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Wednesday
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Presidential Documents

Title 3—

The President

Proclamation 5593 of December 22, 1986

National Year of the Teacher
National Teacher Appreciation Day

By the President of the United States of America

A Proclamation

When Henry Adams wrote, "A teacher affects eternity; he can never tell where his influence stops," he expressed a sentiment that any student could share. Teachers help us learn to read, to write, and to count—and how to study. By word and example, teachers impart moral and civic values. During our most formative and impressionable years, teachers help us understand ourselves and the world around us.

Our teachers in public and private schools, from preschool through elementary, secondary, and beyond, deserve the gratitude of our Nation for their wisdom, sacrifice, community service, and devotion to their students. Teachers prepare us for the future; and anyone who today works, dreams, imagines, creates, and contributes to the well-being of our country can thank devoted teachers who provided help, knowledge, and inspiration along the way.

The memory of a very special teacher inspires us: Sharon Christa McAuliffe, a dedicated teacher who, along with the other crew members of CHALLENGER, lost her life on January 28, 1986. May all Americans commemorate Sharon Christa McAuliffe and her brave companions. May we also express our gratitude to everyone who continues the legacy of devotion and excellence that she and the rest of America's teachers have given us through the years.

The Congress, by Public Law 99–480, has designated September 1986 through May 1987 as "National Year of the Teacher" and January 28, 1987, as "National Teacher Appreciation Day" and authorized and requested the President to issue a proclamation in observance of this year and of this day.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim the school year of September 1986 through May 1987 as National Year of the Teacher and January 28, 1987, as National Teacher Appreciation Day. I invite the Governors of every State, employers, community leaders, school superintendents, principals, educators, students, parents, and all Americans to observe these events with appropriate educational activities to recognize the importance of teachers in American schools.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of December, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and eleventh.

Ronald Reagan

[FR Doc. 86-29059
Filed 12-22-86; 4:13 pm]
Billing code 3195-01-M

Presidential Documents

Proclamation 5594 of December 22, 1986

National Day of Prayer, 1987

By the President of the United States of America

A Proclamation

In 1952 the Congress of the United States, resuming a tradition observed by the Continental Congress from 1776 to 1783 and followed intermittently thereafter, adopted a resolution calling on the President to set aside and proclaim a suitable day each year as a National Day of Prayer. At the time the resolution was adopted, Americans were dying on the battlefield in Korea. More than 125,000 of our young men had been killed or wounded in that conflict, the third major war in which our troops were involved in a century barely half over.

Members of Congress who spoke for the resolution made clear that they felt the Nation continued to face the very same challenges that preoccupied our Founders: the survival of freedom in a world frequently hostile to human ideals and the struggle for faith in an age that openly doubted or vehemently denied the existence of the Almighty. One Senator remarked that "it would be timely and appropriate for the people of our Nation to join in this service of prayer in the spirit of the founding fathers who believed that God governs in the affairs of men and who based their Declaration of Independence upon a firm reliance on the protection of Divine Providence."

Human nature is such that times of distress, grief, and war—or their recent memory—impel us to acknowledgements we are often too proud to make, or too prone to forget, in periods of peace and prosperity. During the Civil War Lincoln said that he was driven to his knees in prayer because he was convinced that he had nowhere else to go. During World War II, an unknown soldier in a trench in Tunisia left behind a scrap of paper with the verses:

> Stay with me, God. The night is dark,
> The night is cold: my little spark
> Of courage dies. The night is long;
> Be with me, God, and make me strong.

America has lived through many a cold, dark night, when the cupped hands of prayer were our only shield against the extinction of courage. Though that flame has flickered from time to time, it burns brightest when we are willing, as we ought to be now, to turn our faces and our hearts to God not only at moments of personal danger and civil strife, but in the full flower of the liberty, peace, and abundance that He has showered upon us.

Indeed, the true meaning of our entire history as a Nation can scarcely be glimpsed without some notion of the importance of prayer, our Declaration of Dependence on God's favor on this unfinished enterprise we call America. Our land today is more diverse than ever, our citizens come from nearly every nation on Earth, and the variety of religious traditions that have found welcome here has never been greater. On our National Day of Prayer, then, we join together as people of many faiths to petition God to show us His mercy and His love, to heal our weariness and uphold our hope, that we might live ever mindful of His justice and thankful for His blessing.

By joint resolution of the Congress approved April 17, 1952, the recognition of a particular day set aside each year as a National Day of Prayer has become a cherished national tradition.

NOW, THEREFORE, I, RONALD REAGAN, President of the United States of America, do hereby proclaim May 7, 1987, as a National Day of Prayer. I call upon the citizens of this great Nation to gather together on that day in homes and places of worship to pray, each after his or her own manner, for unity of the hearts of all mankind.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of December, in the year of our Lord nineteen hundred and eighty-six, and of the Independence of the United States of America the two hundred and eleventh.

Ronald Reagan

[FR Doc. 86-29060
Filed 12-22-86 4:14 pm]
Billing code 3195-01-M

Editorial Note: For the President's remarks on signing Proclamation 5594, see the *Weekly Compilation of Presidential Documents* (vol. 22, no. 52).

Presidential Documents

Executive Order 12577 of December 22, 1986

Closing of Government Departments and Agencies on Friday, December 26, 1986

By the authority vested in me as President of the United States of America, it is hereby ordered as follows:

Section 1. All Executive departments and agencies shall be closed and their employees excused from duty on Friday, December 26, 1986, the day following Christmas Day, except as provided in Section 2 below.

Sec. 2. The heads of Executive departments and agencies may determine that certain offices and installations of their organizations, or parts thereof, must remain open and that certain employees must report for duty on December 26, 1986, for reasons of national security or defense or for other public reasons.

Sec. 3. Friday, December 26, 1986, shall be considered as falling within the scope of Executive Order No. 11582 and of 5 U.S.C. 5546 and 6103(b) and other similar statutes insofar as they relate to the pay and leave of employees of the United States.

Ronald Reagan

THE WHITE HOUSE,
December 22, 1986.

[FR Doc. 86-29101
Filed 12-23-86; 10:30 am]
Billing code 3195-01-M

Rules and Regulations

Federal Register
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This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 910

[Lemon Regulation 541]

Lemons Grown in California and Arizona; Limitation of Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: Regulation 541 establishes the quantity of fresh California-Arizona lemons that may be shipped to market at 255,000 cartons during the period December 28, 1986–January 3, 1987. Such action is needed to balance the supply of fresh lemons with market demand for the period specified, due to the marketing situation confronting the lemon industry.

DATE: Regulation 541 (§ 910.841) is effective for the period December 28–January 3, 1987.

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

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

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

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

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

This regulation is consistent with the marketing policy for 1986–87. The committee met publicly on December 16, 1986, in Los Angeles, California, to consider the current and prospective conditions of supply and demand and recommended, by a vote of 12 to 0, a quantity of lemons deemed advisable to be handled during the specified week. The committee reports that the market for lemons is strong.

It is further found that it is impracticable and contrary to the public interest to give preliminary notice, engage in public rulemaking, and postpone the effective date until 30 days after publication in the **Federal Register** (5 U.S.C. 553), because of insufficient time between the date when information became available upon which this regulation is based and the effective date necessary to effectuate the declared purposes of the act. Interested persons were given an opportunity to submit information and views on the regulation at an open meeting. It is necessary to effectuate the declared purposes of the act to make these regulatory provisions effective as specified, and handlers have been apprised of such provisions and the effective time.

List of Subjects in 7 CFR Part 910

Marketing agreements and orders, California, Arizona, Lemons.

PART 910—[AMENDED]

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

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

2. Section 910.841 is added to read as follows:

§ 910.841 Lemon Regulation 541.

The quantity of lemons grown in California and Arizona which may be handled during the period December 28 through January 3, 1987, is established at 255,000 cartons.

Dated: December 19, 1986.

Thomas R. Clark,

Acting Director, Fruit and Vegetable Division, Agricultural Marketing Service.

[FR Doc. 86–28938 Filed 12–23–86; 8:45 am]

BILLING CODE 3410-02-M

Commodity Credit Corporation

7 CFR Part 1477

Disaster Payment Program for 1986 Crops

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Final rule.

SUMMARY: This Final Rule establishes the terms and conditions for the implementation of a disaster payment program for eligible producers for losses of 1986 crop production due to drought, excessive heat, flood, hail or excessive moisture in 1986. The disaster payment program is carried out in accordance with the provisions of Pub. L. 99–500 and Pub. L. 99–591 (herein referred to as "99–500"). The provisions of this final rule were addressed in an interim rule issued on November 19, 1986. With a few exceptions, the provisions of this final rule are the same as those contained in the interim rule. Changes which are made by this final rule principally involve: (1) The definition of an "economic emergency"; (2) consideration of the quality of a nonprogram crop in determining whether a producer of such a crop is eligible to receive a disaster payment; (3) clarifying the payment rate that is applicable to upland cotton; and (4) the payment rate for sugar beets and sugar cane.

EFFECTIVE DATE: December 19, 1986.

FOR FURTHER INFORMATION CONTACT: Jerry W. Newcomb, Director, Emergency Operations and Livestock Programs

Division, Agricultural Stabilization and Conservation Service, United States Department of Agriculture, P.O. Box 2415, Washington, DC Telephone: (202) 447-5621. A Final Regulatory Impact Analysis is being prepared and will be available upon request.

SUPPLEMENTARY INFORMATION: This final rule has been reviewed in accordance with procedures implementing Executive Order 12291 and Secretary's Memorandum 1512-1 and has been classified as "major" since the program will have an annual effect on the economy exceeding $100 million.

It has been determined that the Regulatory Flexibility Act is not applicable to this rule since the Commodity Credit Corporation (CCC) is not required by 5 U.S.C. 553 or any other provision of the law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

An Environmental Evaluation with respect to the Disaster Payment Program is being completed. It has been determined that this action is not expected to have a significant impact on the quality of the human environment. In addition, it has been determined that this action will not adversely affect environmental factors such as wildlife habitat, water quality, air quality, and land use and appearance. Accordingly, neither an Environmental Assessment nor an Environmental Impact Statement is needed.

The title and number of the federal assistance program to which this notice applies are: Title—Commodity Loans and Purchases; Number 10.051, as found in the Catalog of Federal Domestic Assistance.

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

An interim rule, which established regulations governing the 1986 disaster payment program, was published in the **Federal Register** on November 19, 1986, (51 FR 41757) which set forth the regulations which implemented the disaster payment program authorized by Pub. L. 99-500. The interim rule provides for a disaster payment program for eligible producers for losses of 1986 crop production due to drought, excessive heat, flood, hail or excessive moisture in 1986. The interim rule also establishes the criteria for eligibility of individual producers to receive a disaster payment.

Comments Received

A total of 559 comments were received from 359 persons with respect to the interim rule published on November 19, 1986, (51 FR 41757) from United States Senators and Congressmen, State Governors, State Representatives, State departments of agriculture, county government officials, commodity interest groups, commodity cooperatives, national farmers organizations, producers and other interested individuals.

1. There were 302 comments objecting to the definition of the term "economic emergency" that is utilized to determine the eligibility of nonprogram crop producers. The interim rule defined this term as a loss of 50 percent or more of the value of all crops produced on all farms in which the producers have an interest within the county. The commentors suggested that if a producer produces several crops on the same farm and has suffered a loss of 50 percent or more of any one of those crops, the producers should be eligible for disaster payments on that particular crop. Ninety comments were received with respect to the related issue of considering the quality of the crop in determining whether there has been a loss of production of program and nonprogram crops.

Public Law 99-500 generally provides that disaster payments for program crops shall be based upon the "actual loss of production of the crop" and that the "loss of production of the eligible producer shall be the quantity . . . that eligible producers on a farm are unable to harvest due to reduced yields or are prevented from planting . . . due to drought, excessive heat, floods, hail or excessive moisture in 1986." With respect to nonprogram crops, Pub. L. 99-500 provides that disaster payments will be available if "(A) the producer has suffered a substantial loss of production due to drought, excessive heat, flood, hail or excessive moisture and (B) such loss has caused an economic emergency for the producer to the extent that additional assistance must be made available to alleviate such economic emergency . . . . " Because Pub. L. 99-500 does not provide any measure of loss for program crops other than a loss of harvested production, or take into consideration the occurrence of an "economic emergency" for producers of program crops, consideration of quality factors cannot be made with respect to program crops.

While Pub. L. 99-500 provides that with respect to nonprogram crops the Secretary of Agriculture must determine that a loss of production has created an economic emergency for the producer to the extent that additional assistance must be made available to alleviate such economic emergency, it does not define the term economic emergency. Based upon the comments received, it has been determined that the original definition of an economic emergency does not provide an adequate measure of the occurrence of an economic emergency for a producer. Accordingly, this final rule amends the regulations at 7 CFR 1477.7 to provide that the criteria which is utilized to determine whether or not a producer has suffered an economic emergency will be based on a 50 percent or greater loss on individual nonprogram crops. In making this determination, consideration will be given to the value of the commodity based upon the quality of the individual crop. This determination will be based upon the price recieved by the producer for the crop and, if the individual crop has not been sold, such value will be determined by the county ASC committee in accordance with instructions issued by the Deputy Administrator.

In addition, the quality of harvested nonprogram crops will be taken into consideration in determining whether there has been a "substantial loss of production" of the crop. The loss of production of the crop will be adjusted by taking into consideration the actual quantity of the nonprogram crop that has been marketed, adjusted for the price received for the crop if the price received was reduced because of quality. If such crop has not been marketed, but the producer has obtained an appraisal of the crop which indicates a reduction in quality, the county ASC committee may make an adjustment for quality.

2. Fifty-three comments were received with respect to the time of filing an application for payment. The general consensus of the comments was that not accepting applications from producers until January 11, 1987, is insensitive to the needs of producers needing funds immediately and that applications should be taken immediately.

Public Law 99-500 provides that eligible producers are those producers in a county in which producers are eligible to receive disaster emergency loans as the result of drought, excessive heat, floods, hail or excessive moisture which occurred in 1986. Accordingly, the total number of eligible counties and eligible producers will not be known until after December 31, 1986. Since Pub. L. 99-500 limits the funds that are available for making these disaster payments, it has been determined that it may be necessary to reduce each eligible producer's payment proportionately. Therefore, in order to treat all producers on an equitable basis, it has been determined that all applications must be submitted between January 11, 1986, and the statutory deadline of January 31, 1987.

3. Fifty comments were received that objected to the provision in the interim rule which related to the availability of funds. It was suggested that the interim rule be amended to delete this provision and that the Department of Agriculture either request a supplemental appropriation from Congress or transfer additional funds from the disaster loan account as indicated in the conference report if the $400 million provided in Pub. L. 99–500 was insufficient.

This suggestion has not been adopted since the amount of funds to be used for this purpose was specifically limited to the $400 million made available by Pub. L. 99–500.

4. One comment recommended that the payment rate for upland cotton that is set forth in the interim rule be amended since there is not a "basic county price support loan rate" established for upland cotton. This comment suggested that the payment rate be defined as the "1986 base loan rate, adjusted by location".

This suggestion has been adopted since upland cotton loan rates are established on a nationwide basis and are adjusted based upon the location of the upland cotton which is pledged as collateral for CCC price support loans. Accordingly, 7 CFR 1477.5 has been admended to reflect this change.

5. Eleven comments were received that suggested that a producer who planted a program crop and who was not participating in the price support and production adjustment program that was in effect for the crop should be eligible for disaster payments if an eligible loss of production had occured.

The statute very clearly provides that eligible producers of the 1986 crop of wheat, feed grains, upland cotton, rice, soybeans, sugar beets, sugar cane or peanuts must be eligible to receive price support under the Agricultural Act of 1949, as amended (the "1949 Act"), in order to be eligible for disaster payments. Since producers of wheat, feed grains, upland cotton, and rice must, in accordance with the provisions of the 1949 Act, participate in and comply with the terms and conditions of the production adjustment program established for such a commodity to be eligible to receive price support for that commodity, this suggestion has not been adopted.

6. Two comments were received suggesting that provisions governing the disaster payment acreage should be revised to provide that the eligible disaster acreage is the sum of the 1986 acreage planted for harvest and the 1986 acreage which the producer was prevented from planting to the crop or any other nonconserving crop not to exceed the sum of the acreage planted to the crop for harvest in 1985 (or the corresponding year if there is an approved rotation for the crop on the farm) plus the prevented planted acreage in 1985. One of the comments suggested that the interim rule be amended to provide that the disaster payment acreage be the average 1983, 1984, and 1985 acreage planted to the crop.

Public Law 99–500 provides that, with respect to soybeans, peanuts, sugar beets, and sugar cane, the sum of the acreage for payment purposes shall not exceed the acreage so affected but not in excess of the acreage planted in the immediately preceding year to soybeans or peanuts, respectively, for harvest including any acreage that was prevented from planting to such commodity or to other nonconserving crops in lieu of soybeans or peanuts. With respect to other program crops the disaster payment acreage may not exceed the 1986 permitted acreage for such crops. Accordingly, there is no statutory basis to revise this provision with respect to program crops. It has also been determined that, in order to provide consistency between program and nonprogram crops, the eligible disaster payment acreage for nonprogram crops shall be determined in the same manner as for sugar beets, sugar cane, soybeans, and peanuts.

7. There were 44 nonspecific comments received disagreeing with the interim rule in general.

8. One comment concurred with the definition of "economic emergency". As discussed above, the definition of an "economic emergency" has been amended.

9. One comment recommended that disaster payments not be made available to producers of nonprogram crops because it would reduce the amount of payments available to producers of program crops.

This suggestion was not adopted since Publ L. 99–500 does not provide for the allocation of funds on the basis of nonprogram and program crops.

10. One comment recommended that program participants be given an advantage over the nonparticipant in obtaining disaster payments for both program and nonprogram crop losses.

Public Law 99–500 does not authorize the granting of a preference to program participants in obtaining disaster payments for program and nonprogram crop losses. Accordingly, this suggestion has not been adopted.

11. Three comments stated that the payment rate for sugar beets was not established at a realistic level. It was suggested that the payment rate be established at $29.57 per ton, based upon the 1986 sugar price support loan rate.

Based upon a review of the price support loan rate which is applicable to the sugar program, 7 CFR 1477.5 has been amended to provide that, in order to establish a payment rate that is more reflective of the price support loan rate, the payment rate for sugar beets and sugar cane will be established as follows:

SUGAR BEETS

	Description	Payment rate per net ton
Region:		
1	Michigan and Ohio	$30.90
2	Minnesota and the eastern half of North Dakota.	28.32
3	Northeastern quarter of Colorado, Nebraska, and the southeastern quarter of Wyoming.	30.62
4	Texas	33.32
5	Montana, the northwestern quarter of Wyoming, and western half of North Dakota.	30.98
6	That part of Idaho east of the eastern boundary of Owyhee County and northward of this boundary.	31.81
7	Oregon and that part of Idaho west of the eastern boundary of Owyhee County and northward of this boundary.	31.81
8	California	32.62

Sugar Cane

Florida	$25.15
Louisiana	23.57
Texas	18.81
Hawaii	23.54
Puerto Rico	17.52

12. One comment suggested that the interim rule be expanded to include navy beans, soybeans, and sugar beets as crops eligible for disaster payments.

Since under the provisions of Pub. L. 99–500 and the interim rule, these crops are already eligible crops for disaster payment purposes, no change in the interim rule is necessary.

13. One comment suggested that the interim rule be amended to provide that farms located in counties contiguous to those counties designated to be eligible to receive disaster emergency loans as the result of a Presidential or Secretarial

designation should also be eligible to receive disaster payments.

Public Law 99-500 provides that eligible counties are those counties in which producers are eligible to receive disaster emergency loans under section 321 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1961) as the result of drought, excessive heat, floods, hail or excessive moisture. Under section 321, producers in counties contiguous to designated counties are eligible to receive disaster emergency loans. No change, therefore, is needed in the rule to make producers in counties contiguous to designated counties eligible to receive disaster payments.

14. Two comments suggested that only the property affected by the disaster rather than that the total property of the landowner should be considered in determining eligibility for disaster payments.

Public Law 99-500 specifically provides that the actual production on a farm must be taken into consideration in determining eligibility for disaster payment purposes. Accordingly, there is no statutory basis to make a disaster payment solely on the loss of production of a crop on a specific piece of property regardless of the production of that crop on other unaffected acreage on the farm. Accordingly, this suggestion has not been adopted.

15. One comment suggested that the payment limitation provisions relating to crop insurance indemnity payments and price support loans and purchases be deleted from the provisions of the interim rule.

The payment limitation provisions which are applicable to these disaster payments are specifically set forth in Pub. L. 99-500 and there is no statutory basis to exclude crop insurance indemnity payments and price support loans and purchases when making these disaster payments.

16. One comment suggested that county ASC committees be given the final authority to determine a producer's eligibility for disaster payments and the extent to which such payments may be made available to the producer.

Public Law 99-500 provides that the Secretary of Agriculture shall carry out the program through the Commodity Credit Corporation. Price support and production adjustment programs and related programs generally are implemented by CCC by utilizing State and county ASC committees. In order to ensure that these programs are implemented in a uniform manner nationwide, 7 CFR Part 780 provides that the Administrator, ASCS, may take any action that was not taken or was improperly taken by the State or county ASC committees. Accordingly, in order to ensure that the Disaster Payment Program is implemented on a uniform basis, the program will be carried out by the State and county ASC committees under the supervision of the Executive Vice President of CCC who also serves as the Administrator, ASCS.

List of Subjects in 7 CFR Part 1477

Crop insurance, Indemnity payments.

Final Rule

Accordingly, the interim rule (7 CFR Part 1477), published at 51 FR 41757, is adopted as a Final Rule, with the following changes:

1. The authority citation for Part 1477 is revised to read as follows:

Authority: Pub. L. 99-500 and Pub. L. 99-591.

2. Section 1477.3 is amended by revising paragraph (c), (e) and (f) to read as follows:

§ 1477.3 Definitions.

* * * * *

(c) "Nonprogram crop" means a crop, other than a program crop, produced on a farm for sale or exchange on a commercial basis in a large enough quantity to have a substantial impact on the producer's income, as determined by the county committee in accordance with instructions issued by the Deputy Administrator.

* * * * *

(e) "Disaster payment acreage" means:

(1) For wheat, feed grains, upland cotton, extra long staple cotton, and rice, the sum of the 1986 acreage planted to the crop for harvest, as determined by the county committee in accordance with instructions issued by the Deputy Administrator, and the 1986 acreage which the county committee determines the producer was prevented from planting to the crop or any other nonconserving crop. Such sum shall not exceed the 1986 permitted acreage for the crop.

(f) "Economic emergency" means a loss of 50 percent or more of the value of an individual nonprogram crop produced by a producer on all farms located within a county, as determined by the county committee in accordance with instructions issued by the Deputy Administrator.

* * * * *

3. Section 1477.5 is amended by revising paragraph (c) to read as follows:

§ 1477.5 Disaster payment for program crops.

* * * * *

(c) *Payment computation.* The disaster payment for each crop shall be the result of multiplying the loss of production, as determined in accordance with paragraph (b) of this section, times the 1986 basic county price support loan rate for the applicable commodity, except for upland cotton, sugar beets, sugar cane, and peanuts. The payment rate for upland cotton shall be the national average loan rate adjusted for warehouse location. The payment rate for quota peanuts shall be $607.47 per ton and payment rate for additional peanuts shall be $149.75 per ton. The payment rate for sugar beets shall be:

SUGAR BEETS

	Description	Payment rate per net ton
Region:		
1	Michigan and Ohio	$30.90
2	Minnesota and the eastern half of North Dakota.	28.32
3	Northeastern quarter of Colorado, Nebraska, and the southeastern quarter of Wyoming.	30.82
4	Texas	33.32
5	Montana, the northwestern quarter of Wyoming, and western half of North Dakota.	30.98
6	That part of Idaho east of the eastern boundary of Owyhee County and northward of this boundary.	31.81
7	Oregon and that part of Idaho west of the eastern boundary of Owyhee County and northward of this boundary.	31.81
8	California	32.62

The payment rate for sugar cane shall be:

Sugar Cane

Florida	$25.15
Louisiana	23.57
Texas	18.81
Hawaii	23.54
Puerto Rico	17.52

* * * * *

4. Section 1477.7 is amended by revising paragraphs (a) and (b); redesignating paragraphs (c) and (d) as (d) and (e), respectively; and adding a new paragraph (c) to read as follows:

§ 1477.7 Disaster Payments for nonprogram crops:

(a) *Eligibility for disaster payments.* Disaster payments for prevented planting and low yield losses are authorized to be made to producers of 1986 nonprogram crops only if, in accordance with instructions issued by the Deputy Administrator:

(1) The producer has suffered an economic emergency due to drought, excessive heat, flood, hail, or excessive moisture;

(2) The producer submits a Form ASCS–574, Application for Disaster Credit;

(3) The producer submits a report of production and disposition in accordance with § 1477.10 for the individual nonprogram crop produced by the producer on all farms located within a county; and

(4) The county committee determines that, because of drought, excessive heat, flood, hail, or excessive moisture which occurred in 1986, the producer was prevented from planting another nonprogram crop or other nonconserving crop or that the nonprogram crop production was reduced.

(b) *Loss of production.* The loss of production of a nonprogram crop shall be the difference between:

(1) The result determined by multiplying 50 percent times the established disaster payment yield times the disaster payment acreage, and

(2) The 1986 actual production of such crop, if such quantity is less than the quantity determined in accordance with paragraph (b)(1) of this section.

(c) *Quality adjustment.* With respect to each nonprogram crop, the county committee, in accordance with instructions issued by the Deputy Administrator, shall take into consideration the quality of such crop produced by the producer in determining:

(1) The 1986 actual production;

(2) The disaster payment yield;

(3) The average market price, and

(4) The price received by the producer.

* * * * *

Signed at Washington, DC, on December 19, 1986.

Richard E. Lyng,

Secretary.

[FR Doc. 86–28937 Filed 12–19–86; 3:58 pm]

BILLING CODE 3410–05–M

FARM CREDIT ADMINISTRATION

12 CFR Part 624

Temporary Regulations; Farm Credit System Regulatory Accounting Practices

AGENCY: Farm Credit Administration.

ACTION: Final rule with request for comment.

SUMMARY: The Farm Credit Administration (FCA) has promulgated final regulations implementing the provision of the Farm Credit Act Amendments of 1986 (1986 Amendments) relating to the utilization of regulatory accounting practices (RAP) by Farm Credit System (System) institutions.

The 1986 Amendments authorize System institutions, during the period July 1, 1986, through December 31, 1988, to defer certain specified expenses for regulatory purposes. As these expenses are incurred, they are capitalized rather than expensed, and amortized over a period not to exceed 20 years. Deferring expenses in the manner authorized by the 1986 Amendments is not in accordance with generally accepted accounting principles (GAAP).

The 1986 Amendments provide that the use of RAP by System institutions is subject to the approval of the FCA. These regulations set forth the terms and restrictions, and accounting, reporting, and disclosure requirements applicable to the use of RAP by System institutions. The use of RAP in accordance with these regulations will achieve the principal objective of the 1986 Amendments by enhancing the ability of System institutions to reduce the interest rates charged to their borrowers and enabling certain institutions to avoid insolvency for regulatory purposes.

DATES: Effective December 24, 1986. Written comments must be received on or before February 24, 1987.

ADDRESS: Submit comments in writing (in triplicate) to Frederick R. Medero, General Counsel, Farm Credit Administration, McLean, VA 22102–5090. Copies of all communications received will be available for examination by interested parties in the Office of General Counsel, Farm Credit Administration.

FOR FURTHER INFORMATION CONTACT:

Robert E. Donnelly, Office of Analysis and Supervision, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4450

or

Gary L. Norton, Office of General Counsel, Farm Credit Administration, McLean, VA 22102–5090, (703) 883–4025

SUPPLEMENTARY INFORMATION: The 1986 Amendments, which were enacted on October 21, 1986, amended the Farm Credit Act of 1971 (1971 Act) (12 U.S.C. 2001, *et seq.*) to eliminate the authority of the FCA to approve specific interest rates charged by System institutions and to authorize System institutions to defer certain expenses and amortize them over a period of time not to exceed 20 years on the approval of and in accordance with conditions established by the FCA.

On October 16, 1986, prior to enactment of the 1986 Amendments, the FCA published proposed regulations which would eliminate the requirement for the FCA to approve specific interest rates charged by individual institutions (51 FR 36824). Many of the provisions of those regulations are related to the proposed Capital Adequacy regulations which were published on July 23, 1986 (51 FR 26402). The FCA is analyzing comments received on those proposed regulations and will be adopting final regulations in the near future.

On December 18, 1986, the FCA Board adopted final regulations implementing the provisions of the 1986 Amendments relating to the use of RAP and the reporting and disclosure requirements associated therewith.

The 1986 Amendments were enacted for the purpose of achieving two principal objectives. First, the Amendments enhanced the ability of the System to provide competitive interest rates that meet the credit needs of System borrowers. While the 1986 Amendments were designed to enable the System to reduce the interest rates charged to its borrowers, the Congress made clear that in no case would any institution be authorized to charge rates of interest below competitive market rates for similar loans made by nongovernment lenders to borrowers of equivalent credit-worthiness. This limitation ensures that System assets are not dissipated and thus are available to maintain the current levels of System capital and to provide assistance to other System institutions experiencing financial difficulties through the Farm Credit System Capital Corporation (Capital Corporation). Secondly, the 1986 Amendments authorized System institutions to use RAP to defer and amortize portions of their provisions for loan losses. The use of this authority can enable an institution to avoid insolvency for a limited period of time for regulatory purposes. Again, the use of this authority is subject to FCA approval and such conditions as it may establish.

These regulations will be codified in new Part 624 of Title 12, Code of Federal Regulations. This part sets forth temporary authorities of the System relating to the use of RAP and related reporting and disclosure requirements.

Section 624.102 authorizes a System bank to (1) capitalize and defer expenses associated with the repurchase of its obligations on outstanding Systemwide notes and bonds issued on or before December 31, 1984; (2) provide for the defeasance of such obligations through contracts with a System service corporation or independent third party; or (3) defer the interest costs paid or to be paid on such obligations during the period July 1, 1986, through December 31, 1988. With regard to the repurchase or defeasance of such obligations, the expenses authorized to be capitalized shall be the excess of the cost to repurchase the obligation over the recorded net book value of the obligation. In the case of the capitalization of interest costs, the amount to be capitalized shall be limited to the excess of the bank's costs on such obligations over the market price for those same obligations on October 21, 1986 (date of enactment of the 1986 Amendments).

The FCA analyzed alternative methods of determining the amounts of expenses to be capitalized in accordance with these authorities. As a threshold matter, the FCA determined that the comparison between outstanding obligations and current issues must be based on obligations with the same maturity dates, not obligations with the same term to maturity at the time of issuance. Only a comparison of obligations with the same maturity dates could provide an accurate comparison of actual interest differentials. The FCA also analyzed whether interest comparisons should be based on the difference between the rates on an outstanding obligation and the rate on an obligation with the same maturity dates issued on October 21, 1986. The FCA concluded that this comparison would not be usable, since there could be many circumstances in which there were no new obligations issued on or about the date of enactment with terms comparable to the issues outstanding. Accordingly, the FAC determined that the use of actual secondary market quotations for specific obligations issued prior to December 31, 1984, provides the most accurate and fair method for comparing interest rates that is consistent with the specific requirements of the Act.

Section 624.102(c) restates the statutory provision that prohibits banks that defer expenses from charging rates of interest which are less than competitive interest rates. Competitive rates are defined as rates of interest for loans with similar terms charged by private lending institutions (in the same area) to borrowers of equivalent creditworthiness and access to alternative credit. While this statutory definition does not expressly require System institutions to employ differential rates in their lending programs, System institutions that offer the same lending rates for similar loans to borrowers of dissimilar creditworthiness would be obligated under the 1986 Amendments to charge all of their borrowers the rate which would otherwise apply to their least creditworthy borrowers.

Paragraph (d) of § 624.102 identifies the interest costs and other operating expenses which will be used by the FCA in its examination and supervisory programs as a basis for determining the appropriateness of each System institution's lending rate structure. These expenses are, in the case of System banks, (1) the cost of debt determined in accordance with RAP, (2) the amortized portion of interest expense or premium deferral, and (3) all operating costs and provisions for loan losses as determined in accordance with GAAP. In the case of production credit associations (PCA), such costs include interest expenses and other operating costs, including the provision for loan losses as determined in accordance with GAAP. Items (1) and (2) are not relevant for purposes of determining appropriate lending rates for PCAs, since the balance sheets of these institutions do not include debts of the type for which interest and interest-related costs can be deferred.

Section 624.103 authorizes each System institution to capitalize a portion of its provision for loan losses made during the period July 1, 1986, through December 31, 1988, for the purpose of maintaining the value of such institution's stock and participation certificates at par or face amount. The portion eligible for deferral is the amount of the provision for loan losses made by an institution on an annual basis that is in excess of ½ of 1 percent of the estimated loans outstanding at the current year end. However, for the period July 1, 1986, through December 31, 1986, the portion capitalized shall in no event exceed the amount of provision made by the institution during that half-year period.

The regulation restricts the authority to defer provisions for loan losses to amounts that are necessary to prevent capital impairment (for RAP purposes) because the only purpose for such a deferral is to treat an institution as solvent for regulatory purposes. The deferral cannot be used to improve an institution's financial condition since its financial statements are maintained in accordance with GAAP. This regulation will allow a GAAP-impaired institution to issue and retire stock at par, determined in accordance with RAP, if it elects to do so in accordance with § 624.104.

Paragraph (b) of this section requires an institution that uses RAP to correct capital impairment to execute a management agreement with the Capital Corporation. It is expected that such agreements will address the actions necessary to improve the institution's prospects to regain soundness and, if necessary, to enable the instituion to receive financial assistance from the Capital Corporation in the event RAP procedures prove to be, or later become, insufficient to cure impairment. This requirement is the same as a provision in the regulations governing eligibility for financial assistance from the Capital Corporation. If an institution were to fail to comply with such agreement, its authority to use RAP could be withdrawn.

Institutions are required to execute such agreements as a precondition to using RAP to prevent impairment. However, in order to provide a transitional period, institutions are authorized to use RAP to cure impairments that occur as of December 31, 1986, if they execute agreements prior to March 31, 1987.

Section 624.103(c) prohibits an institution that is using RAP to defer its provision for loan losses from paying dividends or distributing patronage refunds. When such institution is an FICB or FLB, each PCA or FLBA in its district is also prohibited from paying dividends or distributing patronage. In operational terms, an institution that is using RAP to unimpair its capital would not have retained earnings from which it could pay dividends or distribute patronage. The regulation extends the prohibition to include associations in a district where a bank has used RAP to cure an impairment in order to preserve capital within a district that is in a critically weak financial condition. To allow a bank that is impaired on a GAAP basis to pass through additional funds to its associations would result in an even larger impairment of the bank's equities. Should an association, in turn, distribute such funds in the form of patronage or dividends, the effect would be equivalent to authorizing the distribution of all of the district's remaining capital, or having distributions made even after all of the district's capital has been dissipated.

Section 624.114 prohibits System institutions from reversing any financial assistance that was contributed or received (accrued) prior to October 1, 1986, in accordance with System Capital Preservation Agreements. This prohibition will protect institutions that could be facing imminent or actual stock impairment even with the use of RAP. A related concern is that such reversal would leave some institutions in a position where they would be close to having insufficient collateral to issue long-term debt obligations. This result must be avoided since it could cause confusion among investors and borrowers as to the future viability of the System and the marketability of its securities.

The FCA is aware that efforts are under way in the System to develop and implement various steps to deal with collateralization, including agreements that would provide for the sharing of collateral among System institutions. If, at a future date, the System implements collateral-sharing agreements or other actions that are demonstrably effective in correcting existing or potential collateral deficiencies that could otherwise preclude an institution from satisfying the collateral requirements for the issuance of debt, the FCA Board will be in a position to reexamine whether, within the context of the then-existing financial condition of the System, this regulation should be modified or deleted to permit the reversal of financial assistance transferred under the Capital Preservation Agreements. In considering such action in the future, the FCA Board will also have to be assured that the System has taken such other appropriate actions as are necessary to ensure that the reversal of financial assistance will not negatively impact the solvency of the institutions that are affected.

The requirements of this part which (1) prohibit the payment of dividends and patronage refunds, (2) prohibit the consideration of deferred interest expenses as capital, (3) require the execution of management agreements with the Capital Corporation, and (4) prohibit the reversal of intra-System assistance provided prior to October 1, 1986, will enhance the ability of institutions to reduce their interest rates while at the same time preserving the soundness of the System by preserving its resources. These provisions implement the express purposes of the 1986 Amendments and are consistent with the direction of Congress that "The FCA will continue to have authority, under the so-called 'safety and soundness' and 'capital adequacy' provisions of current law to ensure that the System does not take actions that threaten its viability." (See H.R. Rep. No. 967, 99th Cong., 2nd Sess. 6 (1986))

Section 624.104 provides each institution that is capitalizing and deferring a portion of its provision for loan losses with the option of issuing and retiring its stock and participation certificates (equities) on either a RAP or GAAP basis. The FCA believes that the selection of either option is a business decision that must be made by the board of directors and management of the institution. The selection of either option has accounting, disclosure, and legal implications that must be addressed by each institution.

If an institution decides to continue to issue and retire equities on a GAAP basis, the institution's board of directors must adopt a resolution that will require the institution to issue equities at par or face amount and retire equities at the lesser of par (face) or book value as determined in accordance with GAAP. Where an institution decides to issue and retire equities on a RAP basis, the institution's board of directors must adopt a resolution authorizing equities to be issued and retired at par (face) value as determined in accordance with RAP. Under this option, however, the institution is also required to obtain a legal opinion from independent counsel that the policies and procedures to be followed conform with the requirements of all applicable laws. An independent counsel would be an attorney other than the institution's in-house counsel. In either event, stock must be purchased in accordance with the statutory requirement of $5 per share. In addition, this section requires full disclosure to stockholders, holders of participation certificates, and new loan applicants, as set forth in § 624.113.

Subpart B establishes the accounting and disclosure requirements applicable to System institutions that use the authorities contained in the 1986 Amendments. Sections 624.111 and 624.112, pertaining to the deferral and capitalization of debt costs and provisions for loan losses, provide that such costs shall be amortized on a straight-line basis over a period not to exceed 20 years. Section 624.111 provides that capitalized debt costs shall not be considered as capital of an institution for any purpose and thus will not be considered a part of an institution's net worth.

Section 624.112 affirms the requirement that an institution using RAP to defer its provisions for loan losses shall maintain a separate allowance for loan losses determined in accordance with GAAP. The use of RAP to defer and capitalize loan loss provisions does not alter the responsibility of each institution to maintain an allowance for loan losses that reflects the inherent losses within the institution's loan portfolio.

This requirement is consistent with the provision of § 624.113, which require an institution that adopts RAP to issue financial statements to its stockholders in accordance with GAAP as provided for in Part 620 of the regulations. In accordance with § 624.113, the use of RAP must be disclosed in footnotes to the financial statements, and the financial statements must reconcile the differences between the application of GAAP and RAP. With these disclosure requirements, the stockholders of the institution's will be kept fully informed on the use and effects of RAP. Moreover, this requirement is consistent with the provisions of § 5.19(b) of the 1971 Act as amended by the 1986 Amendments, which provide that financial statements must be prepared in accordance with GAAP except with respect to actions authorized by the 1986 Amendments.

The requirement to issue financial statements prepared in accordance with GAAP is necessary since any other approach to disclosure would mislead stockholders as to the institutions true financial condition. In addition, if an institution were to issue RAP financial statements, it would result in the rendering of a qualified, or possibly adverse, opinion on its published financial statements. Either type of opinion would be detrimental to the institution since stockholders and investors have doubts about the actual financial condition of the institution. Such uncertainty could cause them to reduce or terminate their business relationships with the System.

Section 624.113 establishes additional requirements relating to the content and timing of disclosures to stockholders and loan applicants when the book value of an institution's stock and participation certificates determined in accordance with GAAP is less than par. This section requires each such institution to provide a written notice to its stockholders informing them of the following matters: (1) That the value of their investment is worth less than par; (2) the actual book value of the equity determined in accordance with GAAP; (3) the content of the resolution of the institution's board of directors relating to the stock issuance and retirement policy of the institution; and (4) the possible consequences and the effects of such policy on their investment in the institution. The same written disclosure must also be provided to loan applicants at the time of application.

The FCA Board has determined that these regulations shall be effective immediately upon publication and that the public shall have a period of 60 days from the date of publication within which to submit comments thereon. This determination is based upon the FCA Board's finding, for good cause and in accordance with 5 U.S.C. 553(b), that public comments prior to the effective date are impracticable, unnecessary, and contrary to the public interest. These regulations implement the 1986 Amendments, which were enacted in an expeditious manner to address the serious financial condition of the System and provide System institutions with the authority to use RAP accounting. Those statutory powers can only be exercised with the approval of the FCA and subject to such conditions as it imposes. These regulations implement those statutory authorities and will enable the System to take swift actions in accordance with the 1986 Amendments. Since some of these authorities must be available to certain System institutions in time to prepare financial statements for yearend 1986, it would be impracticable and contrary to the public interest to delay their effective date pending the completion of a public comment period.

For the same reasons, these regulations are effective immediately without a delayed effective date as provided for in 5 U.S.C. 553(d). In addition, these regulations permit System institutions to deviate from GAAP accounting by the use of RAP and thus provide exceptions and relieve restrictions that would otherwise apply to those institutions.

Finally, in accordance with 12 U.S.C. 2252(b), the FCA Board finds, for the same reasons enumerated above, that an emergency exists which authorizes the publication of these regulations without prior review by the appropriate congressional committees.

List of Subjects in 12 CFR Part 624

Accounting, Agriculture, Banks, Banking, Credit, Rural Areas.

As stated in the preamble, Part 624 is added to Chapter VI, Title 12, of the Code of Federal Regulations to read as follows:

PART 624—TEMPORARY REGULATIONS

Subpart A—Deferral and Amortization of Premiums, Interest Expenses, and Provisions for Loan Losses

Sec.
624.100 General.
624.101 Definitions.
624.102 Deferral of interest costs on debt.
624.103 Deferral of the provisions for loan losses.
624.104 Retirement of equities.

Subpart B—Accounting and Disclosure

624.110 General.
624.111 Deferral of interest costs.
624.112 Deferral of the provision for loan losses.
624.113 Financial reporting and disclosure.
624.114 Financial assistance.

Authority: 12 U.S.C. 2201, 2159, 2205, 2254, Pub. L. 99-509.

Subpart A—Deferral and Amortization of Premiums, Interest Expenses, and Provisions for Loan Losses

§ 624.100 General.

The regulations contained in this part implement the provisions of the Farm Credit Act Amendments of 1986 relating to accounting by System institutions and establish the authorities, terms, conditions, and restrictions pursuant to which a System institution may use regulatory accounting practices to defer and capitalize a portion of its interest costs, provisons for loan losses, and premiums paid to retire debt instruments, and to amortize such amounts. The regulations contained in this part are effective until December 31, 1988.

§ 624.101 Definitions.

For the purpose of this part, the following definitions apply:

(a) "Capital Corporation" means The Farm Credit System Capital Corporation chartered in accordance with the Act.

(b) "Competitive interest rates" means rates of interest for loans with similar terms charged by private lending institutions in the same area to borrowers of equivalent creditworthiness and access to alternative credit.

(c) "Generally accepted accounting principles (GAAP)" means that body of conventions, rules and procedures necessary to define accepted accounting practice at a particular time, as promulgated by the Financial Accounting Standards Board and other authoritative sources recognized as setting standards for the accounting profession in the United States. Generally accepted accounting principles shall include not only broad guidelines of general application but also detailed practices and procedures that constitute standards against which financial presentations are evaluated.

(d) "Institution" refers to any Federal land bank, Federal land bank association, Federal intermediate credit bank, production credit association, bank for cooperatives, and the Central Bank for Cooperatives chartered under the Act.

(e) "Loans outstanding" means gross loans outstanding net of any participations at the end of each reporting period. The term "loan" includes loans, contracts of sale, notes receivable, and other similar obligations and lease financings. The term "loan" includes loans originated through direct negotiations between the reporting institution and a borrowing entity and loans or interest in loans purchased from another lender that are recorded as assets of a reporting institution.

(f) "Operating costs" means all noninterest expenses incurred by an institution in carrying on its ordinary activities.

(g) "Regulatory accounting practices (RAP)" means those accounting methods and practices directed by statutory and regulatory requirements provided for in the Act and in this part and that are not in accordance with GAAP.

(h) "System" means the Farm Credit System organized and operating in accordance with the Act.

§ 624.102 Deferral of interest costs on debt.

(a) A System bank may capitalize any premium paid to repurchase the bank's obligations on consolidated Systemwide notes and bonds issued on or before December 31, 1984, and may contract with a third party, including a service corporation chartered by the Farm Credit Administration, in order to perform a defeasance of these same obligations. The premium paid shall be the excess of the cost to repurchase or redeem an obligation over the recorded net book value for such obligation.

(b) A System bank may capitalize a portion of its interest expenses which have been paid or will be paid during the period July 1, 1986, through December 31, 1988, on Systemwide consolidated notes and bonds issued on or before December 31, 1984. The amount of a bank's interest expense on an obligation that may be capitalized shall be limited to the excess of the bank's cost on the obligation over the market price for the obligation on October 21, 1986.

(c) System banks that defer expenses in accordance with this section shall not charge rates of interest which are less than competitive interest rates.

(d) For purposes of supervisory evaluations performed by the Farm Credit Administration, the interest rates charged to borrowers will be evaluated in the context of the following costs:

(1) In the case of System banks, such costs include:

(i) The cost of debt determined in accordance with RAP,

(ii) The amortized portion of interest expense or premium deferral, and

(iii) All operating costs and provisions for losses determined in accordance with GAAP.

(2) In the case of production credit associations, such costs include interest expenses and other operating costs including the provision for loan losse

as determined in accordance with GAAP.

§ 624.103 Deferral of the provisions for loan losses.

(a) Subject to the provisions of this section, a System institution is authorized during the period July 1, 1986, through December 31, 1988, to capitalize the amount of its provision for loan losses made on an annual basis in excess of ½ of 1 percent of loans outstanding as is necessary to maintain the value of the institution's stock and participation certificates at par or face amount in accordance with § 624.112 of this part.

