants and other interested parties to the proceeding.

69. Specifically, the "B" list will specify that each applicant must submit in writing its direct case[60] within the approximately 30 day time period set forth therein. In addition to spelling out those facts and characteristics of its proposed operation that the applicant wishes the Commission to consider, the direct case also should include any matters that normally would be raised in a petition to deny against another applicant. Within twenty (20) days after the filing of the direct case, each applicant must submit its written rebuttal case,[61] including oppositions to any matters raised in any petitions to deny filed against its application. Twenty (20) days thereafter each applicant may submit its written surrebuttal case,[62] including any replies to oppositions to matters raised in its petitions to deny filed against other applicants. With its surrebuttal case, each applicant also may submit any request it hs for oral hearings and cross examination, the subject matter of the desired cross-examination, and the basis therefor. Any request for oral hearing must state specifically the evidence that would be presented, the reason why the evidence is material to determine the merits of the proceeding, why oral hearing with cross-examination is necessary to bring it out,

[55] In addition, the operational differences between the low power service and full service television stations should make it unnecessary to investigate in hearing many of the issues raised in petitions to deny that we have designated in full service hearings in the past. For example, issues related to ascertainment and programming will not be relevant. Also, it rarely will be necessary to explore economic of financial issues, in light of the self-certification format of the application form. In addition, the fact that strict enforcement of the twelve-month period for construction will provide conclusive demonstration of whether an applicant's finances were sufficient makes it less important to consider this issue in hearing. Our general policy in favor of permitting free transferability of stations to some extent reduces the general efficacy of painstaking scrutiny of applications in the hearing process. Finally, as we have indicated, we believe that one principal way to expedite the hearing process is to discourage the filing of pleadings on issues that, taken alone, would be less than dispositive of the challenged application. We envision relatively simple designation orders, including only unresolved substantial and material issues of fact necessary to the disposition of the applications and the comparative criteria.

[56] Pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), mutually exclusive applications for the same frequency are entitled to simultaneous consideration before a grant of any of the applications. *See*, Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945). The Commission traditionally has afforded mutually exclusive applicants a "trial-type" evidentiary hearing and has established an elaborate set of procedural rules governing the process. *See*, 47 CFR 1.201–1.364.

[57] *See*, 5 U.S.C. 556(d); 47 CFR 1.248(d).

[58] *See*, 5 U.S.C. 556(b); 47 CFR 1.241(a). It is within the Commission's discretion to implement largely paper hearings pursuant to Section 309(e) with the Commission presiding, under the Administrative Procedure Act. *Also see*, WJR v. FCC, 337 U.S. 265, 275 (1949); Bell Telephone Company of Pennsylvania v. FCC, 503 F. 2d 1250 (3d Cir. 1974); *cert. denied* AT&T v. FCC, 422 U.S.C. 1026, *reh. denied* 423 U.S. 886 (1975); RCA Global Communications, Inc. v. FCC 559 F. 2d 881 (2d Cir. 1977), *reh.* 563 F. 2d 1, *appeal after remand* 574 F. 2d 727 (1978). Indeed, it virtually is essential that we utilize the abbreviated hearing procedures outlined herein, with only a limited right for oral testimony, at the discretion of the Commission, in light of the concomitant savings of time and resources, both for applicants and the Commission itself.

[59] Under our current procedures, the "A" list invites both petitions to deny any competing applications. Pursuant to the modified procedures set forth herein, filing of all petitions to deny will be delayed until issuance of the "B" list, which will identify all non-mutually exclusive applications, as well as mutually exclusive groups.

[60] The direct case is to be limited to 50 pages in length including any index to subject matter, argument, appendices, and other attachments. An original and one (1) copy of the pleading should be filed. The pleading must be typewritten, double-spaced, on 8½ by 11 inch paper.

[61] The rebuttal case is to be limited to 40 pages in length, including any index to subject matter, argument, appendices, and other attachments. An original and one (1) copy of the pleading should be filed. The pleading must be typewritten, double-spaced, on 8½ by 11 inch paper.

[62] The surrebuttal case must be limited to 30 pages in length, including any index to subject matter, argument, appendices, and other attachments. An original and one (1) copy of the pleading should be filed. The pleading must be typewritten, double-spaced, on 8½ by 11 inch paper.

and what evidence already in the record would be contravened (with specific identification of the pleading and the page number). All material statements contained in any pleading must be verified by the person offering the statement—*i.e.*, the facts must be sworn to as true and within the specific knowledge of the person offering the statement.

70. Within 30 days after the filing of the surrebuttal case, each applicant must file a proposed decision.[63] This decision must set forth such information as the Commission would find necessary to make its decision, including a brief summary of the facts, proposed findings (including findings on all allegations raised in any petition to deny), and ultimate conclusions.

71. The Commission will attempt to dispose of virtually all low power comparative cases under the paper hearing procedure set forth herein. The Commission, of course, will review requests for oral testimony at the same time the staff recommended decision is submitted for consideration. However, oral testimony will be ordered only where it is shown that the paper proceeding alone will prejudice a party;[64] where a substantial and material issue of decisional significance cannot adequately be resolved without oral hearing;[65] or where designation of the matter for oral testimony would be otherwise required by the public interest.[66] Denial of an oral hearing request will not be made in a separate decision. The request will be deemed denied where the Commission decides the case on the basis of all the pleadings submitted.

72. Should the Commission determine that oral testimony is necessary, it will order that the particular issue or issues be heard by an Administrative Law Judge. The issue or issues to be tried will be set forth in an interlocutory order, which also will set a pre-hearing conference, to establish a discovery and trial schedule. At this stage, the applicants may avail themselves of the discovery procedures normally available in adjudication cases, *but not before*. After the Administrative Law Judge issues the initial decision on the issue(s) being tried, it may be appealed directly to the Commission.

[63] The proposed decision must be limited to 30 pages in length. An original and one (1) copy of the decision must be filed. The decision must be typewritten on 8½ by 11 inch paper. However, it may be single-spaced.

[64] *See*, Section 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d).

[65] *See*, Section 309(e) of the Communications Act, 47 U.S.C. 309(e).

[66] *Id.*

73. With these procedures and the cooperation of applicants, we believe that most low power proceedings will be resolved on the basis of entirely written submissions within reasonable time frames. With this goal in mind, we shall require strict compliance with procedural dates. Applicants that fail to adhere to established procedural dates or that, in any way, seek to delay resolution of these hearings are subject to having their applications dismissed for failure to prosecute. *See*, § 73.3568(b) of the rules. We encourage expedition, and we are concentrating staff resources with an eye to facilitating low power application processing; nevertheless, mutually exclusive applications that require hearings inevitably will suffer delay. We anticipate that this knowledge itself will act as an incentive to private settlements.

74. *Comparative Factors.* In the interest of administrative simplicity and efficiency, as well as to promote particular service objectives, the Notice proposed three tentative comparative criteria, for which an applicant either qualifies or does not, without more. In order to refine these proposals, we explicitly sought comments in this area. We take the wide range of commentary received to be an indication of the controversial nature of our proposal. Some parties praise the comparative factors as proposed. Others suggest various refinements on the up-or-down nature of the preferences themselves, *e.g.*, consideration of factors such as participation of ownership in management, program proposals, past broadcast record and civic involvement, as part of the minority ownership preference. Still others suggest preference systems more elaborate than the traditional comparative hearing criteria. *See*, Policy Statement on Comparative Broadcast Hearings, 1 F.C.C. 2d 393 (1965). Finally, there are those who advocate that nothing short of traditional hearings using traditional comparative criteria are permitted under the Communications Act.

75. The comments raise problems with two of the preferences proposed. Commenters generally disapprove the preference to be afforded to the first-filed complete and sufficient application. They argue that this preference has little relevance to the quality of service that may be expected from an applicant. The first come, first served preference initially was proposed for two reasons: We wished to encourage complete and sufficient applications; and we believed that in a new, uncharted service there might be a need to provide an incentive for parties to use the previously fallow spectrum. The avalanche of interim applications belied the necessity of a measure to this end, however. We still wish to encourage complete and sufficient applications. However, we are convinced that we can better do this via strict adherence to our policy of returning deficient applications, without regard to any cut-off protection that might be considered to have vested. We shall adopt the single standard for acceptance of low power applications set out in §§ 22.31(b)(2) and 22.32(b)(1) of the rules and we shall require all applicants to meet that standard. We therefore shall not accord any preferential treatment to first-filed applications.[67]

76. On examination of the record, we perceive confusion about the notion of noncommercial or public low power stations. Noncommercial low power service is defined only in the context of the preference proposed for applicants that are nonprofit entities proposing noncommercial service for the public. There are no other rules proposed that would distinguish the character or operation of a noncommercial low power station from its commercial counterparts. Among the commenters, contradictory assumptions regarding noncommercial or public low power stations appear to be operative.[68]

77. This issue previously has not arisen in the translator service, because the rules limit translators to rebroadcast only, and they therefore fully track the mode of operation of the primary, full service station, whether noncommercial under § 73.621 or commercial.[69] We

[67] Elimination of this proposed preference will not prejudice current applicants, because it was not to be effective for applications filed during the pendency of the rule making. *See*, note 48, *supra*.

[68] To receive funding from the Corporation for Public Broadcasting, a station must be both nonprofit and noncommercial, as defined in Section 397(b) of the Communications Act. A noncommercial, educational television station licensee, under § 73.621 of the Commission's rules, likewise must be nonprofit, noncommercial and have an educational or cultural purpose, or be a municipality with no independently constituted educational entity. In the FM and TV services, compliance with this rule is a conditions of operation on a channel reserved for noncommercial use. In the AM service, where there is no table of assignments, a station may be noncommercial, educational and comply with the above definition, but there also may be stations operated by nonprofit entities that are not educational in nature.

[69] Under a 1971 policy, any applicant, noncommercial or otherwise, proposing rebroadcast of noncommercial, educational programming, has priority over a commercial translator operating on a reserved channel in the Television Table of Assignments. *See*, 23 RR 2d 1504, 1508 (1971). We are eliminating this policy as part of our removal of all distinctions in translator or low power status arising from operation on channels in the Table. *See*, paragraph 28, *supra*.

perceive several reasons for not imposing strict regulations regarding noncommercial operation of low power stations. With respect to all aspects except technical ones, we envision the low power service as an essentially unregulated service. The Notice specifically stated that the mode of support, including free and pay programming in any proportions, would be left to the licensees' judgment of what the marketplace requires. In light of the secondary status, the absence of a prohibition upon the free transfer of stations and the as yet undetermined viability of low power stations, we believe that the decision whether or not to air commercials, and in what amounts, should be left to the licensee's discretion.[70] The Commission will not concern itself with this matter, nor with the corporate or organizational structure of an applicant. Whether a low power applicant or licensee is noncommercial or not-for-profit is a decision properly made by the licensee on the basis of applicable corporate and tax law, pertinent requirements of the Corporation for Public Broadcasting and perceived characteristics of the market in which it proposes to operate. Therefore, § 73.621 will not apply to low power stations.

78. In light of the above, we are not going to adopt the three preferences proposed.[71] We are encouraged by many commenters to expand the comparative criteria proposed in the Notice of Proposed Rule Making, to include for example, female ownership, free versus pay service, local ownership, hours of operation, rebroadcast versus origination, financial capacity, integration of ownership and management, locally-oriented programming and/or local program production. While some of these characteristics of service might be a basis for preference in particular cases or in particular areas, it is not clear that they generally should be dispositive in every case, as they would be if they operated as perference points. In many cases, the nature of the particular market proposed to be served should dictate the characteristics of service that might be considered desirable. In a secondary service, particularly one where no prohibition on "trafficking" will be imposed, (*see*, paragraphs 93 and 94, *infra*), meticulous comparative evaluation on the basis of an elaborate system of preferences easily could turn out to be a pointless, though time-consuming, exercise. Additionally, in an untested service, we cannot reliably predict what characteristics ultimately will prove desirable in a license proposal, and therefore should receive comparative perference.

79. We believe that the better course is to distill the issues that currently may be considered in broadcast application hearings to a modicum that should prove relevant for the low power service and manageable in a largely paper hearing. These include issues relating to basic qualifications as well as comparision of competing applicants. As stated above (*see*, paragraphs 60 through 62) we do not believe that Section 307(b) comparisons among competing low power applications is a worthwhile endeavor, because the goal of fair and efficient spectrum allocation already has been anticipated via the Tables of Assignments, and we can expect to accomplish little more by applying such analysis to a secondary service that has no required coverage area nor local programming requirement. As indicated in note 47, above, the application form has been amended to provide for certification of financial qualification, to conform to our practice with other broadcast applications. *See*, Appendix B. The citizenship requirement is straightforward enough. Because the Commission currently has the character requirement under scrutiny in Gen. Docket No. 81-500 (*see*, Notice of Inquiry, 47 FR 40899 (August 13, 1981)), we are not modifying this qualification for low power applications, but shall await the outcome of that Inquiry.

80. Of the comparative issues, we shall retain the criterion enunciated in our 1965 Policy Statement, *supra*, that we consider most relevant in the low power context, diversification of control of the media of mass communications. Along with this, we shall afford merit to applicants that are over 50 percent minority owned. We shall not consider full-time participation in station operation by owners because, in many instances, the functional characteristics of low power stations will not require such extensive involvement in the operations of a particular station by any individual, whether owner or owner's employee. Nor shall we consider program proposals, because we believe low power licensees should be fully responsive to marketplace considerations, without the Commission second-guessing their decisions. These issues are designated in full service comparative hearings only on a special showing, and they rarely are dispositive of the case. *See*, Chapman Radio and Television Co., et al., 7 F.C.C. 2d 213, 215 (1967); Flint Family Radio, Inc., et al., 69 F.C.C. 2d 38, 42-46 (1977), George E. Cameron, Jr. Communications, 71 F.C.C. 2d 460, 464-466 (1979). Additionally, comparative advantage generally is afforded to program proposals on the basis of local or public service programming. We are not requiring local programming by low power licensees, because we cannot determine across the board that this would be in the public interest in every market. Therefore, we would not want to afford across-the-board comparative preference for this. We are not going to consider comparative coverage, for reasons similar to those on which we based our decision not to make Section 307(b) considerations dispositive in individual cases. *See*, paragraphs 60 through 63, *supra*. We are not considering character in the comparative context, beyond the initial qualification determination (*see*, paragraph 74, *supra*). We also are not going to consider past broadcast record comparatively; because so many applicants are new entrants to the telecommunications industry, a result that we do not discourage, it could disadvantage them to accord merit or demerit that only could be garnered by applicants with previous broadcast experience. Both to facilitate expedition in the hearing process and, more importantly, because we believe that low power stations will be very directly responsive to audience needs and interests, we find it in the public interest to limit the comparative issues to diversification and minority ownership. Moreover, we believe that this combination of criteria can further a primary objective for the low power service, facilitating entry by groups and individuals that are new to the broadcast industry.

[70] The Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, *supra*, mandated the establishment of the Temporary Commission on Alternative Financing for Public Telecommunications, whose mission it is to identify additional sources of funding to maintain and enhance public telecommunication services. The Temporary Commission was given specific authorization to conduct an Advertising Demonstration Project to test the desirability and revenue potential of advertising on public stations. In addition, other amendments to the Public Broadcasting Act (*see e.g.*, Section 399) specifically authorize commercial and commercial-like activities by public stations. In light of these amendments and other factors that are forcing public stations to become increasingly self-sufficient financially, we believe that those broadcasting entities that choose to operate on a non-profit basis should be given the greatest possible flexibility in raising operating revenue.

[71] We do, however, reaffirm the continuing vitality and usefulness of our minority ownership policy, as its intent was expressed in the comparative preference proposed for minority low power applicants. We shall continue to award a comparative merit on this basis in the comparative hearing. *See also*, Policy Statement on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d 979 (1978).

81. *Low Power License Renewal.* As proposed in the Notice, we are not now modifying the standards governing contested and comparative renewals. *See*, Notice, 45 FR at 69189 n. 60. Contested renewals will be handled in the manner that full service stations are at present. The license term for translators and low power stations will be five years, in accordance with the amendment to § 73.1020(a) contained in the *Order*, FCC 81–497 (adopted October 30, 1981; released November 2, 1981). An abbreviated renewal form will be used, in conformity with the Commission's practice for full service stations. *See*, Revision of Application for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensee, 46 FR 26236 (published May 11, 1981).

82. *Modifications to the License.* Sections 73.3572(a) and 74.751 currently require formal application for various equipment changes, channel changes, power changes, transmitter location changes and/or change in the primary station being rebroadcast. We are modifying this rule to include facilities or other modifications that would have a significantly greater or different preclusive effect than the existing authorization, including power or frequency change, certain equipment or other engineering modification and change in transmitter location (present § 74.751(b) (1–5), (f) and (c)). Applications for such modifications will be treated as applications for major modification and be placed on "A" cut-off lists, subject to competing applications and petitions to deny. Transfer of ownership or control will not be considered a major modification, but applications for transfer will be subject to petitions to deny. Present or future translator licensees wishing to include low power features must notify the Commission in a manner that indicates an understanding of the additional rules with which they must comply, *e.g.*, the operator requirements. Those wishing to change the primary station being retransmitted (present § 74.751(b)(6)) will be subject only to a notification requirement.

## VII. Low Power Station Operation

83. The Commission's ownership rules are informed by two related policies. The prohibitions upon multiple ownership at once are designed to encourage diversity of voices in the marketplace of ideas and to foster competition by preventing undue concentration of control of telecommunications facilities. The present rules are structured as barriers to entry imposed on proscribed entities in proscribed markets.[72] In a new service, whose viability is unknown and probable competitive impact on other telecommunications services is believed not to be significant cannot yet accurately be predicted, we must exercise no less care to assure that we do not create entry barriers that fetter the development of the service. Ideally, the service effectively will compete with other video services and thus stimulate their responsiveness to market forces, and low power stations will compete with each other in a manner that promotes superior service within the low power service itself.

84. Ownership of translators did not raise the issue of diversity of voices, translators being repeater stations only. In the present ownership regulations, translators are regarded as mere extensions of the primary station and not as new voices. The present rules regarding translator ownership are:

(1) Commercial television stations may not own or financially support VHF translators in distant markets not operating on assigned channels. Section 74.732(e)(1) and (2).

(2) Cable systems may not own translators licensed to the community in which the cable system is franchised. Section 76.501(a)(3).

(3) No VHF translators may be licensed in areas receiving satisfactory service from UHF television stations or UHF translators, except where particular circumstances warrant. Section 74.732(d).

(4) Translators operating at maximum power on assigned channels may be authorized only to existing licensees of television stations, unless non-licensee applicants demonstrate the technical capability to operate them. Section 74.732(i).

The *Notice* proposed deletion of the first, third and fourth rules cited above. It also proposed that cable systems be permitted to own translators, but no originating or subscription low power stations, within their franchise areas. Few commenters take issue with deletion of §§ 74.732(e)(1) and (2), 74.732(d) and 74.732(i), affirming our belief that it is in the public interest to do so. Cable/low power cross ownership is discussed in greater detail, *infra*.

85. Several additional ownership restrictions were proposed for low power stations, but not translators, on the theory that low power stations should be treated as "voices" in the first amendment sense:

(1) A *duopoly* rule, which prohibits commonly-owned stations in the *same service* with overlapping contours.

(2) A *one-to-a-market* rule, which prohibits commonly-owned stations *in different services* with overlapping contours.

(3) The three national networks (*see*, § 73.658(l)(1)(v)) would not be permitted to own any low power stations.

The duopoly and one-to-a-market rules would apply to noncommercial, as well as commercial, low power stations. No newspaper/low power cross ownership rule was proposed. Nor was a limit proposed on the maximum number of low power stations permitted in common ownership.[73] No rule restricting regional concentration of control was proposed.

86. As the comment summary reveals, there are comments virtually on all sides of the ownership issues, with public interest groups generally supporting restrictions and broadcasters generally opposing restrictions. Citizens and consumer groups and other proponents of ownership restrictions tend to characterize the proposed ownership restrictions as devices designed to promote diversity and competition. Those opposing restrictions consider them unnecessary barriers to entry into the low power service. We find that in today's telecommunications environment in which there are an increasing number of avenues on which to communicate, there may be less need for structural restrictions designed to facilitate diverse entrants. That is, the increasing availability of other technologies for telecommunications itself is providing additional modes of access that reduce the efficacy of the scarcity rationale. These general arguments may be applied to each of the rules proposed.

87. *Duopoly rule.* The proposed duopoly rule is opposed particularly by those wishing to operate multiple-channel subscription systems via low power. They argue that STV may be distinguished from true origination on low power STV systems that merely retransmit terrestrial microwave or

[72] It is our intention presently to re-examine in a separate proceeding the efficacy of the Commission's ownership rules and policies in light of the conditions that prevail in today's telecommunications marketplace. Until such time as that is accomplished with respect to all broadcast services, we shall endeavor to enact flexible ownership policies for the low power service that are sensitive to the environment in which the service will develop. The low power rules of course would be subject to modification, should they deviate significantly from future revisions in our overall ownership policy.

[73] A limit of 15 stations in common ownership was imposed during the pendency of the rule making only. *See*, Memorandum Opinion and Order, 46 FR 10728 (published February 4, 1981).

satellite feed; therefore, low power STV need not be considered a separate "voice" for multiple ownership purposes. Also, they contend that only with multiple channel capacity can low power STV compete effectively with cable.[74] A number of comments advocate waiver of the duopoly restriction in rural areas, at least for low power STV, on the grounds that spectrum is less scarce in rural areas and viability also is less certain.

88. The Justice Department is among those who believe that a duopoly rule promotes competition.[75] The worst-case scenario is that, in the absence of a duopoly prohibition, one entity will gain control of all available low power outlets in a community, when there are others who would, if they could obtain licenses, provide greater diversity. On the other hand, it is possible to envision more or less rural markets where only one entrepreneur would be willing to operate, using more than one channel, on a subscription basis or otherwise; if he is permitted to operate on only one channel, the other availabilities may lie fallow into the indefinite future, or he will choose not to initiate a single-channel operation, and the public will be deprived of service altogether. The irony of this situation is that it is precisely in markets that currently have the least service, where the viability of low power is the least certain, that have the greatest need for low power. On balance, we believe the public best may be served if we do not impose a duopoly restriction in the low power service. Therefore, we shall not do so.

89. *One-to-a-market rule.* Many commenters oppose a one-to-a-market rule, especially in the radio/low power context. Convincing arguments are made that local radio licensees already have broadcast expertise, already may have access to local and or national news services, already are familiar with the local community and may have the financial wherewithal to cross subsidize a low power operation with revenues from other broadcast properties. We agree that ownership rules that effectively restrict the entry of those with prior expertise or financial capacity can work to the detriment of a new service. Also, there may be significant economies in same-market ownership of a low power station and a broadcast station in another service. We note that the full service television/low power cross ownership situation closely resembles a duopoly situation, depending upon the nature of the low power operation, *i.e.*, a free full service station and STV low power station that merely broadcasts satellite feed actually may be quite different and appeal to different audiences. While the proponents of a one-to-a-market rule argue that it will have the effect of promoting diversity and competition, we find the countervailing arguments in favor of free entry persuasive, especially in the context of a new service whose viability is undetermined. Moreover, where there are competing applicants, the comparative process will favor diversification. In a comparative situation new entrants will be favored, while current licensees will not be precluded from areas where new entrants may not wish to propose service.

90. *Network ownership of low power stations.* The three commercial networks express opposition to the prohibition on their ownership of low power stations that was proposed. They argue that their expertise can be put to good use in ensuring the viability of the fledgling service and that they are in a favorable position to develop and introduce new technological advances via low power. They dispute the contention of the Justice Department that network ownership of low power stations is highly anticompetitive and will preclude new entrants from the field. The networks cite in support of their position the Network Inquiry Staff Report's conclusion that group owners have an incentive to air diverse programming on co-owned stations, to maximize audience, rather than airing similar programming that could have the effect of fragmenting audience among several co-owned stations. We do not have sufficient evidence of the magnitude of the anticompetitive potential of network ownership of low power stations to justify implementing the rule proposed at this time. Both for this reason, and because we believe that the networks can, as they claim, contribute to the development of the fledgling low power service, we shall not prohibit network ownership of low power stations.

91. *Multiple ownership of low power stations.* A number of commenters advocate a limit on the number of low power stations, on diversity and competition grounds. We are encouraged to impose limits of between five and 25 on the number of stations the Commission would permit to a common owner; however, we are afforded no convincing reason, other than general administrative efficiency in application processing, for the choice of any particular number. Others point out that there are economies of scale in multiple ownership that may be essential to viability in the low power service. As stated in paragraph 78, above, the Commission's ownership rules have a dual purpose: prevention of undue concentration and promotion of diversity. The over 6,000 applications currently on file evince an array of diverse kinds of applicants and program proposals. And, as we stated in the *Notice:* "The concern for anticompetitive effects is lessened where the stations are both secondary and inherently limited in their coverage potential." 45 FR at 69184. The comments do not persuade us to the contrary. That is, we regard low power as neither a significant and general enough competitive threat to other broadcast services nor sufficiently distinct as a market in itself that monopolization should be considered a serious or dangerous enough possibility to warrant structural restraints on ownership. Should a real threat of inappropriate economic concentration arise as the service develops, it can be addressed via antitrust enforcement or by the Commission in appropriate proceedings.

92. We are told by some commenters that a ceiling on multiple ownership would prevent low power network formation. We believe, however, that program-oriented networking of stations can occur other than via common ownership of numerous stations. Affiliation for program distribution or syndication is an alternative. Also, a series of satellite or terrestrial microwave interconnected translators may be used to relay programming originated by one low power station. This suggests that common ownership of a number of low power stations is not necessary to the provision of common programming. However, with a network consisting on commonly-owned low

[74] We perceive a difficulty in justifying a different ownership rule for STV low power stations. It is unlikely that they will operate on a subscription basis during all their hours of operation, although we are not adopting rules prohibiting this. When STV low power stations are operating in a free mode, they are indistinguishable from other low power stations, and we encourage some local origination on each station with the authority to do so.

[75] The comments afford two contradictory economic theories that predict the behavior of common owners of stations in the same service in the same market. There may be an incentive not to actualize fully the potential of one commonly-owned facility, in order not to draw from the audience of the other. On the other hand, in a more formated service, an owner might attempt to attract different audiences with different kinds of programming on each commonly-owned station, and to add to the total audience without fragmenting the audience of either station. The Commission's Network Inquiry Staff Report, New Television Networks: Entry, Jurisdiction, Ownership and Regulation, October, 1980, describes such a result. The nature of the of the particular market would seem to be essential to realistic prediction of the whether in fact this will occur.

power stations, as opposed to translators, the potential exists for each station to originate some programming targeted to discrete local or regional interests. This is a result that we would encourage. Additionally, there may be economies of scale in common ownership of a number of low power stations other than those related to program acquisition or distribution. It is our present belief that the potential economic savings of multiple ownership far outweigh a remote potential of undue concentration. For this reason, we are not imposing a ceiling on the number of low power stations that may be owned in common. We also shall not impose a rule relating to regional concentration of control.

93. *Low power/cable cross ownership.* The cable/low power cross ownership issue is treated similarly in the comments to cross ownership of low power and other broadcast services. The Justice Department is among those that believe that a cable system owning a low power station in its franchise area has an incentive not to maximize the potential of the low power station, because it would compete with the cable system. Other commenters argue that there may be rural areas where the cable operator is the sole potential low power licensee, and that in such cases diversity will be enhanced, not inhibited by cable/low power cross ownership.[76] We note that issues affecting cable cross ownership are under separate consideration.[77] Without prejudging any subsequent proceeding involving the full service/cable cross ownership rules, we believe that in the low power service, the possible economies of scale, including those relating to program distribution, favor our permitting cable/low power cross ownership. Therefore, we believe that there should be no restraints on cable/translator cross ownership.

94. *Summary.* As the preceding discussion indicates, the primary considerations that inform our deliberations on all aspects of the ownership policy are that low power may provide an opportunity for new entrants into the telecommunications industry at lower cost than would be incurred in starting full service stations or cable systems. Because of both the low cost and the comparative criterion favoring diversification, even absent ownership restrictions, it is unlikely that new entrants will be precluded by existing broadcasters. Additionally, in some areas, the development of the service itself might be fettered irretrievably, were we to impose inviolable rules that eliminate experienced broadcasters with the potential to make the service viable. This is so particularly in markets where an owner of other broadcast properties might be the sole potential entrant. Furthermore, NTIA points out in comments that an alternative to imposition of ownership rules that accommodate the latter concern is the adoption of policies that apply in the comparative situation. That is, ownership of other local or distant outlets would not be considered when no one but a sole applicant is applying for the frequency; but only when there are competing applications. NTIA suggests that in such cases a comparative demerit or disadvantage be given to applicants that already own facilities, in local or distant markets. This approach resembles that taken in the traditional comparative hearing context, where diversification of ownership is part of the standard comparative issue among competing applicants, and we are continuing to apply that criterion in the low power service.

95. In summary, we are adopting no ownership restrictions *per se* for the low power service. This approach is in accord with our general belief that free entry into and out of the low power industry will best serve potential applicants and also the public. Low power stations have limited coverage potential, which effectively limits the area from which advertising support may be garnered; their secondary status poses the possibility that they might be required to alter facilities or cease operation at any time; the majority of channel availabilities are in rural areas, where viability generally is less certain than in urbanized areas. We believe these factors augur in favor of permitting experienced participants in the market to pioneer the low power service and outweigh our traditional concerns regarding multiple and cross-ownership. We do not wish to discourage new entrants, and we note again that the comparative criterion favoring diversification will inure to their benefit. However, we also recognize the important role those with proven track records may play in the development of the service, particularly in localities that individuals inexperienced in the market may perceive as posing too great an economic risk to warrant entry.

## VIII. Low Power Station Operation

96. *Construction Permit.* Section 73.3598(b) will be applied to low power, and the Commission will strictly enforce the requirement that construction must be completed and the station be operational within twelve months of issuance of the authorization, or the construction permit must be turned back to the Commission. We envision no extensions of time with regard to this rule, the only possible exception being documented evidence of unforeseen and unavoidable delay in delivery of equipment that was contracted for properly. We do not believe this rule is overly stringent, in light of the relatively minimal burdens of construction of low power stations, as compared with full service stations. Section 73.3597 (e) and (f), which prohibits payments upon assignment or transfer or a construction permit from exceeding reimbursement of the transferor's expenses and limits the equity interest that a transferor or assignor may retain in the permittee to a proportion equal to the transferor's capital contribution, until the station commences program test operations, also will be strictly applied in the low power context, as with the other broadcast services. This appears to be an area in which Sections 301 and 304 of the Communications Act, as well as general public interest concerns, dictate that regulation should be continued. Sections 301 and 304 provide, *inter alia*, that licenses issued by the Commission convey no property interest. Allowing profit to be obtained upon transfer of a construction permit prior to commencement of program test operations appears to violate this prohibition. The permittee would appear to have nothing to convey for profit beyond the mere expectation of future profits that appends to the permit itself. Also, implicit in the filing of an application is an intent to construct a station and commence service. To maintain the integrity of the Commission's processes and to encourage the expeditious introduction

[76] We believe that this would depend on the nature of the particular market: where a cable operator has little hope of garnering additional subscribers, there may be an incentive to maximize total audience with a low power operation. On the other hand, where there is head-to-head competition between cable and low power for audience, the service affording the lowest marginal cost per viewer, or greatest profit margin per viewer, may be favored by a common owner.

[77] *See, Staff Report, FCC Policy on Cable Cross Ownership,* November, 1981. We believe that permitting cable/low power cross ownership could provide valuable data for any proceeding that is initiated regarding cable cross ownership, in general. We received little commentary regarding the proposed deletion of § 76.501(a)(3), which prohibits cable/translator cross ownership. We note that, where there are competing applicants for a translator, one a cable operator and one unaffiliated, the comparative criteria would favor the unaffiliated applicant. As the Staff Report pointed out in paragraph 362, this is the only area of real concern.

of new service in an environment in which free transferability of stations is permitted, we believe it is in the public interest that § 73.3597 (e) and (f) be maintained for the low power service.

97. *License.* We received one comment seeking that the format for the call sign for low power stations be changed to a five-letter one resembling the four-letter call signs assigned to full service stations. We believe that the confusion that is likely to result from such a change, as well as the administrative inconvenience of carrying it out, are not justified by the result. Therefore, we shall continue to assign low power call signs as we assign translator call signs.

98. We proposed in the Notice that § 73.3597 (a) through (d), the "three year rule" not apply to low power stations. We opined that permitting free transferability of stations would encourage entrants into the industry, as well as provide a useful example for reference in other contexts. Indeed, we recently have sought comments on a proposal to do away with the "trafficking" issue altogether, on the grounds that the rule no longer serves a useful purpose in the present telecommunications environment. See, Notice of Proposed Rule Making, Amendment of § 73.3597 of the Commission's rules, supra.

99. The comments on the proposal not to impose an anti-"trafficking" rule in the low power service were divided. The Justice Department supports a policy facilitating ready entry into and exit from the market. The principal objection to the absence of a "trafficking" prohibition is voiced by groups that would hope to garner preference in the competition for licenses. They complain that the preference system easily can be defeated, unless the Commission imposes either a required holding period for the original licensee, or a condition that the station be transferred only to another preferred entity. We do not gain say the cogency of this argument. However, it rests on an incorrect assumption about the purpose of a system of preferences. It is the statutory duty of the Commission to allocate the use of broadcast spectrum in a manner that best serves the public interest. This may be accomplished via comparative hearing, comparative preferences or lottery. However, requiring an unwilling licensee to retain an unwanted broadcast property hardly can result in the best service to the public. The Commission ought not to second guess private decisions that are made in response to marketplace forces, but should permit stations to be put to the highest valued use in the marketplace. Therefore, we shall not impose a "three year rule" in the low power service. We shall, however, impose a one-year holding period on new low power licenses in order to maintain the integrity of the Commission's comparative processes in situations where the constuction permit was awarded by virture of a comparative preference.

100. *Station Management.* The Commission's rules and policies governing Equal Opportunity in Employment will apply to all low power stations. Reporting requirements will apply to those with sufficient employment levels to trigger the requirements. *See,* § 73.2080 of the Rules, which imposes a reporting requirement on all stations with five or more full-time employees. While some commenters argued forcefully to the contrary, we continue to believe that Sections 318 and 325(a) of the Communications Act require that all originating low power stations have an operator holding at least a Restricted Radio Telephone Operator's Permit in continuous attendance during local originations. It appears that some parties misunderstood the nature of the requirements proposed, for a number of comments argue that a low power station merely retransmitting terrestrial microwave or satellite feed should not require a full-time operator. We proposed that, during microwave-fed retransmissions, the statutory operator requirement would be fulfilled in the same manner as the current requirement for all translators employing modulators: observation of the off-air signal for ten continuous minutes each day on a conventional television receiver. In cases of local origination, the operator must be in continuous attendance at the transmitter site, at a remote control point or at the program source. These operator requirements are neither extraordinary nor overly burdensome, and we shall maintain them until and unless they are made unnecessary by legislative change.

101. *Low Power Station Maintenance.* We shall require translator and low power licensees to comply with §§ 74.752 (c), (d) and (e) and also to measure the carrier frequencies of their output channels at least once a year, and as often as necessary to assure compliance with the frequency tolerance standards. *See,* paragraph 39, *supra.* The aural carrier frequency of stations employing modulators also must be measured, but we would permit factory measurement of the modulation characteristics. Proof of performance may be certified by a holder of a General Operator's permit.[78] Maintenance logs must be kept by all translator and low power station licensees. *See,* § 74.781.

## IX. Programming

102. *Station Identification.* We shall require low power stations, during periods of program origination, to comply with the station identification requirements of full service broadcast stations. *See,* § 73.1201. However, we shall continue to allow translators, and low power stations operating in a rebroadcast mode, to be identified in accordance with the current provisions of § 74.783.

103. We believe that low power stations should be subject to a minimum of program-related regulations, so that they might be fully responsive to marketplace conditions. We received comments urging a panoply of programming rules, some even more stringent than those governing full service stations. We do believe this kind of governmental surveillance is neither necessary nor appropriate. In many instances, particularly in rural or remote areas, low power stations will be set up specifically to fill local needs. In areas where the marketplace demands coverage of local events of common interest, licensees can be expected to provide it. In some urban markets, unserved ethnic enclaves may be targeted for low power service. But in a major market that already receives adequate local coverage from several full service stations, a low power licensee may discover and attempt to fill a need for additional national news, sports or entertainment programming. Such judgments properly are left to licensees; it is in their interest, and the public's, to garner audience by attempting to serve unmet needs.

104. The principal structural limit we shall impose on low power stations with respect to programming is that the programming aired must comply with the definition of "broadcast" in the Communications Act and § 73.641(b) of the Commission's rules. Where a potential use of radio frequencies has not yet been authorized for broadcast use, it will not be permitted via low power. *See, e.g.,* Notice of Proposed Rule Making, Amendment of Part 73 to Authorize Transmission of Teletext by TV Stations, BC Docket No. 81–741, 46 FR 60851 (published December 14, 1981).

[78] The General Radiotelephone Operator's license now is issued in place of both First and Second Class licenses. *See, Report and Order,* Docket No. 20817, Radio Operator Licensing Program, 46 FR 35450 (published July 8, 1981).

Nor may low power stations be used for private communications, a service provided more suitably by point-to-point private and common carrier services. *See, e.g.*, Report and Order, Docket No. 19493, Amendment of Parts 1, 2, 21 and 43 of the Commission's rules and regulations to Provide for Licensing and Regulation of Common Carrier Radio Stations in the multipoint Distribution Service, 45 F.C.C. 2d 616 (1974). Finally, while we repeatedly have acknowledged the difficulty of adhering strictly to any definition by which translators and low power stations may be distinguished, we continue to believe that the distinction is best framed in terms of rebroadcast versus origination. Under § 74.784 of the Commission's rules, rebroadcast is simultaneous retransmission of the signal of an existing TV broadcast station. Anything other than this is, by definition, origination, for which a low power license is required. Whether or not the low power licensee engages in any local origination, broadcasts a network feed, offers a subscription service, etc., the potential to do so defines the station.

105. *Statutory requirements.* As we have indicated, the statutory prohibitions on the broadcast of obscene material, plugola, payola and lotteries apply to the low power service. *See,* 18 U.S.C. 1304, 1464, Section 303(m)(D) of the Communications Act of 1934, as amended, and § 73.1211 of the Commission's rules. 47 CFR 73.1211 (1980). Our rule requiring fairness in licensee-conducted contests also will apply. We also shall continue to impose Fairness Doctrine obligations in the low power service only to an extent consonant with a station's origination capacity. If the Commission receives a complaint related to Part I of the Fairness Doctrine, the station may meet it by showing that it aired responsive issue-oriented programming submitted in a mode compatible with the station's origination equipment. Likewise, to meet its obligation under Part II of the Fairness Doctrine, the station must make time available, with or without sponsorship, to responsive issue-oriented programming submitted in a format compatible with the station's origination equipment. The fairness obligation would be on a sliding scale, depending upon the direct involvement of the station management in program production and decisions. Similarly, Sections 312(a)(7) and (f) and 315 will apply to low power stations, to the extent that their origination capacity permits. *See,* Alaska Public Broadcasting Commission, 82 F.C.C. 2d 220 (1980). The reasonable requests of legally qualified candidates for federal elective office who seek to purchase reasonable amounts of time or respond to their opponents' messages must be acceded to, so long as they provide program material that is compatible with the station's origination equipment. See, Public Notice, Acceptance of Political Advertising by UHF Translator Licensees, 62 F.C.C. 2d 896 (1976). Without prejudging issues in our pending rule making on DBS, we note that the hybrid nature of subscription television, which suggest that statutory provisions for broadcast stations properly may not apply to STV stations, has been raised in the DBS proceeding. *See,* note 17, *supra.* In light of the fact that numerous low power applicants envision subscription service, the resolution of that issue in the DBS proceeding may have a direct bearing on our present conclusions regarding the applicability of these statutory provision to low power STV stations.

106. We are not imposing a formal ascertainment obligation on low power stations. It is in the nature of low power stations to be familiar with and responsive to the needs of the viewers they serve. Formalizing this would be needless. To be viable in the highly competitive telecommuncations marketplace, these small stations will have to react with sensitivity to the needs and desires of their markets. Similarly, we are leaving decisions regarding commercialization and nonentertainment programming to the licensees' discretion. Such regulations also would have little public interest value. Indeed, at a time when the continuing vitality of such content-oriented regulations increasingly has been called into question even with respect to full service stations, it would be unreasonable to apply them to low power. *See, e.g.* Report and Order, Deregulation, of Radio, 84 F.C.C. 2d 968 (1981), *reconsid. denied,* 87 F.C.C. 2d 797 (1981). Consonant with this view, we are requiring no minimum hours of operation in the low power service, nor the maintenance of program logs, but only maintenance logs.

107. *Applicability of Copyright Law to Low Power Service.* As we have recognized, the copyright laws apply fully to translators and low power stations. Under the General Revision of the copyright law, Pub. L. No. 94–553, 17 U.S.C. 101 *et seq.* (1976), translator and low power operations are subject to full copyright liability, with an exception for secondary transmissions made by local governments or non-profit organizations. *See,* 17 U.S.C. 111(a)(4). Section 325(a) of the Communications Act requires the consent of the originating station for rebroadcast of programming. *Also see,* §§ 73.1207 and 74.784(b) of the rules. Retransmission consent may not unreasonably be refused. *See, e.g.*, Memorandum Opinion and Order, Docket No. 9808, 17 FR 10309 (1952). We believe that this standard is appropriate to govern the negotiations of low power operators for program services, until and unless legislative change preempts it. Presumption of rebroadcast consent, sought by National Translator Association, could amount to a substantive modification of the initial bargaining positions of the parties, one for which we do not see a necessity. Likewise, the specific standards for refusal of consent and terms for consent agreement, sought by the Washington State Association of Broadcasters, if enacted by this agency via rule making, would amount to a substantial intervention of the government in what properly should be left to private negotiations between parties at arm's length. We also believe that commercial substitution should be permitted, with consent, subject to the negotiations of the parties. Although the Washington State Association of Broadcasters opposes this, it is possible to envision a situation in which the primary station may benefit from allowing commercial substitution, and we believe the issue is best left to the parties.

108. *Low Power Subscription Service.* As we proposed, we are permitting STV via low power, at the licensees' discretion, and not subject to a "complement-of-four" restriction.[79] STV may be particularly suited to formated programming on low power stations; indeed, in some markets it may be essential to the viability of the service. We believe that STV and low power share the potential to accelerate utilization of unused channels, provide viable financial support for specialized programming and small market stations and respond to the interests of the audience. We are not requiring a separate STV authorization, although proposed subscription operation must be indicated on the application form, and existing low power licensees that are providing free service wishing to change to subscription service must so notify the Commission via an application for minor modification. We also will not require low power STV stations to file their franchise agreements with the Commission, although we shall require

[79] This rule restricts STV operations to communities within the Grade A contour of at least five commercial television stations, including that of the STV operator.

that such agreements be consistent with the rules applicable to full service STV agreements, Section 73.642(e). Licensees, however, must provide a copy of the franchise agreement for public inspection at the station office. Consonant with the First Report and Order in Docket No. 21502, adopted September 25, 1979, FCC 79–535, 45 FR 60091, published October 18, 1979, we are not setting technical compatability standards for low power STV equipment. We also are not requiring any minimum hours of free programming, because this requirement could prove overly burdensome to low power operators, and would not be consonant with the absence of minimum required hours of operation. *See,* paragraph 101, *supra.*

109. We note that several of the issues relating to STV are under separate consideration in Docket No. 21502. *See,* Further Notice of Proposed Rule Making, FCC 81–449, adopted September 30, 1981, released November 13, 1981. That document explicitly leaves resolution of STV issues related to low power to the instant proceeding. There is one area, however, where we believe the issues are more appropriately addressed in the context of the separate proceeding on STV. That area is the sale of decoders. The Notice in the instant case proposed that decoders could be sold or leased, at the low power licensee's discretion. We received some comments on both sides of this issue, including a petition seeking consolidation of the STV and low power proceedings, filed by the Subscription Television Association. While that petition was denied (*see,* Further Notice, Docket No. 21502, *supra,* paragraph 58), we believe this particular issue would be the subject of more narrowly focused debate in the proceeding focused exclusively on subscription television service, particularly because we have sought comments on a proposal to permit the sale of decoders generally in that proceeding. Therefore, we shall defer resolution of the issue of the sale of decoders in this docket, pending its resolution in Docket No. 21502.[80] Except in this respect, we believe that the functional differences between low power and full service stations, as well as the secondary nature of the low power service, and its inherently limited coverage potential, justify a distinction in regulatory treatment between full service and low power stations. Again, we note that the structuring of subscription on a broadcast model has been called into question in the DBS proceeding. *See,* note 17, *supra.* Without prejudging issues in our separate STV or DBS proceedings, we believe it is appropriate to acknowledge the possibly hybrid nature of subscription service in our treatment of low power STV stations, particularly in light of the fact that low power is something of a hybrid service itself.

110. *Network Affiliation.* In the interest of ensuring even-handed treatment of all network affiliates, full service or low power, we are requiring that any affiliation agreements between low power stations and networks will be subject to the same regulations as full service station affiliation agreements, *see,* §§ 73.658 and 73.3613 of the Commission's rules.

111. *Mandatory Carriage.* We proposed no mandatory carriage requirement of low power stations by cable systems. *See,* Notice, 45 FR at 69183 n. 31.[81] This issue was hotly contested in the comments. A number of parties, including ABC, NTA and the National Association of Low Power Broadcasters, advocate mandatory carriage, on the grounds that "may carry" status could put low power stations at a serious competitive disadvantage, especially in markets where cable penetration is high. The National Cable Television Association, on the other hand, resists "must carry" rules for low power, on the grounds that they violate the first amendment rights of cable operators to choose the programming they carry and are anticompetitive. Field adds that, without a local public service requirement, low power stations do not fulfill the intent of the "must carry" rules: maintenance of local broadcast coverage within a market.

112. We carefully have considered both sides of the dispute. We believe that the decision whether a low power station will be carried on a local cable system is one best left to the private parties. Noting that the mandatory carriage issue is under consideration in connection with pending copyright legislation, and may well be considered by the Commission in the near future, we do not wish to prejudge or preempt forthcoming developments in this area. While we are not here questioning the continuing usefulness of our rules that require carriage of local full service stations by cable systems, we believe that it is not in the public interest to extend this rule to low power stations. Low power stations are not subject to the programming obligations with regard to the community of license that form the basis for our requiring carriage of full service stations. Additionally, it will not further our goal of fostering a fully competitive telecommunications marketplace if the Commission, by regulation, injects itself between the parties to what should be a private decision-making process. The cable operator, on the basis of his own assessment of marketplace conditions, not the FCC, should decide what programming a cable system will carry, beyond that required by our present carriage rules. Indeed, it is reasonable to assume that, if a cable system has excess channel capacity, it will carry low power programming. Where there is no excess channel capacity, the cable operator should not be required to make the hard choice between the low power signal and other programming for which his subscribers may indicate demand via pay mechanisms, when he already carries the local full service stations. And where low power must compete with other program sources for cable carriage, absence of "must carry" protection could be a spur to low power's provision of creative, innovative programming. This also may encourage low power applicants to seek out remote, unserved areas where cable is thought not to be viable economically, and thereby to fill gaps in existing television coverage, a function for which low power stations are uniquely suited. It is not inconceivable that provision of a high isolation switch, so that both cable and broadcast may be received alternately on the subscriber's set, may be negotiated, at the expense of one, or both, parties in situations where a cable system truly is unwilling or unable to carry a low power station. Finally, until and unless it becomes clear that low power stations are not being carried on cable systems, we have no reason to believe that a "must carry" rule for low power will be useful or necessary.

113. *Alaska.* The Alaska Public Broadcasting Commission evinces concern that several of the technical rules proposed in the Notice (and adopted herein) for the low power service would be overly burdensome, as well as unnecessary. For example, on-site measurememt of frequency tolerance and on-site proof-of-performance certification would be prohibitively expensive, as well as unnecessary. APBC also avers that the operator requirement is unnecessary, as the Alaskan stations primarily engage in

[80] Interim low power grantees proposing STV have been informed that they may not sell decoders until the Commission finally has resolved this issue.

[81] Under the present rules, cable systems must carry, as well as full service stations, commercial translators over 100 watts and educational translators over 5 watts within a 35-mile radius of the cable system, except where this would result in substantial duplication or the cable system already carries the primary station. *See,* §§ 73.55(c)(1) and (2); 76.57(a)(2); 76.59(a)(5); and 76.61(a)(3).

rebroadcast. We acknowledge that Alaska is a "special case," because the low power concept long has been in use there, on a waiver basis, and it is the only means by which much of the State may receive television service. *See, e.g.,* Wrangell Radio Group, *supra.* We agree that the present maintenance program that the state carries out is adequate, and we shall not impose additional requirements in that area. Also, to the extent that we are adding other rules, such as the full-time operator requirement for local originations, that exceed the requirements to which the Alaskan low power facilities previously have been subjected and would be particularly burdensome in that unique environment, we shall continue to authorize waivers where appropriate.

114. *Emergency Broadcast System Participation.* Translator stations normally would carry any Emergency Action Notification alert messages originated by the full service TV broadcast station being retransmitted. However, low power stations, during periods of program origination, would have the obligation, similar to other broadcast stations, promptly to inform viewers of an Emergency Action Notification under the established Emergency Broadcast System procedures. Low power stations therefore will be expected to comply with the EBS procedures set forth in Subpart G of Part 73 of the rules with one exception because of the expected limited coverage area and unspecified operating schedule. Although encouraged to do so, low power stations will be exempted from the requirement to install the encoding device for generating the two-tone EBS attention signal. This exemption is similar to that afforded 10 watt noncommercial FM stations. Subpart G is being amended to accommodate this exemption.

## X. Conclusion

115. The rules promulgated herein represent, we believe, judicious balancing of competing concerns, for spectrum, for broadcast licenses, for overall maintenance of a healthily competitive telecommunications environment. The record adduced in this proceeding proffered opinion from all sectors on all aspects of the Commission's original proposals. With the comments as a basis, we have resolved the six decision criteria with which we commenced this proceeding in 1978. In light of the comment, and the Commission's intervening experience, it will be noted, we modified, to some extent, the proposals of the Notice. The one sentiment that has remained unshaken by the controversy surrounding this proceeding is that the low power service can provide additional television service, particularly in areas where there currently is little or none.

116. The existence of so many pending applications, filed by so many eager applicants, may belie, to some degree, the uncertainties to which the fledgling service will be subjected as it becomes operational. As the public has been reminded, a low power license may not be a license to print money. It certainly is, however, a license to serve the public. It is in this spirit that we authorize the low power service today. The Commission has every hope that low power will succeed in the marketplace, adding to the mix of competitive technologies in today's telecommunications environment and acting as a bellwether for "unregulation" of the broadcast services generally.

117. *Regulatory Flexibility Act—Final Analysis.*[82]

a. *Need for and Purpose of Rules.* The rule amendments promulgated herein are necessary to achieve the goal of additional low-powered television stations, for which the record indicates an overwhelming public demand. While the Commission intends the low power service to be a largely unregulated service, it nevertheless is essential that the technical aspects of the service, from application processing to operating specifications, be strictly maintained, to ensure that low power stations do not cause destructive interference to full service stations or to each other.

In view of the unexpectedly great numbers of TV translator and low power applications filed since the initiation of the rule making, as well as additional applications anticipated upon the lifting of the present moratorium, additional technical standards were proposed in the Further Notice to facilitate more fully automated application processing. The Commission's rules for TV translators did not contain precise standards for determining mutual exclusivity between proposed stations. A mode of processing that left much to engineering judgment was believed not to be feasible for use with large numbers of competing applications. The Commission herein adopts standards of prohibited contour overlap that will facilitate automated processing.

b. *Comments.* We received little commentary directly in response to the initial Regulatory Flexibility Analysis. Several parties took issue with our prediction that the proposed technical standards would not significantly increase the burdens attendant upon preparation of the engineering section of the application. They evince particular concern about the burden of calculating antenna radiation center height above average terrain (HAAT).[83] The Commission acknowledges the possible validity of this position. However, it is our belief that the two major competing considerations, expeditious reduction of the application backlog and spectral efficiency, override the possibly increased burdens on applicants. In the long run, it is our position that the increased opportunity in broadcasting provided for small entrepreneurs by authorization of the low power service is a much more significant overall benefit of the rule changes than the details required in making an application.

c. *Alternatives Considered.* The alternatives to the mode of processing are: (1) A table of assignments for low power stations, which was ruled out as too great an administrative burden on the Commission, as well as spectrally inefficient; (2) processing using assumed antenna heights, which also is spectrally inefficient; (3) processing taking actual, instead of average terrain factors into account, which also is too cumbersome administratively and may create too great a risk of interferene; and (4) not authorizing the service at all, a result not supported by the record. The technical rules adopted herein, represent an optimal compromise between factors of spectral efficiency, prevention of undue interference, administrative efficiency and cost to both applicants and the Commission. As stated above, the overall effect of the rule changes is to create additional opportunities for small entrepreneurs to own and operate new broadcast facilities by using spectrum where full service stations would cause and sustain interference. The lower power service is subject to a minimum of regulations; however, certain technical requirements are

[82] The Notice of Proposed Rule Making in this proceeding was promulgated prior to the effective date of the Regulatory Reform Act of 1980, so that no comments on the particular impact on small businesses were elicited therein. The Further Notice of Proposed Rule Making, however, was subject to the Act. This Final Analysis addresses issues raised in the Initial Analysis, at paragraph 29, of the Further Notice.

[83] Applicants are not required to compute this figure as part of the application process. Indeed, in most cases of UHF low power applications, conformance with the "UHF" taboos, formerly in § 74.702(c)(2), will ensure a noninterfering application. However, because the Commission will make the calculation and use it in processing, it may be presumed that most, if not all, applicants will base their own engineering calculations upon HAAT.

essential to national spectrum management and compliance with these bears a cost that must be sustained by applicants and station operators.

d. The Secretary shall cause a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C. *et seq.*).

118. In light of the foregoing and pursuant to authority contained in Sections 1, 4(i) and 303 of the Communications Act of 1934, as amended, it is ordered, That the rule amendments set out in Appendix A are adopted, effective June 7, 1982;

119. It is further ordered, That the petitions for reconsideration of the April 9, 1981, *Order*, FCC 81–173, filed by the Association of Maximum Service Telecasters, Bogner Broadcast Equipment Corp., the National Association of Broadcasters and the National Translator Association, are dismissed; and

120. It is further ordered, That this proceeding is terminated.

121. For further information concerning this proceeding, the contact person is Edythe Wise, Broadcast Bureau, (202) 632–7792.

(Secs. 4, 303, 48 Stat., as amended, 1066, 1082; (47 U.S.C. 154, 303))

Federal Communications Commission.[84]

**William J. Tricarico,**

*Secretary.*

Appendix A

## PART 73—RADIO BROADCAST SERVICES

1. Section 73.601 is revised in its entirety to read as follows:

**§ 73.601 Scope of Subpart.**

This subpart contains the rules and regulations (including engineering standards) governing TV broadcast stations, including noncommercial educational TV broadcast stations and, where indicated, low power TV and TV translator stations in the United States, its Territories and possessions. TV broadcast, low power TV, and TV translator stations are assigned channels 6 MHz wide, designated as set forth in § 73.603(a).

2. Section 73.903 is revised in its entirety to read as follows:

**§ 73.903 Emergency Broadcast System (EBS).**

The EBS is composed of AM, FM, and TV broadcast stations; low power TV stations; and non-government industry entities operating on a voluntary, organized basis during emergencies at National, State, or Operational (Local) Area Levels.

3. Section 73.904 is revised in its entirety to read as follows:

**§ 73.904 Licensee.**

The term "licensee" as used in this subpart means the holder of a broadcast station license granted or continuing in force under authority of the Communications Act of 1934, as amended. Such licensee includes any AM, FM, TV, or low power TV station holding a valid license, program test authorization, or other authorization permitting regular programming operation.

4. The second sentence of paragraph (b) in § 73.932 is revised to read:

**§ 73.932 Radio monitoring and attention signal transmission requirements.**

* * * * *

(b) *Transmission Requirement.* * * * All broadcast station licensees except noncommercial educational FM stations authorized to operate with transmitter output powers of 0.010 kW or less and low power TV stations, must install, operate, and maintain equipment capable of generating the Attention Signal (see § 73.906) to modulate the transmitter so that the signal may be broadcast to other stations.

* * * * *

5. Paragraph (c) of § 73.961 is revised by adding a sentence at the end of the text, to read as follows:

**§ 73.961 Tests of the Emergency Broadcast System procedures.**

* * * * *

(c) Weekly Transmission Tests of the Attention Signal and Test Script. * * * However, Class D noncommercial educational FM stations authorized to operate with transmitter output powers of 0.01 kW or less and low power TV stations need not transmit the two-tone EBS Attention Signal.

6. Section 73.1001 is amended by revising paragraph (c) to read as follows:

**§ 73.1001 Scope.**

* * * * *

(c) Certain provisions of this subpart apply to International Broadcast Stations (Subpart F, Part 73), TV translator stations, and low power TV stations (Subpart G, Part 74) where the rules for those services so provide.

* * * * *

7. Section 73.1010 is amended by revising paragraph (e) to read as follows:

**§ 73.1010 Cross reference to rules in other Parts.**

* * * * *

(e) Part 74 (Volume III), "Experimental, Auxiliary and Special Broadcast, and Other Program Distributional Services" including subparts on the following stations: A, "Experimental Television—," B, "Experimental Fascimile—," C, "Developmental—", "Instructional TV Fixed Service—," L, "FM Translator and Booster—."

**§ 73.3500 [Amended]**

8. Section 73.3500 is amended by revising the titles for FCC Forms 346, 347, and 348 as follows:

* * * * *

| | |
|---|---|
| 346 | Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator, or FM Translator Station. |
| 347 | Application for a Low Power TV, TV Translator, or FM Translator Station. |
| 348 | Application for Renewal of a Low Power TV, TV Translator, or FM Translator Station License. |

* * * * *

9. Section 73.3516 is amended by revising paragraph (a) to read as follows:

**§ 73.3516 Specification of facilities.**

(a) An application for facilities in the AM, FM, or TV broadcast services or low power TV service shall be limited to one frequency, or channel assignment, and no application will be accepted for filing if it requests alternate frequency or channel assignments.

* * * * *

10. Section 73.3533 is amended by revising paragraph (a)(7) to read as follows:

**§ 73.3533 Application for construction permit.**

(a) * * *

(7) FCC Form 346, "Application for Authority to Construct or Make Changes in a Low Power TV, TV Translator, or FM Translator Station."

* * * * *

11. Section 73.3536 is amended by revising paragraph (a)(7) to read as follows:

[84] Statements of Commissioners Fowler, Chairman; Dawson, Washburn, Fogarty and Rivera attached.

**§ 73.3536 Application for license to cover construction permit.**

(a) * * *

(7) FCC Form 347, "Application for a Low Power TV, TV Translator, or FM Translator Station License."

* * * * *

12. Section 73.3539 is amended by revising paragraph (d)(8) to read as follows:

**§ 73.3539 Application for renewal of license.**

* * * * *

(d) * * *

(8) FCC Form 348, "Application for Renewal of Low Power TV, TV Translator, or FM Translator Station License."

* * * * *

13. Section 73.3564 is amended by revising paragraph (a) to read as follows:

**§ 73.3564 Acceptance of applications.**

(a) Applications tendered for filing are dated upon receipt and then forwarded to the Broadcast Bureau, where an administrative examination is made to ascertain whether the applications are complete. Except for low power TV and TV translator applications, those found to be complete or substantially complete are accepted for filing and are given file numbers. In the case of minor defects as to completeness, the applicant will be required to supply the missing information. Applications that are not substantially complete will be returned to the applicant. In the case of low power TV and TV translator applications, those found to be complete are accepted for filing and are given file numbers. Low power TV and TV translator applications that are not complete will be returned to the applicant.

* * * * *

14. Section 73.3572 is amended by revising the headnote and paragraph (a)(1) to read as follows:

**§ 73.3572 Processing of TV broadcast, low power TV, and TV translator station applications.**

(a) * * *

(1) In the first group are applications for new stations or major changes in the facilities of authorized stations. A major change for TV broadcast stations authorized under this part is any change in frequency or station location, or any change in the power or antenna location or height above average terrain (or combination thereof) that would result in a change of 50% or more of the area within the Grade B contour of the station. (A change in area is defined as the sum of the area gained and the area lost as a percentage of the original area.) In the case of low power TV and TV translator stations authorized under Part 74 of this chapter, it is any change in:

(i) Frequency (output channel) assignment;

(ii) Transmitting antenna system including the direction of the radiation, directive antenna pattern or transmission line;

(iii) Antenna height;

(iv) Antenna location exceeding 200 meters;

(v) Authorized operating power; or

(vi) Community or area to be served.

However, the FCC may, within 15 days after the acceptance of any other application for modification of facilities, advise the applicant that such application is considered to be one for a major change and therefore subject to the provisions of §§ 73.3580 and 1.1111 pertaining to major changes.

* * * * *

15. Section 73.3580 is amended by revising the introductory texts to paragraphs (c), (d)(3), and (g) to read as follows:

**§ 73.3580 Local public notice of filing of broadcast applications.**

* * * * *

(c) An applicant who files an application or amendment thereto which is subject to the provision of this Section, must give a notice of this filing in a newspaper. Exceptions to this requirement are applications for renewal of AM, FM, TV, and International broadcast stations; low power TV stations; TV and FM translator stations; FM booster stations; and applications subject to paragraph (e) of this section. The filing notice shall be given in a newspaper either immediately following the tendering for filing of the application or amendment, or immediately following notification to the applicant by the FCC that a major change is involved requiring the applicant to give public notice pursuant to §§ 73.3571, 73.3572, 73.3573, or 73.3578.

* * * * *

(d) * * *

(3) *An applicant who files for modification, assignment or transfer of a broadcast station license* (except for International broadcast, low power TV, TV translator, FM translator, and FM booster stations) shall give notice of the filing in a newspaper as described in paragraph (c) of this section, and also broadcast the same notice over the station as follows:

* * * * *

(g) An applicant who files an application or amendment thereto for a low power TV, TV translator, FM translator, or FM booster station must give notice of this filing in a daily, weekly, or biweekly newspaper of general circulation in the community or area to be served. The filing notice will be given immediately following the tendering for filing of the application or amendment or immediately following notification to the applicant by the FCC that public notice is required pursuant to §§ 73.3571, 73.3572, 73.3573, or 73.3578.

* * * * *

16. Section 73.3594 is amended by revising the introductory text to paragraphs (a), (b), (f), and paragraph (f)(2) to read as follows:

**§ 73.3594 Local public notice of designation for hearing.**

(a) Except as otherwise provided in paragraph (c) of this section when an application subject to the provisions of § 73.3580 (except for applications for International broadcast, low power TV, TV translator, FM translator, and FM booster stations) is designated for hearing, the applicant shall give notice of such designation as follows: Notice shall be given at least twice a week, for 2 consecutive weeks within the 3-week period immediately following release of the FCC's order, specifying the time and place of the commencement of the hearing, in a daily newspaper of general circulation published in the community in which the station is located or proposed to be located.

* * * * *

(b) When an application which is subject to the provisions of § 73.3580 and which seeks modification, assignment, transfer, or renewal of an operating broadcast station is designated for hearing (except for applications for an International broadcast, low power TV, TV translator, FM translator, or FM booster stations), the applicant shall, in addition to giving notice of such designation as provided in paragraph (a) of this section, cause the same notice to be broadcast over that station at least once daily for 4 days in the second week immediately following the release of the FCC's order, specifying the time and place of the commencement of the hearing. In the case of both commercial and noncommercial TV broadcast stations such notice shall be broadcast orally with the camera focused on the announcer. The notice required by this paragraph shall be broadcast during the following periods;

* * * * *

(f) When an application for a low power TV, TV translator, FM translator, or FM booster station which is subject

to the provisions of § 73.3580 is designated for hearing, the applicant shall give notice of such designation as follows: Notice shall be given at least once during the 2-week period immediately following release of the FCC's order, specifying the time and place of the commencement of the hearing in a daily, weekly or biweekly publication having general circulation in the community or area to be served. However, if there is no publication of general circulation in the community or area to be served, the applicant shall determine an appropriate means of providing the rive notice of such designation as follows: Notice shall be given at least once during the 2-week period immediately following release of the FCC's order, specifying the time and place of the commencement of the hearing in a daily, weekly or biweekly publication having general circulation in the community or area to be served. However, if there is no publication of general circulation in the community or area to be served, the applicant shall determine an appropriate means of providing the required notice to the general public, such as posting in the local post office or other public place. The notice shall state:

* * * * *

(2) The call letters, if any, of the station or stations involved, the output channel or channels of such stations, and, for any rebroadcasting, the call letters, channel and location of the station or stations being or proposed to be rebroadcast.