(b)(1) Except as provided in paragraph (b)(2) of this section, no institution is authorized to use RAP to capitalize and defer its provisions for loan losses until such institution has executed a management agreement with the Capital Corporation that obligates the institution to take those actions that are necessary to correct operating deficiencies, control the management of high-risk assets, and improve management efficiency.

(2) Each institution that is eligible to use RAP to capitalize and defer its provision for loan losses based on its financial condition as of December 31, 1986, shall have until March 31, 1987, to execute a management agreement with the Capital Corporation.

(c)(1) During any period in which an institution has capitalized and is deferring a portion of its provision for losses, such institution shall not distribute or allocate patronage refunds or pay dividends to its patrons or shareholders.

(2) During any period in which a Federal land bank or Federal intermediate credit bank has capitalized and deferred a portion of its expenses related to its provision for loan losses, the production credit associations, in the case of a Federal intermediate credit bank, and the Federal land bank associations, in the case of a Federal land bank, in the district, shall not distribute or allocate patronage refunds or pay dividends.

§ 624.104 Retirement of equities.

An institution that is capitalizing and deferring a portion of its provision for losses in accordance with this part shall operate in accordance with paragraph (a) or (b) of this section:

(a) The board of directors of the institution shall adopt a resolution which provides for the issuance of stock and participation certificates at par value or face amount and the retirement at the lesser of par (or face amount) or book value as determined in accordance with GAAP. Full disclosure shall be provided to stockholders and loan applicants in accordance with Subpart B of this part.

(b) The board of directors of the institution shall adopt a resolution which authorizes the issuance and retirement of stock and participation certificates at par or face amount as determined in accordance with RAP subject to the following requirements:

(1) The institution shall obtain an opinion from independent legal counsel indicating that the basis for the issuance and retirement of equities approved by the board of directors and the related policies and procedures to be followed by the institution are in accordance with the requirements of the law; and

(2) The institution shall provide full disclosure to stockholders and loan applicants in accordance with Subpart B of this part.

Subpart B—Accounting and Disclosure

§ 624.110 General.

System institutions that capitalize and defer interest expenses or provisions for loan losses as authorized by Subpart A of this part shall employ accounting practices and provide disclosures to stockholders and loan applicants as provided for in this part.

§ 624.111 Deferral of interest costs.

A bank that defers any expenses associated with actions taken in accordance with § 624.102 of this part shall amortize such expenses over a period not to exceed 20 years using straight-line amortization. The unamortized portion of debt-related cost that is deferred or is eligible to be deferred shall not be considered as capital of the institution for any purpose.

§ 624.112 Deferral of the provision for loan losses.

An institution that defers a portion of its provision for loan losses in accordance with § 624.103 of this part shall amortize such amount over a period not to exceed 20 years, using straight-line amortization. Institutions using RAP to defer their provisions for loan losses shall maintain an allowance for loan losses determined in accordance with GAAP.

§ 624.113 Financial reporting and disclosure.

(a) Any bank that defers interest expenses or its provision for loan losses shall issue its financial statements to stockholders in accordance with Part 620 of this chapter. In addition, each institution shall disclose clearly in footnotes to its financial statements the regulatory accounting practices adopted by the institution, and shall reconcile the differences between the application of GAAP and RAP.

(b) Each Federal land bank, bank for cooperatives, the Central Bank for Cooperatives, and production credit association that is deferring its provision for loan losses in accordance with § 624.103 of this part shall comply with the requirements of this paragraph.

(1) Not later than 30 days after the institution has deferred a portion of its provision for loan losses the institution shall provide each stockholder and holder of participation certificates with a clearly written notification of the following matters:

(i) That the book value of its stock and participation certificates determined in accordance with GAAP is less than par value or stated value.

(ii) The book value of the institution's stock and participation certificates.

(iii) An explanation of the resolution of the board of directors of the institution that authorizes the issuance and retirement of stock and participation certificates and the institution's equity retirement policy.

(iv) An explanation of the financial consequences of the institution's stock policy on the value of stock and participation certificates at issuance, retirement, and in the event of liquidation of the institution.

(2) The institution shall provide a clearly written notification of the matters contained in paragraph (b)(1) of this section to each loan applicant at the time of the application.

(c) An institution that has adopted any provision of this part shall notify the Farm Credit Administration not later than 30 days after such action. Reports of condition and performance submitted in accordance with Part 621 of this chapter shall be accompanied by an additional schedule as prescribed by the Farm Credit Administration which will reconcile the differences between the application of GAAP and RAP.

§ 624.114 Financial assistance.

No institution shall reverse any financial assistance provided by the Capital Corporation, or under the 37-Bank Capital Preservation Agreement, or any other capital preservation/loss sharing program that was received or accrued prior to October 1, 1986.

Kenneth J. Auberger,

Secretary, Farm Credit Administration Board.

[FR Doc. 28864 Filed 12-23-86; 8:45 am]

BILLING CODE 6705-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 86-NM-27-AD; Amdt. 39-5499]

Airworthiness Directives: McDonnell Douglas Model DC -6, -6A, -6B, R6D, and C-118 (Military) Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment amends an existing airworthiness directive (AD), applicable to McDonnell Douglas DC -6, -6A, -6B, R6D, and C-118 (Military) airplanes which currently requires inspection and repairs, if necessary, of wing lower fittings, stringers, and skin. This amendment defines a more accurate X-ray technique to assure proper coverage and sensitivity. This amendment also revises the inspection intervals, as a result of recent service experience.

DATES: Effective January 28, 1987. Compliance schedule as prescribed in the body of the AD, unless already accomplished.

ADDRESSES: The applicable service information may be obtained from McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-L65 (54-60). This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or at 4344 Donald Douglas Drive, Long Beach, California.

FOR FURTHER INFORMATION CONTACT: Mr. William Roberts, Aerospace Engineer, Airframe Branch, ANM-121L, FAA, Northwest Mountain Region, Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California 90808; telephone (213) 514-6319.

SUPPLEMENTARY INFORMATION: A proposal to amend Part 39 of the Federal Aviation Regulations to amend an existing airworthiness directive (AD) to require X-ray inspections of certain left and right wing lower skins, stringers, fittings on McDonnell Douglas DC-6 series airplanes, was published in the **Federal Register** on May 8, 1986 (51 FR 17054).

Interested persons have been afforded an opportunity to participate in the making of this amendment. No comments were received.

After careful review of the available data, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

It is estimated that 187 airplanes of U.S. registry will be affected by this AD, that it will take approximately 3 manhours per airplane to accomplish the required actions, and that the average labor cost would be $40 per manhour. Based on these figures,the total cost impact of the AD on U.S. operators is estimated to be $22,440. Because the inspection interval has been extended from 500 to 1000 hours, this incremental cost is absorbed, and the AD provides a net savings to the operator.

For the reasons discussed above, the FAA has determined that this regulation is not considered to be major under Executive Order 12291 or significant under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is further certified under the criteria of the Regulatory Flexibility Act that this rule will not have a significant economic effect on a substantial number of small entities because of the minimal cost of compliance per airplane. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft

Adoption of the Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends § 39.13 of Part 39 of the Federal Aviation Regulations (14 CFR 39.13) as follows:

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

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

2. By amending AD 80-12-02, Amendment 39-3785 (45 FR 37811), as follows:

McDonnell Douglas: Applies to McDonnell Douglas Model DC-6, -6A, -6B, R6D, and C-118 series airplanes, certificated in any category. Compliance required as indicated, unless previously accomplished.

A. Revise paragraph (b)(2) to read as follows:

"(2) Repair cracks in accordance with Douglas Structural Repair Manual or other repair data approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region."

B. Revise paragraph (c)(1) to read as follows:

"(1) Inspect by X-ray the left and right wing lower skin, stringers, and fittings between station 60 to 130 and 167 to 185, from the front spar to the center spar; and inspect by X-ray the wing skin that lies beneath the skate angle at wing station 130 at the inboard edge of the inboard nacelle, both left and right wing, in accordance with Douglas Aircraft Company Report MDC-J1946, "NDI Inspection Techniques for DC-6 Lower Wing Skin at Station 130," Revision "A," dated July 26, 1985, or later revision approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region."

C. Reidentify paragraph (c)(4) as (c)(5), and revise to read as follows:

"(5) Repair cracks prior to further flight in accordance with Douglas Structural Repair Manual or other repair data approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region."

D. Add a new paragraph (c)(4) to read as follows:

"(4) The interval for conducting the X-ray inspection in paragraph (c)(1), above, may be extended from 500 to 1000 hours time-in-service from the last X-ray inspection, provided that the visual inspection specified in paragraph (c)(2), above is extended to cover wing stations 60 to 185 from the front spar to the center spar, when the X-ray inspection is not accomplished."

E. Delete paragraphs (d) and (e) and add a new paragraph (d) to read as follows:

"(d) Alternate means of compliance which provide an acceptable level of safety may be used when approved by the Manager, Los Angeles Aircraft Certification Office, FAA, Northwest Mountain Region."

All persons affected by this directive who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to McDonnell Douglas Corporation, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Director, Publications and Training, C1-L65 (54-60). These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Los Angeles Aircraft Certification Office, 4344 Donald Douglas Drive, Long Beach, California.

This Amendment becomes effective January 28, 1987.

Issued in Seattle, Washington, on December 17, 1986.

Frederick M. Isaac,

Acting Director, Northwest Mountain Region.

[FR Doc. 86-28879 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 39

[Docket No. 86-ANE-16; Amdt. 39-5486]

Airworthiness Directives; Para-Flite, Incorporated Swift Reserve Canopy, P/N 82700

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the Federal Register and makes effective as to all persons an amendment adopting a new airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of Para-Flite, Incorporated Swift Reserve canopies by individual letters issued October 29, 1986. The Ad requires Para-Flite, Incorporated Swift Reserve canopies Serial Numbers R3–2750 through R3–3471 to be inspected and modified. The AD is needed because it has been determined that the canopies are not performing properly in rate of descent and forward speed because of a dimensional error in the rib pattern at the leading edge of the canopy.

DATES: Effective December 29, 1986, as to all persons except those to whom it was made immediately effective by individual letters issued October 29, 1986, which contained this amendment.

Compliance—As required in the body of the AD.

Incorporation by Reference—Approved by the Director of the Federal Register on December 29, 1986

ADDRESSES: The applicable service information may be obtained from Para-Flite, Incorporated, 5800 Magnolia Avenue, Pennsauken, New Jersey 08109–1399. A copy of the service information is contained in Rules Docket Number 86–ANE–16, in the Office of the Regional Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803, and may be examined between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: C. Kallis, ANE–173, New York Aircraft Certification Office, Aircraft Certification Division, Federal Aviation Administration, 181 South Franklin Avenue, Valley Stream, New York 11581.

SUPPLEMENTARY INFORMATION: On October 29, 1986, Priority Letter AD 86–22–07 was issued and made effective as to all known U.S. owners and operators of certain Para-Flite, Incorporated Swift Reserve canopies. AD action resulted from reports that Para-Flite, Incorporated Swift Reserve canopies P/N 82700 have not been performing properly. During a routine master pattern regeneration, a dimensional error was introduced in the airfoil section which affected the performance of the involved canopies by creating slower forward speed, higher rate of descent and, most important, very poor or no flare capability. There are approximately 721 of these canopies that are affected by this dimensional error. The FAA has determined that if the dimensional error in the airfoil on these canopies is not corrected, a dangerous performance condition may result in the use of any of the cited canopies.

Since it was found that a situation exists that requires the immediate adoption of this regulation, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Incorporation by Reference.

Adoption of the Amendment

PART 39—[AMENDED]

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration (FAA) amends Part 39 of the Federal Aviation Regulations (FAR) as follows:

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

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

§ 39.13 [Amended]

2. By adding to § 39.13 the following new airworthiness directive (AD):

Para-Flite, Incorporated:

Applies to Swift Reserve Canopy P/N 82700, Serial Numbers R3–2750 through R3–3471.

Compliance is required before further use after the effective date of this AD, unless already accomplished.

To prevent the possibility of the applicable canopies performing below their standards on rate of descent, forward speed and flare capability perform the following:

(a) Inspect and modify the canopies in accordance with Para-Flite, Incorporated Drawing 886028 dated January 17, 1986.

(b) Do not use or repack the affected canopies unless paragraph (a) has been accomplished.

Note: Para-Flite, Incorporated, recall notice dated January 17, 1986, is applicable.

Upon request, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, New York Aircraft Certification Office, Aircraft Certification Division, Federal Aviation Administration, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581.

Para-Flite, Incorporated, Drawing 886028 dated January 17, 1986, identified and described in this document, is incorporated herein and made a part hereof pursuant to 5 U.S.C. 552(a)(1). All persons affected by this directive who have not already received this document from the manufacturer may obtain copies upon request to Para-Flite, Incorporated, 5800 Magnolia Avenue, Pennsauken, New Jersey 08109–1399. This document also may be examined at the Office of the Regional Counsel, Federal Aviation Administration, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803, Room 311, Docket Number 86–ANE–16, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Upon request, an equivalent means of compliance with the requirements of this AD may be approved by the Manager, Aircraft Certification Office, AEU–100, Europe, Africa, and Middle East Office, FAA, c/o American Embassy, Brussels, Belgium 09667–1011; telephone 513.38.30 Ext 2710, or the Manager, New York Aircraft Certification Office, Aircraft Certification Division, FAA, New England Region, 181 South Franklin Avenue, Room 202, Valley Stream, New York 11581, telephone (516) 791–6220.

Aircraft may be ferried in accordance with the provisions of Federal Aviation Regulations 21.197 and 21.199 to a base where the AD can be accomplished.

This amendment becomes effective December 29, 1986.

Issued in Burlington, Massachusetts, on December 2, 1986.

Laurence O. Higgins,

Acting Director, New England Region.

[FR Doc. 86–28880 Filed 12–23–86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 86-AWA-22]

Alteration and Establishment of VOR Federal Airways; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Federal Airways V–276, V–30 and V–445 and establishes new Federal Airway V–613. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO–230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–9254.

SUPPLEMENTARY INFORMATION:

History

On September 30, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V–276, V–30, V–403 and V–445 and establish new VOR Federal Airways V–601 and V–613 (51 FR 34648). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These airway actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, the removal of V–403 and V–601 and description changes to V–276 which involves removing a dogleg between Sea Isle, NJ, and Robbinsville, NJ, and adding Coyle, NJ, radial after Sea Isle, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of Federal Airways V–276, V–30 and V–445 and establishes new Federal Airway V–613. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regualtory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V–276 [Amended]

By removing the words "Sea Isle, NJ, 050° radials" and by substituting the words "Coyle, NJ, 090° radials"

V–30 [Amended]

By removing the words "East Texas, PA; to Solberg, NJ." and by substituting the words "East Texas, PA; INT East Texas 095° and Solberg, NJ, 264° radials; to Solberg."

V–445 [Revised]

From INT Washington, DC, 065° and Baltimore, MD, 197° radials; INT Baltimore 093° and Dupont, DE, 223° radials; Dupont; Yardley, PA; INT Yardley 065° and LaGuardia, NY, 209° radials; to LaGuardia.

V–613 [New]

From Allentown, PA, to Wilkes-Barre, PA.

Issued in Washington, DC, on December 16, 1986.

Harold M. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86–28849 Filed 12–23–86; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 71

[Airspace Docket No. 86–AWP–13]

Alteration of VOR Federal Airways, HI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Federal Airways V–7 and V–25 located in the State of Hawaii. The current discriptions of these airways cite the Flight Information Region/Oceanic Control Airspace (FIR/Oceanic CTA) boundary as the end of these airways. This action redescribes the end of these airways by including geographical coordinates which pilots can easily locate.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO–230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9254.

SUPPLEMENTARY INFORMATION:

History

On September 12, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of Federal Airways V–7 and V–25 located in the State of Hawaii (51 FR 32480). The current descriptions of these airways indicate that the end of V–7 is the Molokai, HI, 358° radial and the Honolulu FIR/Oceanic CTA boundary and V–25 is the Hilo, HI, 356° radial and the Honolulu FIR/Oceanic CTA boundary. To improve the descriptions of these airways, the FAA employs geographical coordinates rather than the FIR boundary. This action aids flight planning and increases safety by giving a precise geographical and navigational point where domestic air traffic control separation criteria must be applied. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA.

No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.127 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of Federal Airways V-7 and V-25 located in the State of Hawaii. The current descriptions of these airways cite the Flight Information Region/Oceanic Control Airspace (FIR/Oceanic CTA) boundary as the end of these airways. This action redescribes the end of these airways by including geographical coordinates which pilots can easily locate.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation Safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.127 [Amended]

2. Section 71.127 is amended as follows:

V-7 [Amended]

By removing the words "to INT Molokai 358° and the Honolulu FIR/Oceanic CTA boundary." and substituting the words "; to INT AMolokai 358°radial and lat. 24°19'00"N.'

V-25 [Revised]

From Hilo, HI, via INT Hilo 356° and Maui, HI, 038° radials; to INT Maui 038° radial and lat. 23°00'24"N.

Issued in Washington, DC, on December 15, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28851 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 86-AWA-19]

Alteration and Revocation of VOR Federal Airways,

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of several Federal Airways located in the states of Minnesota and South Dakota by revoking some airway segments and renumbering other airway segments. This action is in support of the FAA agreement with the International Civil Aviation Organization (ICAO) to eliminate all alternate route designations from the National Airspace System (NAS).

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On September 2, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to change the descriptions of several VOR Federal Airways located in the states of Minnesota and South Dakota by revoking all alternate route descriptions from the NAS. In addition, certain airway segments would be revoked and other segments would be renumbered (51 FR 31138). This action is in support of the FAA agreement with the ICAO to eliminate all alternate airway designations from the NAS. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400. 6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of several VOR Federal Airways located in the states of Minnesota and South Dakota by revoking some airway segments and renumbering other airway segments. This action is in support of the FAA agreement with the ICAO to eliminate all alternate route designation from the NAS.

The FAA determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as amended (50 FR 48178, 51 FR 6, 5989, 8193 and 10365), is further amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-710 [Amended]

By removing the words "including a N alternate via INT Worthington 064° and Fairmont 285° radials;" and by removing the words "That airspace 11,000 feet MSL and below is excluded between Jamestown VORTAC and the Devils Lake VORTAC during the time that the Devils Lake East MOA is activated by NOTAM."

V-430 [Amended]

By removing the words ", including a north alternate via Thief River Falls, MN" and by removing the words ", including a N alternate from Grand Rapids, to Duluth via Hibbing, MN, excluding the airspace between the main and this N alternate airway"

V-191 [Amended]

By removing the words "including an east alternate; to Duluth, MN." and substituting the words "Duluth, MN; Hibbing, MN; Grand Rapids, MN; Bemidji, MN; Thief River Falls, MN; to Grand Forks, ND."

V-129 [Amended]

By removing the words "Hibbing, MN, including an E alternate; International Falls, MN, including a W alternate from Hibbing, INT Hibbing 319° and International Falls 182° radials to International Falls;" and substituting the words "Hibbing, MN; International Falls, MN;"

V-505 [Amended]

By removing the words ", to Grantsburg, WI." and substituting the words "; Grantsburg, WI; Duluth, MI; INT Duluth 331° and Hibbing, MN, 120° radials; Hibbing; INT Hibbing 319° and International Falls, MN, 182° radials; to International Falls."

V-181 [Amended]

By removing the words ", including a W alternate via INT Yankton 015° Sioux Falls 231° radials" and "including an east alternate;" also, by removing the words ", including an east alternate; Grand Forks, ND, including an east alternate via INT Farrgo 004° and Grand Forks 152° radials;" and substituting the words "; Grand Forks, ND"

V-220 [Amended]

By removing the words "From Norfolk, NE; Yankton, SD; INT Yankton 015° and Sioux Falls, SD, 231° radials Sioux Falls; INT Sioux Falls 004° and Watertown, SD, 154° radials; Watertown; INT Watertown 021° and Fargo, ND, 172° radials; Farrgo; INT Fargo 004° and Grand Forks, ND, 152° radials; to Grand Forks."

V-97 [Amended]

By removing the words "Boiler, including a W alternate via Indianapolis; INT Indianapolis 344° and Shelbyville 313° radials and INT Shelbyville 313° and Boiler 136° radials;" and substituting the word "Boilers;"

V-305 [Amended]

By removing the words "to Indianapolis." and substituting the words "Indianapolis; INT Indianapolis 038° and Kokomo, IN, 182° radials; to Kokomo."

Issued in Washington, DC, on December 16, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 28850 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 86-AWA-20]

Alteration of VOR Federal Airways; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Federal Airways V-188, V-36, V-39 and V-433. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On Septembrr 30, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V-188, V-36, V-39 and V-433 (51 FR 34649). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes and changes to the description of V-36 by extending the airway to Toronto, Canada, via Buffalo, NY; and by changing the description of V-39 by removing Chester, MA, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of Federal Airways V-188, V-36, V-39 and V-433. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-188 [Amended]

By removing the words "INT Wilkes-Barre 094° and Sparta, NJ, 290° radials; Sparta" and substituting the words "INT Wilkes-Barre 084° and Sparta, NJ, 300° radials; to Sparta"

V-36 [Amended]

By removing the words "INT Toronto 147° and Buffalo, NY, 309° radials" and substituting the words "INT Toronto 152° and Buffalo, NY, 306° radials" also by removing the words "INT Lake Henry 136° and Sparta, NJ, 290° radials; Sparta; Kennedy, NY." and substituting the words "Sparta, NJ; LaGuardia, NY; INT LaGuardia, 133° and Deer Park, NY, 209° radials; Deer Park;"

V-39 [Amended]

By removing the words "to East Texas, PA." and substituting the words "East Texas, PA; Sparta, NJ; Carmel, NY."

V-433 [Revised]

From INT Washington, DC, 065° and Baltimore, MD, 197° radials; INT Washington, DC, 065° and Dupont, DE, 223° radials; Dupont; Yardley, PA; INT Yardley 047° and Kennedy, NY, 253° radials; INT Kennedy 253° and LaGuardia, NY, 209° radials; to LaGuardia.

Issued in Washington, DC, on December 17, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28852 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 71

[Airspace Docket No. 86-AWA-61]

Alteration and Establishment of VOR Federal Airways; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Federal Airways V-312, V-6, V-408, V-93, V-3, V-147 and V-457. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On October 6, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V-312, V-6, V-408, V-93, V-3, V-147 and V-457 and establish new VOR Federal Airway V-605 (51 FR 35527). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These airway actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, the removal of V-605 and description changes to V-408 involving terminating the airway at the NOAAH Intersection in lieu of Chester, MA, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of Federal Airways V-312, V-6, V-408, V-93, V-3, V-147 and V-457. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation Safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) as amended (51 FR 7 and 6102), is further amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-312 [Amended]

By removing the words "Sea Isle, NJ, 050° radials." and substituting the words "Kennedy, NY, 148° radials."

V-6 [Amended]

By removing the words "to Broadway, NJ." and substituting the words "Solberg, NJ; INT Solberg 105° and Canarsie, NY, 245° radials; INT Canarsie 245° and LaGuardia, NY, 209° radials; to LaGuardia."

V–408 [Revised]

From Baltimore, MD; INT Baltimore 004° and Lancaster, PA, 204° radials; INT Lancaster 204° and Modena, PA, 261° radials; Modena; Pottstown, PA; East Texas, PA; Allentown, PA; Lake Henry, PA; to INT Lake Henry 056° and Hancock, NY, 120° radials.

V–93 [Amended]

By removing the words "Baltimore; Lancaster, PA;" and substituting the words "Baltimore; INT Baltimore 004° and Lancaster, PA, 204° radials; Lancaster;"

V–3 [Amended]

By removing the words "Solberg, NJ; Carmel, NY;" and substituting the words "Solberg, NJ; INT Solberg 044° and Carmel, NY, 243° radials; Carmel;"

V–147 [Revised]

From Yardley, PA; INT Yardley 294° and East Texas, PA, 124° radials; East Texas; Wilkes-Barre, PA; Elmira, NY; Geneseo, NY; to Rochester, NY.

V–457 [Revised]

From Broadway, NJ; Lancaster, PA; Westminster, MD; to Martinsburg, WV.

Issued in Washington, DC, on December 15, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86–28853 Filed 12–23–86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 71

[Airspace Docket No. 86–ANM–22]

Alteration of VOR Federal Airways, V–444 and V–500—Boise, ID

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of V–444 and V–500 located in the vicinity of Boise, ID. The Boise very high frequency omni-directional radio range and tactical air navigational aid (VORTAC) has been relocated 2.4 nautical miles east of its present location. This action alters the descriptions of all airways affected by the VORTAC relocation.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267–9254.

SUPPLEMENTARY INFORMATION:

History

On September 23, 1986, the FAA proposed to amend Part 71 of the Federal Aviation Regulations (14 CFR Part 71) to alter the descriptions of VOR Federal Airways V–444 and V–500 located in the vicinity of Boise, ID (51 FR 33789).

The Boise VORTAC has been relocated approximately 2.4 nautical miles east of its present location, and all affected airway descriptions would be amended where necessary. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, this amendment is the same as that proposed in the notice. Section 71.123 of Part 71 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 71 of the Federal Aviation Regulations alters the descriptions of V–444 and V–500 located in the vicinity of Boise, ID. The Boise VORTAC has been relocated 2.4 nautical miles east of its present location. This action alters the descriptions of all airways affected by the VORTAC relocation.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Aviation safety, VOR Federal airways.

Adoption of the Amendment

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 of the Federal Aviation Regulations (14 CFR Part 71) is amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Exective Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V–444 [Revised]

From Burley, ID, via INT Burley 323° and Boise, ID, 104° radials; 25 miles 95 MSL, 25 miles 90 MSL, 23 miles; Boise; Baker, OR. From Walla Walla, WA, 22 miles, 48 miles 45 MSL; to Spokane, WA.

V–500 [Revised]

From Portland, OR, via Newberg, OR; 41 miles 70 MSL, Kimberly, OR; 30 miles, 71 miles 105 MSL, Boise, ID; 23 miles, 25 miles 90 MSL, 25 miles 95 MSL, 22 miles, 26 miles 70 MSL, to Pocatello, ID.

Issued in Washington, DC, on December 16, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86–28854 Filed 12–23–86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Parts 71 and 73

[Airspace Docket No. 86–ACE–1]

Alteration and Establishment of Restricted Areas; Fort Leonard Wood, MO

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This rule alters the descriptions, altitudes, and/or times of use of Restricted Areas R–4501A, B, C, and D and establishes R–4501E, located near Fort Leonard Wood, MO. The alteration of Restricted Areas R–4501A–D and the establishment of R–4501E will enable the using agency, U.S. Army, to release additional airspace to the flying public when it is not in use.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Andrew B. Oltmanns, Airspace and Aeronautical Information Requirements Branch (ATO–240), Airspace—Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267–9245.

SUPPLEMENTARY INFORMATION:

History

On October 16, 1986, the FAA proposed to amend Parts 71 and 73 of the Federal Aviation Regulations (14 CFR Parts 71 and 73) to alter the descriptions, altitudes, and/or times of use of Restricted Areas R-4501A, B, C, and D and to establish R-4501E, located near Fort Leonard Wood, MO, (51 FR 36827). Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, these amendments are the same as those proposed in the notice. Sections 71.171 and 73.45 of Parts 71 and 73 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

The Rule

These amendments to Parts 71 and 73 of the Federal Aviation Regulations alters the descriptions, altitudes, and/or times of use of Restricted Areas R-4501 A, B, C, and D and establishes R-4501E, located near Fort Leonard Wood, MO. After reviewing R-4501 A-D, the FAA has determined that the alteration of these areas and the establishment of R-4501E will give the U.S. Army the ability to release additional airspace to the flying public when the areas are not in use. R-4501A will be removed from the Continental Control Area and R-4501E will be added. These airspace actions will also reduce the amount of time the restricted areas are in use.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Parts 71 and 73

Aviation safety, Continental control area, Restricted areas.

Adoption of the Amendments

PART 71—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 71 and 73 of the Federal Aviation Regulations (14 CFR Parts 71 and 73) are amended, as follows:

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

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71-151 [Amended]

2. Section 71.151 is amended as follows:

R-4501A Fort Leonard Wood West, MO [Removed]

R-4501E Fort Leonard Wood, MO [New]

PART 73—[AMENDED]

3. The authority citation for Part 73 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 73-45 [Amended]

4. Section 73.45 is amended as follows:

R-4501A Fort Leonard Wood West, MO [Amended]

By removing the present Time of designation and substituting the following:

Time of designation. 0700-1800 local time, Monday—Friday; other times by NOTAM issued at least 24 hours in advance.

R-4501B Fort Leonard Wood East, MO [Amended]

By removing the present Time of designation and substituting the following:

Time of designation. 0700-1800 local time, Monday—Friday; other times by NOTAM issued at least 24 hours in advance.

R-4501C Fort Leonard Wood, MO [Amended]

By removing the present Designated altitudes and Time of designation and by substituting the following:

Designated altitudes. From 2,200 feet MSL to 5,000 feet MSL.

Time of designation. As specified by NOTAM issued at least 24 hours in advance.

R-4501D Fort Leonard Wood, MO [Amended]

By removing the present Boundaries, Designated altitudes and Time of designation and by substituting the following:

Boundaries. Beginning at lat. 37°41'00" N., long. 92°16'10" W.; to lat. 37°41'26" N., long. 92°10'15" W.; to lat. 37°40'16" N., long. 92°07'05" W.; to lat. 37°38'20" N., long. 92°06'55" W.; to lat. 37°36'07" N., long. 92°10'27" W.; to lat. 37°35'22" N., long. 92°15'31" W.; to the point of beginning.

Designated altitudes. From 5,000 feet MSL to 12,000 feet MSL. Time of designation. As specified by NOTAM issued at least 24 hours in advance.

R-4501E Fort Leonard Wood, MO [New]

Boundaries. Beginning at lat. 37°41'00" N., long. 92°16'10" W.; to lat. 37°41'26" N., long. 92°10'15" W.; to lat. 37°40'16" N., long. 92°07'05" W.; to lat. 37°38'20" N., long. 92°06'55" W.; to lat. 37°36'07" N., long. 92°10'27" W.; to lat. 37°35'22" N., long. 92°15'31" W.; to the point of beginning.

Designated altitudes. From 12,000 feet MSL to FL 180.

Time of designation. As specified by NOTAM at least 24 hours in advance.

Controlling agency. FAA, Kansas City ARTCC.

Using agency. U.S. Army, Commanding General, Fort Leonard Wood, MO.

Issued at Washington, DC, on December 15, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28848 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Parts 71 and 75

[Airspace Docket No. 86-AWA-63]

Alteration of VOR Federal Airways and Jet Routes; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: These amendments alter the descriptions of Federal Airways V-31, V-34, V-164, V-252, V-265 and Jet Route J-77. These amendments are part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On October 6, 1986, the FAA proposed to amend Parts 71 and 75 of the Federal Aviation Regulations (14 CFR Parts 71 and 75) to alter the descriptions of VOR Federal Airways V-31, V-34, V-164, V-252, V-265 and Jet Route J-77 (51 FR 35528). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These airway and jet route actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, radial changes to V-31 and description changes to V-252 which involves extending the airway from Huguenot, NY, to Robbinsville, NJ, these amendments are the same as those proposed in the notice. Sections 71.123 and 75.100 of Parts 71 and 75 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

The Rule

These amendments to Parts 71 and 75 of the Federal Aviation Regulations alter the descriptions of Federal Airways V-31, V-34, V-164, V-252, V-265 and Jet Route J-77. These amendments are part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Parts 71 and 75

Aviation Safety, VOR Federal airways and jet routes.

Adoption of the Amendment

PARTS 71 AND 75—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Parts 71 and 75 of the Federal Aviation Regulations (14 CFR Parts 71 and 75) are amended, as follows:

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

Authority. 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 71.123 [Amended]

2. Section 71.123 is amended as follows:

V-31 [Amended]

By removing the words "INT Rochester 289° and Kleinburg, ON, Canada, 133° radials;" and by substituting the words "INT Rochester 279° and Geneseo, NY, 305° radials; INT Geneseo 305° and Kleinburg, ON, Canada, 133° radials;"

V-34 [Amended]

By removing the words "From Kleinburg, ON, Canada, INT Kleinburg 113° and Rochester, NY, 309° radials; Rochester;" and by substituting the words "From Rochester, NY;" and by removing the words "The airspace within Canada and R-5207 is excluded."

V-164 [Amended]

By removing the words, "From Toronto, ON, Canada, via Toronto 172° and Buffalo, NY, 294° radials;" and by substituting the words "From Kleinburg, ON, Canada, INT Kleinburg 133° and Buffalo, NY, 338° radials;"

V-252 [Revised]

From Kleinburg, ON, Canada; INT Kleinburg 133° and Geneseo, NY, 305° radials; Geneseo; Binghamton, NY; Huguenot, NY; INT Huguenot 196° and Robbinsville, NJ, 351° radials; to Robbinsville. The airspace within Canada is excluded.

V-265 [Amended]

By removing the words "Dunkirk, NY." and by substituting the words "Dunkirk, NY; INT Dunkirk 325° and Toronto, ON, Canada, 187° radials; Toronto. The airspace within Canada is excluded."

3. The authority citation for Part 75 continues to read as follows:

Authority. 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

4. Section 75.100 is amended as follows:

J-77 [Revised]

From Boston, MA; Barnes, MA; Sparta, NJ; Broadway, NJ; Pottstown, PA; to Westminster, MD.

Issued in Washington, DC, on December 17, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28855 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 73

[Airspace Docket No. 86-ANM-25]

Alteration of Restricted Areas

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment changes the time of designation and designated altitudes for Restricted Area R-5704 located near Hermiston, OR. In addition, the time of designation and controlling agencies for Restricted Areas R-6701, R-6707, and R-6713 located in the state of Washington will be amended Restricted Areas R-6703A, B, and D located near Fort Lewis, WA, will also be amended to reflect changes in time of designation. This action will reduce the time the restricted areas are in effect, thereby, releasing additional airspace to the flying public when it is not in use.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Andrew B. Oltmanns, Airspace and Aeronautical Information Requirements Branch (ATO-240), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9245.

The Rule

This amendment to Part 73 of the Federal Aviation Regulations (14 CFR Part 73) changes the time of designation and designated altitudes for Restricted Area R-5704 located near Hermiston, OR, from the surface to 5,000 feet MSL to the surface up to but not including 4,000 feet MSL; from 0800-2000 Monday-Friday to 0900-1700 Monday-Friday. Restricted Areas R-6701, R-6707 and R-6713 will be activated by NOTAM only at least two hours in advance. The controlling agency for R-6701 and R-6713 will be NAS Whidbey Island and the Seattle ARTCC will be the controlling agency for R-6707. R-6703A, B, and D will be activated from 0700-2300 Monday-Friday; other times by NOTAM at least two hours in advance. Because this action does not alter any airspace designations and only reduces the time the restricted areas are in effect, I find that notice and public procedure under 5 U.S.C. 553(b) are unnecessary because this action is a minor amendment in which the public would not be particularly interested. Sections 73.57 and 73.67 of Part 73 of the Federal Aviation Regulations were republished in Handbook 7400.6B dated January 2, 1986.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 73

Aviation safety, Restricted areas.

Adoption of the amendment

PART 73—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 73 of the Federal Aviation Regulations (14 CFR Part 73) is amended, as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510, 1522; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 73.57 [Amended]

2. Section 73.57 is amended as follows:

R-5704 Hermiston, OR [Amended]

By removing the present designated altitudes and time of designation and by substituting the following:

Designated altitudes. Surface to but not including 4,000 feet MSL. Time of designation. 0900-1700 Monday-Friday.

§ 73.67 [Amended]

3. Section 73.67 is amended as follows:

R-6701 Admiralty Inlet, WA [Amended]

By removing the present time of designation and controlling agency and by substituting the following:

Time of designation. Intermittent by NOTAM two hours in advance. Controlling agency. Whidbey Island NAS, WA.

R-6707 Queets, WA [Amended]

By removing the present time of designation and controlling agency and by substituting the following:

Time of designation. Intermittent by NOTAM two hours in advance. Controlling agency. FAA, Seattle ARTCC.

R-6713 Whidbey Island, WA [Amended]

By removing the present time of designation and controlling agency and by substituting the following:

Time of designation. Intermittent by NOTAM two hours in advance. Controlling agency. Whidbey Island NAS, WA.

R-6703A Fort Lewis, WA [Amended]

By removing the present time of designation and by substituting the following:

Time of designation. 0700-2300 Monday-Friday; other times by NOTAM two hours in advance.

R-6703B Fort Lewis, WA [Amended]

By removing the present time of designation and by substituting the following:

Time of designation. 0700-2300 Monday-Friday; other times by NOTAM two hours in advance.

R-6703D Fort Lewis, WA [Amended]

By removing the present time of designation and by substituting the following:

Time of designation. 0700-2300 Monday-Friday; other times by NOTAM two hours in advance.

Issued in Washington, DC, on December 12, 1986.

Daniel J. Peterson,

Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28847 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 75

[Airspace Docket No. 86-AWA-60]

Alteration and Establishment of Jet Routes; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the description of Jet Routes J-70 and J-75 and establishes new Jet Routes J-217 and J-221. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On September 30, 1986, the FAA proposed to amend Part 75 of the Federal Aviation Regulations (14 CFR Part 75) to alter the description of Jet Routes J-70 and J-75 and establish new Jet Routes J-217 and J-221 (51 FR 34652). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These jet route actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes and description changes to J-70 and J-75 involving adding Stillwater, NJ, VORTAC to the description of J-70 and by adding Solberg, NJ, VORTAC to J-75, this amendment is the same as that proposed in the notice. Section 75.100 of Part 75 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The rule

This amendment to Part 75 of the Federal Aviation Regulations alters the descriptions of Jet Routes J-70 and J-75 and establishes new Jet Routes J-217 and J-221. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern Unted States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of subjects in 14 CFR Part 75

Aviation safety, Jet Routes.

Adoption of the Amendment

PART 75—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 75 of the Federal Aviation Regulations (14 CFR Part 75) is amended, as follows:

1. The authority citation for Part 75 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

§ 75.100 [Amended]

2. Section 75.100 is amended as follows:

J-70 [Amended]

By removing the words "Sparta, NJ; to Kennedy, NY." and by substituting the words "Wilkes-Barre, PA; Stillwater, NJ; LaGuardia, NY, to Kennedy, NY."

J-217 [New]

From Hancock, NY, via Keating, PA; Clarion, PA; to INT Clarion 222° and Franklin, PA, 175° radials.

J-221 [New]

From Sparta, NJ, Via Lake Henry, NY; Wellsville, NY; to Buffalo, NY.

J-75 [Revised]

From Biscayne Bay, FL; Fort Myers, FL; INT Fort Myers 345° and Taylor, FL, 175° radials; Taylor; Columbia, SC; Greensboro, NC; Gordonsville, VA; Westminster, MD; Modena, PA; Solberg, NJ; Carmel, NY; INT Carmel 044° and Boston, MA, 252° radials; to Boston.

Issued in Washington, DC, on December 17, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86–28844 Filed 12–23–86; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 75

[Airspace Docket No. 86-AWA-59]

Alteration and Establishment of Jet Routes; Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Jet Routes J-78, J-146 and J-584 and establishes new J-220. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On September 30, 1986, the FAA proposed to amend Part 75 of the Federal Aviation Regulations (14 CFR Part 75) to alter the descriptions of Jet Routes J-78, J-110, J-146 and J-584 and establish new J-220 (51 FR 34650). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These jet route actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes and the removal of J-110 and description changes to J-220 which involves adding Stonyfork, PA, VORTAC to the airway alignment, this amendment is the same as that proposed in the notice. Section 75.100 of Part 75 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 75 of the Federal Aviation Regulations alters the descriptions of Jet Routes J-78, J-146 and J-584 and establishes new J-220. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 75

Aviation Safety, Jet Routes.

Adoption of the Amendment

PART 75—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 75 of the Federal Aviation Regulations (14 CFR Part 75) as amended (51 FR 8195), is further amended, as follows:

1. The authority citation for Part 75 continues to read as follows:

Authority: 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); 14 CFR 11.69.

2. Section 75.100 is amended as follows:

J-78 [Amended]

By removing the words "INT Philipsburg 083° and Keating, PA, 099° radials; to Kennedy, NY." and by substituting the words "to Milton, PA."

J-146 [Amended]

By removing the words "to Kennedy, NY." and by substituting the words "Milton, PA; Allentown, PA; to Kennedy, NY."

J-220 [New]

From Armel, VA, INT Armel 001° and Stonyfork, PA, 181° radials; Stonyfork; Wellsville, NY; to Buffalo, NY.

J-584 [Amended]

By removing the words after "Slate Run, PA;" and by substituting the words "Williamsport, PA; to Broadway, NJ."

Issued in Washington, DC, on December 15, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautial Information Division.

[FR Doc. 86–28846 Filed 12–23–86; 8:45 am]

BILLING CODE 4910-13-M

14 CFR Part 75

[Airspace Docket No. 86-AWA-58]

Alteration and Establishment of Jet Routes—Expanded East Coast Plan

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment alters the descriptions of Jet Routes J-48 and J-80 and establishes new J-228 and J-230. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

EFFECTIVE DATE: 0901 UTC, February 12, 1987.

FOR FURTHER INFORMATION CONTACT: Lewis W. Still, Airspace and Air Traffic Rules Branch (ATO-230), Airspace-Rules and Aeronautical Information Division, Air Traffic Operations Service, Federal Aviation Administration, 800 Independence Avenue SW., Washington, DC 20591; telephone: (202) 267-9254.

SUPPLEMENTARY INFORMATION:

History

On September 30, 1986, the FAA proposed to amend Part 75 of the Federal Aviation Regulations (14 CFR Part 75) to alter the descriptions of Jet Routes J-48, J-80 and J-563 and establish new J-228 (51 FR 34650). Also, a supplemental notice was published proposing establishment of J-230 (51 FR 34651). Currently, east coast traffic flows are saturated and compressed in the New York metropolitan area to the point that substantial delays are experienced daily. The FAA has developed an Expanded East Coast Plan (EECP) to alleviate this congestion and reduce delays to and from terminals in the eastern United States. These jets route actions are part of this plan. Interested parties were invited to participate in this rulemaking proceeding by submitting written comments on the proposal to the FAA. No comments objecting to the proposal were received. Except for editorial changes, the removal of J-563, description changes to J-228 which involves changing the Linden, VA, radial from 242° to 234° and the Beckley, WV, radial from 065° to 070° and also changing the description of J-80 by adding East Texas, PA, this amendment is the same as that proposed in the notice. Section 75.100 of Part 75 of the Federal Aviation Regulations was republished in Handbook 7400.6B dated January 2, 1986.

The Rule

This amendment to Part 75 of the Federal Aviation Regulations alters the descriptions of Jet Routes J-48 and J-80 and establishes new J-228 and J-230. This amendment is part of the Expanded East Coast Plan (EECP). The EECP's objective is to establish an improved air traffic system that is designed to reduce delays for aircraft en route to or departing from terminals in the eastern United States. The EECP is being implemented in several segments until completed.

The FAA has determined that this regulation only involves an established body of technical regulations for which frequent and routine amendments are necessary to keep them operationally current. It, therefore—(1) is not a "major rule" under Executive Order 12291; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 75

Aviation safety, Jet routes.

Adoption of the Amendment

PART 75—[AMENDED]

Accordingly, pursuant to the authority delegated to me, Part 75 of the Federal Aviation Regulations (14 CFR Part 75) as amended (51 FR 9 and 6103), is further amended, as follows:

1. The authority citation for Part 75 continues to read as follows:

Authority. 49 U.S.C. 1348(a), 1354(a), 1510; Executive Order 10854; 49 U.S.C. 106(g) (Revised Pub. L. 97-449, January 12, 1983); 14 CFR 11.69.

§ 75.100 [Amended]

2. Section 75.100 is amended as follows:

J-48 [Revised]

From Boston, MA; INT Boston 252° and Carmel, NY, 044° radials; Carmel; INT Carmel 238° and Pottstown, PA, 050° radials; Pottstown; Westminster, MD; Casanova, VA, to Pulaski, VA.

J-228 [New]

From Montreal, Canada; Plattsburg, NY; Albany, NY; Sparta, NJ; Broadway, NJ; Lancaster, PA; INT Lancaster 239° and Linden, VA, 042° radials; Linden; INT Linden 234° and Beckley, WV, 070° radials, to Beckley. The airspace within Canada is excluded.

J-230 [New]

From Robbinsville, NJ; INT Robbinsville 264° and Bellaire, OH, 090° radials, to Bellaire.

J-80 [Amended]

By removing all the words after "Bellaire, OH;" and substituting the words "INT Bellaire 090° and East Texas, PA, 240° radials; East Texas; Sparta, NJ; Barnes, MA; to Bangor, ME."

Issued in Washington, DC, on December 17, 1986.

Harold H. Downey,

Acting Manager, Airspace-Rules and Aeronautical Information Division.

[FR Doc. 86-28845 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 23

[Docket No. 6116-6216]

Use of Penalty Mail in the Location and Recovery of Missing Children, Regulations

AGENCY: Office of the Secretary, Commerce.

ACTION: Final rule.

SUMMARY: This Department of Commerce regulation authorizes the Department of Commerce, through its component organizational units, to use penalty mail to aid in the location and recovery of missing children. The regulation further provides procedures under which penalty mail may be used to assist in the location and recovery of missing children in accordance with 39 U.S.C. 3220(a)(2), (Act of Aug. 9, 1985, Pub. L. 99-87, section 1(a)(1), 99 Stat. 290), in conformance with the Office of Juvenile Justice and Delinquency Prevention (OJJDP) preliminary guidelines which were published in the **Federal Register** on November 8, 1985, [50 FR 46622] pursuant to 39 U.S.C. 3220(a)(1).

EFFECTIVE DATE: This rule is effective January 23, 1987.

FOR FURTHER INFORMATION CONTACT: Mary DiGiulian, Office of Administrative Services Management, Office of Procurement and

Administrative Services, U.S. Department of Commerce, Room H6319, 14th and Constitution Avenue, NW., Washington, DC 20230, telephone (202) 377-0884.

SUPPLEMENTARY INFORMATION: The enactment of 39 U.S.C. 3220 is indicative of the increasing public concern with the problem of missing and exploited children. The Missing Children's Assistance Act of 1984, added as Title IV of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended by the Comprehensive Crime Control Act of 1984 (Pub. L. 98-473, 99 Stat. 1840), recognized the problem and provided a Federal coordination and assistance role in addressing this interstate problem.