* * * * *

17. Section 73.3597 is amended by revising paragraphs (a)(1) and (e)(1)(i) to read as follows:

**§ 73.3597 Procedures on transfer and assignment applications.**

(a) * * *

(1) The application involves a low power TV, TV translator, FM translator, or FM booster station only;

* * * * *

(e) * * *

(1) * * *

(i) "Unbuilt station" refers to an AM, FM, or TV broadcast station or a low power TV station for which a construction permit is outstanding, and, regardless of the stage of physical completion, for which program tests have not commenced or, if required, been authorized.

* * * * *

18. Section 73.3598 is amended by revising paragraph (b) to read as follows:

**§ 73.3598 Period of construction.**

* * * * *

(b) *Other broadcast, auxiliary and Instructional TV Fixed Stations.* Each original permit for the construction of a new AM, FM, or International broadcast; low power TV; TV translator; FM translator; FM booster; broadcast auxiliary; or Instructional TV Fixed station, or to make changes in such existing stations, shall specify a period of 12 months within which construction shall be completed and application for license be filed.

19. Section 73.3613 is amended by revising paragraph (a)(1) to read as follows:

**§ 73.3613 Filing of contracts.**

* * * * *

(a) * * *

(1) All network affiliation contracts, agreements, or understandings between a TV broadcast or low power TV station and a national, regional, or other network.

* * * * *

## PART 74—EXPERIMENTAL, AUXILIARY, AND SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTIONAL SERVICES

20. Section 74.15 is amended by revising introductory text to paragraph (d) to read as follows:

**§ 74.15 License period.**

* * * * *

(d) Initial licenses for low power TV, TV translator, and FM translator stations will ordinarily be issued for a period running until the date specified in this section for the State or territory in which the station is located or, if issued after such date, to the next renewal date determined in accordance with this Section. When renewed, low power TV and TV translator station licenses will ordinarily be renewed for 5 years and FM translator station licenses be renewed for 7 years. However, if the FCC finds that the public interest, convenience, or necessity will be served, it may issue either an initial license or a renewal thereof for a lesser term. The time of expiration of all licenses will be 3 a.m., local time, on the following dates, and, thereafter, at 5-year intervals for low power TV and TV translator stations and at 7-year intervals for FM translator stations:

* * * * *

21. Section 74.432 is amended by revising paragraph (a) to read as follows:

**§ 74.432 Licensing requirements and procedures.**

(a) A license for a broadcast remote pickup station or system will be issued only to the licensee of an AM, FM, noncommercial educational FM, TV, or International broadcast station; low power TV station; or to an eligible network entity. To be eligible, a network entity must provide a program service for simultaneous transmission by 10 or more stations through circuit facilities available for program distribution to each affiliated station at least 12 hours of each day.

* * * * *

22. Section 74.601 is revised in its entirety to read as follows:

**§ 74.601 Classes of TV broadcast auxiliary stations.**

(a) *TV pickup station.* A land mobile station used for the transmission of television program material and related communications from the scenes of events occurring at points removed from the station studios to TV broadcast and low power TV stations.

(b) *TV STL station (studio-transmitter link).* A fixed station used for the transmission of television program material and related communications from the studio to the transmitter of a TV broadcast or low power TV station.

(c) *TV intercity relay station.* A fixed station used for intercity transmission of television program material and related communications for use by TV broadcast and low power TV stations.

(d) *TV translator relay station.* A fixed station used for relaying programs and signals of TV broadcast stations to LPTV, TV translator, and other communications facilities that the FCC may authorize.

(e) *TV broadcast licensee.* Licensees and permittees of both TV broadcast and low power TV stations, unless specifically otherwise indicated.

23. Section 74.602 is amended by revising paragraph (h) as follows:

**§ 74.602 Frequency assignment.**

* * * * *

(h) TV auxiliary stations licensed to low power TV stations and translator relay stations will be assigned on a secondary basis, i.e., subject to the condition that no harmful interference is caused to other TV auxiliary stations assigned to TV broadcast stations, or to community antenna relay stations (CARS) operating between 12,700 and 13,200 MHz. Auxiliary stations licensed to low power TV stations and translator relay stations must accept any interference caused by stations having primary use of TV auxiliary frequencies.

24. The title of Subpart G of Part 74 is amended to read as follows:

**Subpart G—Low Power TV and TV Translator Stations**

25. Section 74.701 is amended by adding new paragraphs (f) and (g) to read as follows:

**§ 74.701 Definitions.**

* * * * *

(f) *Low power TV station.* A station authorized under the provisions of this subpart that may retransmit the programs and signals of a TV broadcast station and that may originate programming in any amount greater than 30 seconds per hour and/or operates a subscription service. (See § 73.641 of Part 73 of this chapter.)

(g) *Program origination.* For purposes of this part, program origination shall be any transmissions other than the simultaneous retransmission of the programs and signals of a TV broadcast station. Origination shall include locally generated television program signals and program signals obtained via video recordings (tapes and discs), microwave, common carrier circuits, or other sources.

26. Section 74.702 is revised in its entirety to read as follows:

**§ 74.702 Channel assignments.**

(a) An applicant for a new low power TV or TV translator station or for changes in the facilities of an authorized station shall endeavor to select a channel on which its operation is not likely to cause interference. The applications must be specific with regard to the channel requested. Only one channel will be assigned to each station.

(1) Any one of the 12 standard VHF Channels (2 to 13, inclusive) may be assigned to a VHF low power TV or TV translator station. Channels 5 and 6 are allocated for nonbroadcast use in Alaska, and will not be assigned to a VHF low power TV or TV translator station in that State.

(2) Any one of the UHF Channels from 14 to 69, inclusive, may be assigned to a UHF low power TV or TV translator station. In accordance with § 73.603(c) of Part 73, Channel 37 will not be assigned to such stations.

(3) Application for new low power TV or TV translator stations or for changes in existing stations, specifying operation on output Channels from 70 through 83 will not be accepted for filing. License renewals for TV translator stations operating on those channels will be granted only on a secondary basis to land mobile radio operations.

(b) Changes in the TV Table of Assignments (§ 73.606(b) of Part 73 of this chapter), authorizations to construct new TV broadcast stations or to change facilities of existing ones, may be made without regard to existing or proposed low power TV or TV tranlator stations. Where such a change results in a low power TV or TV translator station causing actual interference to reception of the TV broadcast station, the licensee of the low power TV or TV translator station shall eliminate the interference or file an application for a change in channel assignment.

27. Section 74.703 is revised in its entirety to read as follows:

**§ 74.703 Interference.**

(a) An application for a new low power TV or TV translator station or for changes in the facilities of an authorized station will not be granted when it is apparent that interference will be caused. The licensee of a new low power TV or TV translator station shall protect existing low power TV and TV translator stations from interference within the protected contour defined in § 74.707.

(b) It shall be the responsibility of the licensee of a low power TV or TV translator station to correct at its expense any condition of interference to the direct reception of the signals of a TV broadcast station operating on the same channel as that used by the low power TV or TV translator station or on an adjacent channel, which occurs as the result of the operation of the low power TV or TV translator station. Interference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the low power TV or TV translator station, regardless of the quality of such reception or the strength of the signal so used. If the interference cannot be promptly eliminated by the application of suitable techniques, operation of the offending low power TV or TV translator stations shall be suspended and shall not be resumed until the interference has been eliminated. If the complainant refuses to permit the low power TV or TV translator licensee to apply remedial techniques that demonstrably will eliminate the interference without impairment of the original reception, the licensee of the low power TV or TV translator station is absolved of further responsibility.

(c) It shall be the responsibility of the licensee of a low power TV or TV translator station to correct any condition of interference which results from the radiation of radio frequency energy outside its assigned channel. Upon notice by the FCC to the station licensee or operator that such interference is caused by the spurious emissions of the station, operation of the station shall be immediately suspended and not resumed until the interference has been eliminated. However, short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.

(d) When a low power TV or TV translator station causes interference to a CATV system by radiations within its assigned channel at the cable headend or on the output channel of any system converter located at a receiver, the earlier user, whether cable system or low power TV or TV translator station, will be given priority on the channel, and the later user will be responsible for correction of the interference.

(e) Low power TV and TV translator stations are being authorized on a secondary basis to existing land mobile uses and must correct whatever interference they cause to land mobile stations or cease operation.

(f) In each instance where suspension of operation is required, the licensee shall submit a full report to the FCC in Washington, D.C., after operation is resumed, containing details of the nature of the interference, the source of the interfering signals, and the remedial steps taken to eliminate the interference.

28. New § 74.705 is added to read as follows:

**§ 74.705 TV broadcast station protection.**

(a) The TV broadcast station protected contour shall be its Grade B contour as defined in § 73.683 of Part 73 of this chapter.

(b)(1) An application to construct a new low power TV or TV translator station or change the facilities of an existing station will not be accepted if it specifies a site which is within the protected contour of a co-channel or first adjacent channel TV broadast station.

(2) Due to the frequency spacing which exists between TV Channels 4 and 5, between Channels 6 and 7, and between Channels 13 and 14, adjacent channel protection standards shall not be applicable to these pairs of channels. (See § 73.603(a) of Part 73 of this chapter.)

(3) A UHF low power TV or TV translator construction permit application will not be accepted if it specifies a site within the UHF TV broadcast station's protected contour and proposes operation on a channel either 14 or 15 channels above the channel in use by the TV broadcast station.

(4) A UHF low power TV or TV translator construction permit application will not be accepted if it specifies a site less than 100 kilometers from the transmitter site of a UHF TV broadcast station operating on a channel which is the seventh channel above the requested channel.

(5) A UHF low power TV or TV translator construction permit application will not be accepted if it specifies a site less than 32 kilometers from the transmitter site of a UHF TV broadcast station operating on a channel which is the second, third, fourth, or fifth channel above or below the requested channel.

(c) The low power TV or TV translator station field strength is calculated from the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) in pertinent directions.

(1) For co-channel protection, the field strength is calculated using Figure 9a, 10a, or 10c of § 73.699 (F (50, 10) charts) of Part 73 of this chapter.

(2) For low power TV or TV translator applications that do not specify the same channel as the TV broadcast station to be protected, the field strength is calculated using Figure 9, 10, or 10b of § 73.699 (F(50,50) charts) of Part 73 of this chapter.

(d) A low power TV or TV translator station application will not be accepted if the ratio in dB of its field strength to that of the TV broadcast station at its protected contour fails to meet the following:

(1) −45 dB for co-channel operations without offset carrier frequency operation or −28 dB for offset carrier frequency operation. An application requesting offset carrier frequency operation must include the following:

(i) A requested offset designation (zero, plus, or minus) identifying the proposed direction of the 10 kHz offset from the standard carrier frequencies of the requested channel. If the offset designation is not different from that of the station being protected, the −45 dB ratio must be used.

(ii) A description of the means by which the low power TV or TV translator station's frequencies will be maintained within the tolerances specified in § 74.761 for offset operation.

(2) 6 dB when the protected TV broadcast station operates on a VHF channel that is one channel above the requested channel.

(3) 12 dB when the protected TV broadcast station operates on a VHF channel that is one channel below the requested channel.

(4) 15 dB when the protected TV broadcast station operates on a UHF channel that is one channel below the requested channel.

(5) 23 dB when the protected TV broadcast station operates on a UHF channel that is fourteen channels below the requested channel.

(6) 6 dB when the protected TV broadcast station operates a UHF channel that is fifteen channels below the requested channel.

29. New § 74.707 is added to read as follows:

**§ 74.707 Low power TV and TV translator station protection.**

(a)(1) A low power TV or TV translator will be protected from interference from other low power TV and TV translator stations within the following predicted contours:

(i) 62 dBu for stations on Channels 2 through 6;

(ii) 68 dBu for stations on Channels 7 through 13; and

(iii) 74 dBu for stations on Channels 14 through 76.

(2) The low power TV or TV translator station protected contour is calculated from the authorized effective radiated power and antenna height above average terrain, using Figure 9, 10, or 10b of § 73.699 (F(50,50) charts) of Part 73 of this chapter.

(b)(1) An application to constuct a new low power TV or TV translator station or change the facilities of an existing station will not be accepted if it specifies a site which is within the protected contour of a co-channel or first adjacent channel low power TV or TV translator station.

(2) Due to the frequency spacing which exists between TV Channels 4 and 5, between Channels 6 and 7, and between Channels 13 and 14, adjacent channel protection standards shall not be applicable to these pairs of channels. (See § 73.603(a) of Part 73 of this chapter.)

(3) A UHF low power TV or TV translator construction permit application will not be accepted if it specifies a site within the UHF low power TV or TV translator station's protected contour and proposes operation on a channel either 7 channels below or 14 or 15 channels above the channel in use by the low power TV or TV translator station.

(c) The low power TV or TV translator construction permit application field strength is calculated from the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) in pertinent directions.

(1) For co-channel protection, the field strength is calculated using Figure 9a, 10a, or 10c of § 73.699 (F(50,10) charts) of Part 73 of this chapter.

(2) For low power TV or TV translator applications that do not specify the same channel as the low power TV or TV translator station to be protected, the field strength is calculated using Figure 9, 10, or 10b of § 73.699 (F(50,50) charts) of Part 73 of this chapter.

(d) A low power TV or TV translator station application will not be accepted if the ratio in dB of its field strength to that of the authorized low power TV or TV translator station at its protected contour fails to meet the following:

(1) −45 dB for co-channel operations without offset carrier frequency operation or −28 dB for offset carrier frequency operation. An application requesting offset carrier frequency operation must include the following:

(i) A requested offset designation (zero, plus, or minus) identifying the proposed direction of the 10 kHz offset from the standard carrier frequencies of the requested channel. If the offset designation is not different from that of the station being protected, or if the station being protected is not maintaining its frequencies within the tolerance specified in § 74.761 for offset operation, the −45 dB ratio must be used.

(ii) A description of the means by which the low power TV or TV translator station's frequencies will be maintained within the tolerances specified in § 74.761 for offset operation.

(2) 6 dB when the protected low power TV or TV translator station operates on a VHF channel that is one channel above the requested channel.

(3) 12 dB when the protected low power TV or TV translator station operates on a VHF channel that is one channel below the requested channel.

(4) 15 dB when the protected low power TV or TV translator station operates on a UHF channel that is one channel above or below the requested channel.

(5) 0 dB when the protected low power TV or TV translator station operates on a UHF channel that is seven channels above the requested channel.

(6) 23 dB when the protected low power TV or TV translator station operates on a UHF channel that is fourteen channels below the requested channel.

(7) 6 dB when the protected low power TV or TV translator station operates on a UHF channel that is fifteen channels below the requested channel.

30. New §74.709 is added to read as follows:

**§ 74.709 Land mobile station protection.**

(a) Stations in the Land Mobile Radio Service, using the following channels in the indicated cities will be protected from interference caused by low power TV or TV translator stations, and low power TV and TV translator stations must accept any interference from stations in the land mobile service operating on the following channels:

| City | Channels | Coordinates | |
|---|---|---|---|
| | | Latitude | Longitude |
| Boston, MA | 14, 16 | 42°21'24" | 071°03'24" |
| Chicago, IL | 14, 15 | 41°52'28" | 087°38'22" |
| Cleveland, OH | 14, 15 | 41°29'51" | 081°41'50" |
| Dallas, TX | 16 | 32°47'09" | 096°47'37" |
| Detroit, MI | 15, 16 | 42°19'48" | 083°02'57" |
| Houston, TX | 17 | 29°45'26" | 095°21'37" |
| Los Angeles, CA | 14, 20 | 34°03'15" | 118°14'28" |
| Miami, FL | 14 | 25°46'37" | 080°11'32" |
| New York, NY | 14, 15 | 40°45'06" | 073°59'39" |
| Philadelphia, PA | 19, 20 | 39°56'58" | 075°09'21" |
| Pittsburgh, PA | 14, 18 | 40°26'19" | 080°00'00" |
| San Francisco, CA | 16, 17 | 37°46'39" | 122°24'40" |
| Washington, DC | 17, 18 | 38°53'51" | 077°00'33" |

(b) The protected contours for the land mobile radio service are 130 kilometers from the above coordinates, except where limited by the following:

(1) If the land mobile channel is the same as the channel in the following list, the land mobile protected contour excludes the area within 145 kilometers of the corresponding coordinates from list below. Except if the land mobile channel is 15 in New York or Cleveland or 16 in Detroit, the land mobile protected contour excludes the area within 95 kilometers of the corresponding coordinates from the list below.

(2) If the land mobile channel is one channel above or below the channel in the following list, the land mobile protected contour excludes the area within 95 kilometers of the corresponding coordinates from the list below.

| City | Channel | Coordinates | |
|---|---|---|---|
| | | Latitude | Longitude |
| San Diego, CA | 15 | 32°41'48" | 116°56'10" |
| Waterbury, CT | 20 | 41°31'02" | 073°01'00" |
| Washington, DC | 14 | 38°57'17" | 077°00'17" |
| Washington, DC | 20 | 38°57'49" | 077°06'18" |
| Champaign, IL | 15 | 40°04'11" | 087°54'45" |
| Jacksonville, IL | 14 | 39°45'52" | 090°30'29" |
| Ft. Wayne, IN | 15 | 41°05'35" | 085°10'42" |
| South Bend, IN | 16 | 41°36'20" | 086°12'44" |
| Salisbury, MD | 16 | 38°24'15" | 075°34'45" |
| Mt. Pleasant, MI | 14 | 43°34'24" | 084°46'21" |
| Hanover, NH | 15 | 43°42'30" | 072°09'16" |
| Canton, OH | 17 | 40°51'04" | 081°16'37" |
| Cleveland, OH | 19 | 41°21'19" | 081°44'24" |
| Oxford, OH | 14 | 39°30'26" | 084°44'09" |
| Zanesville, OH | 18 | 39°55'42" | 081°59'06" |
| Elmira-Corning, NY | 18 | 42°06'20" | 076°52'17" |
| Harrisburg, PA | 21 | 40°20'44" | 076°52'09" |
| Johnstown, PA | 19 | 40°19'47" | 078°53'45" |
| Lancaster, PA | 15 | 40°15'45" | 076°27'49" |
| Philadelphia, PA | 17 | 40°02'30" | 075°14'24" |
| Pittsburgh, PA | 16 | 40°26'46" | 079°57'51" |
| Scranton, PA | 16 | 41°10'58" | 075°52'21" |
| Parkersburg, WV | 15 | 39°20'50" | 081°33'56" |
| Madison, WI | 15 | 43°03'01" | 089°29'15" |

(c) A low power TV or TV translator station application will not be accepted if it specifies a site that is within the protected contour of a co-channel or first adjacent channel land mobile assignment.

(d) The low power TV or TV translator station field strength is calculated from the proposed effective radiated power (ERP) and the antenna height above average terrain (HAAT) in pertinent directions.

(1) The field strength is calculated using Figure 10c of § 73.699 (F(50, 10) charts) of Part 73 of this chapter.

(2) A low power TV or TV translator station application will not be accepted if it specifies the same channel as one of the land mobile assignments and its field strength at the land mobile protected contour exceeds 52 dBu.

(3) A low power TV or TV translator station application will not be accepted if it specifies a channel that is one channel above or below one of the land mobile assignments and its field strength at the land mobile protected contour exceeds 76 dBu.

(e) In order to protect stations in the Offshore Radio Telecommunications Service, a low power TV or TV translator station construction permit application specifying operation on Channel 17 will not be accepted if it specifies a latitude south of the line 31°30′ North, and between longitudes 86°30′ West and 95°30′ West. An application specifying operation on either Channel 16 or Channel 18 will not be accepted if it specifies a latitude south of the line 31°00′ North and between longitudes 87°00′ West and 95°00′ West.

31. Section 74.731 is amended by adding new paragraphs (g), (h), (i), and (j) to read as follows:

**§ 74.731 Purpose and permissible service.**

* * * * *

(g) Low power TV stations may operate under the following modes of service:

(1) As a TV translator station, subject to the requirements of this Part;

(2) For origination of programming and commercial matter as defined in § 74.701(f);

(3) For the transmission of subscription television broadcast (STV) programs, intended to be received in intelligible form by members of the public for a fee or charge, subject to the provisions of §§ 73.642(e) and (f)(3), and 74.644.

(h) A low power TV station may not be operated solely for the purpose of relaying signals to one or more fixed receiving points for retransmission, distribution or relaying.

(i) Low power TV stations are subject to no minimum required hours of operation and may operate in any of the 3 modes described in paragraph (g) of this section for any number of hours.

(j) An applicant for a 1 kW UHF TV translator station to operate on a channel assigned to a TV broadcast station which is not in operation, shall notify the licensee or permittee of the TV broadcast station, in writing of the filing of the application and shall certify to the FCC that such notice has been given.

32. Section 74.732 is revised in its entirety to read as follows:

**§ 74.732 Eligibility and licensing requirements.**

(a) Subject to the restrictions described in paragraph (e) of this section, a license for a low power TV or TV translator station may be issued to any qualified individual, organized group of individuals, broadcast station licensee, or local civil governmental body.

(b) More than one low power TV or TV translator station may be licensed to the same applicant whether or not such stations serve substantially the same area. Low power TV and TV translator stations are not counted for purposes of § 73.636 of Part 73 of this chapter, concerning multiple ownership.

(c) Only one channel will be assigned to each low power TV or TV translator station. Additional low power or translator stations may be authorized to provide additional reception. A separate application is required for each station and each application must be complete in all respects.

(d) The FCC will not act on applications for new low power TV or TV translator stations or for changes in facilities of existing stations when such changes will result in an increase in signal range in any horizontal direction until at least 30 days have elapsed since the date on which "Public Notice" is given by the FCC of acceptance for filing of such application, in order to afford interested parties opportunity to comment and afford opportunity for competing applications to be filed.

(e) A proposal to change the primary TV station being retransmitted or an application of a licensed translator station to include low power TV station operation, i.e., program origination or

subscription service will be subject only to a notification requirement.

(f) Applications for transfer of ownership or control of a low power TV or TV translator station will be subject to petitions to deny.

33. Section 74.734 is revised in its entirety to read as follows:

**§ 74.734 Attended and unattended operation.**

(a) In all circumstances other than during local origination (see § 74.701(g)), low power TV and TV translator stations may be operated without a licensed radio operator in attendance if the following requirements are met:

(1) If the transmitter site cannot be promptly reached at all hours and in all seasons, means shall be provided so that the transmitting apparatus can be turned on and off at will from a point that readily is accessible at all hours and in all seasons.

(2) The transmitter also shall be equipped with suitable automatic circuits that will place it in a nonradiating condition in the absence of a signal on the input channel or circuit.

(3) The transmitting and the ON/OFF control, if at a location other than the transmitter site, shall be adequately protected against tampering by unauthorized persons.

(4) The FCC shall be supplied with the name, address, and telephone number of a person or persons who may be called to secure suspension of operation of the transmitter promptly should such action be deemed necessary by the FCC. Such information shall be kept current by the licensee.

(5) In cases where the antenna and supporting structure are considered to be a hazard to air navigation and are required to be painted and lighted under the provisions of Part 17 of the Rules, the licensee shall make suitable arrangements for the daily observations, when required, and lighting equipment inspections required by §§ 17.37 and 17.38 of the FCC rules.

(6) In the case of a low power TV or TV translator station using modulating equipment, observation of the transmitted program signal on a suitable receiver shall be made for at least 10 continuous minutes each day by a person designated by the licensee, who shall institute measures sufficient to assure prompt correction of any condition of improper operation that is observed.

(b) An application for authority to construct a new low power TV station (when rebroadcasting the programs of another station) or TV translator station or to make changes in the facilities of an authorized station, and that proposes unattended operation, shall include an adequate showing as to the manner of compliance with this section.

34. Section 74.735 is amended by revising paragraphs (a), the introductory text of paragraph (b), and paragraphs (c), (d), and (e); and adding new paragraph (f) to read as follows:

**§ 74.735 Power limitation.**

(a) The power output of the final radiofrequency amplifier of a VHF low power TV or TV translator station, except as provided for in paragraphs (d) and (f) of this section shall not exceed 0.01 kW peak visual power. A UHF station shall be limited to a maximum of 1 kW peak visual power, except as provided for in paragraph (f) of this section. In no event shall the transmitting apparatus be operated with a power output in excess of the manufacturer's rating.

(b) In individual cases, the FCC may authorize the use of more than one final radio frequency amplifier at a single VHF or UHF station under the following conditions:

* * * * *

(c) No limit is placed upon the effective radiated power that may be obtained by the use of horizontally or vertically polarized directive transmitting antennas, provided the provisions of §§ 74.705, 74.707, and 74.709 are met.

(d) VHF low power TV and TV translator stations authorized on channels listed in the TV table of allocations (see §73.606(b) of Part 73 of this Chapter) will be authorized a maximum output power of the radio frequency amplifier of 0.1 kW peak visual power.

(e) The power output of the final radio amplifier of a VHF or UHF transmitter may be fed into a single transmitting antenna, or may be divided between two or more transmitting antennas or antenna arrays in any manner found useful or desirable by the licensee.

(f) A station proposing to use antenna(s) designed for circularly polarized radiation may be authorized to use a type accepted transmitter or parallel connected of two type accepted translator amplifiers to operate at peak visual output power of twice that specified under the maximum transmitter power limitations given above in this section.

35. Section 74.736 is amended by revising paragraph (a) to read as follows:

**§ 74.736 Emissions and bandwidth.**

(a) The license of a low power TV or TV translator station authorizes the transmissions of the visual signal by amplitude modulation (A5) and the accompanying aural signal by frequency modulation (F3).

* * * * *

36. Section 74.737 is revised in its entirety to read as follows:

**§ 74.737 Antenna location.**

(a) An applicant for a new low power TV or TV translator station or for a change in the facilities of an authorized station shall endeavor to select a site that will provide a line-of-sight transmission path to the entire area intended to be served and at which there is available a suitable signal from the primary station, if any, that will be retransmitted.

(b) The transmitting antenna should be placed above growing vegetation and trees lying in the direction of the area intended to be served, to minimize the possibility of signal absorption by foliage.

(c) A site within 8 kilometers of the area intended to be served is to be preferred if the conditions in paragraph (a) of this section can be met.

(d) Consideration should be given to the accessibility of the site at all seasons of the year and to the availability of facilities for the maintenance and operation of the transmitting equipment.

(e) The transmitting antenna should be located as near as is practical to the transmitter to avoid the use of long transmission lines and the associated power losses.

(f) Consideration should be given to the existence of strong radio frequency fields from other transmitters at the site of the transmitting equipment and the possibility that such fields may result in the retransmissions of signals originating on frequencies other than that of the primary station being rebroadcast.

37. Section 74.750 is amended by revising the headnote and paragraphs (a), (b), the introductory text to paragraph (c), (c)(3)(iii), (c)(5), (c)(7), the introductory text to paragraph (d), (d)(1), (e)(1), (e)(2), (e)(3), and (g) to read as follows:

**§ 74.750 Transmission system facilities.**

(a) Application for new low power TV and TV translator stations and for increased transmitter power for previously authorized facilities will not be accepted unless the transmitter is listed in the FCC's list of equipment type accepted for licensing under the provisions of this subpart.

(b) Transmitting antennas, antennas used to receive the signals to be

rebroadcast, and transmission lines are not type accepted by the FCC. External preamplifiers also may be used provided that they do not cause improper operation of the transmitting equipment, and use of such preamplifiers is not necessary to meet the provisions of paragraph (c) of this section.

(c) The following requirements must be met before low power TV and TV translator transmitters will be type accepted by the FCC:

* * * * *

(3) * * *

(iii) Plus or minus 1 kHz of its rated frequency for transmitters to be used at stations employing offset carrier frequency operation.

* * * * *

(5) The apparatus must be equipped with automatic controls that will place it in a non-radiating condition when no signal is being received on the input channel, either due to absence of a transmitted signal or failure of the receiving portion of the facilities used for rebroadcasting the signal of another station. The automatic control may include a time delay feature to prevent interruptions caused by fading or other momentary failures of the incoming signal.

* * * * *

(7) The transmitters of over 0.001 kW peak visual power (0.002 kW when circularly polarized antennas are used) shall be equipped with an automatic keying device that will transmit the call sign of the station, in International Morse Code, at least once each hour during the time the station is in operation when operating in the translator mode retransmitting the programming of a TV broadcast station. However, the identification by Morse Code is not required if the licensee of the low power TV or TV translator station has an agreement with the TV broadcast station being rebroadcast to transmit aurally or visually the low power TV or TV translator station call as provided for in § 74.783. Transmission of the call sign can be accomplished by:

* * * * *

(d) Low power TV and TV translator transmitting equipment using a modulation process for either program origination or rebroadcasting must meet the following requirements:

(1) The equipment shall meet the requirements of paragraphs (l)(1), (a)(2), (a)(3), (b)(1), and (b)(7) of § 73.687.

* * * * *

(e) * * *

(1) Any manufacturer of apparatus intended for use at low power TV or TV translator stations may request type acceptance by following the procedures set forth in Part 2, Subpart J, of this chapter. Equipment found to be acceptable by the FCC will be listed in the "Radio Equipment List" published by the FCC. These lists are available for inspection at the FCC headquarters in Washington, D.C. or at any of its field offices.

(2) Low power TV and TV translator transmitting apparatus that has been type accepted by the FCC will normally be authorized without additional measurements from the applicant or licensee.

(3) Applications for type acceptance of modulators to be used with existing type accepted TV translator apparatus must include the specifications electrical and mechanical interconnecting requirements for the apparatus with which it is designed to be used.

* * * * *

(g) Low power TV or TV translator stations installing new type accepted transmitting apparatus incorporating modulating equipment need not make equipment performance measurements and shall so indicate on the station license application. Stations adding new or replacing modulating equipment to existing low power TV or TV translator transmitting apparatus must have an operator holding a General Radiotelephone Operator License examine the transmitting system after installation. This operator must certify in the application for the station license that the transmitting equipment meets the requirement of paragraph (d)(1) of this section. A report of the methods, measurements, and results must be kept in the station records. However, stations using modulating equipment solely for the limited local origination of signals permitted by § 74.731 need not comply with the requirements of this paragraph.

38. Section 74.751 is amended by revising paragraphs (b)(1), (b)(2), (b)(6), and (c), and adding new paragraph (d) to read as follows:

**§ 74.751 Equipment changes.**

* * * * *

(b) * * *

(1) Replacement of the transmitter as a whole, except replacement with a transmitter of identical power rating which has been type accepted by the FCC for use by low power TV and TV translator stations, or any change which could result in a change in the electrical characteristics or performance of the station.

(2) Any change in the transmitting antenna system, including the direction of radiation, directive antenna pattern, antenna gain, transmission line loss characteristics, or height of antenna center of radiation.

* * * * *

(6) Any changes in the location of the transmitter except within the same building or upon the same pole or tower.

* * * * *

(c) Other equipment changes not specifically referred to in paragraph (a) or (b) of this section may be made at the discretion of the licensee: *Provided,* That the Engineer in charge of the Radio District in which the low power TV or TV translator station is located and the FCC in Washington, D.C., are notified in writing upon completion of such changes, and that the changes are appropriately reflected in the next application for renewal of the station license.

(d) Upon installation of new or replacement transmitting equipment for which prior FCC authority is not required under the provisions of this section, the licensee must place in the station records a certification that the new installation complies in all respects with the technical requirements of this part and the station authorization.

39. Section 74.761 is amended by revising the introduction and adding new paragraph (d) to read as follows:

**§ 74.761 Frequency tolerance.**

The licensee of a low power TV or TV translator station shall maintain the transmitter output frequencies as set forth below. The frequency tolerance of stations using direct frequency conversion of a received signal and not engaging in offset carrier operation as set forth in paragraph (d) of this section will be referenced to the authorized plus or minus 10 kHz offset, if any, of the primary station.