A notice and comment period is not required for this regulation because the subject matter of the regulation pertains to internal management procedures affecting only the Department of Commerce's use of penalty mail in the location and recovery of missing children. Internal factors such as the Department of Commerce's mail management procedures, organizational structure, and the like have been primary considerations in drafting the regulation to structure the most cost effective implementation plan. The plan does not directly affect the rights and interests of the general public. The rule is to be effective thirty days after publication in the **Federal Register.**

Executive Order 12291

Since this rule is related to agency management, it is not a rule or regulation within the meaning of E.O. 12291 and, accordingly, is not subject to the requirements of that Order.

Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule by section 553 of the Administrative Procedure Act (5 U.S.C. 553) or by any other law under the Regulatory Flexibility Act (5 U.S.C. 603(a) and 604(a)), no Regulatory Flexibility Analysis has to be or will be prepared.

Paperwork Reduction Act

There are no collection of information requirements contained in this regulation required for submission to the Office of Management and Budget for review under the Paperwork Reduction Act, 44 U.S.C. 3504(h).

List of Subjects in 15 CFR Part 23

Administrative practice and procedure, Child welfare, Missing and exploited children, Penalty mail.

Accordingly, Title 15 Code of Federal Regulations is amended by adding Part 23 to read as follows:

PART 23—USE OF PENALTY MAIL IN THE LOCATION AND RECOVERY OF MISSING CHILDREN

Sec.
23.1 Purpose.
23.2 Contact person.
23.3 Plan.
23.4 Cost and percentage estimates.
23.5 Report to the Office of Juvenile Justice and Delinquency Prevention.
23.6 Definitions.
23.7 Notice to Department of Commerce organizational units of implementation and procedures.

Authority: 39 U.S.C. 3220(a)(2), 5 U.S.C. 301.

§ 23.1 Purpose.

These regulations are intended to comply with 39 U.S.C. 3220(a)(2), and the Office of Juvenile Justice and Delinquency Prevention (OJJDP) guidelines (50 FR 46622), to assist in the location and recovery of missing children through the use of penalty mail.

§ 23.2 Contact person.

Tim Coss, Office of Administrative Services Operations, U.S. Department of Commerce (H2063), 14th and Constitution Ave., NW., Washington, DC 20230, Telephone (202) 377-2108

§ 23.3 Plan.

(a) The Department of Commerce will supplement and expand the national effort to assist in the location and recovery of missing children through the economical use of missing children information in domestic penalty mail directed to the public and Federal employees.

(b) The Department of Commerce may include, on or inside authorized types of penalty mail, pictures and biographical data related to missing children, provided such use is determined to be cost effective. The authorized types of penalty mail include:

(1) All envelopes; and

(2) Self-mailer publications (newsletters, bulletins, etc.) with a shelf-life of no more than 90 days.

(c) The manner in which pictures and biographical data may be used includes:

(1) Printing on envelopes at the time they are initially printed with the United States Postal Service (USPS) required postal code identification;

(2) Printed inserts that are placed in envelopes along with other mailing material;

(3) Stickers that are printed and placed on envelopes prior to mailing; and

(4) Printing as part of the content of self-mailers such as bureau newsletters, bulletins, etc.

(d) Missing children information will not be placed on letter-size envelopes in the ares described as the "Penalty Indicia Area," "OCR Read Area," "Bar Code Read Area," and "Return Address Area" per Appendix A of the OJJDP guidelines.

(e) The National Center for Missing and Exploited Children (National Center) will be the sole source from which the Department of Commerce will obtain the camera-ready and other photographic and biographical materials for use by organizational units. Photographs which were reasonably current as of the time of the child's disappearance shall be the only acceptable form of visual media or pictorial likeness used on or in penalty mail.

(f) The Department of Commerce will remove all printed penalty mail envelopes and other materials from circulation or other use (i.e., use or destroy) within 90 days of notification by the National Center of the need to withdraw penalty mail envelopes and other materials related to a particular child from circulation. The Department of Commerce will not include missing children information on blank pages or covers of items such as those to be included in the Superintendent of Documents' Sales Program, or to be distributed to Depository Libraries, as such material generally could not be withdrawn from use within 90 days of notification. The National Center will be responsible for immediately notifying the Department Contact Person, in writing, of the need to withdraw from circulation penalty mail envelopes and other materials related to a particular child.

(g) The Department of Commerce will give priority:

(1) To penalty mail that is addressed to the public for receipt in the United States, its territories and possessions; and

(2) To inter- and intra-agency publications and other media that will be widely disseminated to and viewed by Federal employees.

(h) All suggestions and/or recommendations for innovative, cost-effective techniques should be forwarded to the Department Contact Person. The Department Contact Person shall conduct biannual meetings of departmental representatives to discuss the current plan and recommendations for future plans.

(i) This shall be the sole regulation implementing this program for the Department of Commerce.

§ 23.4 Cost and percentage estimates.

It is estimated that this program will cost the Department of Commerce $39,530 in the first year. It is the Department of Commerce's estimate that 9% of its penalty mail will transmit missing children photographs and information when the program is fully implemented.

§ 23.5 Report to the Office of Juvenile Justice and Delinquency Prevention.

The Department of Commerce will compile and submit a consolidated report to OJJDP, by June 30, 1987, on its experience in implementation of 39 U.S.C. 3220(a) (2), the OJJDP guidelines, and the Department of Commerce's regulation. This report will cover the period from December 24, 1986, through March 31, 1987, and provide detail on:

(a) The Department of Commerce's experience in implementation (including problems encountered), successful and/or innovative methods adopted to use missing children photographs and information on or in penalty mail, the estimated number of pieces of penalty mail containing such information, and the percentage of total penalty mail directed to the public which included missing children information.

(b) The estimated total cost to implement the program, with supporting detail, and

(c) Recommendations for changes in the program to make it more effective.

§ 23.6 Definitions.

(a) *Operating units.* Bureaus and other organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs).

(b) *Organizational units.* The organizational units within the Department of Commerce are:

Office of the Secretary
Bureau of Economic Analysis
Economic Development Administration
Bureau of the Census
International Trade Administration
Minority Business Development Agency
National Bureau of Standards
National Oceanic and Atmospheric Administration
National Telecommunications and Information Administration
National Technical Information Service
Patent and Trademark Office
United States Travel and Tourism Administration

§ 23.7 Notice to Department of Commerce organizational units of implementation and procedures.

Following are roles and responsibilities for the program within the Department of Commerce.

(a) The Department Contact Person shall:

(1) Serve as the Department of Commerce's sole representative for ordering materials, including camera-ready negatives, from the National Center,

(2) Serve as the Department of Commerce's sole supplier of materials to Operating Units,

(3) Maintain a current list of personnel within each Operating Unit who are authorized to order materials,

(4) Notify Operating Units whenever permission to use information on a missing child has been withdrawn,

(5) Ensure that only current missing children materials are distributed to Operating Units, and that only those requests from authorized departmental representatives are filled,

(6) Prepare all required departmental reports on the program,

(7) Promulgate any departmentwide operating instructions deemed appropriate for the program, and

(8) Chair biannual meetings of departmental representatives to discuss the program and identify additional opportunities to use the missing children data with penalty mail.

(b) The Head of each Operating Unit (and for the Office of the Secretary, the Director of the Office of Administrative Services Operations), or his/her representative, shall:

(1) Designate a single person to act as the Operating Unit's representative to the Department for requesting and controlling missing children materials and receiving notification to withdraw materials from use (an alternative may be designated to act in the representative's absence),

(2) Provide the Department Contact Person with the name, title, telephone number, and room number of the Operating Unit's representative for the program (and also for the alternate, if one is designated), and notify the Department of changes when they occur,

(3) Ensure that the shelf-life of printed penalty mail materials containing missing children information is limited to a maximum of three months,

(4) Ensure that information on a child is not used once permission has been withdrawn and the shelf-life for the material would keep the information available for greater than 90 days after the date that permission to use it was withdrawn,

(5) Direct that the Operating Unit representative (or alternate) order missing children information, as appropriate, only from the Department Contact Person,

(6) Comply with policies, procedures, and operating instructions issued by the Department,

(7) Maintain necessary information to prepare required reports and submit them in accordance with requirements,

(8) Provide only current camera-ready and other photographic and biographical materials to printers, including those at the Administrative Support Centers, and

(9) Otherwise determine and control the use of missing children materials and information by the Operating Unit.

(c) The Director of each Administrative Support Center, or his/her representatives, shall:

(1) Cooperate with serviced Operating Units to promote the use of missing children information on penalty mail,

(2) As directed by an Operating Unit, utilize camera-ready and other photographic and biographical material provided by the Operating Unit in preparation of material for use with penalty mail, and

(3) Assure that any printing performed or procured under its direction is in accordance with the type of material and the manner of presentation as prescribed in this regulation.

Dated: December 18, 1986.

Hugh L. Brennan,

Director, Procurement and Administrative Services.

[FR Doc. 86-28913 Filed 12-23-86; 8:45 am]

BILLING CODE 3510-FB-M

FEDERAL TRADE COMMISSION

16 CFR Part 13

[Docket No. 9189]

Detroit Auto Dealers Association, Inc., et al.; Prohibited Trade Practices, and Affirmative Corrective Actions

AGENCY: Federal Trade Commission.

AGENCY: Consent orders.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, the Federal Trade Commission Committee has issued three consent orders prohibiting, among other things, certain Detroit, Mich.-area Chevrolet, Chrysler-Plymouth and Cadillac associations, dealerships and dealers from conspiring to not advertise in the classified

sections of newspapers or to not advertise vehicle at all.

DATES: Complaint issued Dec. 29, 1984. Decisions issued Dec. 3, 1986.[1]

FOR FURTHER INFORMATION CONTACT: FTC/A-2105, Richard B. Smith, Washington, DC 20580. (202) 326-2713.

SUPPLEMENTARY INFORMATION: On Wednesday, Aug. 20, 1986, there was published in the **Federal Register**, 51 FR 29660, a proposed consent agreement with analysis In the Matter of Detroit Auto Dealers Association, Inc., et al., (Chevrolet), and on Friday, Sept. 12, 1986, there was published in the **Federal Register**, 51 FR 32485, a proposed consent agreement with analysis In the Matter of Detroit Auto Dealers Association, Inc., et al. (Chrysler-Plymouth and Cadillac), for the purpose of soliciting public comment. Interested parties were given sixty (60) days in which to submit comments, suggestions or objections regarding the proposed form of order.

No comments having been received, the Commission has ordered the issuance of the complaint in the form contemplated by the agreement, made its jurisdictional findings and entered three orders to cease and desist, as set forth in the proposed consent agreements, in disposition of this proceeding.

The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, are as follows: Subpart—Coercing and Intimidating: § 13.345, Competitors; § 13.367, Members. Subpart—Combining or Conspiring: § 13.384, Combining or conspiring; § 13.388, To control allocation and solicitation of customers; § 13.390, To control employment practice; § 13.395, To control marketing practices and conditions. Subpart—Corrective Actions and/or Requirements: § 13.533, Corrective actions and/or requirements; § 13.533-45, Maintain records; § 13.533-50, Maintain means of communication. Subpart—Cutting Off Access To Customers and Market: § 13.565, Interfering with advertising mediums; 13.570, Interfering with competitors' bids or price quotations.

Subpart—Disseminating Advertisements, Etc.: § 13.1043, Disseminating advertisements, etc.

List of Subjects in 16 CFR Part 13

Advertising, Motor vehicles, Trade practices.

(Sec. 6, Stat. 721; 15 U.S.C. 46. Interprets or applies sec. 5, 38 Stat. 719, as amended; 15 U.S.C. 45)

Emily H. Rock,

Secretary.

[FR Doc. 86-28839 Filed 12-23-86; 8:45 am]

BILLING CODE 6750-01-M

ENVIRONMENTAL PROTECTION AGENCY

21 CFR Parts 193 and 561

[OPP-300120A; FRL-3131-6]

Revocation of DDT and TDE Food and Feed Additive Regulations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document (1) revokes the food and feed additive regulations for residues of the insecticide DDT [a mixture of 1,1,1-trichloro-2,2-bis(*p*-chlorophenyl)ethane and 1,1,1-trichloro-2-(*o*-chlorophenyl)-2-(p-chlorophenyl)ethane] and its degradation products, TDE [or DDD (1,1-dichloro-2,2-bis (*p*-chlorophenyl) ethane)] and DDE [1,1-dichloro-2,2-bis (*p*-chlorophenyl)ethylene]; (2) revokes the feed additive regulation established specifically for the residues of TDE; (3) lists the action levels EPA is recommending to the Food and Drug Administration (FDA) to replace the revoked food and feed additive regulations; and (4) lists EPA's recommendations to FDA regarding existing action levels for certain processed food and feed. This rule was initiated by the Environmental Protection Agency to remove pesticide food and feed additive regulations for which related registered uses have been cancelled. A related document, appearing elsewhere in this issue of the **Federal Register**, revokes tolerances for residues of DDT, its degradation products, TDE and DDE, and the tolerances specifically for residues of TDE.

EFFECTIVE DATE: Effective on December 24, 1986.

ADDRESS: Written objections, identified by the document control number [OPP-300120A], may be submitted to the: Hearing Clerk, Environmental Protection Agency, Rm. 3708 (A-110), 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT:

By mail: Patricia Critchlow, Registration Division (TS-767), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-1806).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of March 13, 1985 (50 FR 10070), which (1) proposed the revocation of the food and feed additive regulations for residues of the insecticide DDT and its degradation products, TDE and DDE; and (2) proposed the revocation of the feed additive regulation established specifically for the residues of TDE.

The March 13 **Federal Register** notice also listed the action levels which EPA intended to recommend to the Food and Drug Administration (FDA) to replace the food and feed additive regulations once the rule revoking the regulations was final. The action levels would cover unavoidable residues which can continue to occur in the processed food and feed commodities because of the persistence of DDT, its degradation products, and TDE in the environment. The notice also listed EPA's intended recommendations to FDA regarding retention of existing DDT and TDE action levels for processed food and feed commodities for which no food/feed additive regulations were originally set and which may contain residues of the pesticides because of environmental contamination.

A number of comments were submitted regarding the proposed revocation of DDT and TDE tolerances and food/feed additive regulations. These comments are discussed in a related document [OPP-300119A], appearing elsewhere in this issue of the **Federal Register**, which revokes the tolerances in 40 CFR Part 180 for residues of the insecticide DDT, its degradation products TDE and DDE, and the tolerances established specifically for residues of TDE.

Because of comments received regarding the action level of 5 ppm in fresh and processed (smoked, frozen, canned) fish, EPA has decided to make no recommendation at this time regarding the current DDT action level in fish. When EPA has accumulated more data and studied the situation thoroughly, the Agency will reassess the fish action level and determine what further action to take. This matter is discussed in more detail in the related **Federal Register** document [OPP-300119A].

Based on the information considered by the Agency and discussed in detail in

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[1] A single Complaint was issued against all respondents. Three separate Decisions and Orders with the same docket number were issued simultaneously against associations, dealerships, and dealers for: (1) Chevrolet; (2) Chrysler-Plymouth; and (3) Cadillac. Copies of the Complaint and the Decisions and Orders are available from the Commission's Public Reference Branch, H-130, 6th St. & Pa. Ave., NW., Washington, DC 20580.

the **Federal Register** document of March 13 (50 FR 10070), which proposed revocation of food and feed additive regulations for DDT and its degradation products TDE and DDE, and for TDE, the Agency is hereby revoking (1) all existing food/feed additive regulations in 21 CFR 193.110, 193.120, and 561.120 for DDT and its degradation products TDE and DDE; (2) the existing feed additive regulation in 21 CFR 561.370 established specifically for residues of TDE; and (3) the food additive regulation in 21 CFR 193.450 for combined residues of toxaphene and DDT in crude soybean oil.

EPA is recommending to FDA the following action levels for the sum of DDT, TDE, and DDE residues, expressed in parts per million (ppm), to replace the following food additive regulations which are being revoked for residues of DDT, DDT's degradation products, and TDE:

TABLE 1.—RECOMMENDED ACTION LEVELS

Commodities	Food additive limitations (ppm) being revoked		Recommended action levels (ppm) DDT/TDE/DDE
	DDT	TDE	
Hops (dried)	80		(1)
Manufactured dairy products	2 1.25		(3)
Peppermint oil	100		1
Soybean oil (crude)	4 6		1
Spearmint oil	100		1
Tomato pomace (dried, for use in dog and cat food)	5 100	6 100	0.5

[1] Covered by the 0.1 ppm action level recommended to replace the tolerance in hops (fresh).

[2] Milk-fat basis.

[3] Covered by the 1.25 ppm action level in milk-fat recommended to replace the tolerance in milk.

[4] Includes the food additive level of 6 ppm DDT indicated in the food additive regulation of 12 ppm for combined residues of DDT and toxaphene in crude soybean oil; see 21 CFR 193.450 (toxaphene).

[5] If residues of TDE (DDD) are also present, the total of both such chlorinated compounds shall not exceed 100 ppm.

[6] If residues of DDT are also present, the total of both such chlorinated compounds shall not exceed 100 ppm.

EPA is recommending to FDA retention of the following action level for the sum of DDT, TDE, and DDE residues:

TABLE 2—ACTION LEVEL TO REMAIN IN EFFECT

Commodity	Existing and Recommended Action Level (ppm) DDT/TDE/DDE
Animal feed (processed)	0.5

The proposal to revoke these food/feed additive regulations recommended replacement action levels of 0.1 ppm for residues of DDT and its degradation products in dried hops and 1.25 ppm (on a milk-fat basis) for residues in manufactured dairy products. FDA has indicated that separate action levels for the processed products are not necessary. Since the concentration of residues is not expected to result from processing, the existing action level for residues in fresh fish and the recommended replacement action levels for residues in the fresh hops and raw milk will automatically apply to the related processed products. Revocation of the existing tolerances in fresh hops and raw milk and discussion of the replacement action levels for these commodities are included in the related **Federal Register** document [OPP-300119A]. As discussed above, the Agency is not recommending the setting of a replacement action level for processed fish at this time.

Any person adversely affected by this rule revoking the food and feed additive regulations may, within 30 days after the date of publication of this regulation in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

This document has been reviewed by the Office of Management and Budget as required by Section 3 of Executive Order 12291.

In order to satisfy requirements for analysis as specified by Executive Order 12291 and the Regulatory Flexibility Act, the Agency has analyzed the costs and benefits of the revocation of the food and feed additive regulations for DDT and TDE. This analysis is available for public inspection in Rm. 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Executive Order 12291

As explained in the proposal published on March 13, 1985, the Agency has determined, pursuant to the requirements of Executive Order 12291, that the revocation of the food and feed additive regulations in question will not cause adverse economic impacts on significant portions of U.S. enterprises.

Regulatory Flexibility Act

This rulemaking has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96-354; 94 Stat. 1164, 5 U.S.C. 601 *et seq.*) and it has been determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. The reasons for this conclusion are discussed in the March 13, 1985 proposal.

List of Subjects in 21 CFR Parts 193 and 561

Food additives, Animal feeds, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 1986.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

PART 193—[AMENDED]

Therefore, 21 CFR is amended as follows:

1. In Part 193:

a. The authority citation for Part 193 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 193.110 [Removed]

b. Section 193.110 is removed.

§ 193.120 [Removed]

c. Section 193.120 is removed.

d. Section 193.450 is revised to read as follows:

§ 193.450 Toxaphene.

A tolerance of 6 parts per million is established for residues of the insecticide toxaphene (chlorinated camphene containing 67 to 69 percent chlorine) in crude soybean oil when present therein as a result of the application of this insecticide to the growing soybean crop.

PART 561—[AMENDED]

2. In Part 561:

a. The authority citation for Part 561 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 561.120 [Removed]

b. Section 561.120 is removeo.

§ 561.370 [Removed]

c. Section 561.370 is removed.

[FR Doc. 86-28743 Filed 12-23-86; 8:45 am]
BILLING CODE 6560-50-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8116]

Accelerated Cost Recovery System—Retirement-Replacement-Betterment (RRB) Property

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the cost recovery of retirement-replacement-betterment (RRB) property under the Accelerated Cost Recovery System (ACRS). Changes to the applicable law made by the Economic Recovery Tax Act of 1981 (ERTA), are reflected in this document. These regulations provide the guidance necessary for compliance with the law.

DATES: The regulations are effective for eligible property placed in service before January 1, 1985.

FOR FURTHER INFORMATION CONTACT: Ada S. Rousso of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:LR:T), telephone 202-566-3287 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

On February 16, 1984, the **Federal Register** (49 FR 5940) published proposed amendments to the Income Tax Regulations (26 CFR Part 1) under section 168 of the Internal Revenue Code of 1954 (Code). The amendments were proposed to conform the regulations to sections 201 and 203 of the Economic Recovery Tax Act of 1981 (Pub. L. 97-34; 95 Stat. 203, 221), sections 205 and 206 of the Tax Equity and Fiscal Responsibility Act of 1982 (Pub. L. 97-248; 96 Stat. 427, 431), and section 102 of the Technical Corrections Act of 1982 (Pub. L. 97-448; 96 Stat. 2367). The Service received a number of written comments responding to the notice of proposed rulemaking. One of those comments responded to the special rules for retirement-replacement-betterment (RRB) property. A public hearing was held on May 21, 1984. The Service believes it is necessary to adopt § 1.168-5(a) of the proposed amendments (relating to the cost recovery of RRB property) at this time in order to provide the public with the guidance found in that part of the amendments. However, the Service emphasizes that the unadopted parts of the proposed amendments are not being withdrawn. The balance of the proposed amendments will be adopted at a later date. Accordingly, after consideration of the comments, those proposed amendments as revised by this document are adopted by this Treasury decision.

Summary of Comments

Code section 168(f)(3)(A) and proposed § 1.168-5(a)(1)(i) contain a special transitional rule for RRB replacement property placed in service before January 1, 1985. Proposed § 1.168-5(a)(1)(ii) further provides that the transitional rule does not apply to any taxpayer who did not use the RRB method of depreciation under section 167 as of December 31, 1980. The commentator wrote that denying the transitional rule to such a taxpayer is not supported by either the statute or its legislative history.

In repealing the RRB method of depreciation, Congress generally intended that all property placed in service after December 31, 1980, would be subject to the ACRS. This special transitional rule for RRB replacement property placed in service before January 1, 1985, was intended to apply only in the case of property that would have been expensed had the RRB method not been repealed. Allowing transitional relief to taxpayers who did not use the RRB method of depreciation prior to January 1, 1981, would thus thwart Congressional intent. Accordingly, no change has been made to § 1.168-5(a)(1)(ii) in the final regulations.

In addition, § 1.168-5(a)(4) of the proposed regulations provides a rule for the recovery of the adjusted basis of RRB property as of December 31, 1980. That rule has been clarified in the final regulations to provide that if a taxpayer has consistently used the RRB method of depreciation for all periods after February 28, 1913, the adjusted basis of RRB property as of December 31, 1980, is not required to be reduced for depreciation sustained prior to March 1, 1913.

Non-Applicability of Executive Order 12291

The Commissioner of Internal Revenue has determined that this final rule is not a major rule as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required.

Regulatory Flexibility Act

Although a notice of proposed rulemaking which solicited public comments was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Drafting Information

The principal author of these regulations is Ada S. Rousso of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, on matters of both substance and style.

List of Subjects in 26 CFR 1.61-1—1.281-4

Income taxes, Taxable income, Deductions, Exemptions.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Part 1 is amended as follows:

PART 1—INCOME TAX

Paragraph 1. The authority for Part 1 continues to read in part:

Authority: 26 U.S.C. 7805. * * *

§ 1.168-1 [Redesignated as § 1.168A-1]

Par. 2. Section 1.168-1 is redesignated as § 1.168A-1. Section 1.168A-1 as so redesignated is amended as follows:

§ 1.168A-1 [Amended]

1. Paragraph (a) is amended by removing "§ 1.168-5" and "§ 1.168-2" from the second and third sentences and inserting "§ 1.168A-5" and "§ 1.168A-2", respectively, in lieu thereof.

2. Paragraph (c) is amended by removing "§ 1.168-6" from the last sentence and inserting "§ 1.168A-6" in lieu thereof.

§ 1.168-2 [Redesignated as § 1.168A-2 and Amended]

Par. 3. Section 1.168-2 is redesignated as § 1.168A-2. Section 1.168A-2 as so redesignated is amended by removing "§ 1.168-1" from the second sentence of paragraph (a) and inserting "§ 1.168A-1" in lieu thereof.

§ 1.168-3 [Redesignated as § 1.168A-3]

Par. 4. Section 1.168-3 is redesignated as § 1.168A-3.

§ 1.168-4 [Redesignated as § 1.168A-4]

Par. 5. Section 1.168-4 is redesignated as § 1.168A-4.

§ 1.168-5 [Redesignated as § 1.168A-5 and Amended]

Par. 6. Section 1.168-5 is redesignated as § 1.168A-5. Section 1.168A-5 as so redesignated is amended by substituting "§ 1.168A-6" for "§ 1.168-6" in the last sentence of paragraph (a) (3).

§ 1.168-6 [Redesignated as § 1.168A-6 and Amended]

Par 7. Section 1.168-6 is redesignated as § 1.168A-6. Section 1.168A-6 as so redesignated is amended by substituting "§ 1.168A-5" for "§ 1.168-5" wherever it appears.

§ 1.168-7 [Redesignated as § 1.168A-7 and Amended]

Par. 8. Section 1.168-7 is redesignated as § 1.168A-7 and amended by substituting "§ 1.168A-5" for "§ 1.168-5" wherever is appears.

Par 9. Redesignated sections 1.168A-1 through 1.168A-7 will be added just after § 1.168(j)-1 and before § 1.169-1.

Par. 10. Section 1.168-5 is added immediately following § 1.167(m)-1 to read as follows:

§ 1.168-5 Special rules.

(a) *Retirement-replacement-betterment (RRB) property—(1) RRB replacement property placed in service before January 1, 1985.* (i) Except as provided in paragraph (a)(1)(ii) of this section, the recovery deduction for the taxable year for retirement-replacement-betterment (RRB) replacement property (as defined in paragraph (a)(3) of this section) placed in service before January 1, 1985, shall be (in lieu of the amount determined under section 168(b)) an amount determined by applying to the unadjusted basis (as defined in section 168(d)(1) and the regulations thereunder) of such property the applicable percentage determined in accordance with the following table:

If the recovery year is:	And the year the property is placed in service is:			
	1981	1982	1983	1984
	The applicable percentage is:			
1	100	50	33	25
2		50	45	38
3			22	25
4				12

(ii) The provisions of paragraph (a)(1)(i) of this section do not apply to any taxpayer who did not use the RRB method of depreciation under section 167 as of December 31, 1980. In such case, RRB replacement property placed in service by the taxpayer after December 31, 1980, shall be treated as other 5-year recovery property under section 168.

(2) *RRB replacement property placed in service after December 31, 1984.* RRB replacement property placed in service after December 31, 1984, is treated as other 5-year recovery property under section 168.

(3) *RRB replacement property defined.* RRB replacement property, for purposes of section 168, means replacement track material (including rail, ties, other track material, and ballast) installed by a railroad (including a railroad switching or terminal company) if—

(i) The replacement is made pursuant to a scheduled program for replacement.

(ii) The replacement is made pursuant to observations by maintenance-of-way personnel of specific track material needing replacement.

(iii) The replacement is made pursuant to the detection by a rail-test car of specific track material needing replacement, or

(iv) The replacement is made as a result of a casualty.

Replacements made as a result of a casualty shall be RRB replacement property only to the extent that, in the case of each casualty, the replacement cost with respect to the replacement track material exceeds $50,000.

(4) *Recovery of adjusted basis of RRB property as of December 31, 1980.* The taxpayer shall recover the adjusted basis of RRB property (as defined in section 168(g)(6)) as of December 31, 1980, over a period of not less than 5 years and not more than 50 years, using a rate of recovery consistent with any method described in section 167(b), including the method described in section 167(b)(2), switching to the method described in section 167(b)(3) at a time to maximize the deduction. For purposes of determining the recovery allowance under this subparagraph, salvage value shall be disregarded and, in the case of a taxpayer that depreciated RRB property placed in service before January 1, 1981, using the RRB method consistently for all periods after February 28, 1913, the adjusted basis of RRB property is the adjusted basis for purposes of determining the deduction for retirements under the RRB method, with no adjustment for depreciation sustained prior to March 1, 1913.

(5) *RRB property (which is not RRB replacement property placed in service after December 31, 1980.* Property) placed in service by the taxpayer after December 31, 1980, which is not RRB replacement property and which, under the taxpayer's method of depreciation as of December 31, 1980, would have been depreciated by the taxpayer under the RRB method, is treated as other property under section 168.

(b)-(f) [Reserved].

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: December 5, 1986.

J. Roger Mentz,

Assistant Secretary of the Treasury.

[FR Doc. 86-28934 Filed 12-23-86; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Parts 1 and 602

[T.D. 8117]

Deposit of Estimated Income Tax by Certain Private Foundations and Tax-Exempt Organizations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document provides temporary regulations that revise the Federal tax deposit regulations relating to corporate estimated income tax to make them applicable to quarterly payments required by the Tax Reform Act of 1986 of unrelated business income tax imposed upon certain tax-exempt organizations and the net investment income excise tax imposed upon certain private foundations. These amendments affect certain tax-exempt organizations which have income subject to the tax upon unrelated business income imposed by section 511 and certain private foundations subject to the net investment income excise tax imposed by section 4940. The text of the temporary regulations set forth in this document serves as the comment document for the notice of proposed rulemaking published in the Proposed Rules section of this issue of the Federal Register.

DATES: These amendments are applicable for taxable years beginning after December 31, 1986.

FOR FURTHER INFORMATION CONTACT: John A. Tolleris of the Legislative and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attention: CC:LR:T), (202-566-3590, not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations regarding deposits under section 6302(c) of the Internal Revenue Code of 1986 of tax upon net investment income and unrelated business income of certain private foundations and tax-exempt organizations. Since section 1542 of the Tax Reform Act of 1986 revises the rules for payments of such taxes effective for taxable years beginning after December 31, 1986, there is a need for immediate guidance relating to the manner and time for making these payments so private foundations and tax-exempt organizations can comply with the revisions made by the Tax Reform Act of 1986. These regulations will remain in effect until superseded by final regulations on this subject.

Explanation of Provisions

Prior to the enactment of the Tax Reform Act of 1986, tax-exempt organizations were required to pay the tax imposed by section 511 upon their unrelated business income, and some private foundations were required to pay the excise tax imposed by section 4940 upon their net investment income, annually with their returns. Section 1542 of the Tax Reform Act of 1986 provides that private foundations and tax-exempt organizations must make quarterly estimated payments of the tax on net investment income or of the tax on unrelated business income, respectively, under the same rules that currently require quarterly estimated payments of corporate income taxes.

This Treasury decision provides that private foundations and tax-exempt organizations shall pay their quarterly estimated taxes in the same manner and time as corporations pay their quarterly estimated taxes by making a deposit of their quarterly taxes through the Federal Tax Deposit (FTD) system by the due dates for paying estimated taxes.

Nonapplicability of Executive Order 12291

The Commissioner of Internal Revenue has determined that this rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

Regulatory Flexibility Act

A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, the temporary regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Paperwork Reduction Act

The Collection of information requirements contained in this regulation have been submitted to the Office of Management and Budget (OMB) in accordance with the requirements of the Paperwork Reduction Act of 1980. The requirements have been approved by OMB under control number 1545-0257.

Drafting Information

The principal author of this regulatory amendment is John A. Tolleris of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.6302-1—1.6302-2

Income taxes, Administration and procedure, Tax depositaries.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

PART 1—[AMENDED]

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

Authority: 26 U.S.C. 7805.* * * Section 1.6302-1 also issued under 26 U.S.C. 6302 (c).* * *

Par 2. New § 1.6302-1T is added immediately after § 1.6302-1 to read as follows:

§ 1.6302-1T Use of Government depositaries in connection with corporation income and estimated income taxes and certain taxes of tax-exempt organizations (temporary).

(a) *Requirement.* A corporation (and, for taxable years beginning after December 31, 1986, any organization subject to the tax imposed by section 511, and any private foundation subject to the tax imposed by section 4940) shall deposit with an authorized depositary of Federal taxes all payments of tax imposed by chapter 1 of the Code (or treated as so imposed by section 6154 (h)), including any payments of estimated tax, on or before the date otherwise prescribed for paying such tax. This paragraph does not apply to a foreign corporation or entity which has no office or place of business in the United States.

(b) *Cross-references.* For certain rules regarding the depositary forms to be used and their procurement see paragraphs (b) and (c) of § 1.6302-1. For provisions relating to the penalty for failure to make a deposit within the prescribed time see § 301.6656-1 of this chapter (Regulations on Procedure and Administration).

PART 602—[AMENDED]

Par. 3. The authority citation for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 4. Section 602.101 (c) is amended by inserting in the appropriate place in the table "§ 6302-1 . . . 1545-0257".

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: December 17, 1986.

J. Roger Mentz,

Assistant Secretary of the Treasury.

[FR Doc. 86-28935 Filed 12-23-86; 8:45 am]

BILLING CODE 4830-01-M

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26 CFR Parts 1 and 602

[T.D. 8113]

Withholding Upon Dispositions of U.S. Real Property Interests by Foreign Persons

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final Income Tax Regulations relating to the withholding that is required upon the disposition of a U.S. real property interest by a foreign person. These regulations are necessary to provide the public with guidance with respect to the withholding requirements of section 1445 of the Internal Revenue Code of 1954, as added by the Tax Reform Act of 1984. These regulations affect purchasers of U.S. real property interests and entities with foreign interest-holders that dispose of U.S. real property interests. It also contains amendments to Income Tax Regulations relating to substantive income tax liability on such a disposition.

DATES: The regulations are effective with respect to dispositions of U.S. real property interests after January 23, 1987. However, if a person who is treated as a withholding agent under § 1.1445-8T of the Temporary Regulations exercises the option to apply such regulations to a distribution prior to the general 30 day effective date, then, solely for purposes of applying § 1.1445-8T, this regulation may be applied on the date § 1.1445-8T is applied with respect to that distribution.

FOR FURTHER INFORMATION CONTACT: Jeffrey Dorfman of the Office of Associate Chief Counsel (International) within the Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224 (Attn: CC:INTL:Br5); Telephone 202-566-3407 (not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

Section 1445 was added to the Internal Revenue Code by section 129 of the Tax Reform Act of 1984. Technical corrections were made by sections 311(b)(4) and 1810(f) of the Tax Reform Act of 1986. On December 31, 1984, proposed additions to the Income Tax Regulations (26 CFR Part 1) under section 1445 were published in the Federal Register (49 FR 50739) by cross-reference to Temporary Income Tax Regulations (26 CFR Part 1a) published the same day (49 FR 50667). A public hearing concerning the proposed regulations was held on January 17, 1986. After consideration of all the comments received, those regulations are revised and adopted by this Treasury Decision.

Regulations published under section 897 of the Internal Revenue Code were adopted by Treasury Decision 7999 (49 FR 50689). This Treasury Decision amends those regulations.

Explanation of Provisions

Amendments to §§ 1.897-1(c)(2)(iii), 1.897-1(d)(2)(i), 1.897-1(n), 1.897-2(b)(2)(v), 1.897-2(c)(4)(ii), 1.897-2(c) (5), 1.897-2(g)(3), 1.897-3(a), and 1.897-3(c)(4) of the Income Tax Regulations.

Section 1.897-1(c)(2)(iii) has been clarified to indicate that the rule therein stated applies to regularly traded interests (not to only stock).

With respect to production payments, § 1.897-1(d)(2)(i) provides that an interest in production payments described in section 636 does not generally constitute an interest in real property other than solely as a creditor. However, a right to production payments shall constitute an interest in real property other than solely as a creditor if it conveys a right to share in the appreciation in value of, or in the gross or net proceeds or profits generated by, the mineral property. Thus, the right to typical bank-type production payments is treated as an interest in real property other than solely as a creditor because it is an interest in proceeds or profits, even though the production payment holder may have no right to share in the appreciation in value of the mineral property. Accordingly, § 1.897-1(d)(2)(i) has been amended.

In response to public comment, the definition of "regularly traded" contained in § 1.897-1(n) has been amended. The amendment provides that stock of a corporation which is described in section 851(a)(1) of the Internal Revenue Code (certain mutual funds and unit investment trusts) and units of a unit investment trust registered under the Investment Company Act of 1940, (15 U.S.C. 80 a-1 to 80 b-2), shall be treated as stock of a corporation which is regularly traded on an established securities market. The rationale for this change is that trading of interests in certain entities that are mutual funds (whether open end or closed end funds), unit investment trusts, or other investment vehicles described in section 851(a)(1) is sufficiently analogous to the trading of corporate stock on an established securities market to warrant identical treatment.

The definition of "regularly traded" contained in § 1.897-1(n) has also been clarified with respect to interests that are traded in bearer form on a foreign securities market. The rule provides that interests in a domestic entity that are traded on a foreign exchange shall not be considered to be regularly traded on an established securities market unless such interests are traded in registered form and are registered pursuant to the provisions of the Securities Exchange Act of 1934 (see, 15 U.S.C. 78). The reason for this change is that the Service cannot determine whether shares are regularly traded on a foreign exchange if they are traded in bearer form.

Section 1.897-2(b)(2)(v) has been substantially amended because its application was inconsistent with §§ 1.897-2(g)(1)(ii)(A) and § 1.897-2(g)(2)(ii). Thus, § 1.897-2(b)(2)(v) now provides a reference to §§ 1.897-2(g)(1)(ii)(A) and § 1.897-2(g)(2)(ii) with respect to the effect on interest holders of reliance on a statement issued by a corporation that made a determination as to whether it was a U.S. real property holding corporation under the provisions of § 1.897-2(b).

Typographical errors have been corrected in §§ 1.897-2(c)(4)(ii), 1.897-2(c)(5), 1.897-2(g)(3), 1.897-3(a), and 1.897-3(c)(4).

Amendments to § 1.897-2(h) of the Income Tax Regulations

Section 1.897-2(h)(1)(i) provides that a domestic corporation, any interest in which is known by the corporation to be held by a foreign person, must determine whether it is a U.S. real property holding corporation in accordance with the rules of that section. Section 1.897-2(h)(1)(ii) of the regulations provides that a domestic corporation, any interest in which is known to be held by a foreign person, that determines it is not a U.S. real property holding corporation on each of the applicable determination dates in a given taxable year must attach a statement to its income tax return, informing the Service that it is not a U.S. real property holding corporation. Section 1.897-2(i)(2) provides that with respect to taxable years ending after June 18, 1980, for which a return was filed before January 30, 1985, the statement required to be filed by paragraph (h)(1)(ii) of this section must be separately delivered to the Internal Revenue Service office where the corporation filed its most recent income tax return no later than April 1, 1985.

Commentators have raised two problems with respect to these regulations. First, no method is provided for corporations that have failed to provide statements required under § 1.897-2(h)(1)(ii) to remedy this failure. Second, the regulations may be unclear with respect to whether a corporation that failed to file the required statement with respect to taxable years ending after June 18, 1980, for which a return was filed before January 30, 1985, can file statements with respect to subsequent years.

In view of these problems, the regulations under § 1.897-2(h) have been revised. Section 1.897-2(h)(1) now requires a domestic corporation to provide notice (regarding whether such corporation is or has been a U.S. real property holding corporation) to a foreign interest holder within a reasonable period after receipt of an inquiry by such foreign interest holder. Annual filing of a notice with the Service is no longer required. However, in order for the statement provided to the foreign interest holder to be valid, the corporation must deliver notice to the Service (as provided in § 1.897-2(h)(2)) on or before the 30th day after the statement is mailed to the interest holder that requested it. As in the prior regulations, the requirements of § 1.897-2(h) are not applicable to domestically controlled real estate investment trusts and to corporations in which any class of stock is regularly traded on an established securities market. Section 1.897–2(h)(4) provides that a corporation, any interest in which is known to be held by a foreign person, which determines that it is not a U.S. real property holding corporation on each of the applicable determination dates in a given taxable year may voluntarily attach to its income tax return for that year a statement informing the Service of its determination. The transition rules in § 1.897–2(i) have also been amended.

Section 1.1445–1: General Rules

Commentators suggested that the Service clarify the amount subject to withholding with respect to joint transferors. Accordingly, § 1.1445–1(b)(2) provides that the amount subject to withholding in the case of a joint transfer of a U.S. real property interest by one or more foreign persons and one or more non-foreign persons shall be determined by allocating the amount realized based upon the capital contribution of each transferor with respect to the property and by aggregating the amounts allocated to foreign persons. A special rule, which overrides the general rule, has been provided for joint transferors that are husband and wife. Where a husband and wife are joint transferors their total capital contribution is aggregated and each is deemed to have contributed 50 percent of the aggregated amount. Section 1.1445–1(f)(3)(iv) provides rules regarding the crediting of amounts withheld among joint foreign transferors.

In response to public comment, rules have been provided governing withholding with respect to options to acquire a U.S. real property interest. These rules are contained in § 1.1445–1(b)(3).

Section 1.1445–1(c)(1) provides the general rule regarding reporting and paying over withheld amounts. In response to several comments, the time period for reporting and paying over withheld amounts has been extended from 10 days to 20 days.

Section 1.1445–1(c)(2) provides rules concerning delayed reporting and payment pending application for a withholding certificate. The regulations have been modified in the following manner in response to public comment.

(1) To address concerns that the terms of a sale can change significantly within 30 days prior to a transfer of a U.S. real property interest, the regulations no longer require that an application be submitted to the Service at least 30 days prior to the transfer. Under § 1.1445–1(c)(2)(i)(A), an application need only be submitted on the day of or any time prior to the transfer for delayed reporting and payment to apply.

(2) With respect to reporting and paying over withheld amounts pending a determination by the Service on an application for a withholding certificate, the regulation draws a distinction regarding applications submitted by a transferee of a U.S. real property interest and applications submitted by a transferor. Where the applicant is a transferee, the transferee must report and pay over withheld amounts (or a lesser amount as determined by the Service) by the 20th day following the Service's final determination (defined as the day the withholding certificate or notice of denial is mailed to the transferee). An applicant that is a transferor of a U.S. real property interest must provide notice to a transferee prior to the transfer that an application for a withholding certificate has been submitted to the Service. While the transferee must still withhold 10 percent of the amount realized on the transfer, the transferee need not report and pay over such amount (or a lesser amount determined by the Service) until the 20th day after the Service's final determination. For this purpose, the definition of the Service's "final determination" is the day upon which a copy of the withholding certificate or notice of denial issued by the Service is mailed.

One commentator suggested that an appeal procedure be available if an application for reduced withholding is rejected. This suggestion was not adopted because it is not mandated by section 1445 and would impose an undue administrative burden on the Service. Several commentators suggested that the anti-abuse rule of § 1.1445–1T(c)(2)(iii) of the Temporary Regulations be eliminated. This was rejected because the rule is a needed safeguard against abusive delays in complying with section 1445(a).

Contents of Forms 8288 and 8288-A (§1.1445–1(d))

Several comments were received regarding Forms 8288 and 8288A. The first comment suggested the elimination of the requirement that the name of the transferor be identified. This was rejected because the Service must know the identity of transferors in order to properly credit amounts withheld against tax liability arising from the transfer. The second comment suggested that an individual transferor or transferee be able to provide a mailing address rather than a home address. This suggestion was adopted in part. The regulations now provide that, in addition to a home address, the transferor may specify a mailing address to which the stamped copy of the Form 8288–A is to be sent. A third suggestion was that the requirement that the "nature of an improvement" be reported on Forms 8288 and 8288A be deleted. We have responded to this suggestion by requiring that the nature of only substantial improvements be reported on Forms 8288 and 8288A. Finally, it was suggested that the regulations delete §1.1445–1(d)(1)(vii) which authorizes Forms 8288 and 8288A to include "such other information as the Commissioner may require." This was rejected because the Service may need flexibility in the future with respect to obtaining other information that may be needed to administer section 1445.

Penalties and Interest Imposed on Transferee (§ 1.1445–1(e))

Section 1.1445–1(e) has been expanded to clarify the liability under section 1461 of transferees who fail to withhold and pay over tax under section 1445, and to coordinate that liability with the transferor's tax liability. New § 1.1445–5(e)(3) clarifies that pursuant to section 1463 the liability for tax and penalties generally terminates when the transferor's liability with respect to the transfer has been satisfied. The transferee must provide sufficient information to enable the Service to determine that the transferor's liability has been satisfied.

Section 1.1445–1(e)(3) also clarifies that interest is due from and payable by the transferee, under section 6601 and the regulations thereunder, on the amount of the withholding tax that should have been, but was not, timely withheld and paid over by the transferee. Liability for interest for failure to withhold and pay over tax is not excused by a subsequent payment of tax by the transferor, since the transferee's liability to withhold and pay over tax is not dependent on the transferor's actual tax liability. However, the regulations provide that if the transferor's tax liability is in fact paid (or established to be zero) then the transferee's liability will also be deemed to have been satisfied as of that date. Thus, the transferee will be held liable for the payment of interest with respect to the period between the date on which the transferee was required to pay over tax under section 1445 and the date on which that liability is deemed to be satisfied by reason of the transferor's payment of tax.

Effect of Withholding on Transferor (§ 1.1445–1(f))

Section 1.1445–1(f) requires a stamped copy of Form 8288A to be attached to a transferor's return in order to claim credit for withheld taxes. One commentator raised an issue concerning the effect of the failure of the transferee to remit withheld funds to the Service with the result that the transferor would never receive a stamped copy of Form 8288A. To address this concern, § 1.1445–1(f) now provides that if a stamped copy of Form 8288A is not received by the transferor, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence (*e.g.*, closing documents) of such amount.

Finally, one commentator suggested that a foreign person should not be required to file a return if withholding under section 1445 fully satisfies any substantive tax liability. This was rejected. Withholding under section 1445 is not a substantive tax and taxpayers must file a return to establish their correct liability.

Definitions (§ 1.1445–1(g))

With respect to the definition of amount realized, commentators suggested that, (1) it should be made clear that "cash paid or to be paid" includes only principal and not interest (stated or unstated) or original issue discount, and (2) the normal expenses of sale should be taken into account. While the former suggestion was adopted, the latter was not on the basis that the statutory language of section 1445(a) did not allow this result.

A clarification was also made in the definition of "date of transfer" to indicate that payments made pursuant to a "contract for deed" constitute payments of consideration.

Section 1.1445–2 Situations Where No Withholding Required; Transferor Not a Foreign Person (§ 1.1445–2 (b))

Section 1.1445–2(b)(1) provides that a transferee may employ "other means" (rather than a certification of non-foreign status) to determine the non-foreign status of the transferor. One commentator suggested that, because the transferee may employ "other means," a transferee would not be considered a person "required" to deduct and withhold tax under section 1461 in the event such transferee refused to employ "other means" and demanded a withholding certificate. In response to this comment the rules under §§ 1.1445–2(b)(1) and 1.1445–5(b)(3) have been clarified to indicate that a transferee need not employ "other means" to fall within the ambit of section 1461.

Section 1.1445–2(b)(2)(ii) requires a foreign corporation that made a section 897(i) election to attach a copy of the acknowledgement to the certification of non-foreign status. A commentator suggested that this requirement be replaced with one requiring that a transferee provide only a sworn statement that a section 897(i) election has been filed. This comment was rejected because the copy of the acknowledgement provides assurance that the section 897(i) election has, in fact, been filed with the Service. In addition, the regulations have been clarified to indicate that the acknowledgement provided by the Service must state that the information required by § 1.897–3 has been determined to be complete.

One commentator suggested that withholding resulting from a belated notice of false certification under § 1.1445–2T(b)(4)(iv) of the Temporary Regulations not be made with respect to an unrelated party that has become a holder in due course of a transferee's obligation. This suggestion has been adopted by indicating in § 1.1445–2(b)(4)(iv) that withholding is to take place only with respect to amounts to be paid to the transferor.

Transferred Property Not a U.S. Real Property Interest (§ 1.1445–2(c))

Section 1.1445–2(c)(2) concerns interests in publicly traded corporations. In response to public comment, rules have been adopted that allow certain dispositions to fall within the publicly traded exception where the disposition is incident to a public offering of stock.

Section 1.1445–2(c)(2) provides that the publicly traded exception does not apply to the acquisition from a single transferor (or related transferors) in a single transaction (or related transactions) of an interest described in § 1.897–1(c)(2)(iii)(B) or of similar interests in publicly traded partnerships or trusts. A commentator suggested that the rule was unclear in its application to a single transferee's acquisition of a number of interests, no one of which alone would be considered an interest described in § 1.897–1(c)(2)(iii)(B), from several transferors. This is clarified by indicating that the term "related" is defined pursuant to § 1.897–1(i). If the transferors are not related, a transferee would not aggregate the interests acquired in determining whether the 5 percent threshold of § 1.897–1(c)(2)(iii)(B) was exceeded.

The reference in § 1.1445–2T(c)(93) of the Temporary Regulations to the notice requirement of § 1.897–2(h)(1)(ii) required that a domestic corporation file timely notices of non-U.S. real propery holding corporation status with the Service as a condition precedent to providing a transferor with a certification that an interest in the corporation is not a U.S. real propery interest. A commentator indicated that if a domestic corporation failed to file timely notices, no method was provided to remedy the failure. The rules of § 1.897–2(h) have been substantially amended and this problem should not be significant under the amended rules.

Pursuant the section 1810(f)(2) of the Tax Reform Act of 1986, the regulations under § 1.1445–2(c)(3) and § 1.1445–5(b)(4)(iii)(A) have been clarified to indicate that a domestic corporation can issue a statement that an interest in the corporation is not a U.S. real property interest if such interest ceases to be a real property interest under section 897(c)(1)(B). Further, a rule regarding belated notice of a false statement has been added.

A commentator suggested that the regulations specifically allow a corporation's status as a non-U.S. real property holding corporation to be used as a basis for an early refund. This was rejected because the Service already has such authority under § 1445(c)(2) and § 1.1445-3(c)(4).

Exceptions to Withholding; Purchase of a Residence of $300,000 or Less (§ 1.1445–2(d)(1))

A commentator suggested that the definition of "residence" is unclear. This definition has been clarified to indicate that a U.S. real property interest is acquired for use as a residence if on the date of the transfer, the transferee has definite plans to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. Days that the property will be vacant are not taken into account.

A suggestion that corporations, partnerships and trusts be allowed to purchase a "residence" was rejected as inconsistent with the intent of section 1445. A suggestion that the definition of a residence include the purchase of land with the intent to build a residence on such land in the future was also rejected for the same reason.

Coordination with Nonrecognition Provisions (§ 1.1445–2(d)(2))

Section 1.1445–2T(d)(2)(ii)(A) of the Temporary Regulations provides that the general rules regarding nonrecognition transactions contained in § 1.1445–2(d)(2)(i) do not apply if the transferee and transferor are related persons within the meaning of § 1.897–1(i). Several commentators suggested that this rule be deleted because it has the effect of requiring withholding on most corporate reorganizations. This suggestion was adopted. Commentators also suggested that § 1.1445–2T(d)(ii)(B) of the Temporary Regulations be deleted. This suggestion was rejected because it is not believed that deletion of this rule should be considered until regulations under section 897 (d) and (e) are published. In the interim, taxpayers may request certificates of reduced withholding from the Service. Finally, comments that the "reason to know" standard of § 1.1445–2T(d)(ii)(C) of the Temporary Regulations be deleted were rejected. The "reason to know" standard is needed to insure that the transferor is in fact entitled to nonrecognition treatment, especially in the case of related party transfers.

Foreclosures (§ 1.1445–2(d)(3))

In response to numerous comments, the special foreclosure rules of § 1.1445–2(d)(3) have been substantially amended. The amendments take the perspective that a transferee in a foreclosure sale should be liable for withholding to the extent of the cash flow (with a limit of 10 percent of the amount realized on the transfer by the transferor) to the nonresident alien debtor.

The rules regarding transfers of a U.S. real property interest pursuant to a deed in lieu of foreclosure have been revised. Generally, withholding equal to 10 percent of the amount realized by the debtor/transferor on the transfer must be withheld by the transferee. However, no withholding is required if: (1) The transferee is the only person with a security interest in the property, (2) no cash or other property (other than incidental fees incurred with respect to the transfer) is paid, directly or indirectly, to any person with respect to the transfer, and (3) the notice requirements of § 1.1445–2(d)(3)(iii) are satisfied. If cash or other property is paid to any person, or a person other than the transferee has a security interest in the property, a certificate of reduced withholding may be requested.

Commentators have indicated that non-creditor purchasers at a foreclosure sale have no means of establishing the debts secured by the property and, thus, cannot determine the "excess amount" under § 1.1445–2T(d)(3)(i)(B). To remedy this problem, the new rules provide as follows. A transferee that acquires a U.S. real property interest in a foreclosure must withhold tax under the general rules of section 1445(a). However, if the transferee complies with certain notice requirements (see, § 1.1445–2(d)(3)(ii) and (iii)), the lesser of the amount withheld or the "alternative amount" (as later defined) need not be reported and paid over to the Service until the 20th day following the final determination by a court or trustee with jurisdiction over the foreclosure action regarding the distribution of the amount realized from the foreclosure.

The "alternative amount" is the entire amount, if any, determined by a court or trustee that accrues to the debtor/transferor out of the amount realized from the foreclosure sale. For this purpose, in determining the amount that accrues to the debtor/transferor, any security interest that is terminated, assumed by another person, or to which the property was subject is not taken into account. Any difference between the amount withheld at the time of the foreclosure sale and the amount to be reported and paid over to the Service should be transferred to the court or trustee with jurisdiction over the foreclosure action.

In order to inform the court or trustee with jurisdiction over the foreclosure action of the transferee's actions with respect to withholding under the special foreclosure rules, the transferee must give the court or trustee notice on the day the property is transferred. The information that must be reported to the court or trustee is set forth in § 1.1445–2(d)(3)(ii)(A). A transferee must also provide notice to the court or trustee regarding the amount that is reported and paid over to the Service. The information that must be reported is set forth in § 1.1445–2(d)(3)(ii)(B).

The general notice requirements with respect to the Service are set forth in § 1.1445–2(d)(3)(iii). A special rule was adopted to ameliorate the reporting requirements for lending institutions that are already required to report with respect to foreclosures. A person required under section 6050J to file Form 1099–A does not have to comply with the notice requirement of § 1.1445–2(d)(3)(iii)(A) if the alternative amount is zero. However, the reporting rules of § 1.1445–2(d)(3)(ii) must be complied with.

Section 1.1445–3 Adjustments to Amount Required To Be Withheld Pursuant to Withholding Certificate; General Rules. (§ 1.1445–3(a))

Section 1.1445–3(a) provides that the Internal Revenue Service has 90 days to respond to an application for a withholding certificate. Many applications have been substantially incomplete when submitted and, thus, require time consuming communication with the applicant and resulting significant delays before sufficient information is presented to the Service in order that action can be taken on the application. Accordingly, § 1.1445–3(a) has been clarified to indicate that the 90-day response period will not begin until an application for a withholding certificate is substantially complete. Clarification of the procedure involving applications for early refunds have also been made. Corresponding changes have been made in § 1.1445–6(a).

Applications for Withholding Certificate (§ 1.1445–3(b))

One commentator suggested that the regulations address the procedure an applicant should follow when the facts relevant to an application for a withholding certificate have changed. This suggestion has been adopted by the addition of new §§ 1.1455–3(f) and 1.1455–6(f).

Agreement for Payment of Tax (§ 1.1455–3(e))

Several commentators have suggested that, with respect to an agreement for the payment of tax under § 1.1445–3(e)(2)(ii) (which covers the amount of tax that would otherwise be required to be withheld pursuant to section 1445(a)), interest accrue from the date the withholding tax would otherwise be due (as opposed to the date the agreement has been entered into). This suggestion has been adopted.

Section 1.1445–3(e)(2)(iii) provides that an agreement for the payment of tax which covers the transferor's maximum tax liability must include agreement for the payment of an additional 25 percent of such liability as security for certain interest and penalties that may accrue. Several commentators suggested that the requirement of agreement to pay the additional 25 percent be deleted. This suggestion was rejected because the additional 25 percent is needed to secure the payment of interest and penalties which would accrue in any case in which the Service actually had to rely upon the security provided (*i.e.*, where the transferor fails to file an income tax return within the prescribed time period.)

Early Refunds (§ 1.1445–3(g))

The provisions regarding early refunds (formerly contained in § 1.1445–3T(f) of the Temporary Regulations) have been clarified to indicate that a request for an early refund may be made at any time prior to the date the transferor's tax return is due (without extensions). Corresponding clarification has been made in § 1.1445–6(g).

Section 1.1445–4 Liability of Agents; Duty To Provide Notice of False Certification or Statement to the Transferee (§ 1.1445–4(a))

Section 1.1445–5(b)(3)(ii) provides that a transferee may rely on a non-foreign certification for two years. A commentator suggested that, if an agent represents a transferor that is a foreign corporation which has provided a non-foreign certificate to a transferee prior to such agent's employment and without his knowledge, the agent should not be liable if the certification is false. This suggestion was adopted in § 1.1445–4(a)(2).

Definition of Transferor's Agent or Transferee's Agent (§ 1.1445–4(f))

Several amendments are made to the definition of transferor's agent and transferee's agent. In response to taxpayer comment, the exclusion for settlement officers and clerical personnel has been expanded to indicate that the obtaining of title insurance reports and reports concerning the condition of the real property (*e.g.*, termite reports) will not cause an escrow company (or any other person performing such tasks) to be considered an agent of the transferee or transferor. Further, the transmission of documents between the parties to the transaction will not cause a person to be considered an agent.

An exclusion from the term "agent" for the board of directors of a cooperative housing corporation and the governing body of a condominium association has been adopted for persons functioning exclusively in their capacity as directors with respect to the transaction. A person is not considered to be acting exclusively in his capacity as a director or governing agent with respect to the transaction, however, if such person provides any business advice relating to the merits of the transaction. A parallel exclusion has been provided for the managing agent of these entities.

Section 1.1445–5 Distributions by Entities Rules of General Application § 1.1445–5(b)(1)

The rules of § 1.1445–5T(b)(1) of the Temporary Regulations have been amended to clarify that if a transfer of a U.S. real property interest is exempt from withholding under the rules of § 1.1445–5, then no withholding is required under the general rules of section 1445(a) and § 1.1445–1.

Coordination With Nonrecognition Provisions (§ 1.1445–5(b)(2))

Section 1.1445–5(b)(2) requires an entity or fiduciary to determine whether gain is to be recognized under section 897 and the applicable nonrecognition provisions. One commenter suggested that an entity or fiduciary be allowed to rely on the foreign interest holder's representation that it is subject to a nonrecognition provision. This suggestion was rejected because the entity or fiduciary is in a better position to make this determination.

Interest Holder not a Foreign Person (§ 1.1445–5(b)(3))

One commentator suggested that the two-year period for reliance on a certification should be increased to three or even four years. This comment was rejected since the period begins to run following the close of the calendar year in which the certification is given and therefore already applies to three calendar years.

Public Offerings of Stock (§ 1.1445–5(b)(4)(ii)

In response to public comment, the rules regarding withholding on interests in publicly traded stock have been clarified with respect to initial public offerings of stock. Parallel rules appear in § 1.1445–2(c)(2).

Effect of Withholding (§ 1.1445–5(b)(7))

One commentator suggested that the regulations clarify the effect of withholding with respect to a disposition of a U.S. real property interest by a U.S. person. Accordingly, the regulations provide in § 1.1445–5(b)(7) that a U.S. person may credit any tax withheld under section 1445(e) against his U.S. income tax liability. Early refunds can also be obtained. Parallel rules appear in § 1.1445–1(f).

Effective Dates—Tiered Partnerships (§ 1.1445–5(b)(8)(vi))

In response to public comment, an effective date rule has been provided with respect to a tiered partnership. The rule provides that no withholding is required upon the disposition of a U.S. real property interest by a partnership which is directly owned, in whole or in part, by another partnership until the effective date of a Treasury Decision published under section 1445(e) providing rules governing this issue.

Dispositions of U.S. Real Property Interests by Domestic Partnerships, Trusts, and Estates (§ 1.1445–5(c)(1)); General rules

The final regulations concerning transactions subject to section 1445(e)(1) have been amended in accordance with sections 311(b)(4) and 1810(f)(4) of the Tax Reform Act of 1986.

Section 1.1445–5(c)(1)(ii) now provides the general rule that a partnership must withhold a tax equal to 34 percent (28 percent during a transition period) of each foreign partner's distributive share of the gain realized by the partnership upon the disposition of each U.S. real property interest. This rule does not apply, however, to dispositions by publicly traded partnerships, which are now subject to special rules set forth in § 1.1445–8T. Further, a partnership that is not publicly traded and that has more than 100 partners may elect to apply the large partnership rules of § 1.1445–5(c)(3).

The rules regarding withholding on a disposition of a U.S. real property interest by a domestic trust or estate have been amended to reflect the fact that a trust or estate is a taxable entity. Section 1.1445–5(c)(1)(iii) requires that a trust or estate establish an account (called the "U.S. real property interest account") in which the gains and losses realized from the disposition of U.S. real property interests during the taxable year of the trust or estate are aggregated. A fiduciary must withhold 34 percent (28 percent during a transition period) of any distribution to a foreign beneficiary that is attributable to the balance in the account on the day of the distribution. Distributions by a trust or estate are deemed to be attributable first to any balance in the U.S. real property interest account and then to other amounts. Amounts remaining in the account at the close of the year are not subject to withholding tax under section 1445 (but they may be subject to U.S. income tax in the hands of the trust).

The rules regarding withholding on dispositions of U.S. real property interests by a grantor trust have also been amended to reflect changes made by the Tax Reform Act of 1986.

Belated Notice of False Certification (§ 1.1445–5(c)(2)(ii)(B))

Section 1.1445–5(c)(2)(ii)(B) provides that, if a partnership or fiduciary receives belated notice of a false certification of non-foreign status, the partnership or fiduciary must withhold the lesser of the amount normally required to be withheld or the amount of the partner's or beneficiary's remaining interest in the income or assets of the partnership. Several commentators expressed concern that this rule would cause partnerships to liquidate prematurely a portion of their assets to satisfy the withholding tax obligation.

While it is acknowledged that the rule contained in § 1.1445–5(c)(2)(ii)(B) may cause some partnerships to liquidate assets prematurely, these situations should be rare and the present rule is needed to assure proper withholding under section 1445(e). Accordingly, the comment was rejected.

The rule in § 1.1445–5T(c)(2)(i)(B)of the Temporary Regulations required amounts withheld under that section to be reported and paid over to the Service within 10 days of the time the partnership or fiduciary learns that the certification is false. One commentator suggested that the 10-day period should be extended to 60 days consistent with §§ 1.1445–5(d)(2)(i)(B) and 1.1445–5(e)(2)(iii)(B). This suggestion was adopted.

Large Partnerships (§ 1.1445–5(c)(3)); In general

The rules regarding large partnerships and large trusts have been amended to reflect changes made by the Tax Reform Act of 1986 and to clarify certain matters. Rules regarding partnerships and trusts, interests in which are regularly traded on an established securities market, and real estate investment trusts have been substantially changed and are therefore being published as temporary and proposed regulations under § 1.1445–8T.

One commentator suggested that the large partnership rules of § 1.1445–5(c)(3) should be available to all partnerships. The comment was rejected because the large partnership rules were intended to apply to larger entities whose numerous transactions would have required multiple filings of complex information. The simplification of the administrative rules with respect to large partnerships is not warranted for small partnerships.

Another commentator suggested that the definition of large partnership contained in § 1.1445–5(c)(3) should have the number of required partners reduced from 100 to 35. This comment was also rejected because no information was provided to justify reducing the number of partners to 35.

In response to a comment, the large partnership rules have been amended in § 1.1445–5(c)(3)(ii) to allow large partnerships and large trusts that make recurring sales of unsevered growing crops and timber to withhold at a 10 percent rate on the total amount realized on such transfers, less the amount of prior distributions relating to such transfers.

Distributions by Foreign Corporations (§ 1.1445–5(d)(1))

Section 1.1445–5(d)(1) generally provides that tax will not be assessed and collected from a foreign corporation distributing a U.S. real property interest under both sections 897 and 1445(e)(2). However, § 1.1445–5(d)(1) of the Temporary Regulations provided that separate penalties for failure to comply with the two sections may be asserted. A commentator suggested that if a foreign corporation has fulfilled the total amount of the substantive tax liability under section 897T(d) by virtue of withholding under section 1445(e)(2), it should not face penalties or interest for failure to file a separate Form 1120F since no tax would be due in any event. This comment was rejected because withholding is not a substitute for filing a return required under section 897.

Belated Notice of False Certification (§ 1.1445–5(e)(2)(iii)(B))

Section 1.1445–5T(e)(2)(iii)(B) of the Temporary Regulations generally provided that with respect to a 10 percent (or greater) shareholder, reliance on a false certification will not be excused and that the corporation may be held "fully liable" under § 1.1445–5T(b)(6) of the Temporary Regulations for failure to withhold. A commentator noted, however, that § 1.1445–5T(e)(2)(iii)(B) further provided, in apparent contradiction, that no penalties arose during a 60-day grace period beginning on the day after the false certification is discovered. This contradiction was clarified by indicating that a corporation will be held fully liable under § 1.1445–5(b)(6) as of (but not before) the date specified in § 1.1445–5(e)(2)(iii)(B).

Regulatory Flexibility Act and Executive Order 12291

Although a notice of proposed rulemaking that solicited public comment was issued, the Internal Revenue Service concluded when the notice was issued that the regulations are interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 did not apply. Accordingly, the final regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6). The Commissioner of Internal Revenue has determined that these regulations are not major regulations subject to Executive Order 12291. Accordingly, a regulatory impact analysis is not required and has not been prepared.

Paperwork Reduction Act

These regulations were submitted to the Office of Management and Budget for review under the Paperwork Reduction Act and approved under OMB number 1545–0902.

Drafting Information

The principal author of this regulation is Jeffrey Dorfman of the Office of the Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.861–1 through 1.997–1

Income taxes, Aliens, Exports, DISC, FSC, Foreign investments in U.S., Foreign tax credit, Sources of income, United States investments abroad.

26 CFR 1.1441–1 through 1.1465–1

Income taxes, Aliens, Foreign corporations.

26 CFR 1.6001 through 1.6109

Income taxes, Administration of procedure, Payment of tax.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

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

Authority: 26 U.S.C. 7805 * * * § 1.1445–5 also issued under 26 U.S.C. 1445 (e)(6).

Par. 2. Section 1.897–1 is amended by revising paragraphs (c)(2)(iii)(A), (d)(2)(i) and (n) to read as follows. Paragraph (c)(2)(iii) is republished.

§ 1.897–1 Taxation of foreign investment in United States real property interests, definition of terms.

* * * * *

(c) *United States real property interest.* * * *

(2) *Exceptions and special rules.* * * *

(iii) *Publicly-traded corporations.* If, at any time during the calendar year, any class of stock of a domestic corporation is regularly traded on an established securities market, an interest in such corporation shall be treated as a U.S. real property interest only in the case of:

(A) A regularly traded interest owned by a person who beneficially owned more than 5 percent of the total fair market value of that class of interests at any time during the five-year period ending either on the date of disposition of such interest or other applicable determination date (or the period since June 18, 1980, in shorter), or

* * * * *

(d) *Interest other than an interest solely as a creditor.* * * *

(2) *Interests in real property other than solely as creditor*—(i) *In general.* An interest in real property other than an interest solely as a creditor includes a fee ownership, co-ownership, or leasehold interest in real property, a time sharing interest in real property, and a life estate, remainder, or reversionary interest in such property. The term also includes any direct or indirect right to share in the appreciation in the value, or in the gross or net proceeds or profits generated by, the real property.

A loan to an individual or entity under the terms of which a holder of the indebtedness has any direct or indirect right to share in the appreciation in value of, or the gross or net proceeds or profits generated by, an interest in real property of the debtor or of a related person is, in its entirety, an interest in real property other than solely as a creditor. An interest in production payments described in section 636 does not generally constitute an interest in real property other than solely as a creditor. However, a right to production payments shall constitute an interest in real property other than solely as a creditor if it conveys a right to share in the appreciation in value of the mineral property. A production payment that is limited to a quantum of mineral (including a percentage of recoverable reserves produced) or a period of time will be considered to convey a right to share in the appreciation in value of the mineral property. The rules of this paragraph (d)(2)(i) are illustrated by the following example.

* * * * *

(n) *Regularly traded.* A class of interests that is traded on an established securities market is considered to be "regularly traded" if it is regularly quoted by brokers or dealers making a market in such interests. A class of interests shall be presumed to be regularly traded if the corporation has a total of 500 or more shareholders. Stock of a corporation that is described in section 851 (a)(1) and units of a unit investment trust registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 to 80b-2) shall be treated as regularly traded on an established securities market. Interests in a domestic entity that are traded on a foreign securities market shall not be considered to be regularly traded on an established securities market unless such interests are—

(1) Traded in registered form, and

(2) Registered pursuant to provisions of the Securities Exchange Act of 1934, 15 U.S.C. 78.

Par. 3. Section 1.897-2 is amended by revising paragraph (b)(2)(v), the first sentence of paragraph (c)(4)(ii), the introductory text of paragraph (g)(1)(ii)(A), the introductory text of paragraph (g)(2)(ii), the first sentence of paragraph (g)(3), and paragraphs (h) and (i) to read as follows. In addition, the date "December 31, 1965" in each of the fourth and fifth sentences of example (1) in paragraph (c)(5) is revised to read "December 31, 1985", and the date "April 7, 1966" in the first and second sentences of example (2) in paragraph (c)(5) is revised to read "April 7, 1986."

§ 1.897-2 United States real property holding corporations.

* * * * *

(b) *U.S. real property holding corporation.* * * *

(2) *Alternative test.* * * *

(v) *Effect on interest-holders and related persons.* For the effect on interest holders and related persons of reliance on a statement issued by a corporation that made a determination as to whether it was a U.S. real property holding corporation under the provisions of § 1.897-2(b), see §§ 1.897-2(g)(1)(ii)(A) and 1.897-2(g)(2)(ii).

* * * * *

(c) *Determination dates for applying U.S. real property holding corporation test.* * * *

(4) *Valuation date methods.* * * *

(ii) *Alternative valuation date method for determination dates other than the last day of the taxable year.* For purposes of paragraph (c)(3)(i) of this section, if an applicable determination date under paragraph (c) (1), (2), or (3) of this section is other than the last day of the taxable year, property may be valued as of the later of the last day of the previous taxable year or the date such property was acquired.

* * * * *

(g) *Establishing that a corporation is not a U.S. real property holding corporation.* * * *

(1) *Foreign persons disposing of interest* * * *

(ii) *Statement from corporation*—(A) *In general.* A foreign person disposing of an interest in a domestic corporation may establish that the interest was not a U.S. real property interest as of the date of the disposition by requesting and obtaining from the corporation a statement that the interest was not a U.S. real property interest as of that date. However, a corporation's statement shall not be valid for purposes of this rule, and thus may not be relied upon for purposes of establishing that an interest was not a U.S. real property interest, unless the corporation complies with the notice requirements of paragraph (h) (2) or (h)(4) of this section.

* * * * *

(2) *Corporations determining U.S. real property holding corporation status.* * * *

(ii) *Statement from corporation.* A corporation may determine whether or not an interest in a second corporation was a U.S. real property interest as of its own determination date by obtaining from the second corporation's a statement that the interest was not a U.S. real property interest as of that date. However, the second corporation statement shall not be valid for purposes of this rule, and thus may not be relied upon for purposes of establishing that an interest was not a U.S. real property interest, unless such corporation complies with the notice requirements of paragraph (h)(2) or (h)(4) of this section

* * * * *

(3) *Requirements not applicable.* If at any time during the calendar year any class of stock of a corporation is regularly traded on an established securities market, the requirements of this paragraph (g) shall not apply with respect to any holder of an interest in such corporation other than a person who holds an interest described in § 1.897-1(c)(2)(iii) (A) or (B). * * *

* * * * *

(h) *Notice requirements applicable to corporations*—(1) *Statement to foreign interest-holder*—(i) *In general.* A domestic corporation must, within a reasonable period after receipt of a request from a foreign person holding an interest in it, inform that person whether the interest constitutes a U.S. real property interest. No particular form is required for this statement, which need only indicate the corporation's determination. The statement must be dated and signed by a responsible corporate officer who must verify under penalties of perjury that the statement is correct to his knowledge and belief.

(ii) *Required determination.* For purposes of the statement required by paragraph (h)(1)(i) of this section, an interest in a corporation is a U.S. real property interest if the corporation was a U.S. real property holding corporation on any determination date during the 5-year period ending on the date specified in the interest-holder's request, or on the date such request was received if no date is specified (or during such shorter period ending on the date that is applicable pursuant to section 897(c)(1)(A)(ii). However, an interest in a corporation is not a U.S. real property interest if such interest is excluded under section 897(c)(1)(B).

(2) *Notice to the Internal Revenue Service.* If a foreign interest holder requests that a domestic corporation provide a statement described in paragraph (h)(1) of this section, then such corporation must provide a notice to the Internal Revenue Service in accordance with this paragraph (h)(2). No particular form is required for such notice, but the following must be provided:

(i) A statement that the notice is provided pursuant to the requirements of § 1.897-2(h)(2);

(ii) The name, address, and identifying number of the corporation providing the notice;

(iii) The name, address, and identifying number (if any) of the foreign interest holder that requested the statement (this information may be omitted from the notice if fully set forth in the statement to the foreign interest holder attached to the notice).

(iv) Whether the interest in quesiton is a U.S. real property interest;

(v) A statement signed by a responsible corporate officer verifying under penalties of perjury that the notice (including any attachments thereto) is correct to his knowledge and belief. A copy of any statement provided to the foreign interest holder must be attached to the notice. The notice must be mailed to the Assistant Commissioner (International), Director, Office of Compliance, OP:I:C:E:666, 1325 K Street, NW., Washington, DC 20225 on or before the 30th day after the statement referred to in § 1.897-2(h)(1) is mailed to the interest holder that requested it. Failure to mail such notice within the time period set forth in the preceding sentence will cause the statement provided pursuant to § 1.897-2(h)(1) to become an invalid statement.

(3) *Requirements not applicable.* The requirements of this paragraph (h) do not apply to domestically-controlled REITS, as defined in section 897(h)(4)(B). These requirements also do not apply to a corporation any class of stock in which is regularly traded on an established securities market at any time during the calendar year. However, such a corporation may voluntarily choose to comply with the requirements of paragraph (h)(4) of this section.

(4) *Voluntary notice to Internal Revenue Service*—(i) *In general.* A domestic corporation which determines that it is not a U.S. real property holding corporation—

(A) on each of the applicable determination dates in a taxable year, or

(B) pursuant to section 897(c)(1)(B), may attach to its income tax return for that year a statement informing the Internal Revenue Service of its determination. A corporation that has provided a voluntary notice described in this § 1.897-2(h)(4)(i) for the immediately preceding taxable year and that does not have an event described in § 1.897-2(c)(1) (ii), (iii) or (iv) prior to receiving a request from a foreign person under § 1.897-2(h)(1), is exempt from the notice requirement of § 1.897-2(h)(2).

(ii) *Early termination of real property holding corporation status.* A corporation that determines during the course of its taxable year that interests in it have ceased to be U.S. real property interests pursuant to the rules of section 897(c)(1)(B) may, on the day of its determination or thereafter, provide a statement to the Assistant Commissioner (International); Director, Office of Compliance, OP:I:C:O: 666; 950 L'Enfant Plaza South, SW.; COMSAT Building; Washington, DC 20024, informing the Service of its determination. No particular form is required but the statement must set forth the corporation's name, address, identification number, a brief statement regarding its determination and the date such determination was made. Such statement will enable foreign interest-holders to dispose of their interests without being subject to section 897(a), as provided in paragraph (g) of this section.

(5) *Supplemental statements*—(i) *By corporations with substantial intangible assets.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if—

(A) Such corporation values any of the intangible assets described in § 1.897-1(f)(1)(ii) (other than goodwill or going concern value) by a method other than the purchase price or book value methods described in § 1.897-1(o)(4); and

(B) The fair market value of such intangible assets equals or exceeds 25 percent of the total of the fair market values of the assets the corporation is considered to hold in accordance with the provisions of paragraphs (d) and (e) of this section.

The supplemental statement must inform the Internal Revenue Service that the corporation meets the criteria of subdivisions (A) and (B) of this paragraph (h)(5)(i), and must summarize the methods and calculations upon which the corporation's determination of the fair market value of its intangible assets is based. In addition, the supplemental statement must list any intangible assets that were purchased from any person that have been valued by the corporation at an amount other than their purchase price, and must provide a justification for such a departure from the purchase price. The supplemental statement must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(ii) *Corporation not valuing goodwill or going concern value at purchase price.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if such corporation values goodwill or going concern value pursuant to § 1.897-1(o)(4)(iii). The supplemental statement must set forth that it is made pursuant to this paragraph (h)(5)(ii), and must summarize the methods and calculations upon which the corporation's determination of the fair market value of such intangible assets is based. In addition, the supplemental statement must list any such assets that were purchased from any person that have been valued by the corporation at an amount other than their purchase price, and must provide a justification for such a departure from the purchase price. The supplemental statement must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(iii) *Corporation using alternative U.S. real property holding corporation test.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if—

(A) Such corporation utilizes the rule of paragraph (b)(2) of this section (regarding the book values of assets held by the corporation) to presume that it is not a U.S. real property holding corporation; and

(B) Such corporation is engaged in or is planning to engage in a trade or business of mining, farming, or forestry, or of buying and selling or developing real property, or of leasing real property to tenants.

The supplemental statement must inform the Internal Revenue Service that the corporation meets the criteria of subdivisions (A) and (B) of this paragraph (h)(5)(iii), and must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(iv) *Corporation determining real property holding corporation status of second corporation.* A corporation that is subject to the requirements of paragraph (h)(2) of this section (or that voluntarily complies with the requirements of paragraph (h)(4) of this section) must submit a supplemental statement to the Internal Revenue Service if such corporation independently determines whether or not an interest in a second corporation is a U.S. real property interest, pursuant to paragraph (g)(2)(iv) of this section. The supplemental statement must set forth that it is made pursuant to this paragraph (h)(5)(iv) and must briefly summarize the facts upon which the corporation's determination is based and the sources of the information relied upon by the corporation. The supplemental statement must be attached to or incorporated in the statement provided under paragraph (h)(2) or (h)(4) of this section.

(i) *Transition Rules*—(1) *General waiver of penalties for failure to file.* If a foreign person disposed of an interest in a domestic corporation between June 18, 1980 and January 23, 1987, and such person establishes under the rules of paragraph (g) of this section at any time that the interest disposed of was not a U.S. real property interest, then such person shall not be subject to tax under section 897 and shall not be subject to penalties (or interest) for failure to file an income tax return with respect to such disposition.

(2) *Foreign persons that met the requirements of prior regulations.* A foreign person that disposed of an interest in a domestic corporation between June 18, 1980 and January 23, 1987, shall be deemed to have satisfied the requirements of paragraph (g) of this section with respect to such disposition if such person established under prior temporary or prior final regulations issued under section 897 that the interest disposed of was not a U.S. real property interest.

* * * * *

§ 1.897-3 [Amended]

Par. 4. Section 1.897-3(a) is amended by revising the reference therein to "§ 1.1445-7T" to read "§ 1.1445-7." Section 1.897-3(c)(4) is amended by revising the reference therein to "§ 1.897-1(c)(2) (i) or (ii)" to read "§ 1.897-1(c)(2)(iii) (A) or (B)."

Par. 5. The following sections are added immediately after § 1.1443-1.

§ 1445-1 Withholding on dispositions of U.S. real property interests by foreign persons: In general (temporary).

(a) *Purpose and scope of regulations.* These regulations set forth rules relating to the withholding requirements of section 1445. In general, section 1445(a) provides that any person who acquires a U.S. real property interest from a foreign person must withhold a tax of 10 percent from the amount realized by the transferor foreign person (or a lesser amount established by agreement with the Internal Revenue Service). Section 1445(e) provides special rules requiring withholding on distributions and certain other transactions by corporations, partnerships, trusts, and estates. This § 1.1445-1 provides general rules concerning the withholding requirement of sections 1445(a), as well as definitions applicable under both section 1445(a) and 1445(e). Section 1.1445-2 provides for various situations in which withholding is not required under section 1445(a). Section 1.1445-3 provides for adjustments to the amount required to be withheld by transferees under section 1445(a). Section 1.1445-4 prescribes the duties of agents in transactions subject to withholding under either section 1445(a) or 1445(e). Section 1.1445-5 provides rules concerning the withholding required under section 1445(e), while § 1.1445-6 provides for adjustments to the amount required to be withheld under section 1445(e). Finally, § 1.1445-7 provides rules concerning the treatment of a foreign corporation that has made an election under section 897(i) to be treated as a domestic corporation.

(b) *Duty to withhold*—(1) *In general.* Transferees of U.S. real property interests are required to deduct and withhold a tax equal to 10 percent of the amount realized by the transferor, if the transferor is a foreign person and the disposition takes place on or after January 1, 1985. Neither the transferee's duty to withhold nor the amount required to be withheld is affected by the amount of cash to be paid by the transferee. Amounts withheld must be reported and paid over in accordance with the requirements of paragraph (c) of this section. Failures to withhold and pay over are subject to the liabilities set forth in paragraph (e) of this section. If two or more persons are joint transferees of a U.S. real property interest, each such person is subject to the obligation to withhold. That obligation is fulfilled with respect to each such person if any one of them withholds and pays over the required amount in accordance with the rules of this section. If the amount realized (as defined in paragraph (g)(5) of this section) by the transferor is zero, then no withholding is required. For example, if a real property interest is transferred as a gift (i.e. the recipient does not assume any liabilities or furnish any other consideration to the transferor) then no withholding is required. Withholding is not required with respect to dispositions that takes place before January 1, 1985, even if the first payment of consideration is made after December 31, 1984.

(2) *U.S. real property interest owned jointly by foreign and non-foreign transferors.* The amount subject to withholding under paragraph (b)(1) of this section with respect to the transfer of a U.S. real property interest owned by one or more foreign persons (as defined in § 1.897-1(k)) and one or more non-foreign persons shall be determined by allocating the amount realized from the transfer between (or among) such transferors based upon the capital contribution of each transferor with respect to the property and by aggregating the amounts allocated to any foreign person (or persons). For this purpose, a husband and wife will each be deemed to have contributed 50 percent of the aggregate capital contributed by such husband and wife. See § 1.1445-1(f)(3)(iv) with respect to the crediting of the amount withheld between or among joint foreign transferors.

(3) *Options to acquire a U.S. real property interest.*—

(i) *No withholding on grant of option.* No withholding is required under section 1445 with respect to any amount realized by the grantor on the grant of an option to acquire a U.S. real property interest.

(ii) *No withholding upon lapse of option.* No withholding is required under section 1445 with respect to any amount realized by the grantor upon the lapse of an option to acquire a U.S. real property interest.

(iii) *Withholding required upon the sale or exchange of option.* A transferee of an option to acquire a U.S. real property interest must deduct and withhold a tax equal to 10 percent of the amount realized by the transferor upon the disposition. This § 1.1445-1(b)(3)(iii) does not apply to require withholding upon the initial grant of an option.

(iv) *Withholding required on exercise of option.* If the holder exercises an option to purchase a U.S. real property interest, the amount paid for the option shall be considered an amount realized by the grantor/transferor upon the transfer of the property with respect to which the option was granted, and shall thus be subject to withholding on the day that such underlying property is transferred. The preceding sentence applies regardless of whether or not the terms of the option specifically provide that the option price is applied to the purchase price.

(4) *Exceptions and modifications.* The duty to withhold under section 1445(a) is subject to the exceptions and modifications contained in §§ 1.1445–2 and 1.1145–3. Generally, § 1.1445–2 provides rules for determining that withholding is not required because either the transferor is not a foreign person or the interest transferred is not a U.S. real property interest. In addition, § 1.1445–2 provides exceptions to the withholding requirement, including a rule that exempts from withholding any person who acquires a U.S. real property interest for use as a residence for a contract price of $300,000 or less. If withholding is required under section 1445(a), § 1.1445–3 allows the amount withheld to be modified pursuant to a withholding certificate issued by the Internal Revenue Service. If a transferee cannot withhold the full amount required because the first payment of consideration for the transfer does not involve sufficient cash (or other liquid assets convertible into cash, such as foreign currency), then a withholding certificate must be obtained pursuant to § 1.1445–3.

(c) *Reporting and paying over of withheld amounts*—(1) *In general.* A transferee must report and pay over any tax withheld by the 20th day after the date of the transfer. Forms 8288 and 8288–A are used for this purpose, and must be filed with the Internal Revenue Service Center, Philadelphia, PA, 19255. Pursuant to section 7502 and regulations thereunder, the timely mailing of Forms 8288 and 8228–A will be treated as their timely filing. Form 8288–A will be stamped by the IRS to show receipt, and a stamped copy will be mailed by the IRS to the transferor (at the address reported on the form) for the transferor's use. See §§ 1.1445–1(f) and 1.1445–3(f).

(2) *Pending application for withholding certificate*—(i) *In general.*

(A) *Delayed reporting and payment with respect to application submitted by transferee.* If an application for a withholding certificate with respect to a transfer of a U.S. real property interest is submitted to the Internal Revenue Service by the transferee on the day of or at any time prior to the transfer, the transferee must withhold 10 percent of the amount realized as required by paragraph (b) of this section. However, the amount withheld, or a lesser amount as determined by the Service, need not be reported and paid over to the Service until the 20th day following the Service's final determination with respect to the application for a withholding certificate. For this purpose, the Service's final determination occurs on the day when the withholding certificate is mailed to the transferee by the Service or when a notification denying the request for a withholding certificate is mailed to the transferee by the Service. An application is submitted to the Service on the day it is actually received by the Service at the address provided in § 1.1445–1(g)(10) or, under the rules of section 7502, on the day it is mailed to the Service at the address provided in § 1.1445–1(g)(10).

(B) *Delayed reporting and payment with respect to application submitted by transferor.* If an application for a withholding certificate with respect to a transfer of a U.S. real property interest is submitted to the Internal Revenue Service by the Transferor on the day of or any time prior to the transfer, such transferor must provide notice to the transferee prior to the transfer. No particular form is required but the notice must set forth the name, address, and taxpayer identification number, if any, of the transferor, a brief description of the property which is the subject of the application, and the date the application was submitted to the Service. The transferee must withhold 10 percent of the amount realized as required in paragraph (b) of this section but need not report or pay over to the Service such amount (or a lesser amount as determined by the Service) until the 20th day following the Service's final determination with respect to the application.

The Service will send a copy of the withholding certificate or copy of the notification denying the request for a withholding certificate to the transferee. For this purpose, the Service's final determination will be deemed to occur on the day when the copy of the withholding certificate or the copy of the notification denying the request for a withholding certificate is mailed by the Service to the transferee (or transferees). An application is submitted to the Service on the day it is actually received by the Service at the address provided in § 1.1445–1(g)(10) or, under the rules of § 7502, on the day it is mailed to the Service at the address provided in § 1.1445–1(g)(10).

(ii) *Anti-abuse rule (A) In general.* A transferee that in reliance upon the rules of this paragraph (c)(2) fails to report and pay over amounts withheld by the 20th day following the date of the transfer, shall be subject to the payment of interest and penalties if the relevant application for a withholding certificate (or an amendment to the application for a withholding certificate) was submitted for a principal purpose of delaying the transferee's payment to the IRS of the amount withheld. Interest and penalties shall be assessed on the amount that is ultimately paid over (or collected pursuant to the agreement) with respect to the period between the 20th day after the date of the transfer and the date on which payment is made (or collected).

(B) *Presumption.* A principal purpose of delaying payment of the amount withheld shall be presumed if—

(*1*) The transferee applies for a withholding certificate pursuant to § 1.1445–3T(c) based on a determination of the transferor's maximum tax liability, and

(*2*) Such liability is ultimately determined to be equal to 90 percent or more of the amount that was otherwise required to be withheld and paid over. However, the presumption created by the previous sentence may be rebutted by evidence establishing that delaying payment of the amount withheld was not a principal purpose of the transaction.

(d) *Contents of Forms 8288 and 8288–A*—(1) *Transactions subject to section 1445(a).* Any person that is required to file Forms 8288 and 8288–A pursuant to section 1445(a) and the rules of this section must set forth thereon the following information:

(i) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of any entity) of the transferee(s) filing the return;

(ii) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of any entity) of the transferor(s);

(iii) A brief description of the U.S. real property interest transferred, including its location and the nature of any substantial improvements in the case of real property, and the class or type and amount of interests transferred in the case of interests in a corporation that constitute U.S. real property interests;

(iv) The date of the transfer;

(v) The amount realized by the transferor, as defined in paragraph (g)(5) of this section;

(vi) The amount withheld by the transferee and whether withholding is at the statutory or reduced rate; and

(vii) Such other information as the Commissioner may require.

For purposes of paragraph (d)(1) (i) and (ii), mailing addresses may be provided in addition to, but not in lieu of, home addresses or office addresses.

(2) *Transactions subject to section 1445(e).* Any person that is required to file Forms 8288 and 8288–A pursuant to the rules of § 1.1445–5 must set forth thereon the following information:

(i) The name, identifying number (if any), and office address of the entity or fiduciary filing the return;

(ii) The amount withheld by the entity or fiduciary;

(iii) The date of the transfer;

(iv) In the case of a transaction subject to withholding pursuant to section 1445(e)(1) and § 1.1445–5(c):

(A) A brief description of the U.S. real property interest transferred, as described in paragraph (d)(1)(iii) of this section;

(B) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of each holder of an interest in the entity that is a foreign person; and

(C) Each such interest-holder's pro rata share of the amount withheld;

(v) In the case of a distribution subject to withholding pursuant to section 1445(e)(2) and § 1.1445–5(d):

(A) A brief description of the U.S. real property interest transferred, as described in paragraph (d)(1)(iii) of this section; and

(B) The amount of gain recognized upon the distribution by the corporation.

(vi) In the case of a distribution subject to withholding pursuant to section 1445(e)(3) and § 1.1445–5(e):

(A) A brief description of the property distributed by the corporation;

(B) The name, identifying number (if any), and home address (in case of an individual) or office address (in the case of an entity) of each holder of an interest in the entity that is a foreign person;

(C) The amount realized upon the distribution by each such foreign interest holder; and

(D) Each foreign interest-holder's pro rata share of the amount withheld; and

(vii) Such other information as the Commissioner may require.

(e) *Liability of transferee upon failure to withhold*—(1) *In general.* Every person required to deduct and withhold tax under section 1445 is made liable for that tax by section 1461. Therefore, a person that is required to deduct and withhold tax but fails to do so may be held liable for the payment of the tax and any applicable penalties and interest.

(2) *Transferor's liability not otherwise satisfied*—(i) *Tax and penalties.* Except as provided in paragraph (e)(3) of this section, if a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then the tax shall be assessed against and collected from that transferee. Such person may also be subject to any of the civil and criminal penalties that apply. Corporate officers or other responsible persons may be subject to a civil penalty under section 6672 equal to the amount that should have been withheld and paid over.

(ii) *Interest.* If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then such transferee shall be liable for the payment of interest pursuant to section 6601 and the regulations thereunder. Interest shall be payable with respect to the period between—

(A) The last date on which the tax imposed under section 1445 was required to be paid over by the transferee, and

(B) The date on which such tax is actually paid. Interest shall be payable with respect to the entire amount that is required to be deducted and withheld. However, if the Service issues a withholding certificate providing for withholding of a reduced amount, then, for the period after the issuance of the certificate, interest shall be payable with respect to that reduced amount.

(3) *Transferor's liability otherwise satisfied*—(i) *Tax and penalties.* If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, and the transferor's tax liability with respect to the transfer was satisfied (or was established to be zero) by—

(A) The transferor's filing of an income tax return (and payment of any tax due) with respect to the transfer, or

(B) The issuance of a withholding certificate by the Internal Revenue Service establishing that the transferor's maximum tax liability is zero,

then the tax required to be withheld under section 1445 shall not be collected from the transferee. Such transferee's liability for tax, and the requirement that such person file Forms 8288 and 8288–A, shall be deemed to have been satisfied as of the date on which the transferor's income tax return was filed or the withholding certificate was issued. No penalty shall be imposed on or collected from such person for failure to return or pay the tax, unless such failure was fraudulent and for the purpose of evading payment. A transferee that seeks to avoid liability for tax and penalties pursuant to the rule of paragraph (e)(3)(i) must provide sufficient information for the Service to determine whether the transferor's tax liability was satisfied (or was established to be zero).