* * * * *

(d) The visual carrier shall be maintained to within 1 kHz of the assigned channel carrier frequency if the low power TV or TV translator station is authorized with a specified offset designation in order to provide protection under the provisions of § 74.705 or § 74.707.

40. Section 74.762 is amended in its entirety to read as follows:

**§ 74.762 Frequency measurements.**

(a) The licensee of a low power TV or TV translation station is not required to provide a means for measuring the operating frequencies of the transmitter. However, only equipment having the required stability will be type accepted for use by low power TV or TV translator stations.

(b) In the event that a low power TV or TV translator station is found to be operating beyond the frequency tolerance prescribed in § 74.761, the licensee promptly shall suspend operation of the transmitter and shall not resume operation until transmitter has been restored to its assigned frequencies. Adjustment of the frequency determining circuits of the transmitter shall be made only by a qualified person in accordance with § 74.750(g).

41. Section 74.763 is revised by amending paragraphs (a) and (c) to read as follows:

**§ 74.763 Time of operation.**

(a) A low power TV or TV translator station is not required to adhere to any regular schedule of operation. However, the licensee of a TV translator station is expected to provide service to the extent that such is within its control and to avoid unwarranted interruptions in the service provided.

* * * * *

(c) Failure of a low power TV or TV translator station to operate for a period of 30 days or more, except for causes beyond the control of the licensee, shall be deemed evidence of discontinuation of operation and the license of the station may be cancelled at the discretion of the FCC.

* * * * *

42. Section 74.764 is revised in its entirety to read as follows:

**§ 74.764 Station inspections.**

The licensee of a low power TV or TV translator station shall make the station and the records required to be kept by the rules in this part available for inspection by representatives of the FCC.

43. Section 74.765 is revised in its entirety to read as follows:

**§ 74.765 Posting of station and operator licenses.**

(a) The station license and any other instrument of authorization or individual order concerning the construction of the station or manner of operation shall be kept in the station record file so as to be available for inspection upon request of authorized representatives of the FCC.

(b) The licenses or permits of operators employed at low power TV stations originating programs shall be posted in accordance with the provisions of § 73.1230(b) of Part 73 of this chapter.

(c) The call sign of the station, together with the name, address, and telephone number of the licensee or local representative of the licensee, if the licensee does not reside in the community served by the station, and the name and address of the person and place where the station records are maintained, shall be displayed at the transmitter site on the structure supporting the transmitting antenna, so as to be visible to a person standing on the ground. The display shall be maintained in legible condition by the licensee.

44. Section 74.766 is amended by revising the headnote and adding new paragraph (e) to read as follows:

**§ 74.766 Low power TV and TV translator operator requirements.**

* * * * *

(e) An operator holding any class of FCC operator license or permit, except the Marine Operator Permit, must be on duty in charge of the transmitting apparatus of a low power TV station during all periods of program origination as defined in § 74.701(g).

45–47. New § 74.780 is added to read as follows:

**§ 74.780 Broadcast regulations applicable to low power TV stations.**

The following rules are applicable to programs originated by low power TV stations:

(a) Section 73.658, "Affiliation agreements and network program practices; territorial exclusivity in non-network program arrangements."

(b) Section 73.1202, "Station identification."

(c) Section 73.1205, "Fraudulent billing practices."

(d) Section 73.1206, "Broadcast of telephone conversations."

(e) Section 73.1207, "Rebroadcasts."

(f) Section 73.1208, "Broadcast of taped, filmed, or recorded material."

(g) Section 73.1211, "Broadcast of lottery information."

(h) Section 73.1212, "Sponsorship identification; list retention; related requirements."

(i) Section 73.1216, "Licensee-conducted contests."

(j) Section 73.1940, "Broadcasts by candidates for public office."

(k) Section 73.2080, "Equal employment opportunities."

(l) Part 73, Subpart G, "Emergency Broadcast System."

48. Section 74.783 is amended by revising the introductory text of paragraph (a), paragraph (c), and adding new paragraph (d) to read as follows:

**§ 74.783 Station identification.**

(a) Each TV translator station over 0.001 kW peak visual power (0.002 kW when using circularly polarized antennas) must transmit its station identification as follows:

* * * * *

(c) A low power TV station shall comply with the station identification procedures given in § 73.1201 of Part 73 of this chapter when originating programming (See § 74.701(g)). The identification procedures given in paragraphs (a) and (b) are to be used when programs of another station are being rebroadcast.

(d) Call signs for low power TV and TV translator stations will be made up of the initial letter K or W followed by the channel number assigned to the station and two additional letters. The use of the initial letter generally will follow the pattern used in the broadcast service, i.e., stations west of the Mississippi River will be assigned an initial letter K and those east, the letter W. The two letter combinations following the channel number will be assigned in order and requests for the assignment of the particular combinations of letters will not be considered. The channel number designator for Channels 2 through 9 will be incorporated in the call sign as a 2-digit number, i.e., 02, 03, . . . ., so as to avoid similarities with call signs assigned to amateur radio stations.

49. Section 74.784 is amended by revising paragraphs (b) and (c) and adding new paragraph (d) to read as follows:

**§ 74.784 Rebroadcasts.**

* * * * *

(b) The licensee of a low power TV or TV translator station shall not rebroadcast the programs of any other TV broadcast station or other station authorized under the provisions of this Subpart without obtaining prior consent of the station whose signals or programs are proposed to be retransmitted. The FCC shall be notified of the call letters of each station rebroadcast and the licensee of the low power TV or TV broadcast translator station shall certify that written consent has been obtained from the licensee of the station whose programs are retransmitted.

(c) A TV translator station may rebroadcast only programs and signals that are simultaneously transmitted by a TV broadcast station.

(d) The provisions of § 73.1207 of Part 73 of this chapter apply to low power TV stations in transmitting any material during periods of program origination obtained from the transmissions of any other type of station.

50. Section 74.832 is amended by revising paragraphs (a)(1) and (c) to read as follows:

**§ 74.832 Licensing requirements and procedures.**

(a) * * *

(1) A licensee of an AM, FM, TV, or International broadcast station or low power TV station. Low power auxiliary stations will be licensed for used with a specific broadcast or low power TV station or combination of stations licensed to the same licensee within the same community.

* * * * *

(c) Licensees of AM, FM, TV, and International broadcast stations; low power TV stations; and eligible network entities may be authorized to operate low power auxiliary stations in the frequency bands set forth in § 74.802(a).

## PART 76—CABLE TELEVISION SERVICE

51. Section 76.501 is amended by revising paragraph (a)(2) and removing paragraph (a)(3) in its entirety as follows:

**§ 76.501 Cross-ownership.**

(a) * * *

(1) * * *

(2) A TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of Part 73 of this chapter, overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

(3) [Reserved]

52. Section 76.605 is amended by revising paragraph (a)(9)(iii) to read as follows:

**§ 76.605 Technical standards.**

(a) * * *

(9) * * *

(iii) Each signal that is first received by the cable television system by direct video feed from a TV broadcast station or a low power TV station.

* * * * *

## PART 78—CABLE TELEVISION RELAY SERVICE

53. The last sentence in § 78.1 is revised to read as follows:

**§ 78.1 Purpose.**

* * * In addition CARS stations may be used to transmit television and related audio signals to TV translator and low power TV stations.

54. The first sentence of § 78.11, paragraph (a) is revised to read as follows:

**§ 78.11 Permissible service.**

(a) CARS stations are authorized to relay TV broadcast and low power TV and related audio signals, the signals of AM and FM broadcast stations, signals of instructional TV fixed stations, and cablecasting intended for use by one or more cable television systems. * * *

* * * * * *

**Appendix B**

*Instructions for FCC 346*

Application for Construction Permit For Translator or Low Power Television Station

(FCC Form 346 attached)

*General Instructions*

A. This FCC form is to be used to apply for authority to construct a new translator or low power television broadcast station, or to make changes in the existing facilities of such a station. It consists of the following sections:

I. General Information
II. Legal Qualifications
III. Financial Qualifications
IV. Program Service Statement
V. Engineering Data and Antenna and Site Information
VI. Equal Employment Opportunity Program
VII. Certification.

An applicant for a change in facilities need not file Sections II, III, IV and VI.

B. Prepare and submit three copies of this form and all exhibits to: The Secretary, Federal Communications Commission, Washington, D.C. 20554.

C. Many references to FCC Rules (47 CFR) are made in this application form. Before filling it out, the applicant should have on hand and be familiar with current broadcast rules in:

(1) Volume I: Parts 0 ("Commission Organization"), 1 ("Practice and Procedure"), and 17 ("Construction Marking and Lighting of Antenna Structures").

(2) Volume III: Part 73 ("Radio Broadcast Services").

FCC Rules may be obtained through the Government Printing Office, Washington, D.C. 20402. Orders should be sent directly to the Government Printing Office (not through the FCC). The printed rules are sold on a subscription basis, which entitles the purchaser to receive subsequent amendments to the rule part purchased until and overall revised edition is printed. You may telephone the Government Printing Office at (202) 783–3238.

D. Public Notice Requirement:

(1) Section 73.3580 of the Commission's Rules requires that applicants for construction permits for new broadcast stations and major changes in existing facilities (as defined in Section 73.3572(a)(1) or 73.3573(a)(1) of the Rules) give local notice in a newspaper of general circulation in the community to which the station is licensed. This publication requirement also applies with respect to major amendments thereto as defined in Sections 73.3572(b) and 73.3573(b) of the Rules.

(2) Completion of publication may occur within 30 days before or after tendering of the application. Compliance or intent to comply with the public notice requirement must be *certified* in Section VI of this application. The information that must be contained in the notice of filing is described in Paragraph (f) of Section 73.3580 of the Rules. Proof of publication need not be filed with this application.

E. A Copy of this completed application and all related documents shall be made available for inspection by the public, pursuant to Section 73.3526 of the FCC Rules.

F. Replies to questions in this form and the applicant's statements constitute representations on which the FCC will rely in considering the application. Thus, time and care should be devoted to all replies, which should reflect accurately the applicant's responsible consideration of the questions asked. Include all information called for by this application. If any portions of the application are not applicable, so state. *Defective or incomplete applications will be returned without consideration.* Furthermore, inadvertently accepted applications are also subject to dismissal.

G. In accordance with Section 1.65 of the Rules, the applicant has a *continuing obligation* to advise the Commission, through amendments, of any substantial and significant changes in the information furnished.

*Section I Instructions*

A. The name of the applicant stated in Section I shall be:

(i) if a corporation, the *EXACT* corporate name;

(ii) if a partnership, the names of all partners, and the name under which the partnership does business;

(iii) if an association, the name of the individual(s) authorized to act on behalf of the association, and the name of the association;

(iv) if an individual applicant, the full legal name.

In all other sections of this form, the organization name alone will be sufficient for identification of the applicant.

B. In Section I use the following State abbreviations:

| | |
|---|---|
| Alabama | AL |
| Alaska | AK |
| American Samoa | AS |
| Arizona | AZ |
| Arkansas | AR |
| California | CA |
| Colorado | CO |
| Connecticut | CT |
| Delaware | DE |
| District of Columbia | DC |
| Florida | FL |
| Georgia | GA |
| Guam | GU |
| Hawaii | HI |
| Idaho | ID |
| Illinois | IL |
| Indiana | IN |
| Iowa | IA |
| Kansas | KS |
| Kentucky | KY |
| Louisiana | LA |
| Maine | ME |
| Maryland | MD |
| Massachusetts | MA |
| Michigan | MI |
| Minnesota | MN |
| Mississippi | MS |
| Missouri | MO |
| Montana | MT |

| | |
|---|---|
| Nebraska | NB |
| Nevada | NV |
| New Hampshire | NH |
| New Jersey | NJ |
| New Mexico | NM |
| New York | NY |
| North Carolina | NC |
| North Dakota | ND |
| Northern Mariana Islands | CM |
| Ohio | OH |
| Oklahoma | OK |
| Oregon | OR |
| Pennsylvania | PA |
| Puerto Rico | PR |
| Rhode Island | RI |
| South Carolina | SC |
| South Dakota | SD |
| Tennessee | TN |
| Texas | TX |
| Trust Territory Of The Pacific Islands | TT |
| Utah | UT |
| Vermont | VT |
| Virginia | VA |
| Virgin Islands | VI |
| Washington | WA |
| West Virginia | WV |
| Wisconsin | WI |
| Wyoming | WY |

*Section II Instructions*

A. As used in Section II, the words "party to this application" have the following meanings:

Individual Applicant: The applicant.

Partnership Applicant: All partners, including limited partners. If any partner is a corporation or other entity, the definitions set forth below will apply.

Corporate Applicant: All officers and directors, and all persons or entities who are the beneficial or record owners or have the right to vote any capital stock, membership or owner interest, or subscribers to such interests, shall be considered parties to this application. If any corporation or other legal entity owns stock in the applicant, its officers, directors and persons or entities who are the beneficial or record owners or have the right to vote any capital stock, membership or owner interest, or subscribers to such interest, of that entity shall also be considered parties to this application.

In the event the applicant has more than 50 stockholders, only officers and directors and persons or entities who are the beneficial or record owners or have the right to vote 1% or more of the capital stock, membership or owner interest, or subscribers to such interest shall be considered parties to this application. However, if such entity is a bank, insurance company, or investment company (as defined by 15 U.S.C. § 80a–3) which does not invest for purposes of control, the relevant stock, membership or owner interest is 5% or more. If any corporation or other legal entity owns 1% or more of an applicant with more than 50 stockholders, its officers, directors and all persons or entities who are the beneficial or record owners or have the right to vote 1% or more of the capital stock, membership or owner interest, or subscribers to such interest in the entity, shall also be considered parties to this application. However, if such entity is a bank, insurance company or investment company (as defined by 15 U.S.C. § 80–3) which does not invest for purposes of control, the relevant stock, membership or owner interest is 5% or more.

Any Other Applicant: All executive officers, members of the governing board and owners or subscribers to any membership or ownership interest in the applicant.

B. All applicants must comply with Section 310 of the Communications Act of 1934, as amended. Specifically, Section 310 proscribes issuance of a construction permit to an alien, the representative of an alien, a foreign government or the representative thereof, or a corporation organized under the laws of a foreign government. This proscription also applies with respect to any corporation of which any officer or director is an alien or of which more than 20% of the capital stock is owned or voted by aliens, their representatives, a foreign government or its representative, or by a corporation organized under the laws of a foreign country. This proscription could likewise apply to any corporation directly or indirectly controlled by another corporation of which (a) any officer is, (b) more than 25% of the directors are, or (c) more than 25% of the captial stock is owned and voted by aliens, their representatives, a foreign government or its representative. The Commission may also deny a construction permit to a corporation controlled by another corporation organized under the laws of a foreign country.

C. The applicant must determine the citizenship of each officer and director. It must also determine the citizenship of each shareholder or else explain how it determined the relevant precentages. For large corporations, a sample survey using a recognized statistical method is acceptable for this purpose.

*Section III Instructions*

A. All applicants filing Form 346 must be financially qualified to effectuate their proposals. Certain applicants (i.e., for a new station, to reactivate a silent station, or if specifically requested by the Commission) must demonstrate their financial qualifications by filing Section III. DO NOT SUBMIT Section III if the application is for changes in operating or authorized facilities.

B. An applicant for a new station must attest it has sufficient net liquid assets on hand, or committed sources of funds to construct the proposed facility and operate for three months, without revenue. As used in Section III, "net liquid assets" the means lesser amount of the net current assets or of the liquid assets shown on a party's balance sheet, with net current assets being the excess of current assets over current liabilities.

C. Documentation supporting the attestation of financial qualification need not be submitted with this application but must be available to the Commission upon request. The Commission encourages that all financial statements used in the preparation of this application be prepared in accordance with generally accepted accounting principles.

D. It is Commission policy not to grant extension of time for construction on the basis of financial inability or unwillingness to construct.

*Section VI Instructions*

A. Applicants seeking authority to constuct a new low power television (LPTV) broadcast station, applicants seeking authority to obtain assignment of the construction permit or license of such a station, and applicants seeking authority to acquire control of an entity holding such construction permit or license are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, religion, national origin or sex. See Section 73.2080 of the Commission's Rules. Pursuant to these requirements, an applicant who proposes to employ five or more full-time station employees must establish a program designed to assure equal employment opportunity for women and minority groups (that is, Blacks not of Hispanic origin, Asian or Pacific Islanders, American Indians or Alaskan Natives, and Hispanics). This is submitted to the Commission as the Model EEO Program Form. If minority group representation in the available labor force is less than five percent (in the aggregate), a program for minority group members is not required. However, a program must be filed for women since they comprise a significant percentage of virtually all area labor forces. If an applicant proposes to employ less than five full-time employees, no EEO program for women or minorities need be filed.

B. Guidelines for developing an Equal Employment Opportunity program are set forth as a separate Model EEO program.

**Note.**—This five-point Model EEO Program Form is to be utilized only by applicants for new construction permits, assignees and transferees.

PAGE I

Section I

**General Information**

FILE # _____

*FCC FORM 346*

1. _____
Name of Applicant
_____
Mailing Address
City _____
State _____
Zip Code _____
Telephone No. _____

2. This application is for: FM Translator LPTV TV Translator

(a) Channel number:——

(b) Community of license: City State

(c) Check one:

——New Station

——Major change in existing station (Call Letters)

——Minor change in existing station (Call Letters)

——Amendment to pending application (Application Reference Number)

——Modification of Construction Permit (Construction Permit File Number)

**Note.**—It is not necessary to use this form to amend a previously filed application. Should you do so, however, please submit only Section I and those other portions of the form that contain the amended information.

3. (a) Is this application mutually exclusive with a renewal application?

☐ YES ☐ NO

If Yes, state: Call letters:
Community of license:

(b) To the applicant's knowledge, is this application mutually exclusive with any other application(s)?
☐ YES ☐ NO
If Yes, state: Call letters:
Community of license:
4(a) Is translator applicant the licensee of primary station?
——Yes; ——No.
(b) If answer to 4(a) is no, has written authority been obtained from the licensee of the station whose programs are to be retransmitted?
——Yes; ——No.
5. Station Identification.
Indicate how station identification will be made:
——FSK
——By primary station
——Live or tape
——Amplitude modulation of FM Aural Carrier
——Not required
6. Is type approved broadcast equipment being specified?
——Yes; ——No. If no, please indicate date equipment submitted to FCC Lab for approval.
7. Would a Commission grant of your application be major action as defined by Section 1.1305 of the Commission's Rules?
——Yes. If yes, submit as Exhibit No.

the required statement in accordance with Section 1.1311 of the Rules.
——No. If no, explain briefly.
8. If this application is for a new FM translator, have any funds, legal or engineering services or anything else of value been furnished, directly or indirectly, by the licensee or permittee of any FM broadcast station or any person associated with such station? If the answer is "Yes", attach an explanation as Exhibit No. , identifying the source and nature of the financial support or assistance.
——Yes; ——No

**Legal Qualifications**

Section II
Applicant's Name: _____
1. Applicant is: an individual; a general partnership; a limited partnership; a corporation other.
2. If the applicant is an unincorporated association or a legal entity other than an individual, partnership or corporation, describe in Exhibit No. the nature of the applicant.

*Citizenship and Other Statutory Requirements*

3. (a) Is the applicant in compliance with the provisions of Section 310 of the Communications Acts of 1934, as amended, relating to interests of aliens and foreign governments? Yes No .
(b) Will any funds, credit, etc., for the construction, purchase or operation of the station(s) be provided by aliens, foreign entities, domestic entities controlled by aliens, or their agents? Yes No .
If yes, provide particulars as Exhibit No. .
4. (a) Has an adverse finding been made, adverse final action taken or consent decree approved by any court or administrative body as to the applicant or any party to the application in any civil or criminal proceeding brought under the provisions of any law related to the following: any felony, antitrust, unfair competition, fraud, unfair labor practices, or discrimination? Yes No .
(b) Is there now pending in any court or administrative body any proceeding involving any of their matters referred to in (a)? Yes No .
If the answer to (a) or (b) above is yes, submit as Exhibit No. , a full disclosure concerning the persons and matters involved, identifying the court or administrative body and the proceeding (by dates and file numbers), stating the facts upon which the proceeding was based or the nature of the offense committed, and disposition or current status of the matter.

*Other Media Interests*

5. Does the applicant or any party to this application have any interest in or connection with the following:
(a) An AM, FM or TV broadcast station? Yes No .
(b) A broadcast application pending before the FCC? Yes No .
(c) Other non-broadcast media of mass communications, e.g. cable television, theatres and printed publications. Yes No .
6. Has the applicant or any party to this application had any interest in:
(a) An application which has been dismissed with prejudice by the Commission? Yes No .
(b) An application which has been denied by the Commission? Yes No .
(c) A broadcast station, the license which has been revoked? Yes No .
(d) An application in any Commission proceeding which left unresolved character issues against the applicant? Yes No .

If the answer to any of the questions in 5 is yes, state in Exhibit No. the following information:
(i) Name of party having such interest;
(ii) Nature of interest or connection, giving dates;
(iii) Call letters of stations or file number of application, or docket number;
(iv) Location.

*Minority Ownership*

7. Is the applicant over 50 percent minority owned? Yes No .
If the answer is yes, state in Exhibit No. for each minority owner:
(i) Name, address and percentage of ownership;
(ii) Minority group (e.g., Black not of Hispanic origin, Asian or Pacific Islander, American Indian or Alaskan native, and Hispanic).

Section III

*Financial Qualifications*

**Note.**—If this application is for a change in an operating facility, do not fill out this section. Yes No .
1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to cnstruct and operate the requested facilities for three months without revenue. Yes No .
2. The applicant certifies that: (a) It has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan by banks, financial institutions or others and each purchase of equipment on credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment; (c) it has determined that a reasonable assurance exists that all such sources (excluding banks, financial institutions and equipment manufacturers) have sufficient net liquid assets to meet these commitments. Yes No .

Section IV

*Program Service Statement*

For LPTV (Including STV applicants) only:
1. LPTV stations must offer a broadcast program service: a non-program broadcast service will not be permitted. Therefore, submit as Exhibit No. , a brief description, in narrative form, of your planned programming service. STV applicants should provide a complete description of your proposed STV system including the manner in which you intend to provide decoders to the public.

BILLING CODE 6712-01-M

Section V, Page 1

## ENGINEERING DATA

1. Facilities requested:

| a. Output Channel No. | Transmitter Output Power (watts) | Proposed Principal Community or Communities to be served: City: State: | Primary Station (station to be rebroadcast) (Translator only) Call: Channel No. City: State: Frequency: MHz |
|---|---|---|---|
| b. Offset (Low Power TV and TV Translator Stations only) ___ No offset ___ Plus offset ___ Zero offset ___ Minus offset | | | |
| c. Input Channel No. | If station is to operate via another translator station, indicate call sign and location of final intermediate translator: | | |

2. Proposed transmitter location:

| City | County | State |
|---|---|---|
| Address or other description of location | Geographical coordinates of transmitting antenna to nearest second North Latitude ° ' " | West Longitude ° ' " |

Attach as Exhibit No. a map or maps (preferably topographic, if obtainable, such as U. S. Geological Survey quadrangles) for the area of the proposed transmitter location and show drawn thereon the following data:

a. Scale of miles.
b. Proposed transmitter location accurately plotted.
c. Principal community to be served by the proposed TV or FM translator station, clearly identified and labeled.
d. Locations of all known radio stations (except amateur), such as AM, FM, TV, Translator, Police, Fire, Aeronautical, Public Utility, etc., and known commercial or government receiving sites, within the immediate vicinity of the proposed transmitter location.

3. Transmitter:

| Make | Type No. | Rated output power (watts) P |
|---|---|---|
| | | |

4. Transmission line:

| Make | Type No. | Length | Rated efficiency E for length given (decimal fraction) |
|---|---|---|---|
| | | | |

5. Transmitting antenna

| Manufacturer | Model No. 1/ | Description 1/ | Power gain G (multiplier) in lobe of maximum radiation relative to a half-wave dipole | Height of radiation center above mean sea level (ft) |
|---|---|---|---|---|

| Orientation 2/ | Height above ground 3/ | Elevation of Site 4/ | Elevation of Community 5/ | Effective radiated power R (R = P × E × G) (kW) |
|---|---|---|---|---|
| | | | | |

1. Give basic type using general descriptive terms such as half-wave dipole, "bow-tie" with screen, comer reflector, 10 element Yagi, 4 element in-phase array, two stacked 5 element Yagis, etc.
2. Show the direction of the main radiation lobe in degrees with respect to true north in a 360 degree horizontal azimuth, numbered clockwise, with true north as zero azimuth.
3. Show height to topmost portion of structure, including highest top mounted antenna and beacon if any.
4. Show the ground elevation above mean sea level at the base of the transmitting antenna supporting structure.
5. Show the average elevation of the community above mean sea level, or in lieu thereof, the commonly used elevation figure for the community to be served.

Section V, Page 2

6. Attach as Exhibit No. a vertical plan sketch for the proposed total structure(s) including supporting structure(s), giving height of center of radiation above ground, overall height of structure above ground, including lighting beacon (if any) and height above mean sea level in feet for all significant features for BOTH RECEIVING AND TRANSMITTING ANTENNAS. Also indicate any horizontal separation between receiving transmitting antennas.

7. Will the proposed antenna supporting structure be shared with another station or stations of any class? ☐ YES ☐ NO
If the answer is "Yes", list the call signs and class of such stations.

8. Attach as Exhibit No. a polar diagram of the radiation pattern (relative field) of the transmitting antenna, showing clearly the correct relationship between the major lobe or lobes and the minor lobes of radiation. If a non-directive transmitting antenna will be employed, i.e., an antenna with an approximately circular radiation pattern, check this ☐ and omit the polar diagram.

9. Has FAA been notified of proposed construction? ☐ YES ☐ NO
If yes, give date and office where notice was filed.
(Not necessary to file FCC Form 714, See Part 17 of the rules.)

10. Unattended operation:

a. Is unattended operation proposed? ☐ YES ☐ NO
If the answer is "Yes", and this application is for authority to construct a new station or to make changes in the facilities of an authorized station which proposes unattended operation for the first time, attach Exhibit No. , containing a full description of the means of compliance with the several requirements of Section 74.734 (TV Translators) or Section 74.1234 (FM Translators) of the Rules conceming unattended operation.

b. In space below state name, address and telephone number of a person or persons who may be contacted in an emergency to suspend operation of the translator should such action be deemed necessary by the Commission:

Name(s)

Address (street or other description)

City & State ZIP Code

Telephone number(s) (include area code)

I certify that I represent the applicant in the capacity indicated below and that I have examined the foregoing statement of technical information and that it is true to the best of my knowledge and belief.

Date _____ Signature _____
(check appropriate box below)

Telephone _____
(include area code)

☐ Technical Director ☐ Chief Operator
☐ Registered Professional Engineer ☐ Other (Specify)
☐ Consulting Engineer

FCC Form 346

BILLING CODE 6712-01-C

Section VI

**Equal Employment Opportunity Program**

1. Does the applicant propose to employ five or more fulltime employees? ☐ Yes; ☐ No.

If the answer is Yes, the applicant must include an EEO program called for in the separate 5 Point Model EEO Program.

Section VII

**Certification**

1. Has or will the applicant comply with the public notice requirement of Section 73.3580 of the Commission's Rules? ☐ Yes; ☐ No.

A copy of the text and dates of publication is attached as Exhibit No. ——.

The Applicant hereby waives any claim to the use of any particular frequency as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. *(See Section 304 of the Communications Act of 1934, as amended.)*

The Applicant acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all exhibits are a material part hereof and incorporated herein.

The Applicant represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

In accordance with Section 1.65 of the Commission's Rules, the Applicant has a continuing obligation to advise the Commission, through amendments, of any substantial and significant changes in information furnished.

**Willful False Statements Made on This Form Are Punishable by Fine and Imprisonment—U.S. Code, Title 18, Section 1001**

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this — day of ——, 19—.

Name of Applicant ——————————

Signature ——————————

Title ——————————

*FCC Notice to Individuals Required by the Privacy Act and the Paperwork Reduction Act*

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers, and application examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information. Your response is required to obtain the requested Permit.

The foregoing Notice is required by the Privacy Act of 1974, Pub. L. 93–579, December 31, 1974, 5 U.S.C. 552a(e)(3).

*Attachment 1 to FCC Form 346*

The following information may be submitted at the option of applicants. However, applications containing the requested information will be processed at a faster rate than applications not containing such information. In the latter case, the Commission's limited staff will be required to compute the data manually and processing will, therefore, require substantially more time.

Attach as Exhibit No. —— an allocation study utilizing topographic maps or an accurate full scale reproduction thereof and using pertinent field strength measurement data where available, a full scale exhibit of the entire pertinent area to show the following:

(a) Normally protected and the interfering contours for the proposed operation along all azimuths.

(b) Normally protected and interfering contours of existing stations and other proposed stations in pertinent areas with which prohibited overlap would result as well as those existing stations and other proposals which require study to clearly show absence of prohibited overlap.

(c) Plot of the transmitter location of each station or proposal requiring investigation, with identifying call letters, file numbers, and operating or proposed facilities.

(d) Properly labeled longitude and latitude degree lines, shown across entire exhibit.

United States of America,
Federal Communication Commission,
*Washington, D.C.*

**Model EEO Program**

1. Name of Applicant ——————————
Street Address ——————————
City ——————————
State ——————————
Zip Code ——————————
Telephone No. (Include Area Code) ——————————

2. This form is being submitted in conjuction with:

☐ Application for Construction Permit for New Station
☐ Application for Transfer of Control
☐ Application for Assignment of License

(a) Call letters (or channel number of frequency)

(b) Community of License

——————————
City ——————————
State ——————————

*Instructions*

Applicants seeking authority to construct a new low power television broadcast station, applicants seeking authority to obtain assignment of the construction permit or license of such a station, and applicants seeking authority to acquire control of an entity holding such construction permit or license are required to afford equal employment opportunity to all qualified persons and to refrain from discriminating in employment and related benefits on the basis of race, color, religion, national origin or sex. See Section 73.2080 of the Commission's Rules. Pursuant to these requirements, an applicant who proposes to employ five or more fulltime station employees must establish a program designed to assure equal employment opportunity for women and minority groups (that is, Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives and Hispanics.) This is submitted to the Commission as the Model EEO Program. If minority group representation in the available labor force is less than five percent (*in the aggregate*), a program for minority group members is not required. In such cases, a statement so indicating must be set forth in the EEO model program. However, a program must be filed for women since they comprise a significant percentage of virtually all area labor forces. If an applicant proposes to employ less than five fulltime employees, no EEO program for women or minorities need be filed.

Guidelines for a Model EEO Program and a Model EEO Program are attached.

Note.—Check appropriate box, sign the certification below and return to FCC:

☐ Station will employ less than 5 fulltime employees; therefore no written program is being submitted.
☐ Station will employ 5 or more fulltime employees. Our 5 point program is attached.

*Certification*

I certify that the statements made herein are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this —— day of ——, 19—.

Signature ——————————
Title ——————————

**Willful False Statements Made on This Form Are Punishable by Fine and Imprisonment—U.S. Code, Title 18, Section 1001**

*FCC Notice to Individuals Required by the Privacy Act*

The solicitation of personal information requested in this application is authorized by the Communications Act of 1934, as amended. The principal purpose for which the information will be used is to determine if the benefit requested is consistent with the public interest. The staff, consisting variously of attorneys, accountants, engineers and application examiners, will use the information to determine whether the application should be granted, denied, dismissed, or designated for hearing. If all the information requested is not provided, the application may be returned without action having been taken upon it or its processing may be delayed while a request is made to provide the missing information. Accordingly, every effort should be made to provide all necessary information.

The foregoing Notice is required by the Privacy Act of 1974, Pub. L. 93–579, December 31, 1974, 5 U.S.C. 552a(e)(3).

**Guidelines to the Model EEO Program**

The model EEO program adopted by the Commission for construction permit

applicants contains five sections designed to assist the applicant in establishing an effective EEO program for its station. The specific elements which should be addressed are as follows:

*I. General Policy*

The first section of the program should contain a statement by the applicant that it will afford equal employment opportunity in all personnel actions without regard to race, color, religion, national origin or sex, and that it has adopted an EEO program which is designed to fully utilize the skills of minorities and women in the relevant available labor force.

*II. Responsibility for Implementation*

This section calls for the name (if known) and title of the official who will be designated by the applicant to have responsibility for implementing the station's program.