(ii) *Interest.* If a transferee is required to deduct and withhold tax under section 1445 but fails to do so, then such person shall be liable for the payment of interest under section 6601 and regulations thereunder. Such transferee's liability for the payment of interest shall not be excused by reason of the deemed satisfaction, pursuant to subdivision (i) of this paragraph (e)(3), of the transferee's liability under section 1445, because the deemed satisfaction of that liability is the equivalent of the late payment of a liability, on which interest must be paid. Interest shall be payable with respect to the period between—

(A) The last date on which the tax imposed under section 1445 was required to be paid over, and

(B) The date (established from information supplied to the Service by the transferee) on which any tax due is paid with respect to the transferor's relevant income tax return, or the date the withholding certificate is issued establishing that the transferor's maximum tax liability is zero.

Interest shall be payable with respect to the entire amount that is required to be deducted and withheld. However, if the Service issues a withholding certificate providing for withholding of a reduced amount, then for the period after the issuance of the certificate interest shall be payable with respect to that reduced amount.

(4) *Coordination with entity with holding rules.* For purposes of section 1445(e) and §§ 1.1445–5, 1.1445–6, 1.1445–7, and 1.1445–8, the rules of this paragraph (e) shall be applied by—

(i) Substituting the words "person required to withhold" for the word "transferee" each place it appears in this paragraph (e), and

(ii) Substituting the words "person subject to withholding" for the word "transferor" each place it appears in this paragraph (e).

(f) *Effect of withholding on transferor.*—(1) *In general.* The withholding of tax under section 1445(a) does not excuse a foreign person that disposes of a U.S. real property interest from filing a U.S. tax return with respect to the income arising from the disposition. Form 1040NR, 1041, or 1120F, as appropriate, must be filed, and any tax due must be paid, by the filing deadline generally applicable to such person. (The return may be filed by such later date as is provided in an extension granted by the Internal Revenue Service.) Any tax withheld under section 1445(a) shall be credited against the amount of income tax as computed in such return.

(2) *Manner of obtaining credit or refund.* A stamped copy of Form 8288–A will be provided to the transferor by the Service (under paragraph (c) of this section), and must be attached to the transferor's return to establish the amount withheld that is available as a credit. If to establish the amount with that is available as a credit. If the amount withheld under section 1445(a) constitutes less than the full amount of the transferor's U.S. tax liability for that taxable year, then a payment of estimated tax may be required to be made pursuant to section 6154 or 6654 prior to the filing of the income tax return for that year. Alternatively, if the amount withheld under section 1445(a) exceeds the transferor's maximum tax liability with respect to the disposition (as determined by the IRS), then the transferor may seek an early refund of the excess pursuant to§ 1.1445–3(g), or a normal refund upon the filing of a tax return.

(3) *Special rules*—(i) *Failure to receive Form 8288–A.* If a stamped copy of Form 8288–A has not been provided to the transferor by the Service, the transferor may establish the amount of tax withheld by the transferee by attaching to its return substantial evidence (*e.g.*, closing documents) of such amount. Such a transferor must attach to its return a statement which supplies all of the information required by § 1.1445–1(d) (except such information that was not obtained after a diligent effort).

(ii) *U.S. persons subjected to withholding.* If a transferee withholds tax under section 1445(a) with respect to a person who is not a foreign person, such person may credit the amount of any tax withheld against his income tax liability in accordance with the provisions of this § 1.1145–1(f) or apply for an early refund under 1.1445–3(f).

(iii) *Refund in case of installment sale.* A transferor that takes gain into account in accordance with the provisions of section 453 shall not be entitled to a refund of the amount withheld, unless a withholding certificate providing for such a refund is obtained from the Internal Revenue Service pursuant to the provisions of § 1.1445–3.

(iv) *Joint foreign transferors.* If two or more foreign persons jointly transfer a U.S. real property interest, each transferor shall be credited with such portion of the amount withheld as such transferors mutually agree. Such transferors must request that the transferee reflect the agreed-upon crediting of the amount withheld on the Forms 8288–A filed by the transferee. If the foreign transferors fail to request that the transferee reflect the agreed-upon crediting of the amount withheld by the 10th day after the date of transfer, the transferee must credit the amount withheld equally between (or among) the foreign transferors. In such case, the transferee is indemnified pursuant to section 1461 against any claim by a transferor objecting to the resulting division of credits. For rules regarding the amount realized allocated to joint foreign and non-foreign transferors, see § 1.1445–1(b)(2).

(g) *Definitions*—(1) *In general.* Unless otherwise specified, the definitions of terms provided in § 1.897–1 shall apply for purposes of this section and §§ 1.1445–2 through 1.1445–7. For purposes of section 1445 and the regulations thereunder, definitions of other relevant terms are provided in this paragraph (g). In addition, the term "residence" is defined in 1.1445–2(d)(1), the terms "transferor's agent" and "transferee's agent" are defined in 1.1445–4(f), and the term "relevant taxpayer" is defined in 1.1445–6(a)(2).

(2) *Transfer.* The term "transfer" means any transaction that would constitute a disposition for any purpose, of the Internal Revenue Code and regulations thereunder. For purposes of §§ 1.1445–5 and 1.1445–6, the term includes distribution to shareholders of a corporation, partners of a partnership and beneficiaries of a trust or estate.

(3) *Transferor.* The term "transferor" means any person, foreign or domestic, that disposes of a U.S. real property interest by sale, exchange, gift, or any other transfer. The term "U.S. real property interest" is defined in § 1.897–1(c).

(4) *Transferee.* The term "transferee" means any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.

(5) *Amount realized.* The amount realized by the transferor for the transfer of a U.S. real property interest is the sum of.

(i) The cash paid, or to be paid.

(ii) The fair market value of other property transferred, or to be transferred, and

(iii) The outstanding amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer.

The term "cash paid or to be paid" does not include stated or unstated interest or original issue discount (as determined under the rules of sections 1271 through 1275).

(6) *Contract price.* The contract price of a U.S. real property interest is the sum that is agreed to by the transferee and transferor as the total amount of consideration to be paid for the property. That amount will generally be equal to the amount realized by the transferor, as defined in paragraph (b)(5) of this section.

(7) *Fair market value.* The fair market value of property means the price at which the property would change hands between an unrelated willing buyer and willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all relevant facts.

(8) *Date of transfer.* The date of transfer of a U.S. real property interest is the first date on which consideration is paid (or a liability assumed) by the transferee. However, for purposes of section 1445(e) (2), (3), and (4) and §§ 1.1445–5(c)(1)(iii) and 1.1445–5(c)(3) only, the date of transfer is the date of the distribution that gives rise to the obligation to withhold. For purposes of this paragraph (g)(8), the payment of consideration does not include the payment, prior to the passage of legal or equitable title (other than pursuant to an initial contract for purchase), of earnest money, a good-faith deposit, or any similar sum that is primarily intended to bind the transferee or transferor to the entering or performance of a contract. Such a payment will not constitute a payment of consideration solely because it may ultimately be applied against the amount owed to the transferor by the transferee. Such a payment is presumed to be earnest money, a good faith deposit, or a similar sum if it is subject to forfeiture in the event of a failure to enter into a contract or a breach of contract. However, a payment that is not forefeitable may nevertheless be found to constitute earnest money, a good faith deposit, or a similar sum.

(9) *Identifying number.* Pursuant to § 1.897–1(p), an individual's identifying number is the social security number (or the identification numbers assigned by the Internal Revenue Service). The identifying number of any other person is its United States employer identification number.

(10) *Address of Assistant Commissioner (International).* Any written communication directed to the Assistant Commissioner (International) is to be addressed as follows: Assistant Commissioner (International); Director, Office of Compliance, OP:I:C:E:666; 950 L'Enfant Plaza South, SW.; COMSAT Building; Washington, DC 20024.

§ 1.1445-2 Situations in which withholding is not required under section 1445(a).

(a) *Purpose and scope of section.* This section provides rules concerning various situations in which withhold is not required under section 1445(a). In general, a transferee has a duty to withhold under section 1445(a) only if both of the following are true:

(1) The transferor is a foreign person: and

(2) The transferee is acquiring a U.S. real property interest.

Thus, paragraphs (b) and (c) of this section provide rules under which a transferee of property can ascertain that he has no duty to withhold because one or the other of the two key elements is missing. Under paragraph (b), a transferee may determine that no withholding is required because the transferor is not a foreign person. Under paragraph (c), a transferee may determine that no withholding is required because the property acquired is not a U.S. real property interest. Finally, paragraph (d) of this section provides rules concerning exceptions to the withholding requirement.

(b) *Transferor not a foreign person*—(1) *In general.* No withholding is required under section 1445 if the transferor of a U.S. real property interest is not a foreign person. Therefore, paragraph (b)(2) of this section provides rules pursuant to which the transferor can provide a certification of non-foreign status to inform the transferee that withholding is not required. A transferee that obtains such a certification must retain that document for five years, as provided in paragraph (b)(3) of this section. Except to the extent provided in paragraph (b)(4) of this section, the obtaining of this certification excuses the transferee from any liability otherwise imposed by section 1445 and § 1.1445-1(e). However, section 1445 and the rules of this section do not impose any obligation upon a transferee to obtain a certification from the transferor, thus, a transferee may instead rely upon other means to ascertain the non-foreign status of the transferor. If, however, the transferee relies upon other means and the transferor was, in fact, a foreign person, then the transferee is subject to the liability imposed by section 1445 and § 1.1445-1(e).

A transferee is in no event required to rely upon other means to ascertain the non-foreign status of the transferor and may demand a certification of non-foreign status. If the certification is not provided, the transferee may withhold tax under section 1445 and will be considered, for purposes of sections 1461 through 1463, to have been required to withhold such tax.

(2) *Transferor's certification of non-foreign status*—(i) *In general.* A transferee of a U.S. real property interest is not required to withhold under section 1445(a) if, prior to or at the time of the transfer, the transferor furnishes to the transferee a certification that—

(A) States that the transferor is not a foreign person.

(B) Sets forth the transferor's name, identifying number and home address (in the case of an individual) or office address (in the case of an entity), and

(C) Is signed under penalties of perjury.

In general, a foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, but not a resident alien individual. In this regard, see § 1.897-1(k). However, a foreign corporation that has made a valid election under section 897(i) is generally not treated as a foreign person for purposes of section 1445. In this regard, see § 1.1445-7. Pursuant to § 1.897-1(p), an individual's identifying number is the individual's Social Security number and any other person's identifying number is its U.S. employer identification number. A certification pursuant to this paragraph (b) must be vertified as true and signed under penalties of perjury by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee, executor, or equivalent fiduciary in the case of a trust or estate. No particular form is needed for a certification pursuant to this paragraph (b), nor is any particular language required, so long as the document meets the requirements of this paragraph (b)(2)(i). Samples of acceptable certifications are provided in paragraph(b)(2)(iii) of this section.

(ii) *Foreign corporation that "has made election under section 897(i).* A foreign corporation that has made a valid election under section 897(i) to be treated as a domestic corporation for purposes of section 897 may provide a certification of non-foreign status pursuant to this paragraph (b)(2). However, an electing foreign corporation must attach to such certification a copy of the acknowledgment of the election provided to the corporation by the Internal Revenue Service pursuant to § 1.897-3(d)(4).

An acknowledgment is valid for this purpose only if it states that the information required by § 1.897-3 has been determined to be complete.

(iii) *Sample certifications*—(A) *Individual transferor.* "Section 1445 of the Internal Revenue Code provides that a transferee (buyer) of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee (buyer) that withholding of tax is not required upon my disposition of a U.S. real property interest, I, [*name of transferor*], hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;

2. My U.S. taxpayer identifying number [Social Security number] is ———; and

3. My home address is:

———

———

I understand that this certification may be disclosed to the Internal Revenue Service by the transferee and that any false statement I have made here could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete. [Signature and Date]"

(B) *Entity transferor.* "Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest by [*name of transferor*], the undersigned hereby certifies the following on behalf of [*name of transferor*]:

1. [*Name of transferor*] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations]:

2. [*Name of transferor*]'s U.S. employer identification number is ———, and

3. [*Name of transferor*]'s office address is

———

[*Name of transferor*] understands that this certification may be disclosed to the Internal Revenue Service by transferee and that any false statement contained herein could be punished by fine, imprisonment or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct and complete, and I further declare that I have authority to sign this document on behalf of [*name of transferor*]. [Signature and date] [Title ———]

(3) *Transferee must retain certification.* If a transferee obtains a transferor's certification pursuant to the rules of this paragraph (b), then the transferee must retain that certification until the end of the fifth taxable year following the taxable year in which the transfer takes place. The transferee must retain the certification, and make it avaliable to the Internal Revenue Service when requested in accordance with the requirements of section 6001 and regulations thereunder.

(4) *Reliance upon certification not permitted*—(i) *In general.* A transferee may not rely upon a transferor's certification pursuant to this paragraph (b) under the circumstances set forth in either subdivision (ii) or (iii) of this paragraph (b)(4). In either of those circumstances, a transferee's withholding obligation shall apply as if a certification had never been obtained, and the transferee is fully liable pursuant to section 1445 and § 1.1445-1(e) for any failure to withhold.

(ii) *Failure to attach IRS acknowledgment of election.* A transferee that knows that the transferor is a foreign corporation may not rely upon a certification of non-foreign status provided by the corporation on the basis of election under section 897(i), unless there is attached to the certification a copy of the acknowledgment by the Internal Revenue Service of the corporation's election, as required by paragraph (b)(2)(ii) of this section.

(iii) *Knowledge of falsity.* A transferee is not entitled to rely upon a transferor's certification if prior to or at the time of the transfer the transferee either—

(A) Has actual knowledge that the transferor's certification is false; or

(B) Receives a notice that the certification is false from a transferor's or transferee's agent, pursuant to § 1.1445-4.

(iv) *Belated notice of false certification.* If after the date of the transfer a transferee receives a notice that a certification is false, then that transferee is entitled to rely upon the certification only with respect to consideration that was paid prior to receipt for the notice. Such a transferee is required to withhold a full 10 percent of the amount realized from the consideration that remains to be paid to the transferor if possible. Thus, if 10 percent or more of the amount reailzed remains to be paid to the transferor then the transferee is required to withhold and pay over the full 10 percent. The transferee must do so by withholding and paying over the entire amount of each successive payment of consideration to the transferor until the full 10 percent of the amount realized has been withheld and paid over. Amounts so withheld must be reported and paid over by the 20th day following the date on which each such payment of consideration is made. A transferee that is subject to the rules of this paragraph (b)(4)(iv) may not obtain a withholding certificate pursuant to § 1.1445-3, but must instead withhold and pay over the amounts required by this paragraph.

(c) *Transferred property not a U.S. real property interest*—(1) *In general.* No withholding is required under section 1445 if the transferee acquires only property that is not a U.S. real property interest. As defined in section 897(c) and § 1.897-1(c), a U.S. real property interest includes certain interests in U.S. corporations, as well as direct interests in real property and certain associated personal property. This paragraph (c) provides rules pursuant to which a person acquiring an interest in a U.S. corporation may determine that withholding is not required because that interest is not a U.S. real property interest. To determine whether an interest in tangible property constitutes a U.S. real property interest the acquisition of which would be subject to withholding, see § 1.897-1 (b) and (c).

(2) *Interests in publicly traded entities.* No withholding is required under section 1445(a) upon the acquisition of an interest in a domestic corporation if any class of stock of the corporation is regularly traded on an established securities market.

This exemption shall apply if the disposition is incident to an initial public offering of stock pursuant to a registration statement filed with the Securities and Exchange Commission. Similarly, no withholding is required under section 1445(a) upon the acquisition of an interest in a publicly traded partnership or trust. However, the rule of this paragraph (c)(2) shall not apply to the acquisition, from a single transferor in a single (or related transferors (as defined in § 1.897-1(i)) transaction (or related transactions), of an interest described in § 1.897-1(c)(2)(iii)(B) (relating to substantial amounts of non-publicly traded interests in publicly traded corporations) or to similar interests in publicly traded partnerships or trusts. The person making an acquisition described in the preceding sentence must otherwise determine whether withholding is required, pursuant to section 1445 and the regulations thereunder. Transactions shall be deemed to be related if they are undertaken within 90 days of one another or if it can otherwise be shown that they were undertaken in pursuance of a prearranged plan.

(3) *Transferee receives statement that interest in corporation is not a U.S. real property interest*—(i) *In general.* No withholding is required under section 1445(a) upon the acquisition of an interest in a domestic corporation, if the tranferor provides the transferee with a copy of a statement, issued by the corporation pursuant to § 1.897-2(h), certifying that the interest is not a U.S. real property interest. In general, a corporation may issue such a statement only if the corporation was not a U.S. real property holding corporation at any time during the previous five years (or the period in which the interest was held by its present holder, if shorter) or if interests in the corporation ceased to be United States real property interests under section 897(c)(1)(B). (A corporation may not provide such a statement based on its determination that the interest in question is an interest solely as a creditor). See § 1.897-2 (f) and (h). The corporation may provide such a statement directly to the transferee at the transferor's request. The transferor must request such a statement prior to the transfer, and shall, to the extent possible, specify the anticipated date of the transfer. A corporation's statement may be relied upon for purposes of this paragraph (c)(3) only if the statement is dated not more than 30 days prior to the date of the transfer. A transferee may also rely upon a corporation's statement that is voluntarily provided by the corporation in response to a request from the transferee, if that statement otherwise complies with the requirements of this paragraph (c)(3) and § 1.897-2(h).

(ii) *Reliance on statement not permitted.* A transferee is not entitled to rely upon a statement that a corporation is not a U.S. real property holding corporation if, prior to or at the time of the transfer, the transferee either—

(A) Has actual knowledge that the statement is false, or

(B) Receives a notice that the statement is false from a transferor's or transferee's agent, pursuant to § 1.1445-4.

Such a transferee's withholding obligations shall apply as if a statement had never been given, and such a transferee may be held fully liable pursuant to § 1.1445-1(e) for any failure to withhold.

(iii) *Belated notice of false statement.* If after the date of the transfer, a transferee receives notice that a statement provided under § 1.1445-2(c)(3)(i) (that an interest in a corporation is not a U.S. real property interest) is false, then such transferee may rely on the statement only with respect to consideration that was paid prior to the receipt of the notice.

Such a transferee is required to withhold a full 10 percent of the amount realized from the consideration that remains to be paid to the transferor, if possible. Thus, if 10 percent or more of the amount realized remains to be paid to the transferor, then the transferee is required to withhold and pay over the full 10 percent. The transferee must do so by withholding and paying over the entire amount of each successive payment of consideration to the transferor, until the full 10 percent of the amount realized has been withheld and paid over. Amounts so withheld must be reported and paid over by the 20th day following the date on which each such payment of consideration is made. A transferee that is subject to the rules of this § 1.1445-2(c)(3)(iii) may not obtain a withholding certificate pursuant to § 1.1445-3, but must instead withhold and pay over the amounts required by this paragraph.

(d) *Exceptions to requirement of withholding*—(1) *Purchase of residence for $300,000 or less.* No withholding is required under section 1445(a) if one or more individual transferees acquire a U.S. real property interest for use as a residence and the amount realized on the transaction is $300,000 or less. For purposes of this section, a U.S. real property interest is acquired for use as a residence if on the date of the transfer the transferee (or transferees) has definite plans to the transferee to reside at the property for at least 50 percent of the number of days that the property is used by any person during each of the first two 12-month periods following the date of the transfer. The number of days that the property will be vacant is not taken into account in determining the number of days such property is used by any person. A transferee shall be considered to reside at a property on any day on which a member of the transferee's family, as defined in section 267(c)(4), resides at the property. No form or other document need be filed with the Internal Revenue Service to establish a transferee's entitlement to rely upon the exception provided by this paragraph (d)(1). A transferee who fails to withhold in reliance upon this exception, but who does not in fact reside at the property for the minimum number of days set forth above, shall be liable for the failure to withhold (if the transferor was a foreign person and did not pay the full U.S. tax due on any gain recognized upon the transfer). However, if the transferee establishes that the failure to reside the minimum number of days was caused by a change in circumstances that could not reasonably have been anticipated at the time of the transfer, then the transferee shall not be liable for the failure to withhold.

The exception provided by paragraph (d)(1) does not apply in any case where the transferee is other than an individual even if the property is acquired for or on behalf of an individual who will use the property as a residence. However, this exception applies regardless of the organizational structure of the transferor (i.e., regardless of whether the transferor is an individual, partnership, trust, corporation, etc.).

(2) *Coordination with nonrecognition provisions*—(i) *In general.* A transferee shall not be required to withhold under section 1445(a) with respect to the transfer of a U.S. real property interest if—

(A) The transferor notifies the transferee, in the manner described in paragraph (d)(2)(iii) of this section, that by reason of the operation of a nonrecognition provision of the Internal Revenue Code or the provisions of any United States treaty the transferor is not required to recognize any gain or loss with respect to the transfer, and

(B) By the 20th day after the date of the transfer the transferee provides a copy of the transferor's notice to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10), together with a cover letter setting forth the name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of the transferee providing the notice to the Service. The rule of this paragraph (d)(2)(i) is subject to the exceptions set forth in paragraph (d)(2)(ii). For purposes of this paragraph (d)(2) a nonrecognition provision is any provision of the Internal Revenue Code for not recognizing gain or loss.

(ii) *Exceptions.* A transferee may not rely upon the rule of paragraph (d)(2)(i) of this section, and must therefore withhold under section 1445(a) with respect to the transfer of a U.S. real property interest, if either:

(A) The transferor qualifies for nonrecognition treatment with respect to part, but not all, of the gain realized by the transferor upon the transfer, or

(B) The transferee knows or has reason to know that the transferor is not entitled to the nonrecognition treatment claimed by the transferor.

In either of the above circumstances the transferee or transferor may request a withholding certificate from the Internal Revenue Service pursuant to the rules of § 1.1445-3.

(iii) *Notice of nonrecognition treatment.* No particular form is required for a transferor's notice to a transferee that it is not required to recognize gain or loss with respect to a transfer. The notice must be verified as true and signed under penalties of perjury, by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee or equivalent fiduciary in the case of a trust or estate. The following information must be set forth in paragraphs labelled to correspond with the letter set forth below:

(A) A statement that the document submitted constitutes a notice of a nonrecognition transfer pursuant to the requirements of § 1.1445-2(d)(2);

(B) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of the transferor submitting the notice;

(C) A statement that the transferor is not required to recognize any gain or loss with respect to the transfer;

(D) A brief description of the transfer; and

(E) A brief summary of the law and facts supporting the claim that recognition of gain or loss is not required with respect to the transfer.

(iv) *Transitional rule.* Solely for purposes of the exemption from withholding provided by this paragraph (d)(2), prior to the effective date of a Treasury decision under section 897 (d) and (e) the applicability of a nonrecognition provision shall be determined without regard to the effect of section 897 (d) or (e) upon a particular transaction. Until such a Treasury decision becomes effective, a transferor to whom the exceptions of paragraph (d)(2)(ii) of this section do not apply may therefore provide the notice described in paragraph (d)(2)(iii) if he would qualify for nonrecognition treatment with respect to the transfer without regard to the effect of section 897 (d) or (e).

(3) *Special procedural rules applicable to foreclosures*—(i) *Amount to be withheld—(A) foreclosures.* A transferee that acquires a U.S. real property interest pursuant to a repossession or foreclosure on such property under a mortgage, security agreement, deed of trust or other instrument securing a debt must withhold tax under section 1445(a) equal to 10 percent of the amount realized on such sale. Such amount must be reported and paid over to the Service under the general rules of § 1.1445-1. However, if the transferee complies with the notice requirements of § 1.1445-2(d)(3) (ii) and (iii), such transferee may

report and pay over to the Service on or before the 20th day following the final determination by a court or trustee with jurisdiction over the foreclosure action, the lesser of:

(*1*) The amount otherwise required to be withheld under section 1445(a), or

(*2*) The "alternative amount" as defined in the succeeding sentence. The alternative amount is the entire amount, if any, determined by a court or trustee with jurisdiction over the matter, that accrues to the debtor/transferor out of the amount realized from the foreclosure sale. The amount of any mortgage, lien, or other security agreement secured by the property, that is terminated, assumed by another person, or otherwise extinguished (as to the debtor/transferor) shall not be treated as an amount that accrues to the debtor/transferor for purposes of this § 1.1445-2(d)(3)(i)(A). If the alternative amount is zero, no withholding is required. Any difference between the amount withheld at the time of the foreclosure sale and the amount to be reported and paid over to the Service must be transferred to the court or trustee with jurisdiction over the foreclosure action. Amounts withheld, if any, are to be reported and paid to the Service by using Forms 8288 and 8288-A in conformity with § 1.1445-1(d).

(B) *Deeds in lieu of foreclosures.* A transferee of a U.S. real property interest pursuant to a deed in lieu of foreclosure must withhold tax equal to 10 percent of the amount realized by the debtor/transferor on the transfer. However, no withholding is required if:

(*1*) The transferee is the only person with a security interest in the property,

(*2*) No cash or other property (other than incidental fees incurred with respect to the transfer) is paid, directly or indirectly, to any person with respect to the transfer, and

(*3*) The notice requirement of § 1.1445-2(d)(3) are satisfied.

The amount withheld, if any, must be reported and paid over to the Service not later than the 20th day following the date of transfer. In a case where withholding would otherwise be required, a withholding certificate may be requested in accordance with § 1.1445-3.

(ii) *Notice to the court or trustee in a foreclosure action*—(A) *Notice on day of purchase.* A transferee in a foreclosure sale that chooses to use the special rules applicable to foreclosures must provide notice to the court or trustee with jurisdiction over the foreclosure action on the day the property is transferred with respect to such transferee's withholding obligation. No particular form is necessary but the notice must set forth the transferee's name, home address in the case of an individual, office address in the case of an entity, a brief description of the property, the date of the transfer, the amount realized on the sale of the foreclosed property and the amount withheld under section 1445(a).

(B) *Notice whether amount withheld or alternative amount is reported and paid over to the Service.* A purchaser/transferee in a foreclosure that chooses to use the special rules applicable to foreclosures must provide notice to the court or trustee with jurisdiction over the foreclosure action regarding whether the amount withheld or the alternative amount will be (or has been) reported and paid over to the Service. The notice should set forth all the information required by the preceding paragraph (d)(3)(ii)(A), the amount withheld or alternative amount that will be (or has been) reported and paid over to the Service, and the amount that will be (or has been) paid over to the court or trustee.

(iii) *Notice to the Service*—(A) *General rule.* A transferee that in reliance upon the rules of this paragraph (d)(3) withholds an alternative amount (or does not withhold because the alternative amount is zero) must, on or before the 20th day following the final determination by a court or trustee in a foreclosure action or on or before the 20th day following the date of the transfer with respect to a transfer pursuant to a deed in lieu of foreclosure, provide notice thereof to the Assistant Commissioner (International) at the address provided in § 1.1445-1(g)(10). (The filing of such a notice shall not relieve a creditor of any obligation it may have to file a notice pursuant to section 6050J and the regulations thereunder.) No particular form is required but the following information must be set forth in paragraphs labelled to correspond with the numbers set forth below.

(*1*) A statement that the notice constitutes a notice of foreclosure action or transfer pursuant to a deed in lieu of foreclosure under § 1.1445-2(d)(3).

(*2*) The name, identifying number (if any) and home address (in the case of an individual) or office address (in the case of an entity) of the purchaser/transferee.

(*3*) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of the debor/transferor.

(*4*) In a foreclosure action, the date of the final determination by a court or trustee regarding the distribution of the amount realized from the foreclosure sale. In a transfer pursuant to a deed in lieu of foreclosure, the date the property is transferred to the purchaser/transferee.

(*5*) A brief description of the property.

(*6*) The amount realized from the foreclosure sale or with respect to the transfer pursuant to a deed in lieu of foreclosure.

(*7*) The alternative amount.

(B) *Special rule for lenders required to file Form 1099-A where the alternative amount is zero.* A person required under section 6050J to file Form 1099-A does not have to comply with the notice requirement of § 1.1445-2(d)(3)(iii)(A) if the alternative amount is zero. In such case, the filing of the Form 1099-A will be deemed to satisfy the notice requirments of § 1.1445-2(d)(3)(iii)(A).

(iv) *Requirements not applicable.* A transferee is not required to withhold tax or provide notice pursuant to the rules of this paragraph (d)(3) if no substantive withholding liability applies to the tansfer of the property by the debtor/transferor. For example, if the debtor/transferor provides the transferee with a certification of non-foreign status pursuant to paragraph (b) of this section, then no substantive withholding liability would exist with respect to the acquisition of the property from the debtor transferor. In such a case, no withholding of tax or notice to the Internal Revenue Service is required of the transferee with respect to the repossession or foreclosure.

(v) *Anti-abuse rule.* If a U.S. real property interest is transferred in foreclosure or pursuant to a deed in lieu of foreclosure for a principal purpose of avoiding the requirements of section 1445(a), then the provisions of this paragraph (d)(3) shall not apply to the transfer and the transferee shall be fully liable for any failure to withhold with respect to the transfer. A principal purpose to avoid section 1445(a) will be presumed (subject to rebuttal on the basis of all relevant facts and circumstances) if:

(A) The transferee acquires property in which it, or a related party, has a security interest;

(B) The security interest did not arise in connection with the debtor/transferor's or a related party's or predecessor in interest's acquisition, improvement, or maintenance of the property; and

(C) The total amount of all debts secured by the property exceeds 90 percent of the fair market value of the property.

(4) *Installment payments.* A transferee of a U.S. real property interest is not required to withhold under section 1445

when making installment payments on an obligation arising out of a dispositions that took place before January 1, 1985. With respect to disposition that take place after December 31, 1984, the transferee shall be required to satisfy its entire withholding obligation within the time specified in § 1.1445-1(c) regardless of the amount actually paid by the transferee. Thereafter, no withholding is required upon further installment payments on an obligation arising out of the transfer. A transferee that is unable to satisfy its entire withholding obligation within the time specified in § 1.1445-1(c) may request a withholding certificate pursuant to § 1.1445-3.

(5) *Acquisitions by governmental bodies.* No withholding of tax is required under section 1445 with respect to any acquisition of property by the United States, a state or possession of the United States, a political subdivision thereof, or the District of Columbia.

(6) *Foreign government—(i) As transferor.* Pursuant to section 892 and regulations thereunder, foreign governments and international organizations (as defined in § 1.892-1(b) and section 7701(a)(18), respectively) are subject to U.S. tax only with respect to income arising from commercial activities. Therefore, a foreign government on international organization that disposes of a U.S. real property interest not held for use in a commercial activity may present a notice of nonrecognition treatment pursuant to paragraph (d)(2) of this section, and thereby avoiding withholding by the transferee of the property.

A foreign government that disposes of a U.S. real property interest or the transferee of the property may obtain a withholding certificate from the Internal Revenue Service that confirms the applicability of section 892, but neither is required to do so. Rules concerning the issuance of withholding certificates are provided in § 1.1445-3.

(ii) *As transferee.* A foreign government or international organization that acquires a U.S. real property interest is fully subject to the requirements of section 1445 and the regulations thereunder. Therefore, such an entity is required to withhold tax upon the acquisition of a U.S real property interest from a foreign person.

(7) *Withholding certificate obtained by transferee or transferor.* No withholding is required under section 1445(a) if the transferee is provided with a withholding cerfiticate that so specifies. Either the transferor or the transferee may seek a withholding certificate from the Internal Revenue Service, pursuant to the provisions of § 1.1445-3.

(8) *Amount realized by transferor is zero.* If the amount realized by transferor on a transfer of a U.S. real property interest is zero, no withholding is required.

§ 1.1445-3 Adjustments to amount required to be withheld pursuant to withholding certificate.

(a) *In general.* Withholding under section 1445(a) may be reduced or eliminated pursuant to a withholding certificate issued by the Internal Revenue Service in accordance with the rules of this section. A withholding certificate may be issued by the Service in cases where reduced withholding is appropriate (see paragraph (c) of this section), where the transferor is exempt from U.S. tax (see paragraph (d) of this section), or where an agreement for the payment of tax is entered into with the Service (see paragraph (e) of this section). A withholding certificate that is obtained prior to a transfer notifies the transferee that no withholding is required. A withholding certificate that is obtained after a transfer has been made may authorize a normal refund or an early refund pursuant to paragraph (g) of this section. Either a transferee or transferor may apply for a withholding certificate. The Internal Revenue Service will act upon an application for a withholding certificate not later than the 90th day after it is received. Solely for this purpose (i.e., determining the day upon which the 90-day period commences), an application is received by the Service on the date that all information necessary for the Service to make a determination is provided by the applicant. (For rules regarding whether an application for a withholding certificate has been timely submitted, see § 1.445-1(c)(2).) The Service may deny a request for a withholding certificate where, after due notice, an applicant fails to provide information necessary for the Service to make a determination. The Service will act upon an application for an early refund not later than the 90th day after it is received. An application for an early refund must either (1) Include a copy of a withholding certificate issued by the Service with respect to the transaction or, (2) be combined with an application for a withholding certificate. Where an application for an early refund is combined with an application for a withholding certificate, the Service will act upon both applications not later than the 90th day after receipt. In the case of an application for a certificate based on non-conforming secuirty under paragraph (e)(3)(v) of this section, and in unusually complicated cases, the Service may be unable to provide a final withholding certificate by the 90th day. In such a case the Service will notify the applicant, by the 45th day after receipt of the application, that additional processing time will be necessary. The Service's notice may request additional information or explanation concerning particular aspects of the application, and will provide a target date for final action (contingent upon the application's timely submission of any requested information). A withholding certificate issued pursuant to the privisions of this section serves to fulfill the requirements of section 1445(b)(4) concerning qualifying statements, section 1445(c)(1) concerning the transferor's maximum tax liability, or section 1445(c)(2) concerning the Secretary's authority to prescribe reduced withholding.

(b) *Applications for withholding certificates*—(1) *In general.* An application for a withholding certificate must be submitted to the Assistant Commissioner (International), at the address provided in § 1.445-1(g)(10), 1325 K St. NW., Washington, DC 20225. An application for a withholding certificate must be signed by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, by a trustee, executor, or equivalent fiduciary in the case of a trust or estate, and in the case of an individual by the individual himself. A duly authorized agent may sign the application but the application must contain a valid power of attorney authorizing the agent to sign the application on behalf of the applicant. The person signing the application must verify under penalties of perjury that all representations made in connection with the application are true, correct, and complete to his knowledge and belief. No particular form is required for an application, but the application must set forth the information described in paragraphs (b), (2), (3), and (4) of this section.

(2) *Parties to the transaction.* The application must set forth the name, address, and identifying number (if any) of the person submitting the application (specifying whether that person is the transferee or transferor), and the name, address, and identifying number (if any) of other parties to the transaction (specifying whether each such party is a transferee or transferor). The applicant must determine if an identifying number exists for each party concerned and if none exists for a particular party the application must so state. The address provided in the case of an individual

must be that individual's home address, and the address provided in the case of an entity must be that entity's office address. A mailing address may be provided in addition to, but not in lieu of, a home address or office address.

(3) *Real property interest to be transferred.* The application must set forth information concerning the U.S. real property interest with respect to which the withholding certificate is sought, including the type of interest, the contract price, and, in the case of an interest in real property, its location and general description, or in the case of an interest in a U.S. real property holding corporation, the class or type and amount of the interest.

(4) *Basis for certificate*—(i) *Reduced withholding.* If a withholding certificate is sought on the basis of a claim that reduced withholding in appropriate, the application must include:

(A) A calculation of the maximum tax that may be imposed on the disposition in accordance with paragraph (c)(2) of this section. Such calculation must be accompanied by a copy of the relevant contract and depreciation schedules or other evidence that confirms the contract price and adjusted basis of the property. If no depreciation schedules are provided, the application must state the nature of the use of the property and why depreciation was not allowable. Evidence that supports any claimed adjustment to the maximum tax on the disposition must also be provided;

(B) A calculation of the transferor's unsatisfied withholding liability, or evidence supporting the claim that no such liability exists, in accordance with paragraph (c)(3) of this section; and

(C) In the case of a request for a special reduction of withholding pursuant to paragraph (c)(4) of this section, a statement of law and facts in support of the request.

(ii) *Exemption.* If a withholding certificate is sought on the basis of the transferor's exemption from U.S. tax, the application must set forth a brief statement of the law and facts that support the claimed exemption. In this regard, see paragraph (d) of this section.

(iii) *Agreement.* If a withholding certificate is sought on the basis of an agreement for the payment of tax, the application must include a signed copy of the agreement proposed by the applicant and a copy of the security instrument (if any) proposed by the applicant. In this regard, see paragraph (e) of this section.

(c) *Adjustment of amount required to be withheld*—(1) *In general.* The Internal Revenue Service may issue a withholding certificate that excuses withholding or that permits the transferee to withhold an adjusted amount reflecting the transferor's maximum tax liability. The transferor's maximum tax liability is the sum of—

(i) The maximum amount which could be imposed as tax under section 871 or 882 upon the transferor's disposition of the subject real property interest, as determined under paragraph (c)(2) of this section, and

(ii) The transferor's unsatisfied withholding liability with respect to the subject real property interest, as determined under paragraph (c)(3) of this section.

In addition, the Internal Revenue Service may issue a withholding certificate that permits the transferee to withhold a reduced amount if the Service determines pursuant to paragraph (c)(4) of this section that reduced withholding will not jeopardize the collection of tax.

(2) *Maximum tax imposed on disposition.* The first element of the transferor's maximum tax liability is the maximum amount which the transferor could be required to pay as tax upon the disposition of the subject real property interest. In the case of an individual transferor that amount will generally be the contract price of the property minus its adjusted basis, multiplied by the maximum individual income tax rate applicable to long term capital gain. In the case of a corporate transferor, that amount will generally be the contract price of the property minus its adjusted basis, multiplied by the maximum corporate income tax rate applicable to long term capital gain, currently 28 percent. However, that amount must be adjusted to take into account the following:

(i) Any reduction of tax to which the transferor is entitled under the provisions of a U.S. income tax treaty;

(ii) The effect of any nonrecognition provision that is applicable to the transaction;

(iii) Any losses realized and recognized upon the previous disposition of U.S. real property interests during the taxable year;

(iv) Any amount that is required to be treated as ordinary income; and

(v) Any other factor that may increase or reduce the tax upon the disposition.

(3) *Transferor's unsatisfied withholding liability*—(i) *In general.* The second element of the transferor's maximum tax liability is the transferor's unsatisfied withholding liability. That liability is the amount of any tax that the transferor was required to but did not withhold and pay over under section 1445 upon the acquisition of the subject U.S. real property interest or a predecessor interest. The transferor's unsatisfied withholding liability is included in the calculation of maximum tax liability so that such prior withholding liability can be satisfied by the transferee's withholding upon the current transfer. Alternatively, the transferor's unsatisfied withholding liability may be disregarded for purposes of calculating the maximum tax liability, if either—

(A) Such prior withholding liability is fully satisfied by a payment that is made with the application submitted pursuant to this section; or

(B) An agreement is entered into for the payment of that liability pursuant to the rules of paragraph (e) of this section.

Because section 1445 only requires withholding after December 31, 1984, no transferor's unsatisfied withholding liability can exist unless the transferor acquired the subject or predecessor real property interest after that date. For purposes of this paragraph (c), a predecessor interest is one that was exchanged for the subject U.S. real property interest in a transaction in which the transferor was not required to recognize the full amount of the gain or loss realized upon the transfer.

(ii) *Evidence that no unsatisfied withholding liability exists.* For purposes of paragraph (b)(4)(i)(B) of this section (concerning information that must be submitted with an application for a withholding certificate), evidence that the transferor has no unsatisfied withholding liability includes any one of the following documents:

(A) Evidence that the transferor acquired the subject or predecessor real property interest prior to January 1, 1985;

(B) A copy of the Form 8288 that was filed by the transferor, and proof of payment of the amount shown due thereon, with respect to the transferor's acquisition of the subject or predecessor real property interest;

(C) A copy of a withholding certificate with respect to the transferor's acquisition of the subject or predecessor real property interest, plus a copy of Form 8288 and proof of payment with respect to any withholding required under that certificate;

(D) A copy of the non-foreign certification furnished by the person from whom the subject or predecessor U.S. real property interest was acquired, executed at the time of that acquisition;

(E) Evidence that the transferor purchased the subject or predecessor real property for $300,000 or less, and a statement signed by the transferor under penalties of perjury, that the transferor purchased the property for use as a residence within the meaning of § 1.1445-2(d)(1);

(F) Evidence that the person from whom the transferor acquired the subject or predecessor U.S. real property interest fully paid any tax imposed on that transaction pursuant to section 897.

(G) A copy of a notice of nonrecognition treatment provided to the transferor pursuant to § 1.1445-2(d)(2) by person from whom the transferor acquired the subject or predecessor U.S. real property interest; and

(H) A statement, signed by the transferor under penalties of perjury, setting forth the facts and circumstances that supported the transferor's conclusion that no withholding was required under section 1445(a) with respect to the transferor's acquisition of the subject or predecessor real property interest.

(4) *Special reduction of amount required to be withheld.* The Internal Revenue Service may, in its discretion, issue a withholding certificate that permits the transferee to withhold a reduced amount based upon a determination that reduced withholding will not jeopardize the collection of tax. A transferor that requests a withholding certificate pursuant to this paragraph (c)(4) is required pursuant to paragraph (b)(4)(i)(C) of this section to submit a statement of law and facts in support of the request. That statement must explain why the transferor is unable to enter into an agreement for the payment of tax pursuant to paragraph (e) of this section.

(d) *Transferor's exemption from U.S. tax*—(1) *In general.* The Internal Revenue Service will issue a withholding certificate that excuses all withholding by a transferee if it is established that:

(i) The transferor's gain from the disposition of the subject U.S. real property interest will be exempt from U.S. tax, and

(ii) The transferor has no unsatisfied withholding liability.

For the available exemptions, see paragraph (d)(2) of this section. The transferor's unsatisfied withholding liability shall be determined in accordance with the provisions of paragraph (c)(3) of this section. A transferor that is entitled to a reduction of (rather than an exemption from) U.S. tax may obtain a withholding certificate to that effect pursuant to the provisions of paragraph (c) of this section.

(2) *Available exemptions.* A transferor's gain from the disposition of a U.S. real property interest may be exempt from U.S. tax because either:

(i) The transferor is an integral part or controlled entity of a foreign government and the disposition of the subject property is not a commercial activity, as determined pursuant to section 892 and the regulations thereunder; or

(ii) The transferor is entitled to the benefits of an income tax treaty that provides for such an exemption (subject to the limitations imposed by section 1125(c) of Pub. L. 96-499, which, in general, overrides such benefits as of January 1, 1985).

(e) *Agreement for the payment of tax*—1. *In general.* The Internal Revenue Service will issue a withholding certificate that excuses withholding or that permits a transferee to withhold a reduced amount, if either the transferee or the transferor enters into an agreement for the payment of tax pursuant to the provisions of this paragraph (e). An agreement for the payment of tax is a contract between the Service and any other person that consists of two necessary elements. Those elements are—

(i) A contract between the Service and the other person, setting forth in detail the rights and obligations of each; and

(ii) A security instrument or other form of security acceptable to the Director, Foreign Operations District.

(2) *Contents of agreement*—(i) *In general.* An agreement for the payment of tax must cover an amount described in subdivision (ii) or (iii) of this paragraph (e)(2). The agreement may either provide adequate security for the payment of the chosen amount in accordance with paragraph (e)(3) of this section, or provide for the payment of that amount through a combination of security and withholding of tax by the transferee.

(ii) *Tax that would otherwise be withheld.* An agreement for the payment of tax may cover the amount of tax that would otherwise be required to be withheld pursuant to section 1445(a). In addition to the amount computed pursuant to section 1445(a), the applicant must agree to pay interest upon that amount, at the rate established under section 6621, with respect to the period between the date on which the tax imposed by section 1445(a) would otherwise be due (*i.e.*, the 20th day after the date of transfer) and the date on which the transferor's payment of tax with respect to the disposition will be due under the agreement. The amount of interest agreed upon must be paid by the applicant regardless of whether or not the Service is required to draw upon any security provided pursuant to the agreement. The interest may be paid either with the return or by the Service drawing upon the security.

(iii) *Maximum tax liability.* An agreement for the payment of tax may cover the transferor's maximum tax liability, determined in accordance with paragraph (c) of this section. The agreement must also provide for the payment of an additional amount equal to 25 percent of the amount determined under paragraph (c) of this section. This additional amount secures the interest and penalties that would accrue between the date of a failure to file a return and pay tax with respect to the disposition, and the date on which the Service collects upon that liability pursuant to the agreement. Such additional amount will only be collected if the Service finds it necessary to draw upon any security provided due to the transferor's failure to file a return and pay tax with respect to the relevant disposition.

(3) *Major types of security*—(i) *In general.* The following are the major types of security acceptable to the Service. Further details with respect to the terms and conditions of each type may be specified by Revenue Procedure.

(ii) *Bond with surety or guarantor.* The Service may accept as security with respect to a transferor's tax liability a bond that is executed with a satisfactory surety or guarantor. Only the following persons may act as surety or guarantor for this purpose

(A) A surety company holding a certificate of authority from the Secretary as an acceptable surety on Federal bonds, as listed in Treasury Department Circular No. 570, published annually in the **Federal Register** on the first working day of July;

(B) A person that is engaged within or without the United States in the conduct of a banking, financing, or similar business under the principles of § 1.864-4(c)(5), and that is subject to U.S. or foreign local or national regulation of such business. If that person is otherwise acceptable to the Service; and

(C) A person that is engaged within or without the United States in the conduct of an insurance business that is subject to U.S. or foreign local or national regulation, if that person is otherwise acceptable to the Service.

(iii) *Bond with collateral.* The Service may accept as security with respect to a transferor's tax liability a bond that is secured by acceptable collateral. All collateral must be deposited with a responsible financial institution acting as escrow agent, or, in the Service's discretion, with the Service. Only the following types of collateral are acceptable:

(A) Bonds, notes, or other public debt obligations of the United States, in accordance with the rules of 31 CFR Part 225; and

(B) A certified, cashier's, or treasurer's check, drawn on an entity acceptable to the Service that is engaged within or without the United States in the conduct of a banking, financing, or similar business under the principles of § 1.864-4(c)(5) and that is subject to U.S. or foreign local or national regulation of such business.