*III. Policy Dissemination*

The purpose of this section is to disclose the manner in which the station's EEO policy will be communicated to employees and prospective employees. The applicant's program should indicate whether it: (a) intends to utilize an employment application form which contains a notice informing job applicants that discrimination is prohibited and that persons who believe that they have been discriminated against may notify appropriate governmental agencies; (b) will post a notice which informs job applicants and employees that the applicant is an equal opportunity employer and that they may notify appropriate governmental authorities if they believe that they have been discriminated against; and (c) will seek the cooperation of labor unions, if represented at the station, in the implementation of its EEO program and in the inclusion of nondiscrimination provisions in union contracts. The applicant should also set forth any other methods it proposes to utilize in conveying its EEO policy (e.g., orientation materials, on-air announcements, station newsletter) to employees and prospective employees.

*IV. Recruitment*

The applicant should specify the recruitment sources and other techniques it proposes to use to attract minority and female job applicants. Not all of the categories of recruitment sources need be utilized. The purpose of the listing is to assist the applicant in developing specialized referral sources to establish a pool of minorities and women who can be contacted as job opportunities occur. Sources which subsequently prove to be nonproductive should not be relied on and new sources should be sought.

*V. Training*

Training programs are not mandatory. Each applicant is expected to decide, depending upon its own individual situation, whether a training program is feasible and would assist it in its effort to increase the pool of available minority and female applicants. Additionally, the applicant may set forth any other assistance it proposes to give to students, schools or colleges which is designed to be of benefit to minorities and women interested in entering the broadcasting field. The beneficiary of such assistance should be listed, as well as the form of assistance, such as contributions to scholarships, participation in work study programs, and the like.

**Model Equal Employment Opportunity Program**

*I. General Policy*

It will be our policy to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It will also be our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

To make this policy effective, and to ensure conformance with the Rules and Regulations of the Federal Communications Commission, we have adopted an Equal Employment Opportunity Program which includes the following elements:

*II. Responsibility for Implementation*

(Name/Title), _____ will be responsible for the administration and implementation of our Equal Employment Opportunity Program. It will also be the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

*III. Policy Dissemination*

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts will be made:

( ) The station's employment application form will contain a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, State or Federal agency if they believe they have been the victims of discrimination.

( ) Appropriate notices will be posted informing applicants and employees that the station is an Equal Opportunity Employer and of their right to notify an appropriate local, State, or Federal agency if they believe they have been the victims of discrimination.

( ) We will seek the cooperation of unions, if represented at the station, to help implement our EEO program and all union contracts will contain a nondiscrimination clause.

( ) Other (specify).

*IV. Recruitment*

To ensure nondiscrimination in relation to minorities and women, and to foster their full consideration in filling job vacancies, we propose to utilize the following recruitment procedures:

( ) We will attempt to maintain systematic communication, both orally and in writing, with a variety of minority and women's organizations to encourage the referral of qualified minority and female applicants. Examples of organizations we intend to contact are:

_____

_____

( ) In addition to the organizations noted above, which specialize in minority and female candidates, we will deal only with employment services, including State employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. Examples of these employment referral services are:

_____

_____

**Model Equal Employment Opportunity Program**

( ) When we recruit prospective employees from educational institutions such recruitment efforts will include area schools and colleges with significant minority and female enrollments. Educational institutions to be contacted for recruitment purposes are:

_____

( ) When utilizing media for recruitment purposes, help-wanted advertisements will always include a notice that we are an Equal Opportunity Employer and will contain no indication, either explicit or implied, of a preference for one sex over another.

( ) When we place employment advertisements in printed media some of such advertisements will be placed in media which have significant circulation or are of particular interest to minorities and women. Examples of publications to be utilized are:

_____

_____

( ) We will encourage employees, particularly minority and female employees, to refer minority and female candidates for existing and future openings.

*V. Training*

( ) Station resources and/or needs will be such that we will be unable or do not choose to institute specific programs for upgrading the skills of employees.

( ) We will provide on-the-job training to upgrade the skills of employees.

( ) We will provide assistance to students, schools or colleges in programs designed to enable minorities and women to compete in the broadcast employment market on an equitable basis:
School or Other Beneficiary _____
Proposed Form of Assistance _____

_____

( ) Other (Specify):

_____

_____

**Appendix C**

*List of Commenters*

1. ABC Television Affiliates Association (ABC Affiliates)
2. Action for Children's Television (ACT)
3. Alaska Public Broadcasting Commission

4. American Broadcasting Companies, Inc. (ABC)
5. American Community Television Association (ACTVA)
6. American Radio Relay League (ARRL)
7. American Women in Radio and Television (AWRT)
8. Association of Maximum Service Telecasters (MST)
9. Attaway Broadcast Group, Inc. (Attaway)
10. Frances Ayers
11. Stephen A. Ballo (Ballo)
12. Dr. Marvin R. Bensman, Memphis State University (Bensman)
13. Birmingham Amateur Radio Club (BARC)
14. Blonder-Tongue Laboratories, Inc. (Blonder-Tongue)
15. Blue Mt. Translator District (Blue Mt.)
16. John W. Boler (Boler)
17. Bonneville International Corporation (Bonneville)
18. Craig H. Brown
19. Paul James Broyles (Broyles)
20. Cable Television Review Commission, City of San Diego
21. California Public-Safety Radio Association, Inc. (CPSRA)
22. CBS, Inc. (CBS)
23. Channel 57 Corporation (Channel 57)
24. Children's Hospital of Los Angeles, University Affiliated Program (Childrens Hospital)
25. Christian Broadcasting Network (CBN)
26. Citizens Communications Center, Black Citizens for a Fair Media and National Latino Media Coalition (CCC)
27. City University of New York, Graduate School and University Center (CUNY)
28. Command Productions
29. Colorado Translator Association (CTA)
30. Communications Investment Corporation (CIC)
31. Community Television Network, Inc. (CTN)
32. Consumer Federation of America (CFA)
33. Corinthian Broadcasting Corporation (CBC)
34. Corporation for Public Broadcasting (CPB)
35. Margaret E. Coughlin
36. Council on Wage Price Stability (COWPS)
37. Department of Communications of the County of Los Angeles (LA Communications Dept.)
38. E.B. Craney (Craney)
39. Harvey Dinerstein
40. Charles E. Edgley (Edgley)
41. Electronics Industries Association, Consumer Electronics Group (EIA/CEG)
42. EMCO
43. Federal Express Corporation (Federal Express)
44. Reginald A. Fessenden Educational Fund (Fessenden)
45. Field Communications Corporation (Field)
46. Gammon & Grange (G&G)
47. Garryowen Corporation (Garryowen)
48. General Electric Broadcasting Company, Inc. (GE Broadcasting)
49. General Electric Company (GE)
50. Grassroots Video, Inc. (Grassroots)
51. Robert C. Greene (Greene)
52. Darwin Hillberry (Hillberry)
53. Howard Publications, Inc. (Howard)
54. Independent Cinema Artists and Producers (ICAP)
55. International Broadcasting Network (IBN)
56. International Cultural Network, Inc. (ICN)
57. Joint Business Council of the Shoshone and Arapahoe Tribes (Joint Business Council)
58. Joint Comments of Broadcast Licensees (Joint-Licensees)
59. Joint Comments of Colony Communications, etc. (Joint-Colony)
60. Joint Comments of Cosmos Broadcasting Corp., etc. (Joint-Cosmos)
61. KBOW
62. Kitchen Productions (Kitchen)
63. Ron Kurtenbach (Kurtenbach)
64. Lake County Television Club (Lake County)
65. Land Mobile Communications Council (LMCC)
66. Laramie Plains Antenna TV Association (Laramie Plains)
67. Los Angeles County Sheriff (LA Sheriff)
68. M/A COM, Inc. (M/A COM)
69. Don H. Martin (Martin)
70. Maryland/District of Columbia/ Delaware Broadcasters Association (MDCDBA)
71. Daniel M. Mayeda (Mayeda)
72. Metonomy Cable Corporation (Metonomy)
73. Microband Corporation of America (Microband)
74. Missionary Society of the Oblate Fathers of Texas (Oblate Fathers)
75. Morongo Basin TV Club (Morongo Basin)
76. National Association of Broadcasters (NAB)
77. National Association of Business & Educational Radio, Inc. (NABER)
78. National Association of Public Television Stations (NAPTS)
79. National Black Media Coalition (NBMC)
80. National Broadcasting Company (NBC)
81. National Cable Television Association (NCTA)
82. National Congress of American Indians (NCAI)
83. National Council of Churches of Christ in the U.S.A., Communications Commission (NCC)
84. National Hockey League (NHL)
85. National League of Cities (NLC)
86. National Telecommunications and Information Administration (NTIA)
87. National Telephone Cooperative Association (NTCA)
88. National Translator Association (NTA)
89. Neighborhood Television Company (Neighborhood)
90. New York State Education Department (NYSED)
91. Ohio Educational Broadcasting Network Commission (OEBNC)
92. OK TV Translator Systems (OK TV)
93. Omega Communications, Inc.
94. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
95. O.D. Page
96. Kevin Parkansky (Parkansky)
97. Pennsylvania Association of Broadcasters (PAB)
99. Potomac Communications, Inc. (Potomac)
100. Public Broadcasting Service (PBS)
101. Publicoop
102. Quality Media Corporation, Inc. (QMC)
103. Radio & Television Commission, Southern Baptist Convention (Southern Baptist Convention)
104. RCA Corporation (RCA)
105. Residential Entertainment, Inc. (Residential)
106. Henry R. Sandy (Sandy)
107. Lee R. Shoblom (Shoblom)
108. Sino Communication Group, Inc. (SINO)
109. J. Rodger Skinner (Skinner)
110. Thomas C. Smith (Smith)
111. Southern California Committee for Open Media (SCCOM)
112. Span-Com Broadcasting Group (Span-Com)
113. Spanish International Communications Corp. & Spanish Intl. Network (SIN)
114. Spanish Radio Broadcasters Association
115. Spectradyne, Inc. (Spectradyne)
116. Susan L. Stolcker
117. Storer Broadcasting, Inc. (Storer)
118. Charles E. Strange, M.D. (Strange)
119. William E. Sullivan (Sullivan)
120. Summers Broadcasting, Inc. (Summers)
121. Television Technology Corp. (TTC)
122. Telicommunity, Inc. (Telicommunity)
123. Telocator
124. Third Avenue Community Center (Third Ave.)
125. Tunnel Radio
126. B.D. Thornton (Thornton)
127. Mr. Tomczak (Tomczak)
128. Turner Television Stations, Inc. (Turner)
129. Philip Tymon (Tymon)
130. United Church of Christ (UCC)
131. United Media Corp.
132. United States Catholic Conference (USCC)
133. United States Department of Justice
134. University of Wisconsin System (Univ. of Wisconsin)
135. U.P. TV Systems, Inc. (U.P. TV)
136. Utilities Telecommunications Council (UTC)
137. Richard I. Vega & Associates (Vega)
138. The Video Factory
139. Video Makers
140. Washington State Broadcasters Association (WSBA)
141. Watts Labor Community Action Committee
142. Westinghouse Broadcasting Company, Inc. (Westinghouse)
143. WWHT, Inc. (WWHT)
144. Wometco
145. Steven Zeitlin (Zeitlin)

*Reply Comments*

1. Alaska Public Broadcasting Commission (APBC)
2. American Broadcasting Companies, Inc. (ABC)
3. American Community Television Association (ACTVA)
4. Associated Public-Safety Communications, Inc. (APCO)

5. Association of Community Organizations for Reform Now (ACORN)
6. Association of Maximum Service Telecasters (MST)
7. Belvidere Daily Republican Co. (Belvidere)
8. Messenger Publishing Company (Messenger)
9. John W. Boler (Boler)
10. Channel 57 Corporation (Channel 57)
11. Citizens Communications Center (CCC)
12. CBS, Inc. (CBS)
13. Community Television Network, Inc. (CTN)
14. Corporation for Public Broadcasting (CPB)
15. Council for UHF Broadcasting (CUB)
16. Joint Reply of Broadcast Licensees (Licensees)
17. Joint Reply of Cox Broadcast Corp., etc. (Joint, Cox)
18. Jerrell K. Davis (Davis)
19. Electronic Industries Association, Consumer Electronics Group (EIA/CEG)
20. Field Communications Corp. (Field)
21. State of Florida, Division of Communications (Florida)
22. Gammon & Grange (G&G)
23. Gannett Co., Inc. (Gannett)
24. General Electric Broadcasting Co., Inc. and General Electric Broadcasting Co. of Colorado, Inc. (GEBCO)
25. Global Village Video Resource Center, Inc. (Global Village)
26. Robert C. Greene
27. Arnold Gregg (Gregg)
28. Howard Publications, Inc. (Howard)
29. Honorable Daniel K. Inouye
30. International Broadcasting Network (IBN)
31. B. Jackson (Jackson)
32. Harlan L. Jacobsen (Jacobsen)
33. Joint Council on Educational Telecommunications (JCET)
34. Land Mobile Communications Council, Inc. (LMCC)
35. Don Mason (Mason)
36. Microband Corp. of America (Microband)
37. National Association of Broadcasters (NAB)
38. National Association of Business & Educational Radio, Inc. (NABER)
39. National Association of Educational Broadcasters (NAEB)
40. National Association of Public Television Stations (NAPTS)
41. National Association of Low Power Broadcasters (NALPB)
42. National Black Media Coalition (NBMC)
43. National Broadcasting Company (NBC)
44. National Cable Television Association (NCTA)
45. National Citizens Committee for Broadcasting (NCCB)
46. National Congress of American Indians (NCAI)
47. National Council of Churches of Christ in the U.S.A., Communications Commission (NCC)
48. National Federation of Local Cable Programmers (NFLCP)
49. National Hockey League (NHL)
50. National Innovative Programming Network (NIPN)
51. National League Of Cities Network, Inc. Companies (NIPN)
52. National League of Cities (NLC)
53. National Translator Association (NTA)
54. Neighborhood TV Company (Neighborhood)
55. New Jersey Television Corp.
56. Jeffrey Nightbyrd (Nightbyrd)
57. Oak Industries, Inc. (Oak)
58. Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
59. Park Broadcasting
60. Praxis
61. Public Broadcasting Service (PBS)
62. Response Broadcasting Corp. (Response)
63. Lloyd R. Smith, Sr. (Smith)
64. Spanish International Communications Corp. and Spanish International Network (SIN)
65. Television Technology Corp. (TTC)
66. Tunnel Radio of America, Inc. (Tunnel)
67. International Union, UAW (UAW)
68. UP TV Systems, Inc. (UP)
69. Utilities Telecommunications Council (UTC)
70. Ventures In Communications, Inc. (Ventures)
71. Washington State Association of Broadcasters (WSAB)
72. Western Communications Research Institute (Western)

N.B. All informal comments and letters are not identified herein, on account of the volume received.

*List of Commenters—Further Notice of Proposed Rule Making*

1. AGK Communications, Inc. (AGK)
2. American Broadcasting Companies, Inc. (ABC)
3. American Christian Television System, Inc. (ACTS)
4. American Petroleum Institute, Central Committee on Telecommunications (API, CCT)
5. Associated Public-Safety Communications Officers, Inc. (APCO)
6. Association of Maximum Service Telecasters (MST)
7. Attaway Broadcast Group, Inc. (Attaway)
8. CBS, Inc. (CBS)
9. Communications Investment Corporation (CIC)
10. Community Media Network, Inc. (CMN)
11. Corporation for Public Broadcasting (CPB)
12. Cox Broadcasting Corporation (Cox)
13. Electronics Industries Association, Consumer Electronics Group (EIA)
14. Field Communications Corporation (Field)
15. John P. Gallagher and Garry N. Johnson (Gallagher and Johnson)
16. Garryowen Corporation (Garryowen)
17. General Electric Broadcasting Company, Inc. and General Electric Broadcasting Company of Colorado, Inc. (GEBCO)
18. Howard Publications, Inc. (Howard)
19. International Broadcasting Network (IBN)
20. KHQ, Incorporated (KHQ)
21. Kitchen Productions (Kitchen)
22. Motorola, Inc. (Motorola)
23. Multilingual Broadcasting Company, Inc. (Multilingual)
24. National Association of Broadcasters (NAB)
25. National Association of Public Television Stations (NAPTS)
26. National Cable Television Association, Inc. (NCTA)
27. National Translator Association (NTA)
28. Neighborhood TV Company, Inc. (Neighborhood)
29. New Jersey Television Corporation (NJTV)
30. Offshore Telephone Company (Offshore)
31. Ohio Educational Broadcasting Network Commission (OEBNC)
32. Radio Broadcasting Company, *et al.* (RBC)
33. Spectra Associates, Inc. (Spectra)
34. Storer Broadcasting Company (Storer)
35. Taft Broadcasting Company, McGraw-Hill Broadcasting Company, NEP Communications, Inc. (Taft)
36. Joint Comments of Television Station Licensees (Licensees)
37. Television Technology Corporation (TV Technology)
38. WHP, Inc. (WHP)

*Reply Comments*

1. ABC
2. ACTS
3. MST
4. CBS
5. SPB
6. Cox
7. GEBCO
8. IBN
9. King Broadcasting Company (King)
10. NAB
11. National Association of Business and Educational Radio, Inc. (NABER)
12. National Broadcasting Company, Inc. (NBC)
13. NTA
14. NJTV
15. Licensees
16. International Union, UAW (UAW)

**Appendix D—Summary of Low Power Comments**

*Contents*

General commentary on the low power proposal
Spectrum-related issues
  Secondary Status
  Interference
    Multipoint Distribution Service
    Land Mobile Service
    Cable
    Full-Service Stations
    Notification
    Field Tests
    Low Power Stations
Allocation Issues
  Channel Selection
  Desired-to-Undesired Signal Ratios
  Noncommercial Reservations
  UHF Comparability
  Engineering Issues
  Power
License Issues
  Operator requirement
  License renewal

Trafficking
Programming Issues
Ascertainment
Fairness Doctrine
Access for Political Candidates; Personal Attack Rule
Nonentertainment Programming
Limits on Commercialization
Prohibitions on Obscenity and Lotteries
Retransmission and Commercial Substitution Consent
Local Programming
Alaska
Ownership Restrictions
Duopoly Rule
One-to-a-Market Rule
Network Ownership
Multiple Ownership
Regional Concentration Rule
Translators
Newspapers
Local Ownership
Cable Ownership
Mandatory Carriage
Comparative Issues
Lottery
Paper hearing
Predesignation Conference
Alternative Proposals
Comparative Preferences
First to File
Minority Ownership
Female Ownership
Noncommercial
Commercials on Noncommercial Stations
Channel Reservations for Noncommercial Use
Free Versus Pay
Local Preference
Translator Versus Low Power Station
Alternative Proposals

1. In this summary, an attempt was made to note all relevant comments on the proposals in the *Notice of Proposed Rule Making*. Comments occasionally are referred to by the abbreviation following their names in the list of comments, attached hereto. Except where necessary to the sense of the commentary, whether a statement was made in comments or reply comments is not indicated. Neither all the details nor the identity of every proponent of each suggestion are included, both for the sake of brevity and in recognition of the fact that the entire record is available for examination by anyone wishing to do so. Where a party laid out a detailed counterproposal, an effort was made to include all relevant details, however. Comments that clearly are irrelevant or beyond the scope of this proceeding are not mentioned herein.

2. *General commentary on the low power proposal.* The vast majority of the comments support the concept of the low power service in principle. Supporting comments were filed by such diverse entities as broadcast companies, trade associations, commercial and noncommercial networks, government agencies, public interest groups, religious groups, Indian tribes, individuals, newspaper publishers and equipment manufacturers. Laundry lists of names generally are eschewed herein as of less value than specific suggestions themselves; however, the following list, while by no means exhaustive, may be useful in affording a sense of the apparently broad appeal of the low power proposal. General supporting comments were filed by, among others: Action for Children's Television (ACT), Alaska Public Broadcasting Commission (APBC), American Broadcasting Companies, (ABC), Association of Community Organizations for Reform Now (ACORN), Attaway Broadcast Group (Attaway), Birmingham Amateur Radio Club (BARC), John Boler (Boler), Bonneville International Corporation (Bonneville), Children's Hospital of Los Angeles-University Affiliated Programs, Paul James Broyles (Broyles), Citizens Communications Center (Citizens), Columbia Broadcasting System (CBS), Consumer Federation of America (CFA), Independent Cinema Artists and Producers (ICAP), International Union-United Auto Workers (UAW), Joint Business Council of the Shoshone and Arapahoe Indian Tribes, Lake County Translator Association (Lake County), Messenger Publishing Company (Messenger), Microband Corporation of America (Microband), Missionary Society of the Oblate Fathers of Texas (Oblate Fathers), National Association of Broadcasters (NAB), National Cable Television Association (NCTA), National Federation of Local Cable Programers (NFLCP), National Hockey League (NHL), National Congress of American Indians (NCAI), National Telecommunications and Information Administration (NTIA), National Translator Association (NTA), New York State Department of Education (NYSED), Kevin Parkansky (Parkansky), Potomac Communications, Inc. (Potomac), The Public Broadcasting Service (PBS), Thomas Smith (T. Smith), Spanish International Network (SIN), Charles E. Strange (Strange), William Sullivan (Sullivan), Philip Tymon (Tymon), United Church of Christ (UCC), United States Catholic Conference (USCC), United States Department of Justic (DOJ), Western Communications Research Institute (WCRI), and Steven Zeitlin (Zeitlin). Their various reasons for supporting the proposal include the deregulatory and marketplace-oriented aspects of the proceeding, the potential importance of the low power service to rural telecommunications, the possibilities for additional local television outlets providing local service, the potential for additional minority-owned and noncommercial stations, the possibility for increased programming for specialized audiences such as children and the elderly and the potential for more diverse television service nationally.

3. In contrast, the number of negative comments was quite small, generally relating to what may be characterized as competing needs for spectrum space. The Los Angeles County Sheriff and other representatives of land mobile interests evince concern regarding low power's impact on land mobile services sharing frequencies with broadcast uses. Field Communications Corporation (Field), Channel 57 Corporation (Channel 57), Corinthian Broadcasting Corporation (Corinthian) and Omega Communications (Omega) voice concern about impact on full-service UHF stations. Garryowen Corporation (Garryowen) argues that the typical low power coverage area will not be large enough to serve rural areas adequately. B. D. Thornton (Thornton) wonders whether and how low power stations will be profitable. ABC cautions against "financial bailouts," such as waivers of technial standards, after the service is on line. The ABC Television Affiliates Association (ABC Affiliates) and Pennsylvania Association of Broadcasters (PAB) oppose the proposal, fearing that audience fragmentation will cause a decline in exisiting program services, especially in marginally profitable markets that cannot withstand increased competition. The above points are addressed in greater detail in the discussion that follows.

4. *Spectrum-related issues.* The greatest volume of commentary was addressed to spectrum-related issues, including low power's spectrum priority, channel selection and other technical and engineering matters. A number of parties discuss the proposed secondary status, or spectrum priority, for low power stations. Not all parties are in agreement on the definition of secondary status, not to mention whether or not it should be accorded to low power stations.[1]

5. Parties favoring maintenance of secondary status for the low power service are generally full-service broadcasters and their representatives. They include ABC, ABC Affiliates, CBS, Association of Maximum Service Telecasters (MST), NAB, National Broadcasting Company (NBC), Storer Broadcasting, Inc. (Storer), and Washington State Association of Broadcasters (WSAB). They argue that secondary status must be maintained, to protect full-service stations from potential interference from low power stations and generally to preserve the integrity of the Television Table of Assignments. They encourage the Commission not to modify the secondary stations of low power stations to preserve against possible future economic problems. NAB cautions against waiver of technical standards, in particular. Gammon and Grange states that secondary status permits flexibility in low power authorizations.

6. Parties opposing secondary status generally wish the Commission to provide added channel security for low power stations. They include Metonomy Cable Corporation (Metonomy) and Grassroots Video. Some comments address spectrum priority among translators and low power stations themselves. Colorado Translator Association (CTA) would like translators to have priority over low power stations. Garryowen states that it would expect a low power station on a channel in the Television Table of Assignments to have priority over one on an unasssigned channel. Several parties evince concern about low power stations being required to yield their frequency to later full-service stations.

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[1] For purposes of reference, the *Notice of Proposed Rule Making* defined secondary status as follows:

"This means that a translator or low power station creating harmful interference to a full-service station must cease operation if it is unable to change its channel or take other steps to correct the interference. Translators and low power stations also are secondary in the sense that they must give way to a full-service station proposing a mutually exclusive use of a frequency." 45 FR at 69181, paragraph 22, published October 17, 1980.

Citizens accepts that low power stations would be secondary to existing full-service stations, but finds it unfair that an existing low power station would have to yield to a later full-service station, suggesting that the Commission hold a hearing on which station would better serve its community before mandating the elimination of the low power station. UAW also argues that the Commission should give consideration to the fact that a proposed full-service station would preclude an existing low power station, in licensing the full-service station. The Ohio Educational Broadcasting Network Commission (OEBNC) seeks channel security for noncommercial educational translators, as does the New York State Board of Education, contending that noncommercial low power stations in operation for over three years be accorded primary status. The National Translator Association also would like primary status for low power stations over three years old, adding that when a full-service station is applied for on the channel of a low power station, the low power station should have the opportunity to upgrade to full service, with a comparative preference over the full-service applicant, or a preference on another channel, if the low power station chooses to yield its original frequency to the full-service applicant. International Broadcasting Network (IBN) favors primary status for originating, free low power stations that broadcast a minimum number of hours. The Los Angeles Children's Hospital University Affiliated Program would like the Commission to afford primary status to low power stations providing a unique service.

7. *Interference.* Several parties including ABC, the Los Angeles County Department of Communication, Microband and Storer, would like the Commission to develop more detailed interference criteria than those in the *Notice of Proposed Rule Making.*[2] A number of comments address the potential for interference by low power stations to various other services that use the same frequencies.

8. *Interference to Multipoint Distribution Service.* (The multipoint distribution service (MDS) transmits a signal using microwave frequencies and down-converts the signal to a television channel for receipt on subscribers' television sets.) Microband believes that the Commission should not permit low power stations on channels currently used by MDS carriers, or should require the low power operator to pay to retrofit the MDS down-converters to another channel and related costs. In reply comments, NTA avers that no additional protection is necessary for MDS down-conversion because any channel can be used. CPB contests the right of MDS home delivery to protection from low power, because MDS is unregulated based upon the rationale that it does not preclude broadcast uses of spectrum.

9. *Interference to Land Mobile Stations.* (In thirteen major urban areas, land mobile services are permitted on UHF Channels 14 through 20 on a sharing basis with broadcast uses.) Microband sees a need for interference criteria to and from low power stations and land mobile services using UHF channels.[3] The Los Angeles County Department of Communication, joined by the California Public Safety Radio Association, urge the Commission not to authorize low power stations on Channels 14 through 20. The State of Florida wants Channels 14 through 20 frozen for land mobile use in the top 25 urban areas, as does Channel 57. The Land Mobile Communications Council, citing the 1979 WARC authorization of the band 614–806 MHz (Channels 38 through 69) for land mobile uses, would like this band either reserved exclusively for land mobile, or for land mobile priority to be established in the band. The National Association of Business and Educational Radio Stations (NABER) would like low power to be secondary to land mobile between Channels 4 and 5 and on Channels 14 through 20. Telocator, fearing interference to mobile paging devices, would forbid low power on Channels 4 and 5 and 14 through 20. The Utilities Telecommunications Council (UTC) would like more channels, as well as Channels 38 through 69 restricted as to low power uses. APCO agrees with this approach, including Channel 7 in its prohibition, at least until the Commission studies the utilization of these channels in connection with land mobile needs. The Los Angeles County Sheriff wants the Commission to limit low power to the upper end of the UHF band and to require greater receiver selectivity and sensitivity, to prevent potential interference to land mobile uses.

10. The Maryland, District of Columbia, Delaware Broadcasters Association and the Association of Maximum Service Telecasters oppose the position taken by the Land Mobile Communications Council and allied commenters. Howard Publications (Howard) urges the Commission to resist land mobile claims to Channels 4 and 5. The Corporation for Public Broadcasting (CPB), in response to the land mobile advocates, contends that low power stations should be required to afford protection to land mobile stations on Channels 14 through 20 in the same manner as other broadcast stations must, but that low power should not be made secondary to nonbroadcast uses on Channels 4 and 5, 14 through 20 or 38 through 69. NTA agrees that no additional protection for land mobile is necessary. OK TV Translator Company asks that Channels 70 through 83 be reinstated for low power use.

11. The American Radio Relay League fears that low power stations will receive interference from amateur radio operations, because current television receivers do not have sufficient rejection capacity to prevent this.

12. *Interference to Cable Systems.* (Cable systems sometimes receive program material at the headend via VHF radio frequencies; they also may convert the signal from the cable into the subscribers' receivers using available low-band VHF channels.)[4]

13. NCTA is concerned about interference low power stations might cause to cable systems, both at the headend and the subscribers' receivers. As a solution, it suggests that the Commission either authorize no VHF low power stations, or put the burden of frequency coordination with existing cable systems entirely on the low power operator. Joint comments filed by a group of cable companies also argue that cable systems should not be required to yield if a low power station causes interference to the signal received at the subscribers' sets, but that the low power station should be required to modify its operation to a noninterfering UHF channel, because a cable company cannot modify its subscribers' receivers. Storer believes that low power stations should be authorized only when no potential interference to cable is illustrated. Spectradyne, explaining that MATV systems use coaxial cable to bring pay television into hotels on Channels 12 and 13, states that low power could cause ghosting at the MATV headend, and urges either that low power stations be required to meet the VHF mileage separations, or not be authorized at all on Channels 12 and 13.

14. NTIA advocates a policy that would require cable systems and low power stations to work out interference problems by mutual agreement. NTIA would require a cable company first to object to a low power proposal that would result in headend interference, and then make the cable company responsible to correct all other interference, including that which occurs at subscribers' receivers. NTA takes issue with NCTA's allegation that low power will cause interference to cable, claiming that little evidence exists to support this, and favors the policy proposed in the *Notice* with respect to cable/low power interference. TV Technology Corp. suggests that low power stations be required to protect cable headends within the Grade B contour of the primary station and not more than five degrees below the line-of-sight path between the primary station and any obstacle in the path to the cable headend, and not beyond, because beyond this area there is not a reasonable expectation of reception of the primary station. As a precaution against interference at cable subscribers' receivers, this comment also would require low-band VHF low power stations to maintain a frequency tolerance of better than 25 kHz where cable systems use the phase lock "zero beat" technique to reduce the interference potential of ambient co-channel signals. In reply to NCTA's comment, TV Technology

[2] It should be noted that these comments were filed prior to issuance of the *Further Notice of Proposed Rule Making*, which proposes expanded exclusivity and interference definitions and criteria for the low power service.

[3] The *Further Notice of Proposed Rule Making* proposes such standards.

[4] The *Notice* proposed the following policies, with respect to low power/cable interference:

1. The low power station operator is strictly responsible for taking immediate corrective action where an interference condition to any other service results from operations in violation of the Commission's technical standards, or from improper maintenance.

2. The cable operator should be responsible to correct interference at the cable distribution system and at the subscriber's set (footnote omitted).

3. The first-come, first-served principle should govern conditions of interference between a low power station and reception to a cable television headend. Where possible, a solution should be found by mutual agreement upon the lowest cost solution, and the sharing of any burdens from taking corrective action.

Corp. argues that cable systems can use midband or superband, instead of VHF channels, so that VHF frequencies should not be off limits to low power stations. CPB, in response to NCTA and Spectradyne, contends that because cable's use of broadcast spectrum is unregulated based upon a nonpreclusion theory, delivery via cable or MATV should not be protected from low power frequency use. CPB supports the proposed first-come, first-served policy with respect to headend protection.

15. MST and NBC urge that all low power applicants be required to make noninterference showings, including measurement of field strength in the direction of the affected primary station, to establish antenna performance. NBC and Field point out that low power stations must yield when later full-service station modifications, particularly facilities increases of UHF stations, preclude the low power stations. NBC, Field and General Electric (GE) urge that low power stations be required to cease operations immediately on a report of any interference to full-service stations and remain dark until the interference is cured. ABC also advocates prompt procedures for testing for and remedying interference. NAB suggests that the Commission place the burden of resolution on a low power station whenever it receives notice of interference and that it file a report with the Commission regarding resolution of interference. Bonneville evinces concern that authorization of low power stations as proposed in the *Notice* will jeopardize the integrity of the Television Table of Assignments. Joint comments filed by broadcasters, including Cosmos Broadcasting Corp., seek that the Commission revise § 74.703(b) of the rules (the "UHF Taboos") to govern all VHF and UHF low power applications. Microband and Turner Television Stations, Inc. (Turner) ask for clarification as to whether assigned but unoccupied channels are to be taken into account, in finding a channel available for low power use.

16. NTIA believes that, when interference is complained of, a low power station should be permitted to continue operating until it is proved to be the cause of the interference. Citizens supports this position. NTA argues that the low power station only should be required to cease operations if it cannot correct interference it causes.

17. *Notification.* Several comments addressed the question of whether and under what circumstances low power applicants should be required to notify full-service stations of the pendency of the application. MST, GE and Joint Comments filed by broadcasters, including Cosmos, would require from low power applicants both a noninterference showing and notification to all full-service stations within whose Grade B contour the low power station would be. GE would dismiss low power applications that do not provide this. ABC and Field would require notification to full-service stations to which low power applications do not meet the "UHF Taboos" or full-service mileage separations. NTA objects to such notification as both unnecessary and burdensome, arguing that publication of low power applications in the Federal Register should be sufficient to notify interested parties, as is the case with all other broadcast applications.

18. Two comments addressed whether low power stations should be required to protect service received inside the Grade B contour of full-service stations.[5] NTIA believes that low power stations should be required to protect any reasonable expectation of service within the Grade B contour of a full-service station. Field wishes low power stations to protect service received outside a full-service station's Grade B contour and to this end encourages low power-to-full-service mileage separations.

19. *Field Tests.* Several parties commented upon whether low power stations should be required to conduct field tests prior to authorization. NAB says the Commission should require a field test prior to grant under a one-to-two month temporary authorization. Field would like low power stations to be required to certify to the Commission that they can directionalize as predicted. NCTA supports the concept of a sixty-to-ninety day provisional license, during which period the low power operator must ensure that the low power station does not cause interference. Citizens opposes the NCTA proposal; while recognizing that such a policy might have the effect of encouraging noninterfering applications, Citizens complains that it also would disadvantage applicants who could not afford to risk termination of the low power service, once initiated. NTA and Western Communications Research Institute argue that temporary licenses and field tests are unnecessary and merely burdensome in a secondary service such as low power.

20. *Low Power-to-Low Power Interference.* The Colorado Translator Association, while acknowledging that this might cause problems in the larger markets, argues that generally low power stations can work out interference problems among themselves. The National League of Cities (NLC) supports interference criteria that would permit as many low power stations as possible. National Association of Public Television Stations (NAPTS) argues that leaving the resolution of interference problems up to low power stations themselves will promote marginal applications, cause delays in service and generally favor wealthier applicants. Garryowen states that a low power station on an assigned channel should receive priority over a low power station on an unassigned channel, if an interference problem should arise. TV Technology Corporation would like a policy to protect the first-filed low power applications from interference by later filers, or for the Commission to intervene and decide interference questions. Turner suggests that the Grade B concept be extended from full-service, so that later low power stations can be guided by a standard in protecting earlier low power stations.

21. *Allocation Issues—Channel Selection.* The Los Angeles County Sheriff sees no need for additional television service in urban areas at all. The Los Angeles County Department of Communications likewise would have the Commission require low power applicants first to select a channel from the TV Table of Assignments and if none is available, then to select from Channels 21 through 69, and authorize low power stations on channels not in the Table only in rural areas that do not receive four television signals already. NTIA opposes low power stations being permitted on channels in the Table in urban areas, which it defines as areas receiving a Grade B or better signal from three or more stations. Thomas Smith suggests that low power applicants should try to meet the full-service mileage separations in major markets, that the Commission permit use of the 15-mile rule for low power applicants and that the Commission should amend the Table with additional available channels, because this would be less expensive for low power applicants.

22. ABC supports the establishment of mileage separations for the low power service. William Sullivan advocates a three-tiered system, including full-service and regional and local low power stations, with a new low power table of assignments, to document low power authorizations. Mr. Sullivan proposes the following mileage separations:

| | To full-service stations (miles) | To low power stations (miles) |
|---|---|---|
| Co-channel: | | |
| Full-service stations | 60 | 40 |
| Regional stations | 45 | 25 |
| Local stations | 40 | 15 |
| Adjacent channel: | | |
| Full-service stations | 55 | |
| Regional stations | 40 | 20 |
| Local stations | 30 | 15 |

NAPTS and PBS advocate a table of allotments for low power stations. They contend that a demand system of allocation may permit interference, while a table based on mileage separations is both simpler to administer and encourages the use of maximum facilities. They propose three classes of stations, full-service, low power and micro-power (these would be UHF only, with less than one kilowatt effective radiated power (ERP) and would not be reflected in the table of allotments).

23. CPB, while supporting reserved channels for noncommercial low power stations, advocates a protected contour allocation standard based upon desired-to-undesired (D/U) signal ratios. The National League of Cities supports CPB's approach. Spanish International Network advocates relaxed channel selection standards. TV Technology Corporation opposes mllage separations or a table of assignments, averring that engineering flexibility is necessary for low power. Praxis supports case-by-case application processing as essential for maximum spectrum utilization. Gammon and Grange agrees that a table of assignments would result in inefficient spectrum use, stating that a demand system of allocation is most responsive to market forces: "Communities need not rely on the Commission's clouded crystal ball for an access to spectrum space, but on market

[5] This issue specifically was raised in the Further Notice of Proposed Rule Making, FCC 81-369.

forces which will result in an efficient and quick allocation of spectrum space." Gammon and Grange comments, at page 10.

24. National Black Media Coalition (NBMA), citing the WARC Third Notice of Inquiry, Docket No. 20271, asked that low power stations be precluded from Channels 65 through 69, because these frequencies might be used for FM stations.

25. *Desired-to-Undesired Signal Ratios.* Several parties commented on the D/U ratios proposed in the *Notice*. MST, NAB and RCA criticize the use of D/U ratios based upon mean receiver performance, because under this standard, theoretically, up to one-half of the receivers could sustain interference in an affected area. MST and NAB suggest use of a 90 percent standard. RCA Corporation (RCA) advocates use of § 74.702(c) ("UHF Taboos") only, for three years after a Report and Order in this proceeding, and then modification of the taboos based upon an assessment of receiver performance, stating that receivers would be redesigned to reflect the modified taboos. Electronics Industries Association, Consumer Electronics Group (EIA/CEG) suggest the following D/U ratios be used for five years after a Report and Order, with increased protection to take into account a time lag in improved receiver design, including better RF transistors and surface acoustic wave filters:

| | D/U Ratio dB | | Maximum U dB | | |
|---|---|---|---|---|---|
| | EIA/CEG | (Notice) | EIA/CEG | (Notice) | |
| Co-channel | n | 45 | | 19 | |
| Adjacent channel | n+1 | −6 | (−15) | 70 | (79) |
| Sound image | n −14 | −7 | (−23) | 71 | (87) |
| Picture image | n−15 | 10 | (−6) | 54 | (71) |
| Intermodulation | n+2, 3, 4, 5 | (1) | | | |
| Ocillator | n+7 | (2) | | | |

[1] Minimum separation, 20 miles.
[2] Minimum separation, 50 miles.

EIA/CEG also advocates specific standards under which terrain shielding may be taken into account. CPB argues that the median receiver standard is an appropriate one, because use of a worst case, or ninety percent, standard would be unduly preclusive.

26. Turner states that facilities proposing directional antennas cannot simply use a line between stations as a D/U measure, because there might be interference in other directions than the line, adding that applicants should have to provide full interference analysis, including interstation radial interference analysis with respect to all full-service stations inside the separation requirements on taboo channels.

27. *Noncommercial reservations.* A number of parties address the issue of whether channels should be reserved for noncommercial low power stations. The New York State Department of Education favors reservation of low power channels for noncommerical use by educational institutions. Community Television Network (CTN) would like one channel reserved for noncommercial use in each of the top 25 markets. Citizens would like a low power table of assignments, with UHF channels reserved for minority and noncommercial ownership. CPB, in reply comments, contends that CTN's and Citizens' suggestions are inadequate, and that a table of channel reservations based upon population is necessary to ensure full development of noncommercial low power service. The Joint Council for Educational Telecommunications (JCET) supports this position. CPB attached proposed tables to its comments and reply comments. Its population criteria for the top 150 markets would be: Three reserved channels in communities of over one million population, two channels in communities of over 250 thousand population and one channel in communities of under 250 thousand population. NAPTS and PBS discuss the theory underlying the need for reserved channels for noncommercial use—that nonprofit corporations require more time to acquire funding and thus prepare complete applications. In light of this, they advocate channel reservations for five years after a Report and Order in this proceeding and suggest that 36 percent of the channels available for low power stations be reserved for noncommercial, educational use to mirror the proportion of full-service stations that are noncommercial. They also advocate retention of the priority for noncommercial low power stations on reserved channels in the Television Table of Assignments and urge that the Commission permit subscription service on reserved low power channels.

28. Noncommercial reservations for low power stations are opposed by IBN, Microband and NAB. Gammon and Grange and NTA point out that reserved channels in the Television Table of Assignments still are available in many markets. NAB argues that the concept of reserved channels gives noncommercial low power stations an enhanced status that does not comport with the policy of secondary status for all low power stations.

29. *UHF Comparability.* Several parties commented on whether VHF low power stations would pose a significant competitive threat to UHF full-service stations. NBC argues against any VHF low power authorizations in all-UHF markets, because of the impact on UHF full-service stations and the greater risk of interference. NTIA proposes no 100 watt VHF authorizations in all-UHF markets, until the UHF comparability question is resolved. The Council for UHF Broadcasting states that the entry of low power stations on VHF channels makes it important to achieve UHF comparability as soon as possible. Joint comments filed by various broadcast licensees seek abolition of § 74.732(d) as is proposed, so that UHF full-service stations may operate VHF low power stations.

30. *Engineering Issues.* The pleadings contain various suggestions regarding other engineering matters. Turner argues against relaxation of spurious emissions standards because present equipment is manufactured in accordance with present standards, and even the savings involved in relaxed standards do not justify increased interference. Sullivan would like elimination of the IF beat taboo for low power, while NAB contends it should not be eliminated without further testing. Vega avers that the rules should encourage the use of frequency offset and, as a separation criterion, would permit low power applications outside the Grade B contours of a co-channel full-service or low power station and outside the Grade A contour of adjacent channel stations. Harlan L. Jacobsen (Jacobsen) would like the low power "pick-up" channel protection to be modeled on that of cable, that is, first in time must be protected by later users. GE favors the use of circular polarization to increase the low power coverage area. Grassroots Video urges no vertical blanking requirements for low power.

31. *Power.* Some comments, including those of ABC, GE and Bonneville, strongly urge the Commission never to waive the power limitations proposed in the *Notice*, because of the likelihood that low power stations with higher powers than those proposed could cause interference. Field thinks this is important because low power stations are likely to operate with ERPs higher than those predicted. Western Communications Research Institute stresses that the VHF power limit should be 100 watts. The Los Angeles County Department of Communications would like the Commission to retain the present translator power limits—10 watts VHF and 100 watts UHF, except on channels in the Television Table of Assignments, where 100 watts VHF and 1,000 watts UHF are permitted. Vega supports the 100 watt VHF and 1,000 watt UHF power limits proposed in cases where the mileage separations for full-service stations are satisfied.

32. On the other hand, a number of parties support increased power, either on a waiver basis or across the board. Edward Craney believes low power stations should apply for whatever power they actually would need to cover the desired service area. Los Angeles Children's Hospital thinks that interference alone should limit the power of a low power station. Grassroots Video suggests a 1,000 watt VHF power limit in areas where UHF availability is low. Sullivan, who suggests two classes of low power stations, would permit regional stations to operate at powers up to five kilowatts UHF and one kilowatt VHF, while local stations would be limited to one kilowatt UHF and 100 watts VHF. Garryowen, centending that the proposed power limits are too low to permit adequate coverage of rural areas, would permit, on channels in the Television Table of Assignments, 1,000 watts VHF and 10 kilowatts UHF, as well as multiple final amplifier outputs. GE, supported by UAW, avers that circular polarization would permit 2,000 watts UHF and 20 watts VHF without a low power station's increasing the coverage

in a particular direction, by radiating 1,000 watts UHF or 10 watts VHF each way from one horizontal antenna and one vertical antenna. Spanish International Network urges the Commission to consider waiver requests for higher power on a showing that this is necessary to provide adequate service and that no interference to full-service stations will be caused thereby. Turner believes that the Commission should revisit the power issue at some time after the conclusion of the rule making and consider authorizing low power stations to operate with higher power, or should waive the power limitations on a noninterference showing.

33. *License Issues—Operator Requirement.* A number of commenters argue that the Section 318 operator requirement should not apply to low power stations that merely rebroadcast satellite feed, as opposed to literal program origination. These include Spanish International Network, Residental, Community Broadcasting Network and Gammon and Grange. Westinghouse argues that requiring a full-time operator when this is technically unnecessary imposes a needless barrier to entry into the low power industry, but that in the case of local originations, including tape, film or live transmission, an operator should be available at the transmitter site, a remote control point, or the program source. Turner would like to see Congress amend the statute to permit unattended operation in situations where there is no local origination by a low power station, or permit the operator requirement to be met by having an operator at a remote monitoring point from which the transmitter can be controlled. Metonomy believes there should be no operator requirement, but that the Commission should establish a parameter of satisfactory performance, possibly mandating refunds for subscribers if low power service is disrupted.

34. The OK TV Translator Company believes that a service technician should be available at not more than one hour's distance from the low power station, with 24-hour telephone availability. The telephone number to be posted at the transmitter site. MST suggests that a "low power" operating license be required to monitor low power transmissions, not just a restricted operator's permit. NAPTS believes that low power stations should have to meet the same operator requirements as full-services. station.

35. *License Renewal.* The OK TV Translator Company suggests that the renewal form be streamlined and that the license term be two-to-three years or more. Colorado Translator Association also would have a three-year license term. NTA and Morongo Basin TV Association opt for a five-year license term. Metonomy suggests 10 years. The now-defunct executive Council on Wage Price Stability (COWPS) refers to the statement in the *Notice* to the effect that "responsiveness to specialized needs and interests" would be favored at license renewal, suggesting that this statement either be made more specific or abandoned. CFA avers that the incumbent should not be favored automatically in a contested renewal situation.

36. NTIA suggests that the following technical information is necessary on the license application: Transmitter output power, antenna gain, azimuth at point of maximum gain, gain in horizontal plane at ten degree intervals, height above ground of center of maximum radiation, elevation above mean sea level of the ground on which the tower is situated and ERP in the direction of maximum antenna gain. NTIA and Community Television Network contend that the financial qualification requirement can be replaced by a requirement that construction be completed within a certain period, say, a year, after authorization. NTIA would have no character requirement beyond no felony conviction and no loss of license in the previous five years. NTIA also believes that an applicant that agrees to abide by Commission rules should be deemed technically qualified.

37. NBC suggests a requirement that construction be completed within one year after grant of the construction permit, as in § 73.3598(b), and a requirement that low power stations also commence programming within a specified time. NBC also recommends that minimum hours of operation be prescribed, and that the amount be at least as much as that set out for full-service stations in § 73.1740(a)(12). The National League of Cities advocates a policy requiring prompt construction, with a penalty of forfeiture of the construction permit. ACTVA advocates automatic one-year extensions of the construction period permitted when equipment is not readily available. Kitchen Productions believes that licenses should include a condition that the site be shared with other facilities on different channels serving the same area with the same power. The OK TV Translator Company believes that low power licensees should be required to live in the state of license. Robert C. Greene (Greene) thinks no license should be required for 100 milliwatt translators serving rural areas. William Sullivan thinks new technologies should be permitted on low power stations without specific authorization required: "Local or low power stations may originate subsidiary or ancillary services as part of their licensed service, provided the service does not interfere with the normal reception standards and good engineering practice." He also would like originating low power stations to be assigned five call letters—W or K and four following letters of the licensee's choice.

38. NTIA advocates a *WLVA* standard for when a hearing will be granted under *Carroll Broadcasting Company* v. *FCC*, 258 F. 2d 440 (1958), on a petition to deny based on economic harm. Under this standard, the petitioner must make a *prima facie* case that (1) his loss of income in his market will cause (2) elimination of public service programming, the loss of which (3) will not be offset by similar programming provided by the applicant.

39. A number of parties encourage the Commission to consider the change from translator to low power station a minor modification. Morongo Basin TV Club (Morongo Basin) and OK TV Translator Company believe it should be a minor modification for translators licensed for more than six years. UPTV also advocates the upgrade being a minor modification and adds that a facility engaging in rebroadcast should be considered a translator and a low power station only if it originates programming. CTN also believes that the upgrade should be a minor modification, but cautions that upgrades not be permitted where they would violate the ownership restrictions. NTA points out that minor modification treatment for translator/low power upgrades would encourage rapid development of the service. NFLCP believes that the upgrade should be considered a minor modification, but that low power ownership restrictions should extend to translators. NAPTS also favors minor modification treatment for upgrades, after final rules are adopted for the low power service. Western Institute of Communications Research says that applications to upgrade translators to low power should be subject to petitions to deny but not competing applications. Kitchen Productions would like upgrade applications to be subject to competing applications, but otherwise not treated as a major modification. CFA and CPB believe that translator-to-low power upgrades should be treated as major modifications, with competing applications. Richard I. Vega and Associates (Vega) advocates major modification treatment for translator-to-STV upgrades.

40. *Trafficking.* The Justice Department favors no prohibition on trafficking, because this permits ready entry into and exit from the market. NTIA also supports the absence of a trafficking prohibition, so long as the Commission maintains the minimal involvement in transfers required by the Communications Act. CTN agrees that a prohibition on trafficking is not necessary, but encourages that the Commission oversee transfers to prevent sham transactions. National Citizens Committee for Broadcasting (NCCB) also favors no trafficking prohibition, but wants the Commission to remain willing to investigate complaints regarding particular transfers. NFLCP avers that there should be no trafficking prohibition, but would permit transfers of low power stations only to entities with at least as many preference points as the transferor (*see* paragraph 91, *infra*), or where this does not occur, would require that a transfer be open to challenge from competing applicants. (*But see* Section 310(d), *Avco* Rule.)

41. A number of commenters point out that lack of a trafficking rule could undercut the effect of awarding licenses on the basis of preference points. They include CFA, CPB, Microband, NBMC, NLC and NTA. NBC would not permit sale by a preferred applicant within the first three years of authorization, but would require that the license be turned back to the Commission. UAW would limit the sale price to not more than 200 percent of cost incurred to date, if a station acquired on the basis of preference is not transferred to a preferred applicant. Western Institute of Communications Research would prohibit noncommercial licensees from transferring the station to a commercial entity and would prevent transfer of a low power station to an entity with

fewer preference points than the transferor. Channel 57 says that it is not fair to UHF full-service licensees not to prohibit trafficking in low power stations. NAPTS would require permittees to complete construction and commence operation before allowing sale of a low power station for a price in excess of costs incurred in its acquisition.

42. *Programming Issues.* Turner would like the low power rules to promote diverse programming, particularly all-news formats. NTA agrees that program content regulation should be minimal, perhaps mandated by legislative change, if necessary. ABC avers that minimal programming requirements are consistent with the deregulatory nature of the low power service. Colorado Translator Association cites the necessity for flexible programming rules, especially in rural areas. NAPTS would have the Commission afford a comparative advantage to public service programming proposals, and also would like an hourly station identification requirement, as with full-service stations. The OK TV Translator Company believes there should be no identification requirement on translators of under 100 watts. Telicommunity urges that teleconferencing be permitted to low power stations. Tymon would permit teletext in the low power service. Garryowen argues that translators should not be permitted to duplicate over 50 percent of the prime-time network programming aired on any local full-service station.

43. *Ascertainment.* A number of parties believe that some form of ascertainment should be required of low power stations. The Video Factory suggests a smaller scale ascertainment process than that required of full-service stations. ABC Affiliates aver that if no ascertainment is required of low power stations this will be unfair to full-service stations. The National Association of Low Power Broadcasters (NALPB) and the United Church of Christ also believe that low power stations should be subject to an ascertainment requirement. Citizens proposes, in lieu of ascertainment, a requirement that low power stations periodically broadcast a message to the effect that the station has a statement reflecting its familiarity with community needs and interests and a list of responsive programming in its public file, which the public may examine and comment upon to the Commission. CFA also supports a requirement that low power stations maintain such a statement in the public file. NBMC states that if there is no ascertainment requirement, low power stations should be required to keep logs of nonentertainment programming broadcast, to facilitate monitoring by the public. The American Community Television Association (ACTVA) supports the proposal in the *Notice* that no ascertainment be required of low power stations.

44. *Fairness Doctrine.* Several parties believe that the Fairness Doctrine should be strictly applied to low power stations. These include the National Council of Churches, United Auto Workers and the United Church of Christ, which would impose a fairness obligation only on originating low power stations. Citizens would like to see greater Fairness Doctrine responsibility than that proposed in the *Notice*, suggesting that a sliding scale of fairness obligations be used only if the station provides access time. CFA thinks that originating low power stations should be required to pay for responsive programming, not merely offer time for opposing views free of charge. NAB avers that stringent fairness obligations will discourage experimental originated programming by low power licensees.

45. *Access for Political Candidates; Personal Attack Rule.* CFA and UAW believe that sections 312 (a) and (f) and 315, the rules relating to political candidates, as well as the rules regarding personal attacks and political editorials, should apply to low power stations. Los Angeles Children's Hospital believes that editorializing prohibitions should not be imposed upon noncommercial low power licensees. NAB avers that these rules will discourage experimental originated programming.

46. *Nonentertainment Programming.* CFA suggests a five percent news and public affairs programming requirement for low power stations. ABC Affiliates argue that it is unfair to full-service stations not to impose nonentertainment programming guidelines on low power stations.

47. *Limits on Commercialization.* CFA wants a ceiling of no more than one-third of all originated programmming to be commercial material. ABC Affiliates complains that the absence of limits on low power commercialization is unfair to full-service stations. Los Angeles Children's Hospital supports the absence of limits on commercialization on low power stations.

48. Several parties, including Ventures in Communications and the National League of Cities, indicate that they would like noncommercial low power stations to be permitted to air commercial material. *See also* paragraph 80, *infra.* ACTVA, for example, proposes that a commercial entity be permitted to lease up to ten hours per day from a noncommercial low power licensee, during which hours commercials could be broadcast. ACTVA further suggests that the noncommercial licensee could own the commercial entity, so long as separate corporate identities are maintained. ACORN believes that nonprofit corporations holding low power licenses should be permitted to air advertisements and still receive a noncommercial preference. Global Village supports the concept of advertising on noncommercial low power stations, so long as the majority of broadcast time is free from commercial material. UAW believes that commercial material should be permitted on noncommercial low power stations, so long as they are nonprofit. NFLCP also thinks commercials are acceptable on noncommercial low power stations, but would favor comparatively the nonprofit applicant proposing the highest percentage of air time without commercials. National Innovative Programming Network would afford a preference to instructional programming, whether aired on a noncommercial station or not. Western Communications Research Institute, SINO Communications Group, Inc. (SINO) and Washington State Broadcasters Association believe that noncommercial low power stations should not be permitted to air commercials, except possibly those in rebroadcasted programming.

49. *Prohibition on Obscenity and Lotteries.* ABC believes these rules should apply to low power stations. Los Angeles Children's Hospital disagrees, arguing that they should not apply to a secondary service.

50. *Retransmission and Commercial Substitution Consent.* Colorado Translator Association believes that retransmission consent should not be required. National Translator Association asks the Commission to establish a presumption in favor of retransmission consent. CBS opposes this suggestion, stating that the present standard of reasonableness for refusal is adequate in the low power context. NTIA agrees with CBS. ABC and the National Hockey League also favor required consent for program retransmission and commercial substitution. Washington State Association of Broadcasters would like the grounds for refusal of retransmission consent within the Grade B contour of the originating station to be clearly defined, and to include failure to negotiate in good faith. This party also would like a requirement that the request be in writing, include a fee as compensation for market fragmentation and a prohibition on commercial substitution.

51. *Local Programming.* Some parties suggest additional programming requirements not proposed in the *Notice.* The only one for which there appears to be even a moderate consensus is that low power programming be required to have some sort of local component. *See also* paragraph 83, *infra.* This view is taken by Stephen A. Ballo (Ballo) and Kitchen Productions. Charles Edgely would like a local news and public affairs requirement for rural areas. Colorado Translator Association believes that originated programming should be shown to be in the local public interest. New York State Department of Education wants all low power stations outside the Grade B contour of the originating station or 90 miles from the control point to be required to provide local emergency information.

52. A couple of parties suggest a name change for the low power television service, either because they dislike the connotation of "low power," or because they fear confusion with Subpart H of Part 74 of the rules, "Low Power Auxiliary Stations." ACTVA, supported by Ventures in Communications, suggests "Community Television Service." Attaway, also supported by Ventures in Communications, suggests "Local Television Service." Gammon and Grange believes that the rules for low power should be different according to the nature of the community served, including site of market, urban or rural, whether or not already served by STV or cable and character of population, *i.e.*, large minority component. The comment suggests that the zone concept of § 76.51 could be used to define an urban market.

53. *Alaska.* Alaska Public Broadcasting Commission states that a number of the rules proposed in the *Notice* and, more particularly, additional proposals made in comments, are too burdensome and unnecessary for Alaskan low power stations.

For example, some of the maintenance requirements are too burdensome to be carried out in remote bush country. The comment complains that an annual video proof of performance check would cost $278,000, because it would require year-round use of an airplane and two personnel. Further, the comment contends that it is unnecessary to check for frequency drift where there are no full-service stations for over 50 miles. Because the Alaskan stations engage primarily in rebroadcast, the comment adds, no operator requirement should be imposed. Alaska also opposes the proposed ownership restrictions and any suggestion that a table of assignments might be implemented for low power stations in Alaska.

54. *Ownership Restrictions.* Various parties comment generally on the ownership issues. M/A Com, Inc. (M/A Com) avers that the ownership rules proposed in the *Notice* are premature and that the Commission should first institute the low power service without ownership restrictions and evaluate whether the Fairness Doctrine obligation is sufficient to promote diversity, before imposing additional requirements toward that end. Communications Investment Corporation believes that media concentration only should be an issue in the comparative situation. Community Television Network states that the secondary nature and limited coverage area of low power stations do not distinguish the low power service sufficiently from full-service stations to justify relaxed ownership restrictions. CTN believes that ownership rules based on local and national diversity considerations should apply to low power, including all those proposed in the *Notice*, and argues that the "clear threat of monopoly" test proposed for the Direct Broadcast Satellite Service is not adequate for low power, because competitive abuses can occure far short of a monopoly situation. Gammon and Grange believes there should be no cross ownership prohibition in rural areas, only urban. The National Association of Educational Broadcasters, joined by the National Association of Public Television Stations and the Public Broadcasting Service, objects to multiple ownership restrictions for noncommercial low power stations, on the grounds that such restrictions would have the effect of fragmenting the already limited funds available for noncommercial broadcasting. The Corporation for Public Broadcasting favors no cross ownership rules for noncommercial low power stations, or at least no cross ownership prohibition for noncommercial radio and low power licensees, with a comparative preference for the applicant with fewer other media interests when two noncommercial low power applications are mutually exclusive. The National Federation of Local Cable Programmers advocates no exception to the multiple ownership restriction for noncommercial low power stations, except in rural areas or for an interactive or other kind of service that would require more than one channel. NFLCP also suggests that the Commission maintain a favorable attitude toward the possibility of waivers to permit noncommerical radio/low power cross ownership.

55. *Duopoly Rule.* [A duopoly rule prohibits common ownership of more than one station in *the same service* with overlapping contours.] A number of parties oppose the duoply rule proposed for low power stations. These include Storer, Summers Broadcasting, Inc. (Summers), Howard, Communications Investment Corporation, NAB, the Maryland, Delaware, District of Columbia Broadcasters Association and Joint Comments filed by various broadcast licensees, including Cox. Boler believes a low power duopoly rule is unsuitable for rural areas. The National Congress of American Indians and the Joint Business Council of the Shoshone and Arapahoe Tribes think that the rule would have a harsh effect on Indian tribes. Garryowen cautions against extension of the duopoly prohibition to translators. A great many commenters believe that multiple-channel, low power STV services are economically essential, to be competitive with cable systems, particularly in rural areas. Residential Entertainment, Inc. (Residential) argues that where STV is rebroadcast solely, the duopoly prohibition should not apply. UPTV Systems concurs that originating low power stations should be distinguished from STV rebroadcast. Metonomy, Blonder Tongue Laboratories, Inc. (Blonder Tongue), M/A Com, Kevin Parkansky, TV Technology Corp., Jerrell K. Davis (Davis), General Electronic Broadcasting Company and Morongo Basin also take this position. NTA believes that low power STV stations with multiple channel capacity should be permitted in rural areas on a waiver basis. Morongo Basin also takes this position. NBC would favor a comparative preference for an applicant with no other low power stations in a market, but opposes a duopoly rule. Turner argues that overlapping contours of commonly-owned low power stations should be permitted where the programming is the same. CBS, pointing out that the basis of a duopoly prohibition is to foster diversity in the face of spectrum scarcity, contends that a duopoly rule is not necessary for low power stations because there is no scarcity of spectrum. WHA–TV, City University of New York, Graduate School and University Center (CUNY/GSUC) and the New York State Board of Education oppose a duoply prohibition for noncommercial low power stations, on the grounds that contour overlap may be necessary to facilitate regional educational networking.

56. ACORN, Community Television Network, Consumer Federation of America, Federal Express, Arnold Gregg (Gregg), National Citizens Committee for Broadcasting, and Western Communications Research Institute support a duopoly rule for low power. The Justice Department favors a duopoly rule as promoting competition. Citizens Communications Center believes it can promote diversity within a market. William Sullivan believes the rule should apply to heterodyne conversion modulated signal translators, as well.

57. *One-to-a-Market Rule.* (A one-to-a-market rule prohibits common ownership of broadcast facilities in different services with overlapping contours.) A great number of parties oppose the one-to-a-market prohibition proposed for the low power service. They include NBC, OK TV Translator Company, Howard Publications, Maryland, District of Columbia, Delaware Association of Broadcasters, TV Technology Corporation, the Joint Reply of Cox Broadcast Corp., etc., NAB and Park Broadcasting (Park). Don Martin and Quality Media Corporation believe the rule will hamper the development of the low power service. Gannett Co., Inc. (Gannett) sees no reason for it. A number of parties believe that local broadcasters can lend their already-acquired expertise and familiarity with the community to a new low power venture. This is regarded as a potential economy by Field Communications. ABC and Bonneville see it as a way for local broadcasters to provide specialized service to parts of a larger service area. Many parties, including Lee R. Shoblom (Shoblom), Storer and Summers, believe that the one-to-a-market prohibition will have an especially detrimental effect in smaller communities. Many see wisdom in permitting local radio stations to lend their expertise and financial backing to low power stations. These include Span-Com Broadcasting Group (Span-Com), the Justice Department and Communications Investment Corporation. Joint comments filed by broadcast companies including Forward Communications wonder if low power stations will be financially viable if existing broadcasters are not permitted to subsidize new ventures in low power. Joint comments filed by various broadcast licensees state that the market is sufficiently competitive already, so that a one-to-a-market rule for low power is not necessary to promote diversity. CBS argues that low power does not face the scarcity of spectrum space that is necessary to justify a one-to-a-market rule to ensure diversity. General Electric opposes the rule on the grounds that low power stations are not sufficiently like full-service stations for such a precaution to be required. The National Congress of American Indians and the Joint Business Council of the Shoshone and Arapahoe Tribes object to a one-to-a-market restriction for Indian tribes, alleging that on most reservations it is unlikely that anyone other than existing licensees would start a low power station. CUNY/GSUC, WHA–TV and Dr. Marvin R. Bensman (Bensman) object to the rule for noncommercial low power licensees. Residential and Oak Industries, Inc. (Oak) believe the rule should not preclude common ownership of originating low power stations, STV low power stations that merely rebroadcast any full-service STV stations in the same market. NTIA believes that the rule might be applied in the form of a comparative demerit, but not as an across-the-board cross-ownership prohibition.