(iv) *Letter of credit.* The Service may accept as security with respect to a transferor's tax liability an irrevocable letter of credit. The Service may accept a letter of credit issued by an entity acceptable to the Service that is engaged within or without the United States in the conduct of a banking, financing, or similar business under the principles of § 1.864-4(c)(5) and that is subject to U.S. or foreign local or national regulation of such business. However, the Director will accept a letter of credit from an entity that is not engaged in trade or business in the United States only if such letter may be drawn on an advising bank within the United States.

(v) *Guarantees and other non-conforming security*—(A) *Guarantee.* The Service may in its discretion accept as security with respect to a transferor's tax liability the applicant's guarantee that it will pay such liability. The Service will in general accept such a guarantee only from a corporation, foreign or domestic, any class of stock of which is regularly traded on an established securities market on the date of the transfer.

(B) *Other forms of security.* The Service may in unusual circumstances and at its discretion accept any form of security that if finds to be adequate. An application for a withholding certificate that proposes a form of security that does not conform with any of the preferred types set forth in paragraph (e)(3) (ii) through (iv) of this section or any relevant Revenue Procedure must include:

(*1*) A detailed statement of the facts and circumstances supporting the use of the proposed form of security, and

(*2*) A memorandum of law concerning the validity and enforceability of the proposed form of security.

(4) Terms of security instrument. Any security instrument that is furnished pursuant to this section must provide that—

(i) The amount of each deposit of estimated tax that will be required with respect to the gain realized on the subject disposition may be collected by levy upon the security as of the date following the date on which each such deposit is due (unless such deposit is timely made);

(ii) The entire amount of the liability may be collected by levy upon the security at any time during the nine months following the date on which the payment of tax with respect to the subject disposition is due, subject to release of the security upon the full payment of the tax and any interest and penalties due. If the transferor requests an extension of time to file a return with respect to the disposition, then the Director may require that the term of the security instrument be extended until the date that is nine months after the filing deadline as extended.

(f) *Amendments to application for withholding certificate*— (1) *In general.* An applicant for a withholding certificate may amend an otherwise complete application by submitting an amending statement to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10). The amending statement shall provide the information required by § 1.1445-3(f)(3) and must be signed and accompanied by a penalties of perjury statement in accordance with § 1.1445-3(b)(1).

(2) *Extension of time for the Service to process reqests for withholding certificates*—(i) *In general.* If an amending statement is submitted, the time in which the Internal Revenue Service must act upon the amended application shall be extended by 30 days.

(ii) *Substantial amendments.* If an amending statement is submitted and the Service finds that the statement substantially amends the facts of the underlying application or substantially alters the terms of the withholding certificate as requested in the initial application, the time within which the Service must act upon the amended application shall be extended by 60 days. The applicant shall be so notified.

(iii) *Amending statement received after the requested withholding certificate has been signed by the Assistant Commissioner (International).* If an amending statement is received after the withholding certificate, drafted in response to the underlying application, has been signed by the Assistant Commissioner (International) or his delegate and prior to the day such certificate is mailed to the applicant, the time in which the Service must act upon the amended application shall be extended by 90 days. The applicant will be so notified.

(3) *Information required to be submitted.* No particular form is required for an amending statement but the statement must provide the following information:

(i) *Indentification of applicant.* The amending statement must set forth the name, address and identifying number (if any) of the person submitting the amending statement (specifying whether that person is the transferee or transferor).

(ii) *Date of underlying application.* The amending statement must set forth the date of the underlying) application for a withholding certificate.

(iii) *Real property interest to be (or that has been) transferred.* The amending statement must set forth a brief description of the real property interest with respect to which the underlying application for a withholding certificate was submitted.

(iv) *Amending information.* The amending statement must fully set forth the basis for the amendment including any modification of the facts supporting the application for a withholding certificate and any change sought in the terms of the withholding certificate.

(g) *Early refund of overwithheld amounts.* If a transferor receives a withholding certificate pursuant to this section, and an amount greater than that specified in the certificate was withheld by the transferee, then pursuant to the rules of this paragraph (f) the transferor may apply for a refund (without interest) of the excess amount prior to the date on which the transferor's tax return is due (without extensions). (Any interest payable on refunds issued after the filing of a tax return shall be determined in accordance with the provisions of section 6611 and regulations thereunder.) An application for an early refund must be addressed to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10). No particular form is required for the application, but the following information must be set forth in separate paragraphs numbered to correspond with the number given below:

(1) Name, address, and identifying number (if any) of the transferor seeking the refund;

(2) Amount required to be withheld pursuant to withholding certificate issued by Internal Revenue Service;

(3) Amount withheld by transferee (attach a copy of Form 8288-A stamped by IRS pursuant to § 1.1445-1(c));

(4) Amount to be refunded to transferor. An application for an early refund cannot be processed unless the required copy of Form 8288-A (or substantial evidence of the amount withheld in the case of a failure to receive Form 8288-A as provided in § 1.1445-1(f)(3)) is attached to the

application. If an application for a withholding certificate based upon the transferor's maximum tax liability is submitted after the transfer takes place, then that application may be combined with an application for an early refund. The Service will act upon a claim for refund within the time limits set forth in paragraph (a) of this section.

§ 1.1445-4 Liability of agents.

(a) *Duty to provide notice of false certification or statement to transferee.* A transferee's or transferor's agent must provide notice to the transferee if either—

(1) The transferee is furnished with a non-U.S. real property interest statement pursuant to § 1.1445-2(c)(3) and the agent knows that the statement is false; or

(2) The transferee is furnished with a non-foreign certification pursuant to § 1.1445-2(b)(2) and either (i) the agent knows that the certification is false, or (ii) the agent represents a transferor that is a foreign corporation. An agent that represents a transferor that is a foreign corporation is not required to provide notice to the transferee if the foreign corporation provided a non-foreign certification to the transferee prior to such agent's employment and the agent does not know that the corporation did so.

(b) *Duty to provide notice of false certification or statement to entity or fiduciary.* A transferee's or transferor's agent must provide notice to an entity or fiduciary that plans to carry out a transaction described in section 1445(e) (1), (2), (3), or (4) if either—

(1) The entity or fiduciary is furnished with a non-U.S. real property interest statement pursuant to § 1.1445-5(b)(4)(iii) and the agent knows that such statement is false; or

(2) The entity or fiduciary is furnished with a non-foreign certification pursuant to § 1.1445-5(b)(3) (ii) and either (i) the agent knows that such certification is false, or (ii) the agent represents a foreign corporation that made such a certification.

(c) *Procedural requirements—(1) Notice to transferee, entity, or fiduciary.* An agent who is required by this section to provide notice must do so in writing as soon as possible after learning of the false certification or statement, but not later than the date of the transfer (prior to the transferee's payment of consideration). If an agent first learns of a false certification or statement after the date of the transfer, notice must be given by the third day following that discovery. The notice must state that the certification or statement is false and may not be relied upon. The notice must also explain the possible consequences to the recipient of a failure to withhold. The notice need not disclose the information on which the agent's statement is based. The following is an example of an acceptable notice."This is to notify you that you may be required to withhold tax in connection with *(describe transaction).* You have been provided with a certification of non-foreign status (or a non-U.S. real property interest statement) in connection with that transaction. I have learned that that document is false. Therefore, you may not rely upon it as a basis for failing to withhold under section 1445 of the Internal Revenue Code. Section 1445 provides that any person who acquires a U.S. real property interest from a foreign person must withhold a tax equal to 10 percent of the total purchase price. (The term 'U.S. real property interest' includes real property, stock in U.S. corporations whose assets are primarily real property, and some personal property associated with realty.) Any person who is required to withhold but fails to do so can be held liable for the tax. Thus, if you do not withhold the 10 percent tax from the total that you pay on this transaction you could be required tó pay the tax yourself, if what you are acquiring is a U.S. real property interest and the transferor is a foreign person. Tax that is withheld must be promptly paid over to the IRS using Form 8288. For further information see sections 897 and 1445 of the Internal Revenue Code and the related regulations."

(2) *Notice to be filed with IRS.* An agent who is required by paragraph (a) or (b) of this section to provide notice to a transferee, entity, or fiduciary must furnish a copy of that notice to the Internal Revenue Service by the date on which the notice is required to be given to the transferee, entity, or fiduciary. The copy of the notice must be delivered to the Assistant Commissioner (International) at the address provided in § 1.1445-1 and must be accompanied by a cover letter stating that the copy is being filed pursuant to the requirements of this § 1.1445-4(c)(2).

(d) *Effect on recipient.* A transferee, entity, or fiduciary that receives a notice pursuant to this section prior to the date of the transfer from any agent of the transferor or transferee may not rely upon the subject certification or statement for purposes of excusing withholding pursuant to § 1.1445-2 or § 1.1445-5. Therefore, the recipient of a notice may be held liable for any failure to deduct and withhold tax under section 1445 as if such certification or statement had never been given. For special rules concerning the effect of the receipt of a notice after the date of the transfer, see §§ 1.1445-2(b)(4)iv) and 1.1445-5 (c), (d) and (e).

(e) *Failure to provide notice.* Any agent who is required to provide notice but who fails to do so in the manner required by paragraph (a) or (b) of this section shall be held liable for the tax that the recipient of the notice would have been required to withhold under section 1445 if such notice had been given. However, an agent's liability under this paragraph (e) is limited to the amount of compensation that that agent derives from the transaction. In addition, an agent who assists in the preparation of, or fails to disclose knowledge of, a false certification or statement may be liable for civil or criminal penalties.

(f) *Definition of transferor's or transferee's agent*—(1) *In general.* For purposes of this section, the terms "transferor's agent" and "transferee's agent" means any person who represents the transferor or transferee (respectively)—

(i) In any negotiation with another person (or another person's agent) relating to the transaction; or

(ii) In settling the transaction.

(2) *Transactions subject to section 1445(e).* In the case of transactions subject section 1445(e), the following definitions apply.

(i) The term "transferor's agent" means any person that represents or advises an entity or fiduciary with respect to the planning, arrangement, or consummation by the entity of a transaction described in section 1445(e) (1), (2), (3), or (4).

(ii) The term "transferee's agent" means any person that represents or advises the holder of an interest in an entity with respect to the planning, arrangement or consummation by the entity of a transaction described in section 1445(e) (1), (2), (3), or (4).

(3) *Exclusion of settlement officers and clerical personnel.* For purposes of this section, a person shall not be treated as a transferor's agent or transferee's agent with respect to any transaction solely because such person performs one or more of the following activities.

(i) The receipt and disbursement of any portion of the consideration for the transaction;

(ii) The recording of any document in connection with the transaction; or

(iii) Typing, copying, and other clerical tasks.

(iv) The obtaining of title insurance reports and reports concerning the condition of the real property that is the subject of the transaction; or

(v) The transmission or delivery of documents between the parties.

(4) *Exclusion for governing body of a condominium association and the board of directors of a cooperative housing corporation.* The members of a board, committee or other governing body of a condominium association and the board of directors and officers of a cooperative housing corporation will not be deemed agents of the transferor or transferee if such individuals function exclusively in their capacity as representatives of such association or corporation with respect to the transaction. In addition, the managing agent of a cooperative housing corporation or condominium association will not be deemed to be an agent of the transferee or transferor if such person functions exclusively in its capacity as a managing agent. If a person's activities include advising the transferee or transferor with respect to the transfer, this exclusion shall not apply.

§ 1.1445-5 Special rules concerning distributions and other transactions by corporations, partnerships, trusts, and estates (temporary).

(a) *Purpose and scope.* This section provides special rules concerning the withholding that is required under section 1445(e) upon distributions and other transactions involving domestic or foreign corporations, partnerships, trusts, and estates. Paragraph (b) of this section provides rules that apply generally to the various withholding requirements set forth in this section. Under section 1445(e)(1) and paragraph (c) of this section, a domestic partnership or the fiduciary of a domestic trust or estate is required to withhold tax upon the entity's disposition of a U.S. real property interest if any foreign persons are partners or beneficiaries of the entity. Paragraph (d) provides rules concerning the requirement of section 1445(e)(2) that a foreign corporation withholding tax upon its distribution of a U.S. real property interest to its interest-holders. Finally, under section 1445(e)(3) and paragraph (e) of this section a domestic U.S. real property holding corporation is required to withhold tax upon certain distributions to interest-holders that are foreign persons. Paragraphs (f) and (g) of this section are reserved to provide rules concerning transactions involving interests in partnerships, trusts, and estates that will be subject to withholding pursuant to sections 1445(e)(4) and (5).

(b) *Rules of general application*—(1) *Double withholding not required.* If tax is required to be withheld with respect to a transfer of property in accordance with the rules of this section, then no additional tax is required to be withheld by the transferee of the property with respect to that transfer pursuant to the general rules of section 1445(a) and § 1.1445-1. If tax is required to be withheld under section 1441 or 1442 with respect to a transfer of property, withholding shall not be required under section 1445 or § 1.1445-5.

If a transfer of a U.S. real property interest described in section 1445(e) is exempt from withholding under the rules of this section, then no withholding is required under the general rules of section 1445(a) and § 1.1445-1.

(2) *Coordination with nonrecognition provisions*—(i) *In general.* Withholding shall not be required under the rules of this section with respect to a transfer described in section 1445(e) of a U.S. real property interest if—1445(e) if—

(A) By reason of the operation of a nonrecognition provision of the Internal Revenue Code or the provisions of any treaty of the United States no gain or loss is required to be recognized by the foreign person with respect to which withholding would otherwise be required; and

(B) The entity or fiduciary that is otherwise required to withhold complies with the notice requirements of paragraph (b)(2)(ii) of this section. The entity or fiduciary must determine whether gain or loss is required to be recognized pursuant to the rules of section 897 and the applicable nonrecognition provisions of the Internal Revenue Code. An entity or fiduciary may obtain a withholding certificate from the Internal Revenue Service that confirms the applicability of a nonrecognition provision, but is not required to do so. For purposes of this paragraph (b)(2), a nonrecognition provision is any provision of the Internal Revenue Code for not recognizing gain or loss. If nonrecognition treatment is available only with respect to part of the gain realized on a transfer, the exemption from withholding provided by this paragraph (b)(2) shall not apply. In such cases a withholding certificate may be sought pursuant to the provisions of § 1.1445-6.

(ii) *Notice of nonrecognition transfer.* An entity or fiduciary that fails to withhold tax with respect to a transfer in reliance upon the rules of this paragraph (b)(2) must be the 20th day after the date of the transfer deliver a notice thereof to the Assistant Commissioner, (International), at the address provided in § 1.1445-1(g)(10). No particular form is required for a notice of transfer, but the following information must be set forth in paragraphs labelled to correspond with the letter set forth below:

(A) A statement that the document submitted constitutes a notice of a nonrecognition transfer pursuant to the requirements of § 1.1445-5(b)(2)(ii);

(B) The name, office address, and identifying number (if any) of the entity of fiduciary submitting the notice;

(C) The name, identifying number (if any), and home address (in the case of an individual) or office address (in the case of an entity) of each foreign person with respect to which withholding would otherwise be required;

(D) A brief description of the transfer; and

(E) A brief statement of the law and facts supporting the claim that recognition of gain or loss is not required with respect to the transfer.

(iii) *Transition rule.* Solely for purposes of the exemption from withholding provided by this paragraph (b)(2), prior to the effective date of a Treasury decision under section 897(e) the applicability of a nonrecognition provision to a particular transfer shall be determined without regard to the effect of that section.

(3) *Interest-holder not a foreign person*—(i) *In general.* Pursuant to the provisions of paragraphs (c) and (e) of this section, an entity or fiduciary is required to withhold with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. For purposes of determining whether a holder of an interest is a foreign person, and entity or fiduciary may rely upon a certification of nonforeign status provided by that person in accordance with paragraph (b)(3)(ii) of this section. Except to the extent provided in paragraph (b)(3)(iii) of this section, such a certification excuses the entity or fiduciary from any liability otherwise imposed pursuant to section 1445(e) and regulations thereunder. However, no obligation is imposed upon an entity or fiduciary to obtain certifications from interest-holders; an entity or fiduciary may instead rely upon other means to ascertain the nonforeign status of an interest-holder. If the entity or fiduciary does rely upon other means but the interest-holder proves, in fact, to be a foreign person, then the entity or fiduciary is subject to any liability imposed pursuant to section 1445 and regulations thereunder.

An entity or fiduciary is not required to rely upon other means to ascertain the non-foreign status of an interest-holder and may demand a certification of non-foreign status. If the certification is not provided, the entity or fiduciary may withhold tax under section 1445 and will be considered, for purposes of sections 1461 through 1463, to have been required to withhold such tax.

(ii) *Interest-holder's certification of non-foreign status*—(A) *In general.* For purposes of this section, an entity or fiduciary may treat any holder of an interest in the entity as a U.S. person if that interest-holder furnishes to the entity or fiduciary a certification stating that the interest-holder is not a foreign person, in accordance with the provisions of paragraph (b)(3)(ii)(B) of this section. In general, a foreign person is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust, or foreign estate, but not a resident alien individual. In this regard, see § 1.897–1(k).

(B) *Procedural rules.* An interest-holder's certification of non-foreign status must—

(*1*) State that the interest-holder is not a foreign person;

(*2*) Set forth the interest-holder's name, identifying number, home address (in the case of an individual), or office address (in the case of an entity), and place of incorporation (in the case of a corporation); and

(*3*) Be signed under penalties of perjury.

Pursuant to § 1.897–1(p), an individual's identifying number is the individual's Social Security number and any other person's identifying number is its U.S. employer identification number. The certification must be signed by a responsible officer in the case of a corporation, by a general partner in the case of a partnership, and by a trustee, executor, or equivalent fiduciary in the case of a trust or estate. No particular form is needed for a certification pursuant to this paragraph (b)(3)(ii)(B), nor is any particular language required, so long as the document meets the requirements of this paragraph. Samples of acceptable certifications are provided in paragraph (b)(3)(ii)(D) of this section. An entity may rely upon a certification pursuant to this paragraph (b)(3)(ii)(B) for a period of two calendar years following the close of the calendar year in which the certification was given.

If an interest holder becomes a foreign person within the period described in the preceding sentence, the interest-holder must notify the entity prior to any further dispositions or distributions and upon receipt of such notice (or any other notification of the foreign status of the interest-holder) the entity may no longer rely upon the prior certification. An entity that obtains and relies upon a certification must retain that certification with its books and records for a period of three calendar years following the close of the last calendar year in which the entity relied upon the certification.

(C) *Foreign corporation that has made an election under section 897(i).* A foreign corporation that has made a valid election under section 897(i) to be treated as a domestic corporation for purposes of section 897 may provide a certification of non-foreign status pursuant to this paragraph (b)(3)(ii). However, an electing foreign corporation must attach to such certification a copy of the acknowledgment of the election provided to the corporation by the Internal Revenue Service pursuant to § 1.897–3(d)(4).

An acknowledgment is valid for this purpose only if it states that the information required by § 1.897–3 has been determined to be complete.

(D) *Sample certifications*—(*1*) *Individual interest-holder.* "Under section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. To inform (*name of entity*) that no withholding is required with respect to my interest in it, I, (*name of interest-holder*), hereby certify the following:

1. I am not a nonresident alien for purposes of U.S. income taxation;

2. My U.S. taxpayer identifying number (Social Security number) is ————; and

3. My home address is

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————————————————

I agree to inform [name of entity] promptly if I become a nonresident alien at any time during the three years immediately following the date of this notice.

I understand that this certification may be disclosed to the Internal Revenue Service by (*name of entity*) and that any false statement I have made here could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete.

[*Signature and date*]"

(*2*) *Entity interest-holder.* "Under section 1445(e) of the Internal Revenue Code, a corporation, partnership, trust, or estate must withhold tax with respect to certain transfers of property if a holder of an interest in the entity is a foreign person. To inform [*name of entity*] that no withholding is required with respect to [*name of interest-holder*]'s interest in it, the undersigned hereby certifies the following on behalf of [*name of interest-holder*]:

1. [*Name of interest-holder*] is not a foreign corporation, foreign partnership, foreign trust, or foreign estate (as those terms are defined in the Internal Revenue Code and Income Tax Regulations);

2. [*Name of interest-holder*]'s U.S. employer identification number is ————; and

3. [*Name of interest-holder*]'s office address is

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and place of incorporation (if applicable) is

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[*Name of interest holder*] agrees to inform [*name of entity*] if it becomes a foreign person at any time during the three year period immediately following the date of this notice.

[*Name of interest-holder*] understands that this certification may be disclosed to the Internal Revenue Service by [*name of entity*] and that any false statement contained herein could be punished by fine, imprisonment, or both.

Under penalties of perjury I declare that I have examined this certification and to the best of my knowledge and belief it is true, correct, and complete, and I further declare that I have authority to sign this document on behalf of [*name of interest-holder*].

[*Signature and date*]
[*Title*]"

(ii) *Reliance upon certification not permitted.* An entity or fiduciary may not rely upon an interest-holder's certification of non-foreign status if, prior to or at the time of the transfer with respect to which withholding would be required, the entity or fiduciary either—

(A) Has actual knowledge that the certification is false;

(B) Has received a notice that the certification is false from a transferor's or transferee's agent, pursuant to § 1.1445–4; or

(C) Has received from a corporation that it knows to be a foreign corporation a certification that does not have attached to it a copy of the IRS acknowledgment of the corporation's election under section 897(i), as required by paragraph (b)(3)(ii)(C) of this section. Such an entity's or fuduciary's withholding obligations shall apply as if a statement had never been given, and such an entity or fiduciary may be held fully liable pursuant to § 1.1445–1(e) for any failure to withhold. For special rules concerning an entity's belated receipt of a notice concerning a false certification, see paragraphs (c)(2)(ii) and (e)(2)(iii) of this section.

(4) *Property transferred not a U.S. real property interest*—(i) *In general.* Pursuant to the provisions of paragraphs (c) and (d) of this section, an entity or fiduciary is required to withhold with respect to certain transfers of property, if the property transferred is a U.S. real property interest. (In addition, taxable distributions of U.S. real property interests by domestic or foreign partnerships, trusts, and estates will be subject to withholding pursuant to section 1445(e)(4) and paragraph (f) of this section after publication of a Treasury decision under sections 897 (e)(2) and (g). As defined in section 897(c) and § 1.897–1(c), a U.S. real property interest includes certain interests in U.S. corporations, as well as direct interests in real property and certain associated personal property. This paragraph (b)(4) provides rules pursuant to which an entity (or fiduciary thereof) that transfers an interest in a U.S. corporation may determine that withholding is not required because the interest transferred is not a U.S. real property interest. To determine whether an interest in tangible property constitutes a U.S. real property interest the transfer of which would be subject to withholding, see § 1.897–1 (b) and (c).

(ii) *Interests in publicly traded entities.* Withholding is not required under paragraph (c) or (d) of this section upon an entity's transfer of an interest in a domestic corporation if any class of stock of the corporation is regularly traded on an established securities market. This exemption shall apply to a disposition incident to an initial public offering of stock pursuant to a registration statement filed with the Securities and Exchange Commission.

Similarly, no withholding is required under paragraph (c) or (d) of this section upon an entity's transfer of an interest in a publicly traded partnership or trust. However, the rule of this paragraph (b)(4)(ii) shall not apply to the transfer, to a single transferee (or related transferees as defined in § 1.897–1(i)) in a single transaction (or related transactions), of an interest described in § 1.897–1(c)(2)(iii)(B) (relating to substantial amounts of non-publicly traded interests in publicly traded corporations) or of similar interests in publicly traded partnerships or trusts. The entity making a transfer described in the preceding sentence must otherwise determine whether withholding is required, pursuant to section 1445(e) and the regulations thereunder. Transactions shall be deemed to be related if they are undertaken within 90 days of one another or if it can otherwise be shown that they were undertaken in pursuance of a prearranged plan.

(iii) *Corporation's statement that interest is not a U.S. real property interest.* (A) *In general.* No withholding is required under paragraph (c) or (d) of this section upon an entity's transfer of an interest in a domestic corporation if, prior to the transfer, the entity or fiduciary obtains a statement, issued by the corporation pursuant to § 1.897–2(h), certifying that the interest is not a U.S. real property interest. In general, a corporation may issue such a statement only if the corporation was not a U.S. real property holding corporation at any time during the previous five years (or the period in which the interest was held by its present holder, if shorter) or if interests in the corporation ceased to be United States real property interests under section 897(c)(1)(B). (A corporation may not provide such a statement based on its determination that the interest in question is an interest solely as a creditor.) See § 1.897–2 (f) and (h). A corporation's statement may be relied upon for purposes of this paragraph (b)(4)(iii) only if the statement is dated not more than 30 days prior to the date of the transfer.

(B) *Reliance on statement not permitted.* An entity or fiduciary is not entitled to rely upon a statement that an interest in a corporation is not a U.S. real property interest, if, prior to or at the time of the transfer, the entity or fiduciary either—

(*1*) Has actual knowledge that the statement is false, or

(*2*) Receives a notice that the statement is false from a transferor's or transferee's agent, pursuant to § 1.1445–4.

Such an entity's or fiduciary's withholding obligations shall apply as if a statement had never been given, and such an entity or fiduciary may be held fully liable pursuant to § 1.1445–1(e) for any failure to withhold. For special rules concerning an entity's belated receipt of a notice concerning a false statement, see paragraphs (c)(2)(iii) and (d)(2)(i) of this section.

(5) *Reporting and paying over of withheld amounts*—(i) *In General.* An entity or fiduciary must report and pay over to the Internal Revenue Service any tax withheld pursuant to section 1445(e) and this section by the 20th day after the date of the transfer (as defined in § 1.1445–1(g)(8). Forms 8288 and 8288–A are used for this purpose and must be filed with the Internal Revenue Service Center, Philadephia, PA 19255. The contents of Forms 8288 and 8288–A are described in § 1.1445–1(d). Pursuant to section 7502 and regulations thereunder, the timely mailing of Forms 8288 and 8288–A by U.S. mail will be treated as their timely filing. Form 8288–A will be stamped by the Internal Revenue Service to show receipt, and a stamped copy will be mailed by the Service to the interest-holder, at the address shown on the form, for the interest-holder's use. See paragraph (b)(7) of this section. If an application for a withholding certificate with respect to a transfer of a U.S. real property interest was submitted to the Internal Revenue Service on the day of or at any time prior to the transfer, the entity or fiduciary must withold the amount required under section 1445(e) and the rules of this section. However, the amount withheld, or a lesser amount as determined by the Service, need not be reported and paid over to the Service until the 20th day following the Service's final determination. For this purpose, the Service's final determination occurs on the day when the withholding certificate is mailed to the applicant by the Service or when a notification denying the request for a withholding certificate is mailed to the applicant by the Service. An application is submitted to the Service on the day it is actually received by the Service at the address provided in § 1.1445–1(g)(10) or, under the rules of section 7502, on the day it is mailed to the Service at the address provided in § 1.1445–1(g)(10). For rules concerning the issuance of withholding certificates, see § 1.1445–6.

(ii) *Anti-abuse rule.* An entity or fiduciary that in reliance upon the rules of this paragraph (b)(5)(ii) fails to report and pay over amounts withheld by the 20th day following the date of the transfer, shall be subject to the payment of interest and penalties if the relevant application for a withholding certificate (or an amendment of the application for a withholding certificate) was submitted for a principle purpose of delaying the payment to the IRS of the amount withheld. Interest and penalties shall be assessed on the amount that is ultimately paid over, with respect to the period between the 20th day after the date of the transfer and the date on which payment is made.

(6) *Liability upon failure to withhold.* For rules regarding liability upon failure to withhold under section 1445(e) and this § 1.1445–5, see § 1.1445–1(e).

(7) *Effect of withholding by entity or fiduciary upon interest holder.* The withholding of tax under section 1445(e) does not excuse a foreign person that is subject to U.S. tax by reason of the operation of section 897 from filing a U.S. tax return. Thus, Form 1040NR, 1041, or 1120F, as appropriate must be

filed and any tax due must be paid, by the filing date otherwise applicable to such person (or any extension thereof). The tax withheld with respect to the foreign person under section 1445(e) (as shown on Form 8288-A) shall be credited against the amount of income tax as computed in such return, but only if the stamped copy of Form 8288-A provided to the entity or fiduciary (under paragraph (b)(5) of this section) is attached to the return or substantial evidence of the amount of tax withheld is attached to the return in accordance with the succeeding sentence. If a stamped copy of Form 8288-A has not been provided to the interest-holder by the Service, the interest-holder may establish the amount of tax withheld by the entity or fiduciary by attaching to its return substantial evidence of such amount. Such an interestholder must attach to its return a statement which supplies all of the information required by § 1.1445-1(d) (2) (expect such information that was not obtained by a diligent effort.) If the amount withheld under section 1445(e) constitutes less than the full amount of the foreign person's U.S. tax liability for that taxable year, then a payment of estimated tax may be required to be made pursuant to section 6154 or 6654 prior to the filing of the income tax return for the year. Alternatively, if the amount withheld under section 1445(e) exceeds the foreign person's maximum tax liability with respect to the transaction (*as reflected* in a withholding certificate issued by the Internal Revenue Service pursuant to § 1.1445-6), then the foreign person may seek an early refund of the excess pursuant to § 1.1445-6(f). A foreign person that takes gain into account in accordance with the provisions of section 453 shall not be entitled to a refund to the amount withheld, unless a withholding certificate providing for such a refund is obtained pursuant to §1.1445-6. If an entity or fiduciary withholds tax under section 1445(e) with respect to a beneficial owner of an interest who is not a foreign person, such beneficial owner may credit the amount of any tax withheld against his income tax liability in accordance with the provisions of this § 1.1445-5(b)(7) or apply for an early refund under § 1.1445-6(g).

(8) *Effective dates*—(i) *Partnership, trust, and estate dispositions of U.S. real property interests.* The provisions of section 1445(e)(1) and paragraph (c) of this section, requiring withholding upon certain dispositions of U.S. real property interests by domestic partnerships, trusts, and estates, shall apply to any disposition on or after January 1, 1985.

(ii) *Certain distributions by foreign corporations.* The provisions of section 1445(e)(2) and paragraph (d) of this section, requiring withholding upon distributions of U.S. real property interests by foreign corporations shall apply to distributions made on or after January 1, 1985.

(iii) *Distributions by certain domestic corporations to foreign shareholders.* The provisions of section 1445(e)(3) and paragraph (e) of this section, requiring withholding upon distributions by U.S. real property holding corporations to foreign shareholders, shall apply to distributions made on or after January 1, 1985.

(iv) *Taxable distributions by domestic or foreign partnerships, trusts, and estates.* The provisions of section 1445(e)(4), requiring withholding upon certain taxable distributions by domestic or foreign partnerships, trusts, and estates, shall apply to distributions made on or after the effective date of a Treasury decision under section 897 (e)(2)(B)(ii) and (g).

(iv) *Disposition of interests in partnerships, trusts, and estates.* The provisions of section 1445(e)(5), requiring withholding upon certain dispositions of interests in partnerships, trusts, and estates, shall apply to dispositions on or after the effective date of a Treasury decision under section 897(g).

(vi) *Tiered Partnerships.* No withholding is required upon the disposition of a U.S. real property interest by a partnership which is directly owned, in whole or in part, by another domestic partnership (but only to the extent that the amount realized is attributable to the partnership interest of that other partnership) until the effective date of a Treasury Decision published under section 1445(e) providing rules governing this matter.

(c) *Dispositions of U.S. real property interests by domestic partnerships, trusts, and estates*—(1) *Withholding required*—(i) *In general.* If a domestic partnership, trust, or estate disposes of a U.S. real property interest and any partner, beneficiary, or owner of the entity is a foreign person, then the partnership or the trustee, executor, or equivalent fiduciary of the trust or estate must withhold tax with respect to each such foreign person in accordance with the provisions of subdivision (ii) or (iii), of this paragraph (c)(1) (as applicable). The withholding obligation imposed by this paragraph (c) applies to the fiduciary of a trust even if the grantor of the trust or another person is treated as the owner of the trust or any portion thereof for purposes of the Internal Revenue Code. Thus, the withholding obligation imposed by this paragraph (c) applies to the trustee of a land trust or similar arrangement, even if such a trustee is not ordinarily treated under the applicable provisions of local law as a true fiduciary.

(ii) *Disposition by partnership.* A partnership must withhold a tax equal to 34 percent of each foreign partner's distributive share of the gain realized by the partnership upon the disposition of each U.S. real property interest. Such distributive share of the gain must be determined pursuant to the principles of section 704 and the regulations thereunder. However, the partnership must withhold at the rate of 28 percent if the disposition occurs after November 21, 1986, and the partnership's taxable year before January 1, 1987. See sections 311(b)(4) and 1810(f) of the Tax Reform Act of 1986. The rate of withholding applicable to dispositions that occured before November 22, 1986 shall be determined pursuant to the temporary regulations in effect at that time. For the rules applicable to partnerships, interests in which are regularly traded on an established securities market, see § 1.1445-8T.

(iii) *Disposition by trust or estate.*—(A) *In general.* A trustee, fiduciary, executor or equivalent fiduciary (hereafter collectively referred to as the fiduciary) of a trust or estate having one or more foreign beneficiaries must withhold tax in accordance with the rules of this § 1.1445-5(c)(1)(iii). Such a fiduciary must establish a U.S. real property interest account and must enter in such account all gains and losses realized during the taxable year of the trust or estate from dispositions of U.S. real property interests. The fiduciary must withhold 34 percent of any distribution to a foreign beneficiary that is attributable to the balance in the U.S. real property interest account on the day of the distribution. A distribution from a trust or estate to a beneficiary (domestic or foreign) shall, solely for purposes of section 1445(e)(1), be deemed to be attributable first to any balance in the U.S. real property interest account and then to other amounts. However, a distribution that occurs prior to the transfer of a U.S. real property interest in a taxable year or at any other time when the amount contained in the U.S real property interest account is zero, is not subject to withholding under this § 1.1445-5(c)(1)(iii). The U.S. real property interest account is reduced by the amount distributed to all beneficiaries (domestic and foreign) attributable to such account during the taxable year of the trust or estate. Any ending balance of the U.S. real property interest account not distributed by the close of the taxable year of the trust or estate is cancelled and is not carried over (or carried back) to any other year. Thus, the beginning balance of such account in any taxable year of the trust or estate is always zero. For rules applicable to grantor trusts see § 1.1445-5(c)(1)(iv). For rules applicable to trusts interest in which are regularly traded on an established securities market and real estate investment trusts, see § 1.1445-8.

(B) *Transition rules.* The following rules shall apply for purposes of determining the amount required to be withheld under section 1445 by az trust or estate—

(*2*) In the case of disposition of U.S. real property interest that occured before November 22, 1986, the applicable withholding requirements shall be determined pursuant to the temporary regulations under section 1445 in effect at that time;

(*2*) In the case of disposition of U.S. real property interests occurring after November 21, 1986 but before [30 days after date of publication of this regulation], the applicable withholding requirement shall be determined pursuant to the temporary regulations under section 1445, but substituting a 28 percent withholding rate for any other rate specified therein;

(*3*) In the case of distributions occurring after January 23, 1987 during a taxable year of the trust or estate that began before January 1, 1987, the applicable withholding requirements shall be determined pursuant to these final regulations, but susbstituting a 28 percent withholding rate for the 34 percent rate specified herein;

(*4*) In the case of distributions occurring after January 23, 1987 during a taxable year of the trust or estate that began after December 31, 1986, the applicable withholding requirements shall be determined pursuant to these final regulations; and

(*5*) If a trust or estate withholds under section 1445 with respect to a disposition of a U.S. real property interest, then the amount of gain realized on such disposition shall not be added to the U.S. real property interest account of the trust or estate for the taxable year of the disposition.

(C) *Example.* On January 1, 1987, A establishes a domestic trust (which has as its taxable year, the calendar year) for the benefit of B, a nonresident alien, and C, a U.S. citizen. The trust is not a trust subject to sections 671 through 679. Under the terms of the trust, the trustee, T, is given discretion to distribute income and corpus of the trust to provide for the reasonable needs of B and C. During the trust's 1987 taxable year, T disposes of three parcels of vacant land located in the United States. The following chart illustrates the computation of the amount subject to withholding under section 1445 with respect to distributions made by T to B and C during 1987.

Date	Parcel sold	Gains or (loss) realized	Distributions to C.	Distributions to B (before withholding)	Section 1445 withholding (34 percent rate)	U.S. real property interest account
Jan. 1, 1987		D				0
Mar. 1, 1987						140,000
Mar. 5, 1987	Parcel 1	140,000	5,000	10,000	3,400	125,000
Mar. 15, 1987			10,000	5,000	1,700	110,000
May 1, 1987	Parcel 2	300,000				410,000
May 15, 1987	Parcel 3	(50,000)				260,000
Dec. 1, 1987			170,000	170,000	57,800	20,000
Jan. 1, 1987						0

(iv) *Disposition by grantor trust.* The trustee or equivalent fiduciary of a trust that is subject to the provisions of subpart E of part I of subchapter J (sections 671 through 697) must withhold a tax equal to 34 percent of the gain realized from each disposition of a U.S. real property interest to the extent such gain is allocable to a portion of the trust treated as owned by a foreign person under subpart E of part I of subchapter J. However the fiduciary must withhold tax at the rate of 28 percent if the disposition occurs after November 21, 1986, and the trust's taxable year began before January 1, 1987. See sections 311 (b)(4) and 1810(f) of the Tax Reform Act of 1986. The rate of withholding applicable to dispositions that occurred before November 22, 1986, shall be determined pursuant to the temporary regulations in effect at that time.

(2) *Withholding not required under paragraph (c)*—(i) *Transactions covered elsewhere.* No withholding is required under this paragraph (c) with respect to the distribution of a U.S. real property interest by a partnership, trust, or estate. Such distributions shall be subject to withholding under section 1445(e)(4) and paragraph (f) of this section on the effective date of a Treasury decision published under section 897(e)(2) and (g). See paragraph (b)(8)(iv) of this section. Withholding with respect to the disposition of an interest in a partnership, trust, or estate shall be required only as provided in section 1445(e)(5) and paragraph (g) of this section. No withholding is at this time required under those provisions. See paragraph (b)(8)(v) of this section.

(ii) *Interest-holder not a foreign person*—(A) *In general.* A domestic partnership, trust, or estate that disposes of a U.S. real property interest shall not be required to withhold with respect to any partner or beneficiary that it determines, pursuant to the rules of paragraph (b)(3) of this section, not to be a foreign person.

(B) *Belated notice of false certification.* If after the date of the transfer a partnership or fiduciary learns that a partner's or beneficiary's certification of non-foreign status is false, then that partnership or fiduciary shall be required to withhold, with respect to the foreign partner or beneficiary that gave the false certification, the lessor of—

(*1*) The amount otherwise required to be withheld under the rules of this paragraph (c), or

(*2*) An amount equal to that partner's or beneficiary's remaining interests in the income or assets of the partnership, trust, or estate. Amounts so withheld must be reported and paid over by the 60th day following the date on which the partnership or fiduciary learns that the certification is false. For rules concerning the notifications of false certifications that may be required to be given to partnerships and fiduciaries, see § 1.1445-4(b).

(iii) *Property disposed of not a U.S. real property interest*—(A) *In general.* No withholding is required under this paragraph (c) if a domestic partnership, trust, or estate that disposes of property determines pursuant to the rules of paragraph (b)(4) of this section that the property disposed of is not a U.S. real property interest.

(B) *Belated notice of false statement.* If after the date of the transfer a partnership or fiduciary learns that a corporation's statement (that an interest in the corporation is not a U.S. real property interest) is false, then that partnership or fiduciary shall be required to withhold, with respect to each foreign partner or beneficiary, the lesser of—

(*1*) The amount otherwise required to be withheld under the rules of this paragraph (c), or

(2) An amount equal to that partner's or beneficiary's remaining interests in the income or assets of the parnership, trust, or estate.

Amounts so withheld must be reported and paid over by the 60th day following the date on which the partnership or fiduciary learns that the statement is false. For rules concerning the notifications of false statements that may be required to be given to partnerships or fiduciaries, see § 1.1445-4(b).

(iv) *Withholding certificate.* No withholding is required under this paragraph (c) with respect to the transfer of a U.S. real property interest if the Internal Revenue Service issues a withholding certificate that so provides. For rules concerning the issuance of withholding certificates, see § 1.1445-6.

(v) *Nonrecognition transactions.* For special rules concerning transactions entitled to nonrecognition of gain or loss, see paragraph (b)(2) of this section.

(3) *Large partnerships or trusts—(i) In general.* If a partnership or trust has more than 100 partners or beneficiaries, then the partnership or fiduciary of the trust may elect to withhold in accordance with the provisions of this § 1.1445-5(c)(3) in lieu of withholding in the manner required by § 1.1445-5(c)(1). However, the rules of this § 1.1445-5(c)(3) shall not apply to any partnership or trust interests in which are regularly traded on an established securities market or to any real estate investment trust. See, § 1.1445-8T.

(ii) *Amount to be withheld.* A partnership or trust electing to withhold under this § 1.1445-5(c)(3) shall withhold from each distribution to a foreign person an amount equal 34 percent of the amount attributable to section 1445(e)(1) transfers. However, the partnership or trust must withhold at the rate of 28 percent if the distribution occurs after November 21, 1986, and the partnership's or trust's taxable year began before January 1, 1987. The rate of withholding applicable to distributions that occurred before November 22, 1986 shall be determined pursuant to the temporary regulations in effect at that time.

(iii) *Amounts attributable to section 1445(e)(1) transfers.* A distribution is attributable to section 1445(e)(1) transfers to the extent of the partner's or beneficiary's proportionate share of the current balance of the entity's section 1445(e)(1) account. A distribution from a partnership or trust that has made an election under this § 1.1445-5(c)(3) shall be deemed first to be attributable to a section 1445(e)(1) transfer to the extent of the balance in the section 1445(e)(1) account. An entity's section 1445(e)(1) account shall be equal to—

(A) The total amount of net gain realized by the entity upon all transfers of U.S. real property interests carried out by the entity after the date of its election under this § 1.1445-5(c)(3); minus

(B) The total amount of all distributions by the entity to domestic and foreign distributees from such account.

(iv) *Special rules for entities that make recurring sales of growing crops and timber.* An entity that makes an election under § 1.1445-5(c)(3) and that makes recurring sales of growing crops and timber may further elect to determine the amount subject to withholding under the rules of this § 1.1445-5(c)(3)(iv). Such an entity must withhold from each distribution to a foreign partner or beneficiary an amount equal to 10 percent of such partner's or beneficiary's proportionate share of the current balance of the entity's gross section 1445(e)(1) account. An entity's gross section 1445(e)(1) account equals—

(A) The total amount realized by the entity upon all transfers of U.S. real property interest carried out by the entity after the date of its election under this § 1.1445-5(c)(3)(iv); minus

(B) The total amount of all distributions to domestic and foreign distributees from such account.

An entity that elects to compute the amount subject to withholding under this § 1.1445-5(c)(3)(iv), shall make such election in accordance with § 1.1445-5(c)(3)(vi) and shall be subject to the provisions otherwise applicable under § 1.1445-5(c)(3).

(v) *Special rules regarding publicly traded partnerships, trust and real estate investment trusts.* [Reserved].

(vi) *Procedural rules.* An election under paragraph (c)(3) may be made by filing a notice thereof with the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10). The notice must be submitted by a general partner (in the case of a partnership) or the trustee or equivalent fiduciary (in the case of a trust). The notice must set forth the name, office address, and identifying number of the partnership or fiduciary making the election, and, in the case of a partnership, must include the name, office address, and identifying number of the general partner submitting the election. An election under this paragraph (c)(3) may be revoked only with the consent of the Internal Revenue Service. Consent of the Service may be requested by filing an application to revoke the election with the Assistant Commissioner (International) at the address stated above. This application must include all information provided to the Service with the election notice and must provide an explanation of the reasons for revoking the election. The application to revoke an election must also specify the amount remaining to be distributed in the section 1445(e)(1) account or the gross section 1445(e)(1) account.

An entity that ceases to qualify under section 1.1445-5(c)(3) because such entity does not have more than 100 partners or beneficiaries may revoke its election only with the consent of the Internal Revenue Service.

(d) *Distributions of U.S. real property interests by foreign corporations—(1) In general.* A foreign corporation that distributes a U.S. real property interest must deduct and withhold a tax equal to 34 percent of the amount of gain recognized by the corporation upon the distribution. However, the foreign corporation must withhold at the rate of 28 percent if the corporation's taxable year began before January 1, 1987. The amount of gain required to be recognized by the corporation must be determined pursuant to the rules of section 897 and any other applicable section. For special rules concerning the applicability of a nonrecognition provision to a distribution, see paragraph (b)(2) of this section. The withholding liability imposed by this paragraph (d) applies to the same taxpayer that owes the related substantive income tax liability pursuant to the operation of section 897. Only one such liability will be assessed and collected from a foreign corporation, but separate penalties for failures to comply with the two requirements will be asserted.

(2) *Withholding not required—(i) Property distributed not a U.S. real property interest—(A) In general.* No withholding is required under this paragraph (d) if a foreign corporation that distributes property determines pursuant to the rules of paragraph (b)(3) of this section that the property distributed is not a U.S. real property interest.

(B) *Belated notice of false statement.* If after the date of a distribution described in paragraph (d)(1) of this section a foreign corporation learns that another corporation's statement (that an interest in that other corporation is not a U.S. real property interest) is false, then the foreign corporation may not rely upon that statement for any purpose. Such a foreign corporation's withholding obligations under this paragraph (d) shall apply if a statement had never been given, and such a corporation may be held fully liable pursuant to § 1.1445-5(b)(5) for any failure to withhold. Amounts withheld pursuant to the rule of this paragraph (d)(2)(i)(B) must be reported and paid over by the 60th day following the date on which the foreign corporation learns that the statement is false. No penalties or interest will be assessed for failures to withhold prior to that date. For rules concerning the notifications of false statements that may be required to be given to foreign corporations, see § 1.1445-4(b).

(ii) *Withholding certificate.* No withholding is required under this paragraph (d) with respect to a foreign corporation's distribution of a U.S. real property interest if the distributing corporation obtains a withholding certificate from the Internal Revenue Service that so provides. For rules concerning the issuance of withholding certificates, see § 1.1445-6.