58. ACORN, Gregg, Consumer Federation of America, National Citizens Committee for Broadcasting and William Sullivan support a one-to-a-market rule for low power. Community Television network contends that viewer preferences do not determine that there will be diverse programming on commonly-owned stations, and, with Citizens Communications Center, believes the one-to-a-market rule can promote diversity. Gammon and Grange agrees, adding that

such a rule also will discourage strike applications. Microband supports the rule, except in the case of MDS/low power cross ownership, because MDS operations do not control the programming broadcast via MDS.

59. *Network Ownership of Low Power Stations.* Several parties believe networks should be permitted to own low power stations, including NBC, the National Association of Broadcasters and Quality Media Corporation (QMC). William Sullivan believes networks should be limited by the one-to-a-market rule only. Turner states that networks will not garner affiliates on account of the counter-programming principle. NTIA would permit networks to own low power stations, but would prohibit duplication of network programs on a network-owned low power station within the Grade B contour of a network affiliate. ABC and NBC cite the conclusion of the Commission's Network Inquiry to the effect that multiple owners have an incentive to provide diverse programming, to add to, rather than simply fragment their existing audiences. CBS adds that it is unfair to distinguish networks from other group owners and points out that networks are in a favorable position to develop and introduce new technologies via low power.

60. Network ownership of low power stations is opposed by ACTVA, Gammon and Grange, Western Communications Research Institute, Charles Edgely, Consumer Federation of America, IBN, ACORN and Gregg. Community Television Network and National Citizens Committee for Broadcasting ascribe to the view that an entity with the capacity to reach up to 25 percent of the nation's television households should not be permitted further broadcast interests. This would preclude network ownership of low power stations. Field would preclude the three national commercial networks, but not any new networks that might arise in connection with low power. The National Council of Churches would forbid network ownership in major markets, but not in rural areas. The Justice Department believes that networks should not be permitted to own or affiliate with low power stations or translators, because this would have the anticompetitive effect of precluding new entrants into the industry. Community Television Network, in reply comments, opposes this view insofar as it applies to network affiliates as well as networks themselves.

61. *Multiple Ownership.* A great many commenters, including Channel 57, the National Association of Low Power Broadcasting, National League of Cities, Lake County Translator Association and the United Church of Christ, believe there should be some limit upon the number of low power stations permitted in common ownership. Attaway would put the limit at 25 low power stations. Quality Media Corporation suggests 21. Fessenden supports 15 to 20. Fifteen is supported by the National Council of Churches, Arnold Gregg, B. Jackson, IBN, Citizens, NBMC, Consumer Federation of America, Westinghouse Broadcasting Company, Inc. (Westinghouse), Jeffrey Nightbyrd, Darwin Hillberry and Western Communications, and Research Institute. Gregg would add a limit of not more than five applications of an entity with five or more percent common ownership interest to be eligible for processing at one time, for purposes of administrative efficiency. NBMC would favor a liberal waiver policy for minority ownership in excess of 15. UPTV Systems would put the limit at twelve, four VHF and eight UHF low power stations. Sullivan would start from the seven-station limit for full-service stations and set a ten-station limit for regional stations (including full-service in the total), a fourteen station limit for local stations (including full-service, and regional) and a sixteen-station limit for translators (including full-service, regional and local). *See* paragraph 19, *infra.* Don Mason (Mason) would permit seven low power stations in common ownership. Potomac Communications would set a limit of not more than five low power stations in common ownership. Community Television Network would prohibit further ownership of low power stations by any entity with existing broadcast ownership interests that permit access to over twenty-five percent of national television households. Vega believes that one way to encourage joint ventures to resolve mutually exclusive applications would be to exempt from the mutiple ownership limit an applicant acquiring less than twenty percent interest in a competing application.

62. ACORN, Federal Express, the Department of Justice, Gammon and Grange, the Corporation for Public Broadcasting, Residential, Turner and Videomakers oppose a numerical limit on low power stations in common ownership. Daniel Mayeda and the United Auto Workers believe a preference for local ownership is preferable to an overall limit. Microband points to economies of scale involved in group ownership. NTIA believes that networking may be necessary for low power to be viable economically. Neighborhood TV Company sees a benefit in low power facilitating additional national networks. New York State Board of Education cites the BOCES system, which has 79 stations, as a successful low power network experiment. The Radio and Television Commission, Southern Baptist Convention, believes there should be no multiple ownership limitation on noncommercial low power licensees. National Innovative Programming Networks seeks no limit for minority owners.

63. *Regional Concentration Rule.* Citizens Communications Center, Community Television Network and Consumer Federation of America believe there should be a regional concentration rule for low power stations. CFA suggests that an owner of two stations not be permitted to acquire a third if the primary service contours of any of the three overlap.

64. *Translators in Common Ownership.* Colorado Translator Association urges that conventional translators not be included in the low power ownership restrictions. The *Notice* does not propose to do so, although a number of parties appear to assume that translators would be included.

65. *Newspapers.* The parties evince some confusion regarding whether the cross-ownership rules proposed for the low power service would include low power/newspaper crossownership. Community Television Network and Consumer Federation of America believe that newspaper/low power cross ownership should be prohibited, in the interest of diversity. Messenger Publishing Company, Gannett, Belvedere Daily Republican and Joint Reply of Cox Broadcast Corp., etc., advocate no newspaper/low power cross ownership prohibition, on the grounds that local newspapers, especially in smaller communities, may be uniquely well-situated to operate low power stations that provide local information services subsidized by newspaper revenues.

66. *Local Ownership.* In addition to comments advocating a comparative preference for local ownership, some would like a local ownership requirement. Craney wants local ownership and operation required for low power stations. Kitchen Productions believes that low power stations should be 50 percent locally owned. Darwin Hillberry proposes that for all entities that own more than seven low power stations, 61 percent of the owners should live within 300 miles of the station.

67. *Noncommercial Operation.* Ron Kurtenbach argues that either all low power stations should have to operate noncommercially, or 75 percent, with 50 percent of those providing access for free speech messages. International Culture Network would like 50 precent of low power stations to be noncommercial or minority-owned.

68. *Cable/Low Power Cross Ownership.* A number of parties, including Attaway, Storer, Don Martin, National Telephone Cooperative Association, believe that cable companies should be permitted to own low power stations within their franchise areas. NTIA believes that this situation should give rise to a comparative demerit only. National Congress of American Indians believes that a cable/low power cross ownership rule should not apply to Indian reservations, where a local cable company is likely to be the only entity with the financial wherewithal and communications expertise to operate a low power station. Joint Comments filed by Colony Communications and other Cable Companies dispute that cable/low power cross ownership would be anticompetitive.

69. Opposing cable/low power cross ownership are Blue Mountain Translator District, Colorado Translator Association, Consumer Federation of America, Charles Edgely, Garryowen and Spanish International Network. The Justice Department envisions a situation where a cable company could acquire a local low power license solely for the purpose of thwarting potential competitors.

70. *Mandatory Carriage Rules.* The issue of whether cable systems should be required to carry low power stations is contested. The National Cable Television Association supports a "may carry" policy, such as was proposed in the *Notice.* NCTA claims that "must carry" rules violate the first amendment rights of cablecasters, inhibit competition and have the illegal effect of imposing a common carrier-like obligation on cablecasters. Field argues that the primary

intent of the Commission's mandatory carriage requirement is to maintain local broadcast coverage within a market, but for low power "must carry" rules would have the additional effect of extending the signal. Because low power stations are under no public service obligations, Field contends that "must carry" rules for low power work an unfairness on full-service broadcasters, who have public service obligations. Finally, Field adds, with respect to low power STV stations, the scrambled signal may be incomprehensible to cable subscribers anyway, defeating the purpose of a "must carry" rule. Omega opposes a "must carry" rule on the grounds that it would provide an improper subsidy to low power stations. Channel 57 thinks mandatory carriage is inappropriate for low power because it is a secondary service on which no local programming is required. TV Technology Corporation opposes "must carry" rules, but believes that cable operators should be required to provide all subscribers with high isolation switches, so that broadcast signals, including low power, may be received.

71. Numerous parties favor "must carry" status for low power signals. They include the National Translator Association, New Jersey TV Corp., Spanish International Network, Kitchen Productions, ACORN, Fessenden Educational Foundation, P. J. Broyles, Ron Kurtenbach, Thomas Smith, Los Angeles Children's Hospital, Grassroots Video, National Hockey League and Ventures In Communications. Garryowen believes that all low power stations of 100 or greater wattage should be carried. ABC supports "must carry" rules based on the principle that local broadcasters are entitled to an assurance of their audiences. Association of Maximum Service Telecasters and National Association of Broadcasters urge maintenance of the present translator/cable carriage rules. Howard contends that low power will not be viable in areas of high cable penetration without a "must carry" requirement. Harlan Jacobsen would require carriage of all free low power stations that originate over five percent of their programming locally. The National Association of Public Television Stations and Philip Tymon advocate mandatory carriage of all low power stations by cable systems located within the low power station's Grade B contour. Alternatively, Tymon would require that cable companies provide A/B switches free of charge to subscribers if there are no "must carry" rules for low power. International Broadcasting Network would require cable carriage of low power signals except on a showing of no preclusion to their off-air reception. ACTVA would require mandatory carriage on a first-come, first-served basis. The National League of Cities would require carriage if a vacant cable channel is available. Gammon and Grange would grandfather saturated cable systems and give them 18 months to add channel capacity for low power carriage. Nightbyrd would require cable carriage of low power stations on all greater-than-twelve channel cable systems. National Federation of Local Cable Programmers would impose a "must carry" rule for low power on all cable systems having over 30 channels. On systems with fewer than 30 channels, NFLCP would require carriage unless the system were saturated, in which case the cable operator would be required to provide an A/B switch. NFLCP contends that low power would be severely hampered without a "must carry" rule, designed to assure local broadcasters access to their audience and thus promote competition in local programming. National Citizens Committee for Broadcasting would require free carriage of low power signals on all cable systems of over 36 channels, channels to be shared among low power operators if the subject cable system is saturated. Western Communications Research Institute also would require low power carriage on all over-36-channel systems, and smaller systems that have available channels, that are within the 64 dBu contour of the subject low power station. United Auto Workers would require the cable company to pay the costs associated with carriage of the low power signal if the cable system is located within the low power coverage area; otherwise the low power station should pay for coverage. UAW believes that low power stations should share channels in saturated cable systems. OK TV Translator Company wants cable companies to be required to obtain written consent to carry low power signals and to be forbidden to degrade the low power signal. Darwin Hillberry suggests that cable operators must pay low power operators for signals carried.

72. *Comparative Issues.* (The Omnibus Budget Reconciliation Act (Pub. L. No. 97–35), signed into Law by President Reagan on August 13, 1981, gave the Commission 180 days to establish a system of choosing among competing applicants by random selection, with significant preferences for groups that are under represented in ownership of telecommunications facilities. A separate proceeding was initiated toward this end. It set the framework for establishment of a random selection system *with* preferences, but does not apply to any particular service. Institution of the system in the broadcast service will be accomplished in a separate proceeding directed toward that end. However, because a comparative selection system for the low power service may be implemented sooner than the lottery for broadcast services, the comments and replies relating to comparative procedures and criteria for low power stations are memorialized below.)

73. *Lottery.* A number of parties oppose the lottery proposed as the last resort mode of selection for competing low power applications. NBC, Residential, CBS, General Electric, Howard, Citizens Communications Center, Consumer Federation of America, United Church of Christ, United States Catholic Conference, National Translator Association, Washington State Association of Broadcasters, National Council of Churches, National Citizens Committee for Broadcasting, International Broadcasting Network, National Federation of Local Cable Programmers, National Innovative Programming Network and United Auto Workers agree that the lottery violates the Communications Act of 1934 (before it was amended by the Omnibus Budget Reconciliation Act of 1981). ACORN calls the lottery proposal capricious. The Corporation for Public Broadcasting and Microband contend that the lottery proposal violates the strictures of the *Ashbacker* case. The Maryland, District of Columbia, Delaware Broadcasters Association argues that a lottery will not elicit the best-qualified applicant, in many cases. ABC states: "The only possible justification for administrative adjudication by lot would be if reasoned decision-making were infeasible."

74. The Justice Department and the now-defunct Executive Council on Wage/Price Stability would support a lottery, although they believe that auction is the most efficient method of frequency allocation. NTIA, Community Television Network and International Cultural Network support a lottery where the preference system proposed results in a tie. Mason would favor a lottery only in the last resort.

75. *Paper hearing.* Parties generally were in favor of a paper hearing of some sort. National Citizens Committee for Broadcasting, United Auto Workers, the Justice Department and NTIA support the paper hearing proposal as detailed in the *Notice*. International Broadcasting Network, Gammon and Grange, and Western Communications Research Institute commend the cost-saving aspect of the proposal. Gammon and Grange believes this is particularly appropriate in a secondary service. Summers believes that paper hearings can be a significant time-saving device. National Translator Association and National Association of Public Television stations believe curtailed hearing procedures are essential. Other commenters, while supporting the concept of a paper hearing, believe that all relevant comparative considerations must be evaluated in the paper hearing, not just the proposed comparative preferences. They include Microband (suggesting additional factors for comparison such as financial capacity, technical, programming and entrepreneurial experience), Community Television Network (suggest factors such as diversification of ownership and programming, integration of ownership and management and past broadcast record), joint comments by broadcast licensees and by cable operators, Citizens Communications Center (including additional factors such as efficient use of spectrum, programming free vs. pay service and integration of ownership and management), Consumer Federation of America, National Council of Churches and National Innovative Programming Network. General Electric would like the paper hearing to include recognition of past service by translator operators. The Corporation for Public Broadcasting favors the paper hearing concept only as an initial screening device.

76. Residential contends that the paper hearing concept violates the Communications Act. ABC agrees, on grounds of arbitrariness. CBS finds no public interest justification for the departure from a full hearing requirement, and argues that a paper hearing violates Section 307(b). The National Association of Broadcasters would like a traditional hearing required for low power. Washington State Association of Broadcasters also opposes the

paper hearing concept. Federal Express proposes evidentiary hearings, held in the locality of the competing applications. Grammon and Grange replies that this would be prohibitively expensive.

77. *Predesignation Conference.* Microband and the Washington State Association of Broadcasters favor the predesignation conference proposed in the *Notice.* International Broadcasting Network believes the plan will not work.

78. *Alternative Proposals.* Microband suggests a system which affords a thirty-day period for amendment after designation of mutual exclusivity, followed by the predesignation conference and a paper hearing with extensive pleadings on all relevant comparative factors, particularly program proposals, as opposed to comparative preferences. Turner would like to see amendments to change channel permitted without a cut-off requirement, or a grant specifying a different channel, in the situation where applications are mutually exclusive and none has comparative preferences. The Justice Department advocates as an alternative, should the streamlined comparative procedures proposed prove legally insufficient, a predesignation conference, designation of issues as to which a *prima facie* case has been made and a paper hearing on those issues. NTIA proposes issuance of a show cause order asking why a mutually exclusive applicant should not change to another frequency, with dismissal of the application as the penalty for an insufficient response. If no alternative frequency is available, NTIA suggests a thirty-day period for the filing of pleadings establishing claims to the comparative preferences, a thirty-day reply period, Commission solicitation of pleadings regarding material questions of fact, responsive pleadings to the solicitation, oral hearings on unresolved questions, Commission ranking of applications based on the pleadings and a lottery, in the event of a tie. Community Television Network favors a presumption that a later-filed mutually exclusive application is a strike application, if other channels are available, and, minor modification treatment of amendments by mutually exclusive applicants to change channel to a non-mutually exclusive channel. William Sullivan describes a preliminary hearing without counsel before a local official, with the results certified to the Commission on a rating form. *See* paragraph 90, *infra.* National Federation of Local Cable Programmers would give minimally acceptable, mutually exclusive applications twenty days to file information relating to the preferences claimed, followed by sixty days for rebuttal pleadings and then either a compromise proposal or a comparative hearing. John Boler advocates case-by-case evaluation of mutually exclusive applications as the preferable comparative procedure.

79. *Comparative Preferences—First to File.* An overwhelming number of parties oppose the preference point proposed for the first-filed complete and sufficient application. Microband argues that this is irrelevant as a comparative criterion. NBC insists that this would have the effect of encouraging sloppy applications. Summers finds no public interest justification in the notion. ACTVA believes it is arbitrary. Southern California Committee for Open Media and United Church of Christ state that the first-filed preference would have the effect of disadvantaging noncommercial, minority and other less affluent applicants. These commenters' disapproval is echoed by Citizens Communications Center, SINO, Joint Comments filed by Cable Companies, Los Angeles Children's Hospital, Consumer Federation of America, National Black Media Coalition, National Congress of American Indians, National League of Cities, Corporation for Public Broadcasting, National Association of Broadcasters, Gammon and Grange, National Council of Churches, Ohio Educational Broadcasting Network, National Citizens Committee for Broadcasting, United Auto Workers, National Association of Public Television Stations and National Federation of Local Cable Programmers.

80. Community Television Network, NTIA and National Innovative Programming Network find the first-filed preference acceptable.

81. *Minority-Ownership Preference.* The preference proposed for minority ownership is widely supported, by Spanish International Network, NTIA, Community Television Network, Consumer Federation of America, Grassroots Video, National League of Cities, National Congress of American Indians, Corporation for Public Broadcasting, ACORN, International Broadcasting Network, National Federation of Local Cable Programmers, National Innovative Programming Network, National Citizens Committee for Broadcasting, United Auto Workers, Ventures in Communications, Western Communications Research Institute and Microband. National Black Media Coalition would prefer channel reservations for minority applicants to a minority preference. Mason believes 100 percent ownership by minorities is preferable to the over 50 percent proposed. National Association of Broadcasters contends that minority participation in management of the stations must be considered in conjunction with mere ownership. Turner would like minority-oriented program proposals to be considered part of the minority preference. SINO says the minority ownership criterion should be based on the existing comparative criteria, including the extent of minority ownership, the degree of integration of ownership and management, program proposals. Summers concurs, averring that minority ownership alone might be unconstitutional, but that the existing criteria, including participation of ownership in management, local ownership, past broadcast record, program proposals and civic involvement of ownership, should be part of the minority evaluation.

82. CBS contends that a minority preference is tantamount to reverse discrimination, that minority control cannot be assured by an initial preference, absent a trafficking prohibition and that the Commission cannot make an irrebuttable presumption that minority owners will air minority-oriented programming. Federal Express agrees that a minority preference is discriminatory. The National Hockey League complains that it inhibits the free enterprise system. E. B. Craney opposes it on the grounds that excellence of service should be the sole criterion of a license award.

83. *Preference for Women.* A number of parties contend that, although not within the Commission's definition of minority, female low power applicants should receive a comparative preference. They include the National League of Cities, NTIA, Corporation for Public Broadcasting, American Women in Radio and Television, National Federation of Local Cable Programmers, Western Communications Research Institute, United Auto Workers, Microband, Los Angeles Children's Hospital and Consumer Federation of America.

84. *Noncommercial Preference.* The proposed preference for noncommercial service is favored by Grassroots Video, National Black Media Coalition, National Congress of American Indians, National League of Cities, Corporation for Public Broadcasting, International Broadcasting Network, Mason, National Innovative Programming Network, National Federation of Local Cable Programmers, United Auto Workers, Ventures In Communications and Western Communications Research Institute. National Citizens Committee for Broadcasting believes the preference should be afforded to nonprofit corporations applying for low power stations. National Association of Public Television Stations would like the preference to go to public service programming proposals. Independent Cinema Artists and Producers wants a preference for local noncommercial programming only.

85. The noncommercial preference is opposed by NBC, Summers, Consumer Federation of America and the National Hockey League. The comment of the now-defunct Executive Council on Wage/Price Stability claims that noncommercial stations are becoming increasingly less important because of the increase in "high-brow" programming on commercial stations. CBS says that it is not clear why noncommercial service is more in the public interest than commercial service. E. B. Craney believes the only appropriate comparative criterion is excellence of service, whether commercial or noncommercial. National Association of Broadcasters avers that the presence of a noncommercial station in no way assures that a market's needs will be met.

86. *Commercials on Noncommercial Stations.* Several comments raise the issue of whether noncommercial low power stations that air commercials nevertheless should receive a comparative preference. National League of Cities and Ventures In Communications support this view. United Auto Workers believes this is permissible, so long as no profit is made. National Innovative Programming Network would give a preference point for instructional programming, whether proposed by a commercial or noncommercial applicant. Global Village proposes a preference in the situation under consideration, so long as the majority of the station's time is without commercials. ACORN would give a preference to applicants that are nonprofit corporations, whether or not they propose to

have advertising. National Federation of Local Cable Programmers would rank noncommercial applicants in the basis of the highest percentage of advertising-free time proposed and issue preference points on that basis. *See* paragraph 91, *infra*. National Citizens Committee for Broadcasting supports the concept of a noncommercially-preferred low power station being permitted to sell up to ten hours per day to a commercial entity, so long as the noncommercial entity is kept strictly separate from the commercial entity, even if one owns the other. Western Communications Research Institute, SINO and Microband believe that noncommercial low power stations should be bound by § 73.621 of the rules, which currently forbids advertising on full-service stations.

87. *Channel Reservations for Noncommercial Stations.* Corporation for Public Broadcasting proposes that channels be set aside for noncommercial low power stations in the top 150 markets, the number of channels to be set aside to be determined by the population of the market. It is claimed that only in this way will the more slowly developing noncommercial service be permitted to develop fully in the low power context. *See* paragraph 24, *supra*. Western Communications Research Institute believes that Channels 2 through 4 and 14 through 35 should be set aside for noncommercial low power stations and that a comparative preference should be afforded to noncommercial applicants for channels over 35. National Federation of Local Cable Programmers supports the concept of channel reservations for noncommercial low power applicants only if no comparative preference is to be awarded to same.

88. *Free vs. Pay.* William Sullivan, National Association of Broadcasters, Los Angeles Children's Hospital, International Broadcasting Network and Consumer Federation of America believe that free low power stations should be preferred over those proposing subscription service. Community Television Network disagrees.

89. *Local Preference.* A number of parties propose a preference for some sort of local component, whether ownership, program origination or orientation. These include the United Church of Christ, the National League of Cities and William Sullivan. Potomac Communications favors a local ownership preference. Daniel Mayeda would give a comparative preference for 50 percent local ownership. Video makers would prefer local owners proposing service oriented to unique community needs. Community Television Network would give a comparative preference for 100 percent participation of local owners in management of a low power station proposing locally produced news of public affairs programming. Thomas Smith would give a comparative preference to local origination of public service programming. National Federation of Local Cable Programmers and Los Angeles Children's Hospital would prefer local ownership and programming. Video Factory would award a preference point for locally originated "high quality art and cultural programming." Independent Cinema Artists and Producers believe a preference should go to local noncommercial programming. Praxis would favor programs to serve local needs. International Broadcasting Network would give preference to locally produced programming. Consumer Federation of America would give a comparative preference for local access and management and programming addressed to local concerns. Ventures In Communications also would prefer a proposal that includes local access and program origination. Metonomy would favor local small business as low power applicants.

90. Microband disagrees, stating that the market may be depended upon to provide local programming, if there is demand for it. GEBCO and joint comments filed by various broadcast licensees argue that a further notice of proposed rule making is necessary to explore further the entire issue of comparative preferences.

91. *Translator vs. Low Power Station.* UPTV Systems, Residential, Colorado Translator Association and OK TV Translator Company argue that existing translator licensees should get a comparative advantage when seeking to add low power features in competition with new low power applicants, in recognition of the service previously provided by the translator. NBC and joint comments filed by broadcast licensees aver that extension of the coverage of a full-service station should be the only decisive comparative preference. Telecommunity believes that a locally-originating low power application should be preferred over a translator application. Consumer Federation of America and Ventures In Communications agree that low power applications should be favored when in competition with translator applications. Gammon and Grange and Microband disagree.

92. NBC argues that all relevant comparative factors must be weighed together, particularly technical and service characteristics of mutually exclusive low power proposals. National Association of Broadcasters contends that the proposed preferences are not flexible enough. National Translator Association and National Council of Churches urge that all relevant comparative factors be considered. Washington State Association of Broadcasters would like the 1965 comparative criteria used for low power applications. Summers argues that the proposed preferences are not sufficiently detailed to provide a basis for a meaningful choice among competing applicants, stating that the present criteria are preferable. Response argues that the secondary nature of the low power service justifies abbreviated preferences. Turner would like a system of weighted preferences, the foremost for live informational programming proposals, the next most important for minority ownership and the least most important for noncommercial applicants. NTIA would give equal weight to the following comparative criteria: First-to-file, ownership (demerit for duopoly situations), women or minority applicant, but would not consider the proposed service area. Ed Craney would place paramount emphasis upon excellence of service as a comparative criterion. Thomas Smith would look to local origination, minority ownership, minority programming and proposed coverage area as comparative criteria. Joint comments filed by various cable companies cite financial qualifications, ability to meet local needs, local preference and proposed service as appropriate comparative criteria. Los Angeles Children's Hospital suggests ownership by the handicapped and women, local ownership and programming, time sharing or other innovative concepts, service to underserved audiences or geographical areas and free service as meriting favorable comparative consideration. Gammon and Grange suggests that in urban markets a preference be afforded to the first specialized programming of its kind.

93. National Association of Public Television Stations believes that the comparison of competing low power applications should include the complete range of relevant criteria, including public service programming, other media interests and local ownership. National Association of Low Power Broadcasters also favors a greater range of preferences, stating that the Commission should determine the unmet needs of a service area and award the license on that basis. Mason would give a preference point for residence of the licensee in the proposed service area, noncommercial service, 100 percent minority ownership, no more than 51 percent ownership of another broadcast facility and demonstrated broadcasting expertise (two years of work or four years of education). In case of a tie, the license would be awarded to the most extensively qualified applicant.

94. ABC argues that a further notice of proposed rule making must be issued to consider expanded comparative criteria, including ability to implement proposals, recognition of the value of traditional translator service, financial qualification, prior broadcast experience and record, familiarity with the community to be served, ability to acquire or produce programming and program plans. GEBCO and Joint Reply of Broadcast Licensees also recommend a further notice of proposed rule making to consider as comparative issues: minimum hours of operation, local origination, familiarity with community interests, recognition of translator service, minority population served, noncommercial service, the need for local service, the need for STV and program proposals.

95. Community Television Network advocates a paper hearing preference system based in part upon media concentration, with two points if the applicant's other broadcast interests reach fewer than fifteen percent of national television households, one point if they reach between fifteen and twenty percent of national television households and no points if they reach over twenty percent. CTN also would award two points for at least one-half hour per day of local informational programming, two points for minority ownership and one point for 100 percent participation of local owners in management. CTN would not give comparative merit to free versus pay service, hours of operation, first-filed application, population covered or efficient use of spectrum, on the grounds that

these factors are too difficult to evaluate without an oral hearing. Consumer Federation of America would award comparative preference to, in descending order of importance, low power versus translator service, minority and female ownership, specialized programming addressing local concerns (*e.g.*, programming for the elderly, handicapped, foreign language, cultural and educational programming), opportunity for local access, commitment to Fairness Doctrine and access for political candidates, news and public affairs programming, control of least other broadcast interests, local management, EEO compliance, hours of operation, free versus pay service, amount of commercial material and originated programming. NBMC indicates that it assumes that the Commission's EEO policies will apply to low power stations.

96. International Broadcasting Network proffers a three-tiered preference system, first awarding one point each for noncommercial service, minority ownership and free versus pay service; then, in the event of a tie, one point each for locally produced programming and absence of other broadcast interests and, finally, one point each for specialized programming and greatest hours of operation. Corporation for Public Broadcasting would consider minority ownership, female ownership, local origination facilities (as opposed to local ownership), absence of other media interests, efficient use of frequency (*i.e.*, larger service area than competitor by a least 50 percent) and noncommercial service (outside the top 150 markets, where CPB advocates noncommercial channel reservations). *See* paragraphs 27 and 84, *supra*, on the comparative process.

97. William Sullivan advocates the following system of preferences:

| Preference | Points |
|---|---|
| First local service | 10 |
| Local ownership (within one hour's drive) | 8 |
| Population covered (largest) | 8 |
| Local origination of more than 20 prime time hours per week | 6 |
| Financial feasibility | 4 |
| Familiarity with community needs | 4 |
| Free, versus pay, service | 2 |
| Nonduplicated program service | 2 |
| Site availability | 1 |
| Possibility of channel upgrade | 1 |
| Creative or auxiliary service | 2 |
| City grade coverage over entire community | 2 |

98. The National Federation of Local Cable Programmers suggests the following preference scheme:

| Category | Amount (percent) | Points |
|---|---|---|
| Minority/female ownership, control | 91 to 100 | 20 |
| | 81 to 90 | 17 |
| | 71 to 80 | 15 |
| | 61 to 70 | 12 |
| | 51 to 60 | 10 |
| Percent of time noncommercial | 95 to 100 | 20 |
| | 85 to 95 | 10 |
| | 75 to 85 | 5 |
| Local ownership, control | 100 | 15 |
| | 75 to 99 | 10 |
| | 51 to 74 | 5 |
| Local programming | Over 25 | 15 |
| | 15 to 25 | 10 |
| | 10 to 14 | 5 |
| No other broadcast interests owned | | 15 |
| Local access | Over 25 | 15 |
| | 20 to 25 | 10 |
| | 10 to 19 | 5 |

99. Western Communications Research Institute proposed:

| | |
|---|---|
| Noncommercial | 10 |
| Minority/female ownership, control: | |
| Over 50 | 10 |
| Over 25 | 3 |
| Less than 3% minority | −2 |
| Less than 10% women | −2 |
| Other media interest: | |
| 5% or greater control | 5 |
| None within 150 miles or in same state | 2 |
| Radio | 1 |
| Low power stations—over 10 | −3 |
| TV | −3 |
| Newspaper | −3 |
| Other print media | −3 |
| Cable: | |
| Under 10,000 subscribers | −1 |
| 10-50,000 subscribers | −2 |
| Over 50,000 subscribers | −3 |
| Integration of ownership and management (full-time): | |
| Over 50 | 3 |
| Over 25 | 1 |
| Under 2 | −1 |
| Local residence of owners (within 64 dBu contour of station): | |
| Over 50 | 3 |
| Over 25 | 1 |
| Under 2 | −1 |
| Local programming production: | |
| Over 10 | 3 |
| Some | 1 |
| None | −2 |
| Amount of service, free or pay: | |
| Over 12 hours/day | 2 |
| 100% free | 3 |
| 70% free | 2 |
| Under 20% free | −2 |

Western Communication Research Institute would not consider the size of the service area, the population served or specific program proposals.

**Summary of Comments and Reply Comments Filed in Response to the Further Notice of Proposed Rule Making**

1. *Automated Processing.* A number of parties, including CBS and NBC, support the concept of automated processing with a prohibited contour overlap standard. CPB proposes a system virtually identical to that proposed in the Further Notice. According to CPB, the application should include location, frequency, ERP, antenna gain and directionality and HAAT. Field strengths should be calculated in accordance with § 73.684 of the rules. Processing should be accomplished using automated terrain data, the F(50,10) curves and standardized antenna patterns. NAPTS evinces concern that low power stations not be locked into their initially authorized facilities and suggests that the Commission establish and assume maximum power and antenna height in processing. NTA opposes this concept on grounds of spectral efficiency. NAB opposes protecting future low power facilities increases. Cox approves automated processing only to reduce the present application backlog. NAB endorses automated processing, but adds that manual engineering review should continue, as well.

2. Other parties advocate retention of the mileage separations [1] and the two-tiered mode of processing originally proposed: Applicants first should try to meet the mileages, but if they cannot they may submit a special engineering showing with a request for waiver of the mileage separations. ABC, American Christian Television Systems, EIA and Cox are in this group. MST proposes a new set of mileage separations for low power stations. Field would have the Commission establish three classes of low power stations, each with mileage separations prescribed:

| | ERP | HAAT (feet) |
|---|---|---|
| Class A | 1 kW | 300 |
| Class B | 10 kW | 500 |
| Class C | (1) | (1) |

[1] Facilities in excess of Class B—must meet full service mileage separations.