(e) *Distributions of foreign persons by U.S. real property holding corporations*—(1) *In general.* A domestic corporation that distributes any property to a foreign person that holds an interest in the corporation must deduct and withhold a tax equal to 10 percent of the fair market value of the property distributed to the foreign person, if—

(i) The foreign person's interest in the corporation constitutes a U.S. real property interest under the provisions of section 897 and regulations thereunder; and

(ii) The property is distributed either—

(A) In redemption of stock under section 302; or

(B) In liquidation of the corporation pursuant to the provisions of Part II of Subchapter C (sections 331 through 341). For the treatment of a domestic corporation's transfer of a U.S. real property interest to a foreign interest-holder in a distribution to which section 301 applies, see sections 897(f), 1441, and 1442.

(2) *Withholding not required*—(i) *Foreign person's interest not a U.S. real property interest.* Withholding is required under this paragraph (e) only with respect to distributions to foreign persons holding interests in the corporation that constitute U.S. real property interests. In general, a foreign person's interest in a domestic corporation constitutes a U.S. real property interest if the corporation was a U.S real property holding corporation at any time during the shorter of (A) the period in which the foreign person held the interest or (B) the previous five years (but not earlier than June 19, 1980). See section 897(c) and §§ 1.897-1(c) and 1.897-2 (b) and (h). However, an interest in such a corporation ceases to be a U.S. real property interest after all of the U.S. real property interests held by the corporation itself are disposed of in transactions on which gain or loss is recognized. See section 897(c)(1)(B) and §1.897-2(f)(2). Thus, if a U.S. real property holding corporation in the process of liquidation does not elect section 337 nonrecognition treatment upon its sale of all U.S. real property interests held by the corporation, and recognizes gain or loss upon such sales, interests in that corporation cease to be U.S. real property interests. Therefore, no withholding would be required with respect to that corporation's subsequent liquidating distribution to a foreign shareholder of property other than a U.S. real property interest.

(ii) *Nonrecognition transactions.* For special rules concerning the applicability of a nonrecognition provision to a distribution described in paragraph (e)(1) of this section, see paragraph (b)(2) of this section.

(iii) *Interest-holder not a foreign person*— (A) *In general.* A domestic corporation shall not be required to withhold under this paragraph (e) with respect to a distribution of property to any distributee that it determines, pursuant to the rules of paragraph (b)(3) of this section, not to be a foreign person.

(b) *Belated notice of false certification.* If after the date of a distribution described in paragraph (e)(1) of this section a domestic corporation learns that an interest-holder's certification of non-foreign status is false, then the corporation may rely upon that certification only if the person providing the false certification holds (or held) less than 10 percent of the value of the outstanding stock of the corporation. With respect to less than 10 percent interest-holders, no withholding is required under this paragraph (e) upon receipt of a belated notice of false certification. With respect to 10 percent or greater interest-holders, the corporation's withholding obligations under this paragraph (e) shall apply as if a certification had never been given, and such a corporation may be held fully liable pursuant to § 1.1445-5(b)(6) for any failure to withhold as of the date specified in this § 1.1445-5(e)(2)(iii)(B). Amounts withheld pursuant to the rule of this paragraph (e)(2)(iii)(B) must be reported and paid over by the 60th day following the date on which the corporation learns that the certification is false. No penalties or interest for failures to withhold will be assessed prior to that date. For rules concerning the notifications of false certifications that may be required to be given to U.S. real property holding corporations, see § 1.1445-4(b).

(iv) *Withholding certificate.* No withholding, or reduced withholding, is required under this paragraph (e) with respect to a domestic corporation's distribution of property if the distributing corporation obtains a withholding certificate from the Internal Revenue Service that so provides. For rules concerning the issuance of withholding certificates, see § 1.1445-6.

(f) *Taxable distributions by domestic or foreign partnerships, trusts, or estates.* [Reserved]

(g) *Dispositions of interests in partnerships, trusts, and estates.* [Reserved]

§ 1.1445-6 Adjustments pursuant to withhold certificate of amount required to be withheld under section 1445(e).

(a) *Withholding certificate for purposes of section 1445(e)*—(1) *In general.* Pursuant to the provisions of § 1.1445-5 (c)(2)(iv), (d)(2)(ii), and (e)(2)(iv), withholding under section 1445(e) may be reduced or eliminated pursuant to a withholding certificate issued by the Internal Revenue Service in accordance with the rules of this § 1.1445-6. A withholding certificate may be issued in cases where adjusted withholding is appropriate (e.g., because of the applicability of a nonrecognition provision—see paragraph (c) of this section), where the relevant taxpayers are exempt from U.S. tax (see paragraph (d) of this section), or where an agreement for the payment of tax is entered into with the Service (see paragraph (e) of this section). A withholding certificate that is obtained prior to a transfer allows the entity or fiduciary to withhold a reduced amount or excuses withholding entirely. A withholding certificate that is obtained after a transfer has been made may authorize a normal refund or an early refund pursuant to paragraph (g) of this section. The Internal Revenue Service will act upon an application for a withholding certificate not later than the 90th day after it is received. (The Service may deny a request for a withholding certificate where, after due notice, an applicant fails to provide the information necessary to make a determination.) Solely for this purpose (i.e., determining the day upon which the 90 day period commences), an application is received by the Service on the date when all information necessary for the Service to make a determination is provided by the applicant. (For rules regarding whether an application has been timely submitted, see § 1.1445-5(b)(5)). The Internal Revenue Service will act upon an application for an early refund not later than the 90th day after it is received. An application for an early refund must either (i) include a copy of a withholding certificate issued by the Service with respect to the transaction, or (ii) be combined with an application for a withholding certificate. Where an application for an early refund is combined with an application for a withholding certificate, the Service will act upon both applications not later than the 90th day after receipt. Either an entity, a fiduciary, or a relevant taxpayer (as defined in paragraph (a)(2) of this section) may apply for a withholding certificate. An entity or fiduciary may apply for a withholding certificate with respect to all or less than all relevant taxpayers. For special rules concerning the issuance of a withholding certificate to a foreign corporation that has made an election under section 897(i), see § 1.1445-7(d).

(2) *Relevant taxpayer.* For purposes of this section, the term "relevant taxpayer" means any foreign person that will bear substantive income tax liability by reason of the operation of section 897 with respect to a transaction upon which withholding is required under section 1445(e).

(b) *Applications for withholding certificates*—(1) *In general.* An application for a withholding certificate pursuant to this § 1.1445-6 must be submitted in the manner provided in § 1.1445—3 (b). However, in lieu of the information required to be submitted pursuant to § 1.1445-3(b)(4), the applicant must provide the information required by paragraph (b)(2) of this section. In addition, the information required by paragraph (b)(3) of this section must be submitted with the application.

(2) Basis for certificate—(i) *Adjusted withholding.* If a withholding certificate is sought on the basis of a claim that adjusted withholding is appropriate, the application must include a calculation, in accordance with paragraph (c) of this section, of the maximum tax that may be imposed on each relevant taxpayer with respect to which adjusted withholding is sought. The application must also include all evidence necessary to substantiate the claimed calculation, such as records of adjustments to basis or appraisals of fair market value.

(ii) *Exemption.* If a withholding certificate is sought on the basis of a relevant taxpayer's exemption from U.S. tax, the application must set forth a brief statement of the law and facts that support the claimed exemption. See paragraph (d) of this section.

(iii) *Agreement.* If a withholding certificate is sought on the basis of an agreement for the payment of tax, the application must include a copy of the agreement proposed by the applicant and a copy of the security instrument (if any) proposed by the applicant. In this regard, see paragraph (e) of this section.

(3) *Relevant taxpayers.* An application for withholding certificate pursuant to this section must set forth the name, identifying number (if any) and home address (in the case of an individual) or office address (in the case of an entity) of each relevant taxpayer with respect to which adjusted withholding is sought.

(c) *Adjustment of amount required to be withheld.* The Internal Revenue Service may issue a withhold certificate that excuses withholding or that permits an entity or fiduciary to withholding an adjusted amount reflecting the relevant taxpayers' maximum tax liability. A relevant taxpayer's maximum tax liability is the maximum amount which that taxpayer could be required to pay as tax by reason of the transaction upon which withholding is required. In the case of an individual taxpayer that amount will generally be the gain realized by the individual, multiplied by the maximum individual income tax rate applicable to long term capital gain, currently 20 percent. In the case of a corporate taxpayer, that amount will generally be the gain realized by the corporation, multiplied by the maximum corporate income tax rate applicable to long term capital gain, currently 28 percent. However, that amount must be adjusted to take into account the following:

(1) Any reduction of tax to which the relevant taxpayer is entitled under the provisions of a U.S. income tax treaty;

(2) The effect of any nonrecognition provision that is applicable to the transaction;

(3) Any losses previously realized and recognized by the relevant taxpayer during the taxable year by reason of the operation of section 897;

(4) Any amount realized upon the subject transfer by the relevant taxpayer that is required to be treated as ordinary income under any provision of the Code; and

(5) Any other factor that may increase or reduce the tax upon the transaction.

(d) *Relevant taxpayer's exemption from U.S. tax*—(1) *In general.* The Internal Revenue Service will issue a withholding certificate that excuses withholding by an entity or fiduciary if it is established that a relevant taxpayer's income from the transaction will be exempt from U.S. tax. For the available exemptions, see paragraph (d)(2) of this section. If a relevant taxpayer is entitled to a reduction of (rather than an exemption from) U.S. tax, then the entity or fiduciary may obtain a withholding certificate to that effect pursuant to the provisions of paragraph (c) of this section.

(2) *Available exemptions.* A relevant taxpayer's income from a transaction with respect to which withholding is required under section 1445(e) may be exempt from U.S. tax because either:

(i) The relevant taxpayer is an integral part or controlled entity of a foreign government and the subject income is exempt from U.S. tax pursuant to section 892 and the regulations thereunder; or

(ii) The relevant taxpayer is entitled to the benefits of an income tax treaty that provides for such an exemption (subject to the limitations imposed by section 1125(c) of Pub. L. 96-499, which, in general overrides such benefits as of January 1, 1985).

(e) *Agreement for the payment of tax*—(1) *In general.* The Internal Revenue Service will issue a withholding certificate that excuses withholding or that permits an entity or fiduciary to withhold a reduced amount, if the entity, fiduciary, or a relevant taxpayer enters into an agreement for the payment of tax pursuant to the provisions of this paragraph (e). An agreement for the payment of tax is a contract between the Service and the entity, fiduciary, or relevant taxpayer that consists of two necessary elements. Those elements are—

(i) A contract between the Service and the other person, setting forth in detail the rights and obligations of each; and

(ii) A security instrument or other form of security acceptable to the Director, Foreign Operations District.

(2) *Contents of agreement*—(i) *In general.* An agreement for the payment of tax must cover an amount described in subdivision (ii) or (iii) of this paragraph (e)(2). The agreement may either provide adequate security for the payment of the chosen amount with respect to the relevant taxpayer in accordance with paragraph (e)(3) of this section or provide for the payment of that amount through a combination of security and withholding of tax by the entity or fiduciary.

(ii) *Tax that would otherwise be withheld.* An agreement for the payment of tax may cover the amount of tax that would otherwise be required to be withheld with respect to the relevant taxpayer pursuant to section 1445(e). In addition to the amount computed pursuant to section 1445(e), the applicant must agree to pay interest upon that amount, at the rate established under section 6621, with respect to the period between the date on which withholding tax under section 1445(e) would otherwise be due and the date on which the relevant taxpayer's payment of tax with respect to the disposition will be due. The amount of interest agreed upon must be paid by the applicant regardless of whether or not the Service is required to draw upon any security provided pursuant to the agreement. The interest may be paid either with the return or by the Service drawing upon the security.

(iii) *Maximum tax liability.* An agreement for the payment of tax may cover the relevant taxpayer's maximum tax liability, determined in accordance with paragraph (c) of this section. The agreement must also provide for the payment of an additional amount equal to 25 percent of the amount determined under paragraph (c) of this section. This additional amount secures the interest and penalties that would accrue between the date of the relevant taxpayer's failure to file a return and pay tax with respect to the disposition, and the date of which the Service collects upon that liability pursuant to the agreement.

(iv) *Allocation of payment.* An agreement for the payment of tax pursuant to this section must set forth an allocation of the payment provided for by the agreement among the relevant taxpayers with respect to which the withholding certificate is sought. In the case of an agreement that covers an amount described in subdivision (ii) of this paragraph (e)(2), such allocation must be based upon the amount that would otherwise be required to be withheld with respect to each relevant taxpayer. In the case of an agreement that covers an amount described in subdivision (iii) of this paragraph (e)(2), such allocation must be based upon each relevant taxpayer's maximum tax liability.

(3) *Major types of security.* The major types of security that are acceptable to the Internal Revenue Service for purposes of this section are described in § 1.1445-3(e)(3).

(4) *Terms of security instrument.* Any security instrument that is furnished pursuant to this section must contain the terms described in § 1.1445-3(e)(4).

(f) *Amendments to application for withholding certificates*—(1) *In general.* An applicant for a withholding certificate may amend an otherwise complete application by submitting an amending statement to the Assistant Commissioner (International) at the address provided in § 1.1445-1(g)(10). The amending statement shall provide the information required by § 1.1445-6(f)(3) and must be signed and accompanied by a penalties of perjury statement in accordance with § 1.1445-6(b).

(2) *Extension of time for the Service to process requests for withholding certificates*—(i) *In general.* If an amending statement is submitted, the time in which the Internal Revenue Service must act upon the amended application shall be extended by 30 days.

(ii) *Substantial amendments.* If an amending statement is submitted and the Service finds that the statement substantially amends to the facts of the underlying application or substantially alters the terms of the withholding certificate as requested in the initial application, the time within which the Service must act upon the amended application shall be extended by 60 days. The applicant shall be so notified.

(iii) *Amending statement received after the requested withholding certificate has been signed by the Assistant Commissioner (International).* If an amending statement is received after the withholding certificate, drafted in response to the underlying application, has been signed by the Assistant Commissioner (International) or his delegate and prior to the day such certificate is mailed to the applicant, the time in which the Service must act upon the amended application shall be extended by 90 days.

(3) *Information required to be submitted.* No particular form is required for an amending statement but the statement must provide the following information:

(i) *Identification of applicant.* The amending statement must set forth the name, address, and identifying number (if any) of the person submitting the amending statement.

(ii) *Date of application.* The amending statement must set forth the date of the underlying application for a withholding certificate.

(iii) *Real property interest to be (or that has been) transferred.* The amending statement must set forth a brief description of the real property interest with respect to which the underlying application for a withholding certificate was submitted.

(iv) *Amending information.* The amending statement must fully set forth the basis for the amendment including any modification of the facts supporting the application for a withholding certificate and any change sought in the terms of the withholding certificate.

(g) *Early refund of overwithheld amounts.* If the Internal Revenue Service issues a withholding certificate pursuant to this section, and an amount greater than that specified in the certificate was withheld by the entity or fiduciary, then pursuant to the rules of this paragraph (g) a relevant taxpayer may apply for an early refund of a proportionate share of the excess amount (without interest) prior to the date on which the relevant taxpayer's return is due (without extensions). An application for an early refund must be addressed to the Assistant Commissioner (International), at the address provided in § 1.1445-1(g)(10). No particular form is required for the application, but the following information must be set forth in separate paragraphs numbered to correspond with the numbers given below:

(1) Name, address, and identifying number (if any) of the relevant taxpayer seeking the refund;

(2) Amount required to be withheld pursuant to withholding certificate;

(3) Amount withheld by entity or fiduciary (attach a copy of Form 8288-A stamped by IRS pursuant to § 1.1445-5(b)(4) or provide substantial evidence of the amount withheld in the case of a failure to receive Form 8288-A, as provided in § 1.1445-5(b)(7)); and

(4) Amount to be refunded to the relevant taxpayer.

An application for an early refund cannot be processed unless the required copy of Form 8288-A or substantial evidence of the amount withheld in the case of a failure to receive Form 8288-A (as provided in § 1.1445-5(b)(7)) is attached to the application. If an application for a withholding certificate is submitted after the transfer takes place, then that application may be combined with an application for an early refund. The Service will act upon a claim for refund within the time limits set forth in § 1.1445-6(a)(1).

§ 1.1445-7 Treatment of foreign corporation that has made an election under section 897(i) to be treated as a domestic corporation (temporary).

(a) *In general.* Pursuant to section 897(i) a foreign corporation may elect to be treated as a domestic corporation for purposes of sections 897 and 6039C. A foreign corporation that has made such an election shall also be treated as a domestic corporation for purposes of the withholding required under section 1445, in accordance with the provisions of this section.

(b) *Withholding under section 1445(a)*—(1) *Dispositions by corporation.* A foreign corporation that has made an election under section 897(i) may provide a transferee with a certification of non-foreign status in connection with the corporation's disposition of a U.S. real property interest. However, in accordance with the provisions of §§ 1.1445–2(b)(2)(ii) and 1.1445–5(b)(3)(ii)(C), such an electing foreign corporation must attach to such certification a copy of the acknowledgment of the election provided to the corporation by the Internal Revenue Service pursuant to § 1.897–3(d)(4) which states that the information required by § 1.897–3 has been determined to be complete.

(2) *Dispositions of interests in corporation.* Dispositions of interests in electing foreign corporations shall be subject to the withholding requirements of section 1445(a) and the rules of §§ 1.1445–1 through 1.1445–4. Therefore, if a foreign person disposes of an interest in such a corporation, and that interest is a U.S. real property interest under the provisions of section 897 and regulations thereunder, then the transferee is required to withhold under section 1445(a).

(c) *Withholding under section 1445(e).* Because a foreign corporation that has made an election under section 897(i) is treated as a domestic corporation for purposes of determining withholding obligations under section 1445, such a corporation is not subject to the requirement of section 1445(e)(2) that a foreign corporation withhold at the corporate capital gain rate from the gain recognized upon the distribution of a U.S. real property interest. Such a corporation is subject to the provisions of section 1445(e)(3). Thus, if interests in an electing corporation constitute U.S. real property interests, then the corporation is required to withhold with respect to the non-dividend distribution of any property to an interest-holder that is a foreign person. See § 1.1445–5(e). Dividend distributions (distributions that are described in section 301) shall be treated as provided in sections 897(f), 1441 and 1442. In addition, if interests in an electing foreign corporation do not constitute U.S. real property interests, then distributions by such corporation shall be treated as provided in sections 897(f) (if applicable), 1441 and 1442.

(Approved by the Office of Management and Budget under control number 545–0902.)

Par 6. Sections 1.1445–1, 1.1445–2, 1.1445–3, 1.1445–4 1.1445–5, 1.1445–6, and 1.1445–7 are removed as of January 23, 1987.

§ 1.6012–1 [Amended]

Par. 7. Section 1.6012–1(b)(2)(i) is amended by adding the following sentence after the second sentence thereof: "In addition, this subdivision does not apply to a nonresident alien individual who has income for the taxable year that is treated under section 871(b)(1) as effectively connected with the conduct of a trade or business within the United States by reason of the operation of section 897."

OMB Control Numbers Under the Paperwork Reduction Act (26 CFR Part 602)

Par. 8. The authority for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

§ 602.101 [Amended]

Par. 9. Section 602.101 (c) is amended by inserting in the appropriate place in the table "1.1445–1 . . . 1545–0902," "1.1445–2 . . . 1545–0902," "1.1445–3 . . . 1545–0902," "1.1445–4 . . . 1545–0902," "1.1445–5 . . . 1545–0902," "1.1445–6 . . . 1545–0902," and "1.1445–7 . . . 1545–0902."

Lawrence B. Gibbs,
Commissioner of Internal Revenue.

Approved: December 9, 1986.

J. Roger Mentz,
Assistant Secretary of the Treasury.

[FR Doc. 86–28511 Filed 12–18–86; 4:47 pm]

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26 CFR Parts 1 and 602

[T.D. 8114]

Income Taxes; Withholding Upon Dispositions of U.S. Real Property Interests by Publicly Traded Patnerships, Publicly Traded Trusts and Real Estate Investment Trusts

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document provides temporary Income Tax Regulations relating to the withholding that is required upon the disposition of a U.S. real property interest by publicly traded partnerships, publicly traded trusts, and real estate investment trusts. The text of the temporary regulations set forth in this document also serves as the text of the proposed regulations cross-referenced in the notice of proposed rulemaking in the Proposed Rules section of this issue of the **Federal Register**.

DATE: The regulations are effective with respect to distributions following January 23, 1987, with respect to dispositions of U.S. real property interests. However, at the option of any person who by these regulations would be treated as a withholding agent, that person may apply these regulations to any distributions occurring on any date after December 24, 1986, as long as no other person also acts as a withholding agent with respect to the same distribution.

FOR FURTHER INFORMATION CONTACT: John M. Zoscak, Jr. of the Office of the Associate Chief Counsel (International) within the Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC 20224 (Attn: CC:INTL:Br2); Telephone (202) 566–3289 (not a toll-free call).

SUPPLMENTARY INFORMATION:

Background

This document contains temporary Income Tax Regulations (26 CFR Part 1) under section 1445. Section 1445 was added to the Internal Revenue Code by section 129 of the Tax Reform Act of 1984. Technical amendments were made by section 1810(f) of the Tax Reform Act of 1986. On December 31, 1984, proposed additions to the Income Tax Regulations (26 CFR Part 1) under section 1445 were published in the **Federal Register** (49 FR 50739) by cross-reference to Temporary Income Tax Regulations (26 CFR Parts 1 and 6a) published the same day (49 FR 50667). A public hearing concerning the proposed regulations was held on January 17, 1986. Final regulations regarding section 1445 (other than matters considered in these temporary regulations) are being published simultaneously with these temporary regulations.

In view of the significant changes in these rules, and after consideration of the comments received regarding distributions from publicly traded partnerships, publicly traded trusts and real estate investment trusts, revised Temporary Regulations with respect to such distributions are being republished.

Need for Temporary Regulations

Section 1445 is generally effective for dispositions of U.S. real property interests occurring after December 31, 1984. Some taxpayers have argued that they have found it difficult to apply section 1445 to publicly traded partnerships and trusts and real estate investment trusts (REITS), with respect to their dispositions of U.S. real property interests. See Discussion, below. The proper application of section 1445 is dependent upon the Service's specification of the manner in which the requirements of the statute will be administered. Because of the need for immediate guidance in this regard both to Service personnel and to the public, the Internal Revenue Service has found it to be impractical to issue these temporary regulations with the notice and public comment procedure under section 553(b) of title 5 of the United States Code.

Discussion

Under the prior Temporary Regulations (§ 1.1445-5T(c)(3)(ii)), publicly traded partnerships, publicly traded trusts, and REITS are required to obtain certificates of non-foreign status from their interest holders in order to be excused from withholding tax liability. Commenters have argued that such entities are unable to ascertain the non-foreign status of interest holders at the time of distributions, because of rapid turnovers in the interests. Interests in these entitles are frequently held by major financial institutions (or chains of such institutions) as nominees, and obtaining certificates of non-foreign status from the beneficial owner at the end of the chain of legal ownership may be difficult. In view of the practical difficulties that may result from requiring withholding at the level of the publicly traded partnership, publicly traded trust, or REIT, commenters have suggested that withholding can be more effectively achieved by placing the burden of withholding upon those who are in a position to know the non-foreign status of an interest holder. Accordingly, the special rules set forth in § 1.1445-8T have been developed. These rules require that withholding be performed by the person that makes a payment relating to a distribution attributable to the disposition of a U.S. real property interest by a publicly traded partnership, publicly traded trust, or REIT to a foreign person.

Pursuant to § 1.1445-8T(a), the rules of § 1.1445-8T apply to all partnerships and trusts, interests in which are regularly traded on an established securities market, and all real estate investment trusts (hereinafter referred to collectively as the "subject entities").

Section 1.1445-8T(b) provides rules for determining the person required to withhold with respect to distributions governed by § 1.1445-8T. Section 1.1445-8(b)(1) provides that the primary responsibility to withhold rests with the partnership, trust or REIT. However, if a person (1) is a nominee (as defined in § 1.1445-8T(d)), (2) receives a distribution attributable to a disposition of a U.S. real property interest by a subject entity, (3) receives the distribution for payment to any foreign person or the account of any foreign person, and (4) receives notice in accordance with § 1.1445-8T(f), then such person is required to satisfy the withholding requirements of section 1445(e)(1) and § 1.1445-8T. A person obligated to withhold is referred to as a withholding agent.

Section 1.1445-8T(b)(3) provides that a withholding exemption granted under § 1.1441-4(f), which exempts a person from withholding under section 1441 or section 1442, also exempts that person from withholding under § 1.1445-8T(b), provided that the letter that grants the exemption under § 1.1441-4(f) identifies another person as the withholding agent, and such other person agrees in writing to serve as the withholding agent for purposes of § 1.1445-8T(b).

Section 1.1445-8T(c) provides rules governing the amount to be withheld with respect to distributions by the subject entitles. A distinction is drawn between REITS and publicly traded partnerships and trusts because of the unique rules that govern the taxation of REITs under section 857 of the Code. With respect to publicly traded partnerships and trusts, the large partnership and trust rules of § 1.1445-5T(c)(3) apply.

With respect to REITS, § 1.1445-8T(c) revises the rules of the prior Temporary Regulations. Under the prior Temporary Regulations (§ 1.1445-5T(c)(4)), REITs were treated as publicly traded trusts and, thus, were required to use the section 1445(e)(1) account. This had the effect of characterizing REIT distributions as, first, composed of gain from the sale or exchange of a U.S. real property interest and, second, composed of other income (*e.g.*, rent). This characterization could conflict with rules under section 857. In order to avoid any such conflict, § 1.1445-8T(c)(2)(ii) provides that the amount subject to withholding under section 1445 is the amount of any distribution, determined with respect to each share or certificate of beneficial interest, which the REIT designates as a capital gain dividend (as defined in section 857(b)(3)(C)) multiplied by the number of shares or certificates of beneficial interest held by the foreign person. If the REIT designates a prior distribution as a capital gain dividend, the prior distribution is not subject to withholding. Rather, subsequent distributions are to be recharacterized as capital gain distributions until section 1445 capital has been effected on the amount of the prior capital gain dividend. This recharacterization applies only for purposes of section 1445 and does not control, in any manner, any computations made under section 857. It is understood that recharacterizing REIT distributions in the manner described above will affect the characterization of income for purposes of withholding under section 1441. This is necessary to insure collection of tax under section 1445. The rate of withholding is 34 percent (28 percent during a transition period).

A withholding agent is not restricted to relying on a certification of non-foreign status from an interest holder in order to establish the absence of a withholding tax liability. Section 1.1445-8T(e) provides that a withholding agent may also rely on the statements and address provided on Form 1001, Form W-8, or Form W-9 to determine whether an interest holder is a foreign person.

Since the withholding agent will often be a person other than the first payor of the distribution, it is necessary to provide the withholding agent with notice as to the amount subject to withholding. The notice requirement, which is stated in § 1.1445-8T(f), is met by complying with the notice provisions of 17 CFR 240.10(b)-17(b) (1) or (3) issued under authority of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.* Since withholding agents will have ready access to information published pursuant to the notice provisions of 17 CFR 240.10(b)-17(b) (1) or (3), requiring that a subject entity give actual notice of the amount subject to withholding was viewed as an unnecessary burden. Taxpayers are invited to comment, however, as to whether a system of actual notice should also be provided for in the regulations.

The rules for reporting and paying over withheld amounts with respect to distributions described in § 1.1445-8T(b) have been changed. Generally, the new rules apply the system adopted for reporting and paying over withheld amounts under section 1441 and 1442. This approach was taken because that system is generally familiar to potential withholding agents under § 1.1445-8T and the specialized system developed under section 1445 is unnecessary in this context. Thus, § 1.1445-8T(g) provides that a withholding agent must report and pay over withheld amounts pursuant to section 1461 and the regulations thereunder and § 1.6302-2. Form 1042 and Form 1042S will be used for this purpose. It should be noted that these procedures apply solely with regard to distributions subject to the special rules of § 1.1445-8T; all other withholding required under section 1445 will continue to be reported and paid over using Forms 8288 and 8288A.

The rules of § 1.1461-4 control the timing and manner of obtaining refunds of overwithheld amounts. Thus, the early refund procedure set forth in § 1.1445-6(g) does not apply to persons whose payments were withheld upon under § 1.1445-8T.

Regulatory Flexibility Act And Executive Order 12291

The Internal Revenue Service has determined that the proposed rule is interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, this rule is not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6). The Commissioner of Internal Revenue has determined that the proposed rule is not a major regulation subject to Executive Order 12291. Accordingly, a regulatory impact analysis is not required and has not been prepared.

Paperwork Reduction Act

These regulations were submitted to the Office of Management and Budget for review under the Paperwork Reduction Act and approved under OMB number 1545-0096.

Drafting Information

The principal author of this regulation is John M. Zoscak, Jr. of the Office of the Associate Chief Counsel (International), within the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR 1.1441-1 through 1.1465-1

Income taxes, Aliens, Foreign corporations.

26 CFR Part 602

Reporting and recordkeeping requirements

Adoption of Amendments to the Regulations

Accordingly, 26 CFR Parts 1 and 602 are amended as follows:

Income Tax Regulations

PART 1—[AMENDED]

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

Authority: 26 U.S.C. 7805. * * * Section 1.1445-8T also issued under 26 U.S.C. 1445(e)(6).

Par. 2. Section 1.1445-8T is added immediately after § 1.1445-7, to read as follows.

§ 1.1445-8T Special rules regarding publicly traded partnerships, publicly traded trusts and real estate investment trusts (REITS) (temporary).

(a) *Distributions to which this section applies.* The rules of this § 1.1445-8T apply to distributions from—

(1) Any partnership or trust, interests in which are regularly traded on an established securities market (regardless of the number of its partners or beneficiaries), and

(2) Any REIT (regardless of the form of its organization).

(3) *Obligation to withhold*—(1) *In general.* If an entity described in § 1.1445-8T(a) distributes an amount attributable to the disposition of a U.S. real property interest, then such entity must withhold tax with respect to each holder of an interest in the entity that is a foreign person in accordance with the general rules of § 1.1445–T(a) and (b) of this § 1.1445-8T(b). However, a person that—

(i) Is a nominee (as defined in paragraph (d) of this § 1.1445-8T),

(ii) Receives a distribution attributable to the disposition of a U.S. real property interest directly from an entity described in § 1.1445-8T(a) or indirectly from such entity through a nominee,

(iii) Receives the distribution for payment to any foreign person, or the account of any foreign person, and

(iv) Receives notice pursuant to § 1.1445-8T(f), shall be required to withhold in accordance with the general rules of section 1445(e)(1) and this § 1.1445-8T(b) and shall be fully liable under § 1.1445-5(b)(6) for failure to do so. A person obligated to withhold by reason of this § 1.1445-8T(b) is referred to as a withholding agent.

(2) *Person designated to act for withholding agent.* The rules stated in § 1.1441-7(b)(2) regarding a person designated to act for a withholding agent shall apply for purposes of this § 1.1445-8T.

(3) *Effect of withholding exemption granted under § 1.1441-4(f).* A letter issued by a district director under the provisions of § 1.1441-4(f), which exempts a person from withholding under section 1441 or section 1442, shall also exempt that person from withholding under this § 1.1445-8T(b), provided that—

(i) The letter identifies another person as the withholding agent for purposes of section 1441 or 1442, and

(ii) Such other person enters into a written agreement, with the district director who issued the letter, to be the withholding agent for purposes of § 1.1445-8T(b).

The exemption granted, and the corresponding withholding obligation imposed, by this § 1.1445-8T(b)(3) shall apply with respect to the first distribution made after the agreement described in the preceding sentence is executed, and shall continue to apply to all distributions made during the period in which the exemption granted under § 1.1441-4(f) is in effect.

(4) *Payment other than in money.* The rule stated in § 1.1441-7(c) regarding payment other than in money shall apply for purposes of this § 1.1445-8T.

(c) *Amount to be withheld*—(1) *Distribution from a partnership or trust.* The amount to be withheld with respect to a distribution by a partnership or trust under this § 1.1445-8T shall be computed in accordance with § 1.1445-5(c)(3).

(2) *REITS*—(i) *In general.* The amount to be withheld with respect to a distribution by a REIT under this § 1.1445-8T shall be equal to 34 percent of the amount subject to withholding, as defined in § 1.1445-8T(c)(2)(ii). However, the REIT must withhold at the rate of 28 percent if the distribution occurs before January 1, 1987.

(ii) *Amount subject to withholding*—(A) *In general.* The amount subject to withholding is the amount of any distribution, determined with respect to each share or certificate of beneficial interest, designated by a REIT as a capital gain dividend, multiplied by the number of shares or certificates of beneficial interest owned by the foreign person.

(B) *Designation of prior distribution as capital gain.* If a REIT designates a prior distribution, in whole or in part, as a capital gain dividend, such prior distribution shall not be subject to withholding under this § 1.1445-8T. Rather, a REIT must recharacterize (solely for purposes of section 1445(e)(1)) each distribution, determined with respect to each share or certificate of beneficial interest, made on the day of, or any time subsequent to, such designation as capital gain until such recharacterized amounts equal the amount of the prior distribution designated as a capital gain dividend.

(d) *Definition of nominee.* For purposes of this § 1.1445-8T, the term "nominee" means a domestic person that holds an interest in an entity described in § 1.1445-8T(a) on behalf of another domestic or foreign person.

(e) *Determination of non-foreign status by withholding agent.* A withholding agent may rely on a certificate of non-foreign status pursuant to § 1.1445-2(b) or on the statements and address provided to it on Form 1001, Form W-8, or Form W-9 to determine whether an interest holder is a foreign person. Reliance on these documents will excuse the withholding agent from liability imposed under section 1445(e) in the absence of actual knowledge that the interest-holder is a foreign person. A withholding agent may also employ other means to determine the status of an interest-holder, but, if the withholding agent relies on such other means and the interest-holder proves, in fact, to be a foreign person, then the withholding agent is subject to any liability imposed pursuant to section 1445 and the regulations thereunder for failure to withhold.

(f) *Notice of a distribution.* A partnership or trust satisfies the notice requirement of § 1.1445–8T(b)(1)(iv) by giving notice of a distribution that is attributable to the disposition of a U.S. real property interest in accordance with 17 CFR 240.10(b)–17(b) (1) or (3) issued pursuant to the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*; notice requirements with respect to dividends. A REIT satisfies the notice requirement of § 1.1445–8T(b)(1)(iv) by giving notice of a distribution, all or any portion of which it designates, or recharacterizes (as explained in § 1.1445–8T(c)(2)(ii)(B)), as a capital gain dividend in accordance with 17 CFR 240.10(b)–17(b) (1) or (3), with respect to each share or certificate of beneficial interest.

(g) *Reporting and paying over withheld amounts.* With respect to a distribution described in § 1.1445–8T(b), withholding agent must report and pay over to the Internal Revenue Service any amount required to be withheld pursuant to the rules and procedures of section 1461, the regulations thereunder and § 1.6302–2. Forms 1042 and 1042S are to be used for this purpose.

(h) *Early refund procedure not available.* The early refund procedure set forth in § 1.1445–6(g) shall not apply to persons withheld upon under the rules of this § 1.1445–8T. For adjustment of over-withheld amounts, see § 1.1461–4.

PART 602—[AMENDED]

Par. 3. The authority citation for Part 602 continues to read as follows:

Authority: 26 U.S.C. 7805

Par. 4. Section 602.101(c) is amended by inserting in the appropriate place in the table "§ 1.1445–8T . . . 1545–0096".

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved: December 9, 1986.

J. Roger Mentz,

Assistant Secretary of the Treasury.

[FR Doc. 86–28509 Filed 12–18–86; 4:47 pm]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 934

Amendments to the North Dakota Permanent Regulatory Program; Correction

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Final rule; correction.

SUMMARY: This notice explains and corrects an ambiguity in the Director of OSMRE's approval of a proposed amendment submitted by the State of North Dakota as a modification to its permanent regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

FOR FURTHER INFORMATION CONTACT: Mr. Jerry R. Ennis, Director, Office of Surface Mining Reclamation and Enforcement, Casper Field Office, Federal Building, 100 East B. Street, Room 2128, Casper, Wyoming 82601–1918; Telephone: (307) 261–5776.

SUPPLEMENTARY INFORMATION: On May 30, 1986, the State of North Dakota submitted proposed amendments to its approved permanent regulatory program. The amendment package consisted of revisions to the approved North Dakota regulations. The amended section of the regulations, North Dakota Administrative Code (NDAC), and a brief description of the amended subject areas affected by this notice are as follows: Sections 69–05.2–16–04(1)(b) and 69–05.2–16–09(22) concerning criteria for allowing the removal of sedimentation ponds and other treatment facilities prior to the end of the revegetation responsibility period.

On October 21, 1986, the Director approved the amendment submitted by North Dakota on May 30, 1986, including amendments to NDAC 69–05.2–16–04(1)(b) and 69–05.2–16–09(22) (51 FR 37271). The preamble discussion at 51 FR 37272 contained ambiguous statements regarding supplemental seedings into established vegetation stands. To clear up the confusion surrounding this issue, revisions to the preamble discussion are as follows:

On page 51 FR 37272 (October 21, 1986), third column, the second paragraph should read "The Federal rule at 30 CFR 816.46(b)(5) requires satisfaction of two similar, separate tests for siltation structure removal; however, it does not contain the exception to the timeframe of the last augmented seeding, as does the North Dakota amendment. The Director finds that since the purpose of siltation structures is to prevent additional contributions to the streamflow that are caused by mining disturbances and North Dakota requires that the disturbed area be stabilized and revegetated prior to sedimentation pond removal and Phase III bond release, the intent of the Federal rule is met by North Dakota's provisions. Further, North Dakota's "last augmented seeding" is the seeding that actually provides established vegetation that is effectively controlling erosion. Since North Dakota's exception specifies that the supplemental seeding must be into an established vegetation stand that is effectively controlling erosion, the supplementary seeding has no effect on the sedimentation pond removal timeframe."

Dated: December 18, 1986.

Brent Wahlquist,

Assistant Director, Program Policy.

[FR Doc. 86–28888 Filed 12–23–86; 8:45 am]

BILLING CODE 4310-05-M

VETERANS ADMINISTRATION

DEPARTMENT OF DEFENSE

38 CFR Part 21

Veterans Education; Effective Date of Refund Upon Disenrollment From VEAP

AGENCY: Veterans Administration and Department of Defense.

ACTION: Final Regulations.

SUMMARY: The law provides a few veterans with the opportunity to choose between receiving benefits under 38 U.S.C. Ch. 34 (commonly called the Vietnam Era G.I. Bill) or VEAP (Post-Vietnam Era Educational Assistance Program). Once such a veteran begins receiving benefits under the Vietnam Era G.I. Bill, he or she may never receive benefits under VEAP. VA regulations have not provided for a refund of the veteran's contributions to the VEAP fund when this situation occurs unless the veteran applied for a refund. This amended regulation permits a refund even if the veteran does not fill out an application for it, and provides an effective date for the refund.

EFFECTIVE DATE: October 27, 1986.

FOR FURTHER INFORMATION CONTACT: June C. Schaeffer (225), Assistant Director for Policy and Program

Administration, Vocational Rehabilitation and Education Service, Department of Veterans Benefits, Veterans Administration, 810 Vermont Avenue NW, Washington, DC 20420 (202) 233-2092.

SUPPLEMENTARY INFORMATION: On pages 20846 and 20847 of the Federal Register of June 9, 1986, there was published notice of intent to amend Part 21 to provide refunds to those veterans who choose to receive benefits under the 38 U.S.C. Ch. 34 rather than under 38 U.S.C. Ch. 32. Interested people were given 31 days to submit comments, suggestions or objections.

The VA and the Department of Defense received one letter. The letter writer was concerned because the regulation does not state how the veteran will be notified of the fact that his or her contributions will be refunded once he or she chooses to receive benefits under 38 U.S.C. Ch. 34.

At the time that the veterans chooses to receive benefits under 38 U.S.C. Ch. 34 the VA will notify him or her of the fact that his or her contributions will be refunded. However, the agency does not think that detailed procedures such as this belong in the Code of Federal Regulations. Placing them there would tend to unduly restrict the ability of the VA to administer education programs most efficiently. Accordingly, this regulation is being made final with no change from the proposal.

The VA and the Department of Defense have determined that this final regulation does not contain a major rule as that term is defined by E.O. 12291, entitled Federal Regulation. The regulation will not have a $100 million annual effect on the economy, and will not cause a major increase in costs or prices for anyone. It will have no 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.

The Administrator of Veteran's Affairs and the Secretary of Defense certify that this final regulation will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Pursuant to 5 U.S.C. 605(b), the amended regulation, therefore, is exempt from the initial and final regulatory flexibility analyses requirements of sections 603 and 604.

This certification can be made because the regulation affects only individuals. It will have no significant economic impact on small entities, i.e., small businesses, small private and nonprofit organizations and small governmental jurisdictions.

The Catalog of Federal Domestic Assistance number for the program affected by this regulation is 64.120.

List of Subjects in 38 CFR Part 21

Civil rights, Claims, Education, Grant programs-education, Loan programs-education, Reporting and recordkeeping requirements, Schools, Veterans, Vocational education, Vocational rehabilitation.

Approved: October 27, 1986.

Thomas K. Turnage,

Administrator.

A. Lukeman,

Major General, USMC, Deputy Assistant Secretary of Defense.

November 21, 1986.

PART 21—[AMENDED]

38 CFR Part 21. VOCATIONAL REHABILITATION AND EDUCATION, is amended by revising § 21.5064 paragraph (b)(2) to read as follows:

§ 21.5064 Refund upon disenrollment.

* * * * *

(b) *Effective date of refund.*

* * * * *

(2) If an individual voluntarily disenrolls from the program after discharge or release from active duty under other than dishonorable conditions, the effective date of the refund or his or her contributions shall be determined as follows.

(i) If an individual described in § 21.5040.(g)(1) voluntarily disenrolls by deciding to receive educational assistance allowance under 38 U.S.C. Ch. 34 rather than electing to receive educational assistance allowance under Ch. 32 his or her contributions shall be refunded no earlier than 60 days after the VA first authorized benefits for the veteran under Ch. 34.

(ii) If an individual voluntarily disenrolls under circumstances other than those described in subparagraph (i) of this paragraph, the individual's contributions shall be refunded within 60 days of receipt by the VA of an application for a refund from the individual.

* * * * *

(38 U.S.C. 1602, 1623, 1632)

[FR Doc. 86-28868 Filed 12-23-86; 8:45 am]

BILLING CODE 8320-01-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-4-FRL-3131-5; AL-008]

Approval and Promulgation of Implementation Plans; Alabama; Bubble for Union Camp's Prattville Mill

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA is today approving a revision to the Alabama SIP which involves the approval of an emissions trading action (bubble) at Union Camp's kraft pulp mill in Prattville, Alabama (Autauga County). The pollutant involved is total suspended particles (TSP). Autauga County is designated attainment for both the primary and secondary National Ambient Air Quality Standard (NAAQS) for TSP. Specifically covered under this bubble are the #1 recovery boiler (point of decreasing emissions) and the #1 power boiler (point of increasing emissions). Approval of this bubble will allow Union Camp to burn more wood waste (i.e., bark) in the #1 power boiler, with no change in total allowable TSP emissions from the mill. While there is a possibility that actual emissions will increase by as much as 251 pounds per hour, ambient dispersion modeling conducted by EPA demonstrates that there will be no significant degradation in air quality.

DATE: This action will be effective on February 23, 1987 unless notice is received within 30 days that someone wishes to submit adverse or critical comments.

ADDRESSEES: Copies of the material submitted by Alabama may be examined during normal business hours at the following locations:

Public Information Reference Unit, Library Systems Branch, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460

Environmental Protection Agency, Region IV, Air Programs Branch, 345 Courtland Street, NE., Atlanta, Georgia 30365

Library, Office of the Federal Register, 1100 L Street, NW., Room 8301, Washington, DC.

Alabama Department of Environmental Management, Air Division, 1751 Federal Drive, Montgomery, Alabama 36109

FOR FURTHER INFORMATION CONTACT: Roger O. Pfaff of the EPA Region IV Air Programs Branch at the above EPA address, telephone 404-347-3286 (FTS 257-3286).

SUPPLEMENTARY INFORMATION:

Background

On December 16, 1982, Union Camp Corporation asked the Alabama Department of Environmental Management (ADEM) to consider their proposal for an emissions trading action (bubble) for total suspended particulate (TSP) emissions at their kraft pulp mill in Prattville, Alabama (Autauga County): Specifically, the bubble involves particulate emissions from the plant's #1 wood waste power boiler (increasing emissions) and the #1 recovery boiler (decreasing emissions). Autauga County is designated attainment for both the primary and secondary TSP NAAQS under section 107 of the Clean Air Act (Act).

The ADEM formally submitted the bubble proposal to EPA on January 21, 1983, and requested parallel processing. EPA and the State resolved various identified problem areas in the proposal and the State submitted necessary revisions on June 22, 1983. After further review EPA then proposed to approve the Union Camp TSP bubble in the January 25, 1984, Federal Register (49 FR 3096) and provided a 30-day public comment period. No public comments were received, but the State did submit supplementary information on January 20, 1984, March 9, 1984, and October 9, 1985, in response to EPA concerns. Because there are now new facts and a new modelling analysis, EPA is again providing opportunity for comment.

Additionally, Union Camp Corporation has provided EPA with technical information to further support their bubble proposal.

This information supports the use of an opacity limit in conjunction with a mass emissions cap as the compliance mechanism on the power boiler. This matter is discussed in more detail in a Technical Support Document which is available at EPA's Region IV office.

Discussion

The emissions trade at Union Camp's Prattville plant will not cause a change in total allowable emissions from the mill. The following table indicates the allowable emissions limits before and after the trade:

TABLE I

Source	Allowable emissions before trade (lbs/hr)	Allowable emissions after trade (lbs/hr)
No. 1 power boiler	433	589
No. 1 recovery boiler	216	60

TABLE I—Continued

Source	Allowable emissions before trade (lbs/hr)	Allowable emissions after trade (lbs/hr)
Total allowable emissions	649	649

However, while total allowable emissions will not change, the bubble could result in an increase in actual emissions. The following table (Table II) indicates, for each boiler, the average actual emissions before and the maximum allowable emissions after the trade:

TABLE II

Source	Average actual emissions before trade (lbs/hr)	Maximum allowable emissions after trade (lbs/hr)
No. 1 power boiler	263	589
No. 1 recovery boiler	135	60
Total emissions	398	649

As part of the bubble, Alabama has made provisions for federally enforceable limits on each of the boilers involved, in the form of revised State Implementation Plan (SIP) regulatory requirements. These are discussed below.