3. A number of parties urge the Commission to permit UHF low power licensees to accept interference received on the seventh, fourteenth or fifteenth adjacency. They include ACTS, CTN, Kitchen, Neighborhood, NTA and Taft. CPB, Kitchen and Taft also advocate elimination of the separation directed toward intermodulation interference.

4. A great number of parties, including OEBNC and Multilingual, object that the low power UHF protected contour is too small, a result, they aver, of the unrealistic assumption on which the 84 dBu contour was calculated. Community Media Network says that instead of assuming two maximum facilities UHF stations at the minimum separation, the UHF stations should be assumed to operate at 1 megawatt power with 1,000 foot antennas, which more closely approximates actual full service UHF station operating characteristics. AGK finds the contour proposed for VHF low power stations acceptable, but, with ACTS, recommends a 74 dBu protected contour for UHF low power stations. CTN, Neighborhood, Storer and Taft would have a 70 dBu protected contour for UHF low power stations. EIA believes the UHF adjacent channel D/U ratio should be used for UHF low power stations. MST says that the low power-to-low power station protected contours proposed are adequate. CPB says that they are too small and that the Grade B contour should be used. Cox believes that the low power protected contour should be the higher of the Grade B or interference received from full service stations. IBN proposes a Grade B protected contour for low power stations as follows:

| Frequency | Protected contour (decibel units) |
|---|---|
| Low band VHF | 47 |
| High band VHF | 56 |

[1] It should be noted that there currently are no VHF translator-to-full service mileage separations in the rules.

| Frequency | Protected contour (decibel units) |
|---|---|
| UHF | 64 |

King wants low power stations protected beyond the Grade B contour. Garryowen, complaining that the protection standards proposed for low power stations won't protect existing translators, proposes the following protected contours for low power stations:

| TPO (watts) | Protected contour (miles) |
|---|---|
| 1 | 10 |
| 1 to 10 | 20 |
| 10 to 100 | 40 |
| 100 to 1,000 | 80 |

NBC suggests an 8-to-10 dB increase in the D/U ratios proposed for both low power and full service stations. OEBNC states that low power protected contours should be defined with reference to the population and area proposed to be served.

5. Spectra argues that the Commission should not play the role of engineer but should rely on applicants' engineering showings and suggests five percent interference caused and ten percent probability of interference. Taft advocates use of the antenna radiation height above the elevation center of the community of license instead of height above average terrain. NBC agrees that HAAT is too burdensome for applicants to compute. CPB favors use of HAAT, for greater spectral efficiency.

6. *Protection to full service stations.* A number of parties advocate protection of any service received from full service stations. MST, endorsed by EIA, GEBCO, ABC, Storer and Joint Comments filed by broadcast licensees, proposes a set of mileage separations for low power stations, or, alternatively, that low power stations be required to protect the following contours of full service stations:

| Frequency | Protected contour (decibel units) |
|---|---|
| Low band VHF | 40 |
| High band VHF | 50 |
| UHF | 60 |

7. Cox, in response to CPB's argument that a low power station will provide more truly local service than a full service station at the farthest reaches of its signal, points out that full service stations have a secondary ascertainment obligation within their field intensity contours. Cox proposes that a low power/full service protected contour be established seven dB below the Grade B at 40 dBu, similar to that adopted in Docket 20735 for Channel 200/Channel 6 protection. Cox also asks that low power stations that would cause interference to full service stations that increase facilities be required to amend their licenses to correct the interference within 60 days after issuance of the full service construction permit. NAB concurs that full service stations should be protected beyond the Grade B by low power stations, adding that the Grade B concept should be re-examined before it is used as an allocations tool. CIC argues that the standards must be flexible and allow for waivers in deserving cases, suggesting that the Commission permit no low power interference to existing service beyond the full service Grade B contour where the low power signal would cause "significant degradation" to the full service signal, in terms of the number of hosueholds affected. ACTS suggests a rule requiring low power stations to protect a full service signal beyond the Grade B contour where it is "significantly viewed," as defined in § 76.54 of the rules. Kitchen believes that actual reception should be the test of protection of service by low power licensees. AGK suggests that the Commission not license a low power station in any community outside the Grade B contour of a full service station if the community is within the ADI (area of dominant influence) of the full service station. CBS advocates a requirement that low power applicants choose the channel least likely to cause interference and that the Commission then protect service received beyond a full service station's Grade B contour on a complaint basis. Field would require low power applicants to engage in prior frequency coordination with full service licensees, in the hopes that this policy would encourage private resolution of interference disputes.

8. NAPTS avers that full service stations should receive protection from low power stations at least to the Grade B contour. Spectra contends that service received beyond the full service Grade B contour should be disregarded, in a low power context. ACTS and Attaway believe that low power stations should have to protect the Grade B contour of full service stations. Community Media Network agrees, arguing that full service stations should be limited to their power levels as of a date certain, *e.g.*, December 31, 1982. NTA advocates low power stations protecting full service station coverage to the Grade B contour, except where terrain prevents actual reception of a full service station within the predicted Grade B contour.

9. CPB, supported by IBN, argues that low power stations should not have to protect full service stations to their Grade B contours because two full service stations are not required to protect each other's signal to the Grade B contour. MST contests this by pointing out that neither of two full service stations is secondary to the other, as low power is to full service. CPB adds that low power stations are more likely to provide truly local service than are full service stations at the perimeter of their field intensity contours. CPB recommends that the following full service contours should be protected by low power stations:

| Frequency | Protected contour (decibel units) |
|---|---|
| Low band VHF | 62 |
| High band VHF | 68 |
| UHF | 80 |

10. *Terrain roughness.* Several parties, including Attaway, Community Media Network, NTA, Multilingual and OEBNC, recommend that terrain roughness be considered in processing, to achieve greater spectral efficiency. Others, including ABC, NAB and Spectra, argue that automated terrain data is not sufficiently reliable to justify the cost.

11. *Offset.* ABC, Cox and MST argue that use of a nonstandard offset factor is too expensive to justify its implementation. CBS believes that relaxed frequency tolerance standards such as those proposed will not permit the maintenance of a nonstandard visual carrier offset factor. Other commenters, including NTA, Multilingual and Gallagher and Johnson, support the use of a nonstandard offset factor as an interference reducer, provided that frequency stability is required. CPB endorses the use of a 10 kHz offset factor, with 1 kHz frequency tolerance required. Field would permit ±20 kHz offset, with a ± 1.5 kHz frequency tolerance requirement. TV Technology Corp and IBN support a 8 or 24 kHz offset factor with a ± 1 kHz tolerance requirement. Kitchen endorses use of an offset factor with a tolerance requirement, on a waiver basis, in large cities. OEBNC and Community Media Network endorse a higher frequency tolerance requirement. NTA would require a stricter tolerance standard where it proves necessary on a case-by-case basis. EIA would require between 2 and 3 kHz tolerance.

12. Attaway, Kitchen, Multilingual, CMN, NTA, OEBNC and Spectra support the inclusion of a front-to-back ratio in the protection ratio, as proposed in paragraph 10 of the Further Notice. A number of other parties, including ABC, MST, CBS, CPB, Cox, EIA, Field, Gallagher and Johnson, NAB, Storer, Taft, ACTS, IBN and NBC, advocate consideration of a front-to-back ratio as a safety factor only. Storer contends that use of a front-to-back ratio has been considered and rejected in BC Docket No. 80–499, VHF Drop-Ins. *See,* Notice of Proposed Rule Making, BC Docket No. 80–499, 83 F.C.C. 2d 51, 102 (1980). The other comments aver that outdoor receiving antennas cannot be relied upon to afford additional protection against interference in a uniform manner. CPB believes inclusion of a front-to-back ratio would result in low power stations receiving more interference from full service stations than they would otherwise.

13. Several parties, including ABC, Taft Cox, NAB and MST, express the concern that any standards adopted ensure the secondary spectrum priority of low power stations, as well as ensuring that full service stations are fully protected from interference. Others believe that, in certain circumstances, the status of power of low power stations should be enhanced. As discussed in paragraph 4,

above, Garryowen believes that higher power is necessary for low power adequately to serve rural areas. IBN wants the standards to afford full protection between low power stations and to permit future facilities increases to ensure good reception. NTA would like rural low power stations to be fully protected from interference within the city of license.

14. A number of comments, including those of CBS and Garryowen, believe that any standards adopted should ensure protection from interference to traditional translators. OEBNC and NTA believe that existing translators that do not meet the standards adopted should be grandfathered. NTA would like low power stations to be required to protect existing translators to a contour twenty miles beyond the Grade B contour of the station the translator rebroadcasts. CMN also advocates full protection from interference by low power stations for translators completing plans of area-wide coverage by full service stations. AGK proposes a comparative preference for translators proposed by full service stations within their Grade B contours. KHQ, Taft and King would like low power applicants to be required to show that they will not interfere with the off-air input channels of translators, as well as their output channels. King also believes that low power stations should be required to protect translators outside their Grade B contour.

15. NCTA complains that the Further Notice does not propose that low power stations protect the use of radio frequencies by cable systems. The Commission should, according to NCTA, require frequency coordination between low power applicants and cable operators. NCTA also would prefer low power stations only to be licensed in UHF channels, but if the Commission should license low power stations in VHF channels, NCTA believes that low power licensees should be held responsible to correct all interference between low power and cable, including interference to set-top converters on output channels 2, 3 or 4, interference to cable headends and frontend overload, all of which NCTA claims, would be very expensive for the cable operator to correct. NTA would have low power licensees protect CATV systems to twenty miles beyond the Grade B contour of stations whose signal the CATV system extends. Taft would require showings from low power applicants that they will not interfere with any existing cable system off-air pickup. MST objects to NCTA's proposal, averring that cable systems have to remedy cable/low power interference, because cable does not have to pay for programming but charges for program service. NAB also opposes low power having to protect cable reception at the headend or the output channel of set-top converters, further contending that cable systems can correct frontend overload with filters.

16. A number of parties decry the protection standards proposed for land mobile systems. The Central Committee on Telecommunications of the American Petroleum Institute emphasizes the health and safety factors involved in maintaining interference-free communications service to offshore drilling personnel in the Gulf Coast off Southern Louisiana. The Offshore Telephone Company concurs. They are concerned that the Channel 17 land mobile stations in Southern Louisiana and others will receive interference from low power stations, because the assumed maximum facilities UHF stations on which the low power/full service UHF separations are based are unrealistic. Where land mobile shares frequencies with full service television stations, it is averred, low power stations should be secondary to both. The Offshore Telephone Company would require low power applicants to select the highest available UHF channel and believes that enhanced separation criteria from Zone 3 should be applied to low power stations proposed in Zone 3. APCO believes that land mobile stations would receive interference from low power stations because of the wideband characteristics of television receivers. APCO would prohibit low power stations on Channels 14 through 20 and on 4 and 5, to protect the 72 through 76 MHz band between Channels 4 and 5 that is used by land mobile. Motorola advocates increased separations to prevent low power interference to land mobile base stations, *viz.* a 190 mile co-channel separation between a low power station and the center of the land mobile city and a 170-mile adjacent channel separation. NABER endorses these separations, adding that low power applicants should be required to choose from channels 55 through 69 first and that low power stations should not be permitted on Channels 14 through 20 within 115 miles of the urban areas in which these channels may be used by land mobile. Radio Broadcasters, concerned that land mobile stations in Philadelphia will receive interference from low power stations, argue that the F(50,50) curves instead of the F(50,10) curves should be used to calculate permitted low power signal strengths in relation to the land mobile channels and suggest that co-channel low power stations should not be permitted to exceed 38 dBu at the land mobile protected contour. 68 dBu is suggested for adjacent channel stations. Telocator advocates prohibition of low power stations from Channels 14 through 20 and 4 and 5, and a 140-mile separation requirement from Philadelphia and Los Angeles on Channel 21.

17. ACTS, on the other hand, contends that the threat of interference by low power to land mobile is not as serious as that claimed by land mobile advocates. Kitchen agrees with the land mobile protection standards proposed in the Further Notice and also believes that low power/land mobile sharing should be reinstituted on Channels 70 through 83. NTA would like land mobile removed from the other channels used by television and relegated entirely to 70 through 83. WHP would permit low power on Channels 14 through 20 without regard to land mobile and remove land mobile to Channels 70 through 83 (in the 806 and 960 MHz band). MST also would remove land mobile uses from Channels 14 through 20 and opposes keeping low power off Channels 4 and 5. Neighborhood would either remove land mobile from Channels 14 through 20 or have no fixed protection standards for land mobile by low power applicants on those channels, but require a noninterference showing by the low power applicant. NJTV contends that adjacent channel interference to land mobile is not a serious risk and simply would condition low power grants on the licensee's correcting any interference caused to adjacent channel land mobile stations. NJTV also advocates the Commission's appointing a committee to investigate the land mobile and television channel sharing issue.

**Appendix E—Tiered Application Processing Procedures for Pending Applications**

1. The Commission currently is confronted with an unprecedented processing backlog of more than 6,500 applications for television translators and low power stations. While herein we adopt channel allocation standards tailored to rapid computerized interference analysis, the full implementation of this capability cannot be realized for at least the next 12 months. During this period, the processing staff faces the enormous task of identifying mutually exclusive applications on an essentially manual basis.[1] We also are confronted by a situation in which a sizeable majority of the applications propose service in the larger television markets. We estimate that approximately one half of the applications are associated with the top 50 television markets and 70 percent with the top 100 markets. In contrast, only 15 to 20 percent propose to locate outside of any ranked market, *i.e.*, outside a market having at least one commercial television station. We recognize that these percentages do not reflect the extent to which numerous applicants compete for relatively few available channels in the largest markets. Nonetheless, we are concerned that this imbalanced demographic array of the pending applications could frustrate near-term attainment of one of our principal goals in this proceeding: to provide programming, including local outlets, in unserved and lesser-served rural areas. We believe the public interest would be served by our adopting a processing hierarchy that would facilitate the expeditious authorization of service to rural areas. In view of the circumstances, we believe the best vehicle for achieving this objective is a transitional "tiered" processing system, in which the application backlog is subdivided into a number of prioritized groups of applications on the basis of the extent of existing television diversity. Once the present backlog has been eliminated (in three phases), and only then, will we lift the freeze on the filing of television translator and low power applications.

2. In general terms, the tiered processing system will function in the following manner. We shall identify and make public lists of applications as either TIER I, TIER II or TIER III applications, classified on the basis of market location. We envision three stages of processing pending applications, including freeze-exempt applications. During the initial phase only TIER I and freeze-exempt applications will be processed. All pending

[1] To this end, we are requesting additional topographical information from present applicants that could greatly facilitate our manual processing. *See*, note 46 of the *Report and Order*.

freeze-exempt applications as of the effective date of this *Report and Order* will be treated as TIER I applications. During the second stage, only pending TIER II and freeze-exempt applications (as these are filed) will be considered. TIER I applications still awaiting grant or denial (some may be awaiting hearing) will be accorded "protected" status in terms of our contour overlap standards. During this second stage, newly-received freeze-exempt applications will be accorded equal protection status with pending TIER II applications. The freeze will be lifted only for competing TIER II filings. Finally, the Commission will enter into the third stage, in which the remaining pending TIER III applications will be considered. At this stage, TIER III applications must protect yet-undisposed TIER I and II applications. Freeze-exempt applications received during this stage will be treated as TIER III applications. The Commission will announce publicly the completion of each stage of processing.

3. The three tier classifications will be defined in terms of the Commission's ranking of television size as contained in the Public Notice encaptioned "Television Channel Utilization" (Public Notice dated April 16, 1982, mimeo number 3331). This report ranks markets from one to 212. For purposes of tiered processing, we define the boundary of a market as a 55-mile circle centered about the reference coordinates of the principal market city or town (cities or towns in the case of hyphenated markets).[2] The 55-mile radius is roughly equivalent to the predicted Grade B coverage area of a full service UHF television station operating at maximum power. Thus, TIER I will consist of those applications proposing to locate the transmitting antenna at a distance of more than 55 air miles from any FCC-ranked television market. TIER II will consist of those additional applications proposing a location within 55 miles from the reference coordinates of all ranked markets from 101 through 212. TIER III will comprise the remaining applications proposing location within 55 miles of the reference coordinates of all ranked markets from one through 100, inclusive. Fractions of miles should be rounded off to the nearest mile, in accordance with the Commission's customary practice, *See* § 73.611(d) (5) of the rules. Hereinafter, we shall eliminate the freeze exemption pertaining to the number of television services received. In its place, we shall consider any prospective applicant meeting TIER I qualifications to be freeze exempt. The remaining two freeze exemptions will remain unchanged.[3]

4. We believe that this tiered processing approach is consistent with the public interest and represents the best means of addressing the application backlog until a fully automated system of processing can be implemented. During the initial stage, the staff will be required to make its determinations through analysis of only 15 to 20 percent of the pending applications. Upon commencement of the last stage, involving some 70 percent of the applications, we expect to have a fully automated processing capability. Second, and perhaps of greater significance, the tiered processing approach will provide greater opportunities for increased service, beginning with the least-served rural areas, a major goal of this proceeding.[4]

5. We recognize that, in affording priority to rural applicants, we may be precluding timely-filed non-rural applications that may be mutually exclusive with rural applications. To alleviate this situation and to preserve any rights that may be argued to have accrued on behalf of non-rural applicants, where a group of mutually exclusive applications includes applications that would fall into a tier to be processed later, the entire group will be deferred until we reach the later tier. That is, if an otherwise exclusively TIER I group contains one or more applications that do not meet the standard for processing during TIER I (more than 55 miles from any ranked market) but fall within TIER II or III, we will defer processing of the group until TIER II (or III) applications are to be processed. The same will hold true when TIER II groups contain TIER III applications. Only in this manner can we ensure that urban channel availabilities will not be precluded by tiered processing of rural applications. With this exception, we believe that tiered processing is fully justified, both on policy and administrative grounds. Provision of service to rural areas that currently are unserved or underserved is an objective that the low power service is particularly suited to carry out. The cost of constructing and operating a full service station often is prohibitive in sparsely-populated rural areas. The lower cost of a low power television may facilitate the introduction of local television service in such areas. However, saddling rural applicants with the costs and delays associated with hearings involving urban applicants as well would raise the entry costs considerably and could discourage applicants from attempting to provide service to rural areas. Additionally, giving priority to rural applicants comports with our mandate under Section 307(b) of the Communications Act to allocate spectrum in an equitable, fair and efficient manner, and with the way we interpret Section 307(b) as it applies to the low power service. *See*, paragraph 61 of the Report and Order. Moreover, applications in TIERS II and III appear to contemplate additional television service to areas and populations already receiving multiple services, whereas TIER I applications would bring needed service to unserved or underserved rural areas and populations. Affording processing priority to the latter group would appear to comport with our Section 307(b) obligations. Finally, all interim applicants have been on notice from the outset of this proceeding that their applications and/or interim authorizations would be conditioned upon the outcome of the rule making, so that no inalterable rights can be argued to have accrued.

6. In the near term, between of adoption of the Report and Order and employment of fully computerized processing methods, the tier system will be of little assistance in expediting authorization of service due to the necessarily tedious nature of manual processing using complex engineering criteria. However, with the advent of the computer as a processing tool, the tier system will aid in increasing the number of authorizations because it will reduce the numbers of mutually exclusive applications that must be considered together in chain sequences. This also will expedite the hearing process.

**Statement of Chairman Mark S. Fowler in Which Commissioner Mimi Weyforth Dawson Joins**

*Re: Low Power Television*

Low power television may not have the transmission capabilities of full broadcast television, but its capacity to provide televised programming that is directly responsive to the interests of smaller audience segments makes it truly unique in its ability to expand consumer choices in video programming. From this perspective, the power of these stations may be low, but their potential is enormous.

I fear, however, that the majority may not realize how their vote to impose a one year trafficking limitation on low power facilities may undercut the potential for this service to provide an outlet for new broadcast entrepreneurs, particularly minorities and nonprofit groups, to enter the market. We cannot ignore the fact that the low power service will be inaugurated during a time when financing costs pose a significant barrier to capital investment. It will be difficult enough for these new entrants to obtain financial backing without the added burden that this limitation on the disposability of the facility will impose. Against this very real concern, the majority's speculations as to possible problems that might arise absent a rule seem all the less compelling as a pretext for a general proscription.

Absent a showing of need for government interference in the marketplace, the burden for imposing regulation should lie with those proposing regulation with the presumption in favor of non-interference. I find no argument of the majority overcoming the presumption in favor on non-interference and, therefore, dissent to this aspect of the order.

**Dissenting—in Part—Statement of Commissioner Abbott Washburn**

*Re: Low Power Television, BC Docket No. 78-253*

The absence of any limitation on multiple ownership of this new low power service is inconsistent with the Commission's long-

[2] We shall utilize the reference coordinates for cities and towns specified in the publications "All Populated Places," available from the United States Geological Survey, 507 National Center, NCIC, Reston, Virginia 22092.

[3] The other exceptions are applications for major amendments to change frequency from Channels 70 through 83 or to change frequency to resolve interference to or from full service stations.

[4] The *Notice* formulated the two principal goals as (1) not adopting burdensome new regulations "that would make translator service more difficult to provide, especially in isolated rural areas where the need for television service is greatest" and "to provide maximum flexibility for new originating services to come into being, easily and at low cost." *See*, Notice of Proposed Rule Making, 45 FR at 69179.

standing limitation on ownership of conventional television stations and of AM and FM stations. Currently, ownership of each of these three services is limited to seven stations per licensee. Such limits have proved valuable in preventing concentration (chain ownership) of these facilities and in encouraging diversity of voices of opinion. It would have been in the public interest to include a similar provision here for low power television. Therefore, I dissent to that portion of today's decision which permits unlimited ownership of low power stations.

I also dissent to the majority's abandonment of the proposed preference for noncommercial applicants. As both the Congress by statute and the Commission by our decisions have affirmed repeatedly: *There is an important place for public broadcasting in our society.* But the tremendous number of applications for LPTV, only 6% of which are noncommercial applicants, suggests that we cannot be sure that noncommercial licensees will occupy that place in low power television unless we award a comparative preference to noncommercial licensees. Similarly, the record before us does not persuade me that a completely open and unregulated market environment will assure diversity of programming. Specifically, programming which appeals to special or limited audiences will not survive in a commercial marketplace environment where success is largely determined by broad audience appeal.[1] The Commission recognizes this fact in preserving the comparative preference for minority low power applicants (see Footnote 62). I regret that my colleagues' desire to maximize diversity of programming for the public does not extend to awarding a preference to noncommercial applicants.

Finally, I caution the Commissioners to keep a close watch on the hearing procedures under which decisions in mutually exclusive low power cases are to be made by the Commission in the first instance. It may happen that contrary to our goal of expediting establishment of the new low power service, resolution of mutually exclusive cases by the Commission itself without the helpful assistance of an Administrative Law Judge's Initial Decision and review by the Review Board will prove to be too cumbersome and burdensome. It is possible that a total of 10,000 to 12,000 additional applications will be received. Our staff estimates that three quarters of these are likely to be mutually exclusive. Such a flood of LPTV paperwork could end up seriously impeding the other work of the Commissioners and their staffs.

**Separate Statement of Commissioner Joseph R. Fogarty**

*In Re: Low Power Television Broadcasting—Report and Order.*

This *Report and Order* begins to clear the way for Low Power Television (LPTV) to have its chance in the telecommunications marketplace. The regulatory framework established by this decision gives LPTV the opportunity to prove its promise of enhanced program service diversity and increased minority ownership without jeopardizing the technical integrity or continued development of the full service television station system.

Because of the uncertain viability of this new and secondary LPTV service and the herculean administrative task of processing the 6,000 low power applications now pending before the Commission, this *Report and Order* wisely and appropriately prescribes a minimum of governing regulation. At the same time, however, I also believe that the tiered processing system and comparative criteria specified by this decision meet the Commission's important statutory responsibilities under Sections 307(b) and 309(e) of the Communications Act. In particular, the tiered processing standards ensure first consideration of underserved rural area LPTV applications but also guarantee that where early grant of a rural application might preclude the availability of an LPTV frequency in an urban area, those rural and urban applications will be jointly processed and reviewed. In light of the fledgling and secondary status of this new LPTV service, I am convinced that this processing system meets the command of Section 307(b) that the Commission "provide a fair, efficient, and equitable distribution" of service to each of the "several States and communities." As I emphasized in my Separate Statement on the Notice of Proposed Rulemaking in this proceeding, the statutory mandate of Section 307(b) is not a static, one-time requirement because the balance of demand for broadcast facilities and service is dynamic and changes over time.[1] While the Commission has considerable discretion in implementing the Section 307(b) requirement, it may not ignore it. We have kept faith with Section 307(b) in this *Report and Order.*

Our decision to apply the *1965 Policy Statement on Comparative Broadcast Hearings* [2] to competing LPTV applications according to diversification and minority ownership criteria also adheres to the statutory requirements of Section 309(e) of the Act while providing the flexibility and expedition necessary for the effective implementation of this untested, secondary service. While difficult *ad hoc* adjudicatory issues may be presented under these two criteria, I believe that the paramount public interest in "best practicable service" will be advanced and protected by this case-by-case process.

In terms of further protecting the public interest, I am especially pleased that the Commission has decided to apply a one-year anti-trafficking rule to LPTV license grants. Together with the strict requirement that LPTV stations be constructed and go on-air within one year of grant of construction permit, this action safeguards the integrity of the diversification and minority ownership comparative criteria and provides critical assurance that only bona fide public interest applications will be prosecuted.

Low Power Television offers exciting new ownership and public service opportunities in broadcasting, as the 6,000 applications filed during the pendency of this proceeding more than amply demonstrate. This Commission is doing its part to provide the fair chance for these dreams to become reality. Candor, as well as standards of truth in advertising, compels the final observation that there are no guarantees. As former Chairman Robert E. Lee perhaps presciently observed, an LPTV authorization "isn't going to be a license to print money." [3] The fair opportunity, however, is afforded. This Commission should do no less and can do no more.

**Separate Statement of Commissioner Henry M. Rivera**

*Re: Broadcast Docket No. 78–253; Low Power Television*

Today's Report and Order is the first concrete step toward making the low power television service available to the American public. There are several impediments to substantial near-term development of this service. Among the most prominent obstacles to the low power service are: (i) The staggering number of pending applications and the resulting continuation of the existing processing freeze; and (ii) the possibility that low power grants may even be *precluded* in some large markets if the Commission reallocates television spectrum for land mobile use after reviewing the staff recommendations it has requested on the subject. In this context, truth in advertising requires that the public (especially members of minority groups) be advised to temper its optimism over the low power television service at this juncture.

Despite these implementation handicaps, I firmly support the decision to launch the first new broadcast service in decades. The Commission's initiative offers a rich, if distant, opportunity to promote diversity of ownership generally and to widen opportunities for minority ownership in particular; it also may serve as a testing ground for new regulatory approaches.

Our decision to impose minimum regulatory constraints upon low power television is appropriate for a service whose viability is so uncertain, and whose stations are of limited reach and easily preemptable by full-service stations. However, the framework adopted is not without risk. The failure to impose any ownership limitations, for instance, is said to be likely to induce experienced broadcasters to provide LPTV service and to allow parties to achieve economies of scale from multiple ownership—thereby generally fostering the development of the low power service. It is also possible, on the other hand, that without restrictions on network ownership, cross-ownership or duopolies, a low power television landscape far different from that intended by the Commission will develop. I am persuaded by the Report and Order that the Commission does not now need to impose ownership limits but am prepared to reconsider if the absence of ownership rules

[1] An example of this is children's television programming which today, in quality and quantity, is so well handled on public television.

[1] Separate Statement of Commissioner Joseph R. Fogarty, Concurring in Part, 82 FCC 2d 82, 83–84 (1980), *citing* Pasadena Broadcasting Co. v. FCC, 555 F. 2d 1046 (D.C. Cir. 1977).

[2] 1 FCC 2d 393 (1965).

[3] Concurring Statement of Commissioner Robert E. Lee, 82 FCC 2d 81 (1980).

seriously erodes the primary goals of the low power service.

The tiered processing system adopted to resolve the serious administrative problems caused by the ocean of pending LPTV applications is an unfortunate, but probably necessary, by-product of this proceeding. Most unfortunate is that under the scheme, LPTV authorizations in major urban centers—where ethnic and minority groups with special needs are highly concentrated—will be the last to be made. However, to its credit, the system is designed to protect urban LPTV service: it expressly defers action on all rural applications, which if granted, would foreclose a pending application to serve an urban area.

Not surprisingly, a sizeable number of applications filed by minorities are concentrated in urban markets. A processing hierarchy premised exclusively on geographic remoteness would have precluded many of these applications at the starting gate, and substantially undercut this proceeding's goals of encouraging minority ownership of broadcast facilities. The Commission's modified tier approach avoids that pitfall by according priority to underserved rural area as a general matter but preserving the interests of those proposing service in urban areas where there are competing demands to provide LPTV.

The one-year holding period preserves the dignity of the comparative process. It gives some assurance that those who were deemed comparatively superior by the Commission will indeed serve the public and forestalls the creation of a low power "CP futures market" that could vitiate the essential goals of the comparative process. Contrary to assertions in some quarters, this restriction will not force parties to operate failing LPTV stations. Waivers of the holding period are always grantable upon a proper showing by the licensee. Moreover, if the restriction works an unintended hardship on the development of the service the Commission has the discretion to revisit the issue.

I sincerely hope that the Commission's decision to award priority to diversification of media control and minority ownership in comparative cases will go far in advancing the goals of this new service.[1]

Applying these two comparative factors will surely be among the Commission's most challenging tasks. I frankly would have preferred a more precise discussion of the substantive elements of the comparative process, but on balance am satisfied to let the requisite detail emerge as we begin to process the myriad pending comparative cases.

The Commission may ultimately find that adoption of a policy statement to guide its application of the two primary comparative criteria—diversification of ownership and minority ownership—will facilitate speedier and surer resolution of comparative cases. Until that time, considerable gloss will have to be placed on these criteria in evaluating competing applications. The Commission has reconfigured its comparative licensing standards for the low power service,[2] and its comparative analysis will have to be reconfigured as well.[3]

[FR Doc. 82-13389 Filed 5-17-82; 8:45 am]

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[1] In view of the severe underrepresentation of minorities in broadcast ownership, *see, e.g.*, Policy Statement on Minority Ownership of Broadcast Facilities, 68 FCC 2d 979 (1979), the decision to accord comparative priority to applicants proposing over fifty percent minority ownership in low power television licensing policies is eminently justified. That decision also follows the theme of prior agency actions designed to increase minority ownership of broadcast facilities. In the clear channel proceeding, for example, *see* Clear Channel Broadcasting in the AM Broadcast Band, 78 FCC 2d 1345 (1980), the Commission found that the public interest would be served (in awarding frequencies made available by the decision to allow limited sharing of clear channel frequencies), by giving precedence to applicants proposing a first or second local primary service, applicants with over fifty percent minority ownership and applicants proposing non-commercial operations. See 78 FCC 2d at 1368–70. The Commission classified as "paramount" among competing demands for spectrum the need to increase the number of minority-owned radio stations, citing the fact that just 200 of the over 8,000 radio stations were then owned by minorities. *Id.* at 1368. This decision was recently judicially affirmed. Loyola University v. FCC, No. 80–1824 (D.C. Cir. Jan. 26, 1982). The record regarding minority ownership of television outlets is even more discouraging, with just 16 of 1,050 licensees being minority owned, and thus, the case for awarding comparative priority in this new television service all the more compelling. *See also* Policy Statement on Minority Ownership, supra; Grayson Enterprises, Inc., FCC 80–175 (1980) (allowing approval of "distress sale" applications when it is shown that over fifty percent of the prospective licensee is minority-owned).

[2] As an initial matter, the focus of the Commission's comparative inquiry has been substantially narrowed. In addition, the Commission has altered the prerequisites for comparative recognition of minority ownership in two important particulars: integration of ownership and management is no longer required, but over fifty percent ownership by minorities must now be shown. The Commission, in my judgment, has the latitude to recast its comparative analysis in this manner, and the record in this proceeding furnishes a rational basis for doing so.

[3] For example, because the Commission has altered the circumstances under which it will consider minority ownership in the low power service, reference to the "merit" concept as it has evolved under TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973) and its progeny would be essentially inapposite here.

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## AGENCY PUBLICATION ON ASSIGNED DAYS OF THE WEEK

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| DOT/NHTSA | HHS/FDA | | DOT/NHTSA | HHS/FDA |
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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.

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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.**

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