Power boiler

Prior to the bubble, the No. 1 power boiler burned a combination of natural gas, oil and/or wood-waste and actual emissions averaged 263 lbs/hr. As a result of this bubble, an increase in actual emissions at the power boiler will result. Such an increase in actual emissions will cause the opacity to increase beyond the current statewide limit of 20%.

Because of this, Alabama has revised Chapter 4 (Control of Particulate Emissions), section 8—Wood Waste Boilers, subsection 4.8.4, of its regulations to establish special conditions for this power boiler. The previous limit in the SIP was 0.30 grains per standard dry cubic foot adjusted to 50% excess air. There is no change in control equipment for the power boiler. The revision, adopted by the State on December 9, 1983, states: (a) The allowable particulate emissions shall be 2.43 pounds per million Btu (lb/MBtu) heat input from bark, with the additional requirement that particulate emissions from such units shall not exceed 589 pounds per hour.

(b) In lieu of the opacity limits contained in Part 4.1 (the existing statewide 20% limit), such units shall not discharge into the atmosphere any air containment of an equivalent opacity greater than that designated as forty percent (40%) opacity, as determined by moving one-hour averages of transmissometer data. If the transmissometer is not working properly, EPA Reference Method 9 (40 CFR Part 60, Appendix A) shall serve as the compliance technique.

Union Camp has demonstrated to Region IV that this 40% opacity limit on the power boiler will be an indicator of compliance with the applicable particulate mass emission limit. The demonstration was made on the basis of 16 stack tests run in 1981 and 1982 to generate grain loading (particulate concentration) versus opacity data. It should be noted that this demonstration by Union Camp would indicate that further stack testing would be necessary if an opacity limit of 40% was exceeded.

The data generated in the stack tests were mathematically correlated to arrive at an opacity limit which would be used to monitor compliance with the mass standard. For the purpose of this bubble and based upon the results of the 16 stack tests, Region IV believes that the 40% opacity limit is a good indicator of compliance and will serve to protect the mass limit. However, in order to document violation of the mass standard, EPA test method 5 (40 CFR Part 60, Appendix A) would have to be utilized. ADEM has assured EPA (via permit conditions) that annual emission tests will continue to be required for the two units along with annual recertification of the transmissometers in the stacks. This is discussed in detail in a Technical Support Document which is available for inspection at EPA Region IV's Atlanta office.

Since compliance with the lb/hr emission standards is, in the case of the power boiler, contingent upon the source limiting its bark burning rate, the inclusion of a federally enforceable limitation on loading rate and a federally enforceable provision to monitor loading rate would normally be required. Otherwise, the source would be permitted to operate above a level which has been predicted to result in an emission rate which exceeds the lbs/hr emission rate. Although this bubble does not contain a federally enforceable limit on load nor load monitoring requirement, approval of this bubble is warranted given the stringency of the opacity limit. Approval in this instance, however, is not intended to set a precedent for the acceptability of future actions of this type. Federally enforceable load limitations and federally enforceable load monitoring provisions normally will be required in future SIP revisions, where compliance with the emission limit is based on the source limiting its loading rate. Furthermore, if it proves in practice that the opacity limit in this bubble is not sufficient to protect the mass limit, the inclusion of a bark loading limit may be required.

Recovery Boiler

To establish an enforceable limit for the Union Camp #1 recovery boiler, Alabama revised Chapter 4, Section 7—Kraft Pulp Mills Subsection 5, of its regulations. This regulation, adopted on March 7, 1984, applies to chemical recovery boilers constructed before 1972 at kraft pulp mills in Autauga County and provides that allowable particulate emissions shall be 1.11 pounds per air-dried ton of pulp (lbs/ADTP) (60 lbs/hr). The previous SIP limit was 4.0 lbs/ADTP (216 lbs/hr). Also, Alabama's existing statewide 20% opacity limit (Alabama regulations 4.1.1.(a)) will continue to be applicable to this recovery boiler.

The decrease in emissions at the recovery boiler, as indicated in Table II, resulted from the replacement of an electrostatic precipitator (ESP) in May 1982. The actual emissions from the new ESP were 7.4 lbs/hr in May 1982 and at the time Union Camp applied for the bubble in December 1982.

Attainment and Maintenance of the NAAQS

The April 7, 1982 (47 FR 15076) emissions trading policy and a February 17, 1983, guidance memo by Sheldon Myers, Director of OAQPS, entitled Emissions Trading Policy—Technical Clarifications, allow the use of a limited Level I or Level II air quality modeling analysis to determine if the NAAQS will be attained and maintained. In a Level I analysis, if the trade does not result in a net increase in applicable baseline (allowable) emissions, the sources are located within 250 meters of each other, and no increase in allowable emissions occurs at the source with the lower effective plume height, dispersion modeling will not be required.

In a Level II analysis, only limited modeling involving the specific emission sources subject to the trade is needed if there is no net increase in applicable baseline emissions and if emissions after the trade will not cause a significant ambient air quality impact. The maximum air quality impact (delta) due to the trade must be determined both spatially and temporarily using a full year of meteorological data with a refined model. In addition, all national ambient air quality standards (NAAQS) averaging periods must be considered when performing the air quality equivalence analysis. In a Level II analysis for TSP, the significance levels are 10 $\mu g/m^3$ (24-hour) and 5 $\mu g/m^3$ (annual).

The Leval I analysis was used as a basis for proposing approval of this bubble in the January 25, 1984, **Federal Register** notice. Following EPA proposed approval of this bubble, EPA determined that a Level I analysis would not meet the applicable policy requirements since an increase in emissions would occur at the source with the lower effective plume height. However, the trade does meet all of the criteria for a Level II analysis, which has since been conducted. In order to meet the requirements for the Level II analysis, the State and EPA each conducted air quality modeling for the two sources in the trade to determine if the change in emissions would exceed the relevant Level II significance values under the emissions trading policy.

The State used the COMPTER model which, at present, is not an EPA approved guideline model. Therefore, in order to expedite the bubble review, the EPA Region IV office performed the analysis with the Industrial Source Complex model (ISC), using a full year of Montgomery, Alabama, National Weather Service hourly meteorological data. A number of different ISC computer runs were made to determine the area of maximum impact. The final ISC analysis was refined to the nearest 100 meters. In the EPA analysis, a maximum increase of no more than 9.2 $\mu g/m^3$ for 24 hours and an annual increase of 1.0 $\mu g/m^3$ were found at receptors showing maximum impact. Since these levels are less than the Level II significance levels no further evaluation of ambient impact is necessary before approval. The maximum increases calculated were based on the emission rates in Table II.

It should be particularly noted that because there may be a net increase in actual emissions as a result of this trade, EPA modeled the ambient effects of the trade assuming the maximum possible increase in actual emissions (i.e., the difference between average actual emissions before the trade and maximum allowable emissions after the trade). Nevertheless, the Level II analysis of only the sources in the trade showed that the maximum increase in actual emissions which could result from the trade would have no significant impact on ambient air quality and therefore, EPA believes that that increase will not interfere with maintenance of the TSP NAAQS and PSD increment.

Prior to replacement of the ESP in May 1982, average actual particulate emissions from the recovery boiler were 135 lbs/hr. The Level II modeling analysis predicted an increase in the 24-hour ambient concentration of 9.2 μ/m^3 based upon these emissions. After replacement of the ESP in May 1982 and at the time of the application to bubble (December 1982), the actual emissions were 7.4 lbs/hr. Prior to the bubble application, EPA never required a control strategy demonstration that the allowable emissions will attain and maintain the NAAQS and protect the PSD increments for this area. However, in evaluating the acceptability of this SIP revision, a full PSD increment analysis was performed. EPA is relying here on the Level II modeling which predicts that the actual emissions increase which potentially accompany the approval of this bubble will not produce significant increases in TSP concentrations at any site for any 24-hour or annual period. The emissions trading policy allows the use of a Level II analysis to determine whether a trade will have a significant ambient impact. In short, the area is designated attainment, there are no measured exceedances of the NAAQS at the closest ambient monitors in Montgomery (which is located in the next county), and EPA has not found under section 110(a)(2)(H) that the area's TSP SIP is substantially inadequate. Since the Level II modeling as performed shows that this trade will not result in significant increases in actual total suspended particulate (TSP) concentrations as of May 1982 when the ESP was replaced, EPA believes that the trade will not interfere with maintenance of the TSP NAAQS and PSD increments.

PSD Analysis

The increase in emissions from the power boiler, as a result of this bubble application, was analyzed to determine if the increase in emissions would constitute a major modification under PSD regulations. In 1972, the boiler was capable of accommodating the burning of wood waste (including bark) and no additional wood handling equipment was necessary to increase the wood waste burning rate. Further, there is no current construction permit limitation which prohibits increased use of bark. Based upon its review of this proposed action, EPA has determined that a PSD review, including a BACT analysis, was not necessary to be performed in approving this bubble application. An air quality impact analysis was performed, however, to see whether the TSP PSD increment could be violated as a result of the emissions trade.

Emissions which would affect increment consumption are as follows:

1. Increases in actual particulate emissions from the power boiler (589–263=326TPY) since the baseline date in 1977.

2. Decrease in actual particulate emissions from the recovery boiler (135–60=75TPY) since the baseline date in 1977.

3. Increase in particulate emissions from a 1977 expansion at the mill. This expansion underwent a PSD review which resulted in a $1 \mu g/m^3$, 24-hour maximum PSD increment increase and a decrease in the annual PSD increment.

Since that time, there have been no other increases or decreases in particulate emissions and no increment consuming emissions related to construction.

Based upon information from the Alabama Department of Environmental Management, the Union Camp, Prattville facility is located in an isolated area in Autauga County and there are no other facilities which would contribute to the consumption of TSP PSD increment. Since it is possible there will be a net increase in actual emissions resulting from the trade, EPA modeled the two sources using the difference between actual emissions on the baseline date and allowable emissions after the trade. Predicted concentrations were $9.2^{\circ}\gamma/\mu^3$, 24-$\eta o\theta\rho\sigma$ $\mu\alpha\chi\iota\mu\theta\mu$ $\alpha\nu\delta$ $\lambda\epsilon\sigma\sigma$ $\tau\eta\alpha\nu$ $1 \mu g/m^3$, annual geometric mean. Thus the PSD increment potentially consumed, as a result of this bubble and the 1977 expansion, is well below the PSD increments of 37 $\mu g/m^3$, 24-hour maximum and 19 $\mu g/m^3$, annual geometric mean.

EPA is publishing this action without prior proposal of the new facts (e.g., Level II modeling analysis) because EPA views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective 60 days from the date of this **Federal Register**, unless with 30 days of its publication, notice is received that adverse or critical comments will be submitted.

If such notice is received, this action will be withdrawn before the effective date by publishing two subsequent notices, one notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective February 23, 1987.

Final Action

EPA is today approving the Alabama SIP revision described above, including the trade (bubble) at Union Camp's Prattville, Alabama kraft pulp mill. This bubble was submitted under and is being approved in accord with EPA's 1982 interim emissions trading policy (47 FR 15076) and is consistent with the requirements for "pending" bubbles in the final policy (51 FR 43814).

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 23, 1987. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities (see 46 FR 8709).

Incorporation by reference of the State Implementation Plan for the State of Alabama was approved by the Director of the **Federal Register** on July 1, 1982.

List of Subjects in 40 CFR Part 52

Air pollution control, Intergovernmental relations, Particulate matter, Incorporated by reference.

Dated: December 16, 1986.

Lee M. Thomas,

Administrator.

PART 52—[AMENDED]

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401–7642.

Subpart B—Alabama

2. Section 52.50 is amended by adding paragraph (c)(38) as follows:

§ 52.50 Identification of plan.

* * * * *

(c) * * *

(38) Bubble for Union Camp Corporation's Prattville, Alabama kraft pulp mill, submitted on January 21, 1983, January 20, 1984, and March 9, 1984, by the Alabama Department of Environmental Management (ADEM).

(i) Incorporation by reference.

(A) Alabama Department of Environmental Management Resolution and Regulation 4.8.4, dealing with control of particulate emissions from wood waste boilers, was adopted on December 9, 1983.

(B) Alabama Environmental Management Commission Resolution and Regulation 4.7.5, dealing with particulate emissions from kraft pulp mills, was adopted on March 7, 1984.

(ii) Other material.

(A) None.

[FR Doc. 86–28741 Filed 12–23–86; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 180

[OPP-300119A; FRL 3131-9]

Revocation of DDT and TDE Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document (1) revokes the tolerances for residues of the insecticide DDT [a mixture of 1,1,1-trichloro-2,2-bis (*p*-chlorophenyl)ethane and 1,1,1-trichloro-2-(*o*-chlorophenyl)2-(*p*-chlorophenyl)ethane] and its degradation products, TDE [or DDD (1,1-dichloro-2,2-bis(*p*-chlorophenyl)ethane)] and DDE [1,1-dichloro-2,2-bis(*p*-chlorophenyl)ethylene]; (2) revokes the tolerances established specifically for residues of TDE; (3) lists the action levels EPA is recommending to the Food and Drug Administration (FDA) and the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture (USDA) to replace the revoked tolerances; and (4) lists EPA recommendations to FDA, FSIS, and the Agricultural Marketing Service (AMS) of USDA regarding existing action levels for commodities bearing residues for which tolerances had not been established. This rule was initiated by the Environmental Protection Agency to remove pesticide tolerances for which related registered uses have been cancelled. A related final rule document, [OPP-300120A], appearing elsewhere in this issue of the **Federal Register**, addresses revocation of food/feed additive limitations for DDT and TDE.

EFFECTIVE DATE: Effective on December 24, 1986.

ADDRESS: Written objections, identified by the document control number [OPP-300119A], may be submitted to the: Hearing Clerk, Environmental Protection Agency, Rm. 3708 (A-110), 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Patricia Critchlow, Registration Division (TS-767), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA (703-557-1806).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of March 13, 1985 (50 FR 10077), which (1) Proposed the revocation of all existing tolerances in 40 CFR 180.147 and 180.147b for residues of the insecticide DDT and its degradation products, TDE and DDE; (2) proposed the deletion of the related § 180.147a which discusses residues of DDT in corn feed products; (3) proposed the revocation of the tolerances in § 180.187 established specifically for residues of TDE; and (4) proposed the revision of § 180.138 to delete the entry of 3.5 ppm for the combined residues of DDT and toxaphene in or on soybeans. The toxaphene tolerance on soybeans will not be changed since § 180.138 also includes a separate entry of 2 ppm for toxaphene in or on soybeans.

The March 13 **Federal Register** notice also listed the action levels which EPA intended to recommend to FDA and FSIS to replace the tolerances once the rule revoking the regulation was final. The action levels would cover unavoidable pesticide residues which can continue to occur in the tolerance-related food and feed commodities because of the persistence of the pesticides in the environment. The notice also listed EPA's intended recommendations to FDA, FSIS, and AMS regarding revision of existing action levels for food and feed commodities for which tolerances had not been established and which may contain unavoidable residues of the pesticides because of environmental contamination.

No requests for referral to an advisory committee were received. However, a number of interested persons submitted comments regarding the proposed revocation action.

The Conservation Law Foundation of New England, Inc. (CLF) indicated support for the tolerance revocation proposal and for the setting of action levels, but only where necessary to cover residues of cancelled pesticides which persist in the environment. They also suggested that such action levels should be lowered over time as residues decline. The CLF expressed concern that dicofol contains DDT, and therefore suggested that EPA recommend replacement action levels for DDT at sufficiently low levels to discourage the continued use of dicofol as well as the illegal use of DDT.

EPA agrees that action levels should be recommended to replace revoked tolerances only when necessary to cover residues of cancelled pesticides that continue to persist in the environment and unavoidably contaminate food and feed commodities. EPA plans to reassess all its recommended action levels in the future on a regular basis so that the action levels may be lowered as residues decline. EPA believes that the action levels being recommended to replace the tolerances for DDT and TDE are sufficiently low to discourage any illegal use of these cancelled pesticides. These action levels are also consistent with the Agency's proposed regulatory position on dicofol (Position Document 2/3; 50 FR 33008, August 15, 1985).

The National Food Processors Association (NFPA) and the Pineapple Growers Association of Hawaii (PGAH) indicated their opposition to EPA's revocation of the existing tolerances for residues of persistent pesticides such as DDT before such residues have fully dissipated from the environment. These organizations also expressed concern that the setting of replacement action levels may not be legal under the recent decision of the United States Court of Appeals for the District of Columbia in *Community Nutrition Institute (CNI)* v. *Young*, 757 F. 2d 354 (D.C. Cir. 1985).

In order to eliminate any implied sanctioning of the use of pesticides whose registrations have been cancelled for food safety reasons and of the presence of residues in food and feed commodities from such use, EPA considers it appropriate to revoke tolerances and food/feed additive regulations for residues of such pesticides. There are major differences between tolerances and action levels. A tolerance is set before the fact to cover residues which will result from legal and purposeful use of the pesticide. An action level is a more appropriate mechanism for situations involving residues which persist in the environment after the once-legal use of that pesticide has been halted. With regard to the concern of NFPA and PGAH that the setting of replacement action levels may not be legal in light of the Court of Appeals decision in the CNI case, the Agency notes that the Supreme Court has recently reversed the Court of Appeals decision. The Court gave deference to FDA's interpretation that the Federal Food, Drug, and Cosmetic Act provides flexibility to set action levels under section 402(a), rather than promulgate tolerances by formal rulemaking pursuant to section 406. The Agency also notes that it does not interpret section 406 as applying to residues of pesticide chemicals in food; rather, sections 402(a)(2)(B), 402(a)(2)(C), 408, and 409 govern the issue of whether food bearing such residues is adulterated.

The NFPA also stated that action levels do not provide sufficient legal protection to food producers (but did not specify in what manner) and further indicated that NFPA also opposed the 1982 policy statement (47 FR 42956, September 29, 1982) which describes EPA's policy on the revocation of tolerances for cancelled pesticides and the replacement of these tolerances with action levels for unavoidable residues of these pesticides. The basis for their opposition was that the setting and revising of action levels does not afford the public the same hearing rights and procedural protections provided for tolerance rulemaking actions under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA).

EPA believes that its procedures regarding the recommendation of replacement action levels afford adequate legal protection to food producers. As a matter of policy, the Agency will provide notice and the opportunity to comment on recommended action levels at the proposal stage of a tolerance revocation action. When a determination is reached to further decrease action levels, the Agency will publish a notice in the **Federal Register** of that determination and provide an opportunity to comment before making its final recommendations on action levels to FDA or USDA.

The Regional Administrator for EPA's Region V (which includes the states of Illinois, Indiana, Michigan, Ohio, and Wisconsin) opposed the proposal that FDA continue to enforce the current action level of 5 parts per million for residues in fish. The Regional Administrator argued that this action level did not provide adequate protection of human health and that possibly it was inconsistent with statutory authority, policy, and proposed guidelines regarding risk-benefit assessments. He also suggested that the action level derivation process, particularly regarding fish, should be reevaluated.

The Southern California Coastal Water Research Project (SCCWRP) was concerned that EPA might be recommending the fish action level based on economics far more than on risk; SCCWRP suggested that EPA should base the action level more on risk and also indicated that the risk estimates of the Carcinogen Assessment Group (CAG) would require the action level for DDT in fish to be considerably lower than EPA has recommended.

Several other commenters expressed concern about the current action level in fish and indicated that they have regional fish residue data and fish consumption statistics which they wish to submit for EPA's analysis and consideration before the Agency makes its final recommendation on the fish action level. Not all of the commenters submitted their data at that time, however, and until this additional information is received and can be evaluated, the Agency has decided to make no recommendation at this time regarding the current DDT action level in fish. The Agency does believe that the factors listed in the 1982 policy statement for setting appropriate action levels are basically sound and need not be changed. Therefore, these factors will continue to be used as guidance by the Agency in assessing the appropriate action level for fish.

When EPA has accumulated more data and studied the situation thoroughly, the Agency will reassess the fish action level and determine what recommendation to make to FDA for action levels. As part of this reassessment, EPA intends to also study further the concerns about pesticides in fish in various regional areas where members of specific population subgroups may consume fish at rates above the "national average." Because action levels enforced by FDA apply to fish in interstate commerce, it would be very difficult, if not impossible, for FDA to enforce and defend in court differing "regional" limits. However, EPA recognizes that some population groups may be at higher risk because of the frequency and amount of fish consumed locally. It is usually not possible, however, to set an enforcement limit for this situation while also satisfying the criteria for setting an appropriate national limit.

If a potential local health problem exists, a state or locality may issue guidance on the quantity of contaminated fish which may be consumed without appreciable risk to the health of local consumers, based on an assessment of the level of the contaminant and on fish consumption patterns, or may take other action.

This final rule revoking the tolerances for DDT and TDE is being issued in accordance with EPA's 1982 policy statement and the action levels being recommended are based on the factors cited in that statement, i.e., the action levels are set at the level necessary to protect the public health while taking into account the extent to which the residues cannot be avoided. As environmental residues continue to dissipate, risk will gradually decrease and action levels may be lowered.

EPA believes that during the time period that residues of DDT and its degradation products continue to occur in food, the potential risk from dietary exposure to such residues will be low. Based on the monitoring data which were used to formulate its action level recommendations, EPA has determined that most foods and feeds contain no detectable residues of DDT, DDT's degradation products or TDE, or contain residues which are generally below the recommended action levels. Only a few foods and feeds on the action level list contain residues at or near the maximum limits being recommended. In fact, most of the foods and feeds contain residues well below the recommended action level. Thus, the occurrence of unavoidable residues is not a widespread or commonplace situation. In addition, the level of exposure will continue to decrease as environmental residues decrease.

Another commenter argued against setting replacement action levels lower than the existing tolerances for DDT/TDE and appeared to be in favor of continuing the existing tolerances as they are, describing the proposed action levels as being "unnecessary because the existing tolerances are adequate."

It is not clear whether the commenter is opposed to the proposed revocation action or to individual replacement action levels being lower than the existing tolerances. Justification of the revocation action is discussed earlier in this document; and available monitoring data on residue levels for the pesticides support the individual replacement action levels. Further, the existing tolerances are higher in most cases than what would be "adequate" to cover the current levels of residues occurring in food and feed from the environment.

Rohm & Haas Company expressed concern about the absence of food/feed additive action levels for processed food and feed commodities derived from raw agricultural commodities for which tolerances were proposed for revocation, where DDT would be expected to concentrate, and further recommended establishment of "appropriate" food/feed additive action levels in certain specific processed commodities.

EPA's review of available data indicated that processing would not result in residue concentrations above the action levels being recommended. Because, with several exceptions, it was not necessary in the past to have separate food/feed additive regulations for DDT/TDE residues concentrating in processed food (i.e., the tolerances were sufficient to cover residues in processed food), EPA would expect the same situation to hold for the recommended action levels. The exceptions are covered in a related final rule [OPP-300120A], appearing elsewhere in this issue of the **Federal Register**, which addresses revocation of food/feed additive limitations for DDT and TDE. Where residue concentration may occur in certain processed commodities, an action level is being recommended at a level higher than the action level for the related raw commodity.

Another commenter argued in favor of DDT as a pesticide but did not indicate what he proposed that EPA should do in lieu of tolerance revocation accompanied by establishment of replacement action levels.

As stated previously in response to other commenters, EPA considers its proposed action to be appropriate and necessary.

EPA is basing its recommended action levels for DDT and TDE on residue monitoring data from the late 1970's. A reassessment of these action levels, using updated surveillance data, is planned for late 1986. If any revision of the action levels is subsequently deemed appropriate, a notice to that effect will be published in the **Federal Register** with an opportunity for public comment. However, the Agency does not wish to delay its revocation of the DDT and TDE tolerances and is thus proceeding with this action.

Based on the information considered by the Agency and discussed in detail in the March 13, 1985, proposal and in this final rule, the Agency is hereby: (1) Revoking all existing tolerances in 40 CFR 180.147 and 180.147b for residues of DDT and its degradation products, TDE and DDE; (2) deleting the related § 180.147a which discusses residues of DDT in corn feed products; (3) revoking all existing tolerances in 40 CFR 180.187 established specifically for TDE; and (4) revising § 180.138 to delete the entry of 3.5 ppm for combined residues of DDT and toxaphene in or on soybeans.

EPA is recommending to FDA and FSIS the following action levels for the sum of DDT, TDE, and DDE residues, expressed in parts per million (ppm), to replace the following tolerances which are being revoked for residues of DDT, DDT's degradation products, and TDE:

TABLE 1.—RECOMMENDED ACTION LEVELS

Commodities	Tolerances (ppm) being revoked		Recommended action levels (ppm) DDT/TDE/DDE
	DDT	TDE	
Apples	0.5	7	0.1
Apricots	0.5	7	0.2
Artichokes	1		0.5
Asparagus	1		0.5
Avocados	3.5		0.2
Beans (dried).	0.5	7 (beans)	0.2
Beans (except dried beans).	7	7 (beans)	0.2
Beets (roots and tops).	1		0.2
Blackberries	0.5	3.5	0.1
Blueberries (huckleberries).	0.5	7	0.1
Boysenberries.	0.5	3.5	0.1
Broccoli	1	1	0.5
Brussels sprouts.	1	1	0.5
Cabbage	1	1	0.5
Carrots	3.5	1	3
Cauliflower	1	1	0.5
Celery	1		0.5
Cherries	0.5	3.5	0.2
Citrus fruits	3.5	3.5	0.1
Collards	1		0.5
Corn, fresh sweet K+CWHR.	3.5	3.5	0.1
Cottonseed	4		0.1
Cranberries	7		0.1
Cucumbers	0.5	7	0.1
Currants	0.5		0.1
Dewberries	0.5	3.5	0.1
Eggplants	0.5	7	0.1
Endive (escarole).	1		0.5
Fat of meat from cattle, goats, hogs, horses, and sheep.	5		([1])
Gooseberries.	0.5		0.1
Grapes	7	7	0.05
Guavas	0.5		0.2
Hops (fresh)	20		0.1
Kale	1		0.5
Kohlrabi	1	1	0.5
Lettuce	7	1	0.5
Loganberries	0.5	3.5	0.1
Mangoes	0.5		0.2
Melons	0.5	7	0.1
Milk	[2] 0.05	[3] 1.25	
Mushrooms	1		0.5
Mustard greens.	1		0.5
Nectarines	0.5	7	0.2
Okra	1		0.2
Onions (dry bulb).	1		0.2
Papayas	3.5		0.2
Parsnips (roots and tops).	1		0.2
Peaches	05	7	0.2
Peanuts	0.5		0.2
Pears	0.5	7	0.1
Peas	0.5	1	0.2
Peppermint hay.	50		0.5
Peppers	7	7	0.1
Pineapples	7		0.2
Plums (fresh prunes).	0.5	3.5	0.2
Potatoes	1		1
Pumpkins	0.5	7	0.1
Quinces	0.5	7	0.1
Radishes (roots and tops).	1		0.2
Raspberries	0.5	3.5	0.1
Rutabagas (roots and tops).	1	1 (roots); 7 (tops)	0.2
Soybeans (dry).	[4] 1.5		0.2
Spearmint hay.	50	1	0.5
Spinach	1	1	0.5
Squash	0.5	7	0.1
Squash, summer.	0.5	7	0.1
Strawberries	0.5	3.5	0.1
Sweet potatoes.	1		1
Swiss chard	1		0.5
Tomatoes	7	7	0.05
Turnips (roots and tops).	1	1 (roots); 7 (tops)	0.2
Youngberries.	0.5		0.1

[1] Covered by the existing action level of 5 ppm in fat, meat, and meat byproducts from cattle, goats, horses, sheep, swine, poultry, and rabbits (fat basis), which is recommended to continue at the current level.

[2] Equivalent to 1.25 ppm in milk-fat.

[3] Fat basis.

[4] Includes the tolerance of 3.5 ppm for combined residues of DDT and toxaphene in or on soybeans (dry form), of which residues of DDT shall not exceed 1.5 ppm; see 40 CFR 180.138 (toxaphene).

EPA is recommending to FDA and AMS the following action levels for the sum of DDT, TDE, and DDE residues to replace existing action levels for residues of DDT, DDT's degradation products, and TDE:

TABLE 2.—RECOMMENDED REPLACEMENT ACTION LEVELS

Commodities	Existing action levels (ppm) DDT/TDE/DDE	Recommended action levels (ppm) DDT/TDE/DDE
Cocoa beans, whole raw bean	2 (DDT only)	1
Eggs	1.5	0.5

EPA is recommending that FDA and FSIS retain the following action levels for the sum of DDT, TDE, and DDE residues:

TABLE 3.—ACTION LEVELS TO REMAIN IN EFFECT

Commodities	Existing and Recommended Action Levels (ppm) DDT/TDE/DDE
Barley grain (human food)	0.5
Barley grain (animal feed)	0.5
Corn grain (animal feed)	0.5
Corn grain (human food)	0.5
Fat, meat, and meat byproducts from cattle, goats, horses, sheep, swine, poultry, and rabbits (fat basis)	5
Hay	0.5
Milo sorghum grain (animal feed)	0.5
Milo sorghum grain (human food)	0.5
Rice grain (animal feed)	0.5
Rice grain (human food)	0.5
Rye grain (animal feed)	0.5
Rye grain (human food)	0.5
Wheat grain (animal feed)	0.5
Wheat grain (human food)	0.5

The commodity definition, "Fat of calves, cattle, chickens, ducks, geese, goats, horses, rabbits, sheep, swine, and turkeys," which was listed in the proposed rule, has been modified as shown in the first footnote to Table 1 and in Table 3 to agree with the commodity definition used by FSIS.

As discussed earlier in this document, EPA will defer making a recommendation to FDA regarding the current 5 ppm action level for the sum of DDT, TDE, and DDE residues on fish (edible portion).

Elsewhere in this issue of the **Federal Register**, the Agency is issuing a related final rule [OPP-300120A] which revokes food and feed additive regulations under 21 CFR Parts 193 and 561 for residues of DDT and TDE in processed food and feed commodities.

Any person adversely affected by this regulation revoking the tolerances may, within 30 days after the date of publication of this regulation in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

This document has been reviewed by the Office of Management and Budget as required by Section 3 of Executive Order 12291.

In order to satisfy requirements for analysis as specified by Executive Order 12291 and the Regulatory Flexibility Act, the Agency has analyzed the costs and benefits of the revocation of tolerances for these pesticides. This analysis is available for public inspection in Rm. 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Executive Order 12291

As explained in the proposal published on March 13, 1985, the Agency has determined, pursuant to the requirements of Executive Order 12291, that the revocation of these tolerances will not cause adverse economic impacts on significant portions of U.S. enterprises.

Regulatory Flexibility Act

This rulemaking has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96–354; 94 Stat. 1164, 5 U.S.C. 601 *et seq.*) and it has been determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. The reasons for this conclusion are discussed in the March 13, 1985, proposal.

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 1986.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 180.138 [Amended]

2. In $ 180.138 by removing the entry at "3.5 ppm for soybeans (dry form)".

§ 180.147 [Removed]

3. Section 180.147 is removed.

§ 180.147a [Removed]

4. Section 180.147a is removed.

§ 180.147b [Removed]

5. Section 180.147b is removed.

§ 180.187 [Removed]

6. Section 180.187 is removed.

[FR Doc. 86–28744 Filed 12–23–86; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 180

[OPP-300121A; FRL-3131-8]

Revocation of Aldrin and Dieldrin Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: This document (1) revokes the tolerances for residues of the insecticide aldrin and its epoxidation product dieldrin, resulting from application of aldrin; (2) revokes the tolerances established specifically for residues of dieldrin; (3) lists the action levels EPA is recommending to the Food and Drug Administration (FDA) to replace the revoked tolerances; and (4) lists EPA recommendations to FDA and to the Food Safety and Inspection Service (FSIS) and the Agricultural Marketing Service (AMS) of the U.S. Department of Agriculture (USDA) regarding existing action levels for commodities bearing residues for which tolerances had not been established. This rule was initiated by the Environmental Protection Agency to remove pesticide tolerances for which related registered uses have been cancelled.

EFFECTIVE DATE: Effective on December 24, 1986.

ADDRESS: Written objections, identified by the document control number [OPP–300121A], may be submitted to the: Hearing Clerk, Environmental Protection Agency, Rm. 3708 (A–110), 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail Patricia Critchlow, Registration Division (TS–767), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703–557–1806).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of March 13, 1985 (50 FR 10080), which (1) proposed the revocation of all existing tolerances in 40 CFR 180.135 for residues of the insecticide aldrin and its epoxidation product dieldrin, resulting from application of aldrin; and (2) proposed the revocation of tolerances in § 180.137 established specifically for residues of dieldrin.

The March 13 **Federal Register** notice also listed the action levels which EPA intended to recommend to FDA to replace the tolerances once the rule revoking the tolerances is final. The action levels would cover unavoidable pesticide residues which can continue to occur in the tolerance-related food and feed commodities because of the persistence of the pesticides in the environment. The notice also listed EPA's intended recommendations to FDA, FSIS, and AMS regarding revision of existing action levels for food and feed commodities for which tolerances had not been established and which may contain unavoidable residues of the pesticides because of environmental contamination.

No requests for referral to an advisory committee were received. However, a number of interested persons submitted comments regarding the proposed revocation action.

The Conservation Law Foundation of New England, Inc. (CLF) indicated support for the tolerance revocation proposal and for the setting of action levels, but only where necessary to cover residues of cancelled pesticides which persist in the environment. They also suggested that such action levels should be lowered over time as residues decline.

EPA agrees that action levels should be recommended to replace revoked tolerances only when necessary to cover residues of cancelled pesticides that continue to persist in the environment and unavoidably contaminate food and feed commodities. EPA plans to reassess all its recommended action levels in the future on a regular basis so that the action levels may be lowered as residues decline.

The National Food Processors Association (NFPA) and the Pineapple Growers Association of Hawaii (PGAH) indicated their opposition to EPA's revocation of the existing tolerances for residues of persistent pesticides such as aldrin and dieldrin before such residues have fully dissipated from the environment. These organizations also expressed concern that the setting of replacement action levels may not be legal under the recent decision of the United States Court of Appeals for the District of Columbia in *Community Nutrition Institute (CNI)* v. *Young*, 757 F. 2d 354 (D.C. Cir. 1985).

In order to eliminate any implied sanctioning of the use of pesticides whose registrations have been cancelled for food safety reasons and of the presence of residues in food and feed commodities from such use, EPA considers it appropriate to revoke tolerances for residues of such pesticides. There are major differences between tolerances and action levels. A tolerance is set before the fact to cover residues which will result from legal and purposeful use of the pesticide. An action level is a more appropriate mechanism for situations involving residues, which persist in the environment after the once-legal use of that pesticide has been halted. With regard to the concern of NFPA and PGAH that the setting of replacement action levels may not be legal in light of the Court of Appeals decision in the CNI case, the Agency notes that the Supreme Court has recently reversed the Court of Appeals decision. The Court gave deference to FDA's interpretation that the Federal Food, Drug, and Cosmetic Act provides flexibility to set action levels under section 402(a) rather than promulgate tolerances by formal rulemaking pursuant to section 406. The Agency also notes that it does not interpret section 406 as applying to residues of pesticide chemicals in food; rather, sections 402(a)(2)(B), 402(a)(2)(C), 408, and 409 govern the issue of whether food bearing such residues is adulterated.

The NFPA also stated that action levels do not provide sufficient legal protection to food producers (but did not specify in what manner) and further indicated that NFPA also opposed the 1982 policy statement (47 FR 42956; September 29, 1982) which describes EPA's policy on the revocation of tolerances for cancelled pesticides and the replacement of these tolerances with action levels for unavoidable residues of these pesticides. The basis for their opposition was that the setting and revising of action levels does not afford the public the same hearing rights and procedural protections provided for tolerance rulemaking actions under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA).

EPA believes that its procedures regarding the recommendation of replacement action levels afford adequate legal protection to food producers. As a matter of policy, the Agency will provide notice and the opportunity to comment on recommended action levels at the proposal stage of a tolerance revocation action. When a determination is reached to further decrease action levels, the Agency will publish a notice in the **Federal Register** of that determination and provide an opportunity to comment before making its final recommendations on action levels to FDA or USDA.

The Regional Administrator for EPA's Region V (which includes the states of Illinois, Indiana, Michigan, Ohio, and Wisconsin) opposed the proposal that FDA continue to enforce the current action level of 0.3 part per million for residues in fish. The Regional Administrator argued that this action level did not provide adequate protection of human health and that possibly it was inconsistent with statutory authority, policy and proposed guidelines regarding risk-benefit assessments. He also suggested that the action level derivation process, particularly regarding fish, should be reevaluated.

The Southern California Coastal Water Research Project (SCCWRP) was concerned that EPA might be recommending the fish action level based on economics far more than on risk; SCCWRP suggested that EPA should base the action level more on risk and also indicated that the risk estimates of the Carcinogen Assessment Group (CAG) would require the action level for residues of aldrin and dieldrin in fish to be considerably lower than EPA has recommended.

The National Wildlife Foundation's Great Lakes Natural Resource Center (NWF/GLNRC) opposed retention of the existing action level for residues of aldrin and dieldrin in fish, indicating that the action level presents an increased (and unacceptably high) cancer risk (10–3) to consumers of fish containing that level of residues. NWF/GLNRC also stated that they considered the recommended action level in fish to be in conflict with EPA's Ambient Water Quality Criteria for Aldrin/Dieldrin (1980), and therefore recommended that EPA publish in the **Federal Register** a discussion of any data or risk assessments showing a lower risk, or other considerations (e.g., economic) leading to the decision to retain the existing action level. This commenter did not suggest setting a particular lower action level, but only stated that "there are a number of remedial measures available . . . to reduce human exposure to aldrin/dieldrin contamination of fish. The commenter did not indicate what those remedial measures might include.

Several other commenters expressed concern about the current action level in fish and indicated that they have regional fish residue data and fish consumption statistics which they wish to submit for EPA's analysis and consideration before the Agency makes its final recommendation on the fish action level. Not all of the commenters submitted their data at that time, however, and until this additional information is received and can be evaluated, the Agency has decided to make no recommendation at this time regarding the current aldrin and dieldrin action levels in fish. The Agency does believe that the factors listed in the 1982 policy statement for setting appropriate action levels are basically sound and need not be changed. Therefore, these factors will continue to be used as guidance by the Agency in assessing the appropriate action levels for fish.

When EPA has accumulated more data and studied the situation thoroughly, the Agency will reassess the fish action level and determine what recommendation to make to FDA for the action level. As part of this reassessment, EPA intends to also study further the concerns about pesticides in fish in various regional areas where members of specific population subgroups may consume fish at rates above the "national average." Because action levels enforced by FDA apply to fish in interstate commerce, it would be very difficult, if not impossible, for FDA to enforce and defend in court differing "regional" limits. However, EPA recognizes that some population groups may be at higher risk because of the frequency and amount of fish consumed locally. It is usually not possible, however, to set an enforcement limit for this situation while also satisfying the criteria for setting an appropriate national limit.

If a potential local health problem exists, a state or locality may issue guidance on the quantity of contaminated fish which may be consumed without appreciable risk to the health of local consumers, based on an assessment of the level of the contaminant and on fish consumption patterns, or may take other action.

This final rule revoking the tolerances for aldrin and dieldrin is being issued in accordance with EPA's 1982 policy statement and the action levels being recommended are based on the factors cited in that statement, i.e., the action levels are set at the level necessary to protect the public health while taking into account the extent to which the residues cannot be avoided. As environmental residues continue to dissipate, risk will gradually decrease and action levels may be lowered.

EPA believes that during the time period that residues of aldrin and dieldrin products continue to occur in food, the potential risk from dietary exposure to such residues will be low. Based on the monitoring data which were used to formulate its action level recommendations, EPA has determined that most foods and feeds contain no detectable residues of aldrin or dieldrin, or contain residues which are generally below the recommended action levels. Only a few foods and feeds on the action level list contain residues at or near the maximum limits being recommended. In fact, most of the foods and feeds contain residues well below the recommended action level. Thus, the occurrence of unavoidable residues is not a widespread or commonplace situation. In addition, the level of exposure will continue to decrease as environmental residues decrease.

Scallop Corporation, a Royal Dutch/Shell company, submitted comments stating that they are not opposed to the revocation action and setting of replacement action levels if these actions are an administrative result of the 1975 cancellation action and if the replacement action levels being recommended are based on a determination of the residues actually occurring in the environment, rather than on toxicological data submitted in connection with the current termiticide proceedings (termiticides were not subject to the 1975 cancellation action). Scallop pointed out that a review of toxicological data for aldrin and dieldrin was underway at EPA in connection both with the Special Data Call-ins on termiticides and with the Registration Standard for the termiticide use of aldrin and dieldrin.

EPA has discussed the basis for the recommended action levels previously in the proposed rule of March 13, 1985. As stated therein, the recommended action levels were determined based on residues occurring in the environment, as evidenced by residue monitoring data acquired from FDA and USDA. The Agency will reassess these action levels periodically based upon new information which becomes available to the Agency.

EPA is basing its recommended action levels for aldrin and dieldrin on residue monitoring data from the late 1970's. A reassessment of these action levels, using updated surveillance data, is underway with completion planned by the end of 1986. If any revision of the action levels is subsequently deemed appropriate, a notice to that effect will be published in the **Federal Register** with an opportunity for public comment. However, the Agency does not wish to delay its revocation of the aldrin and dieldrin tolerances and is thus proceeding with this action.

Based on the information considered by the Agency and discussed in detail in the March 13, 1985, proposal and in this final rule, the Agency is hereby: (1) Revoking all existing tolerances in 40 CFR 180.135 for the residues of aldrin and its epoxidation product dieldrin, resulting from application of aldrin, and (2) revoking all existing tolerances in 40 CFR 180.137 established specifically for dieldrin.

EPA is recommending to FDA the following action levels for the sum of aldrin and dieldrin residues, expressed in parts per million (ppm), to replace the following tolerances that are being revoked for residues of aldrin and dieldrin:

TABLE 1.—RECOMMENDED ACTION LEVELS

Commodities	Tolerances (ppm) being revoked		Recommended action levels (ppm)
	Aldrin[1]	Dieldrin	
Alfalfa	[2]0 (0.03)	0	0.03
Apples	0	0.1	0.03
Apricots	0	0.1	0.03
Asparagus	0.1	0.1	0.03
Bananas		0.1	0.02
Barley, grain	0.02	0.02	0.02
Barley, straw	0.1	0.1	0.03
Beans	[2]0 (0.05)	0	0.05
Beets, garden	[2]0 (0.05)	0	0.1
Beets, garden, tops	[2]0 (0.05)	0	0.05
Beets, sugar	0		0.1
Beets, sugar, tops	0		0.05
Blackeyed peas	[2]0 (0.05)	0	0.05
Broccoli	0.1	0.1	0.03
Brussels sprouts	0.1	0.1	0.03
Cabbage	0.1	0.1	0.03
Cantaloupe	0.1		([3])
Carrots	0	0.1	0.1
Cauliflower	0.1	0.1	0.03
Celery	0.1		0.03
Cherries	0.1	0.1	0.03
Clover	[2]0 (0.03)	0	0.03
Collards	[2]0 (0.05)	0	0.05
Corn, forage	[2]0 (0.03)	0	0.03
Corn, grain	[2]0 (0.03)	0	0.02
Corn, pop	[2]0 (0.03)	0	0.02
Cowpeas	[2]0 (0.05)	0	0.05
Cowpeas, hay	[2]0 (0.03)	0	0.03
Cranberries	0.1	0.1	([4])
Cucumbers	0.1	0.1	0.1
Eggplant	0.1	0.1	0.05
Endive (escarole)	[2]0 (0.05)	0	0.05
Garlic	[2]0 (0.05)		0.1
Grain sorghum	[2]0 (0.03)	0	0.02
Grain sorghum, forage	[2]0 (0.03)	0	0.03
Grapefruit	0.05	0.05	0.02
Grapes	0.1	0.1	([4])
Horseradish	0	0.1	0.1
Kale	[2]0 (0.05)	0	0.05
Kohlrabi	[2]0 (0.05)	0	0.05
Leeks	[2]0 (0.05)		0.1
Lemons	0.05	0.05	0.02
Lespedeza	[2]0 (0.03)	0	0.03
Lettuce	0.1	0.1	0.03
Limes	0.05	0.05	0.02
Mangoes	0.1	0.1	0.03
Muskmelons	0.1		([3])
Mustard greens	[2]0 (0.05)	0	0.05
Nectarines	0.1	0.1	0.03
Oats, grain	0.02	0.02	0.02
Oats, straw	0.1	0.1	0.03
Onions	0	0.1	0.1
Oranges	0.05	0.05	0.02
Parsnips	0	0.1	0.1
Peaches	0.1	0.1	0.02
Peanuts	[2]0 (0.05)		0.5
Peanuts, hay	[2]0 (0.03)		0.03
Pears	0	0.1	0.03
Peas	[2]0 (0.05)	0	0.05
Peas, hay	[2]0 (0.03)	0	0.03
Pimentos	0.1	0.1	0.05
Pineapple	0.1		0.03
Plums (fresh prunes)	0.1	0.1	0.03
Potatoes	0.1	0.1	0.1
Pumpkins	0.1		0.1
Quinces	0	0.1	0.03
Radishes	0	0.1	0.1
Radishes, tops		0.1	0.03
Rice, grain	0.05		0.02
Rice, straw	0.1		0.03
Rutabagas	[2]0 (0.05)	0	0.1
Rye, grain	0.02	0.02	0.02
Rye, straw	0.1	0.1	0.03
Salsify, roots	0	0.1	0.1
Salsify, tops	[2]0 (0.05)	0	0.05
Shallots	[2]0 (0.05)		0.1
Soybeans	[2]0 (0.05)	0	0.05
Soybeans, hay	[2]0 (0.03)	0	0.03
Spinach	[2]0 (0.05)	0	0.05
Squash, summer	0.1	0.1	0.1
Squash, winter	0.1		0.1
Strawberries	0.1	0.1	([4])
Swiss chard	[2]0 (0.05)	0	0.05
Tangerines	0.05	0.05	0.02
Tomatoes	0.1	0.1	0.05
Turnips	[2]0 (0.05)	0	0.1
Turnips, tops	[2]0 (0.05)	0	0.05
Watermelons	0.1		([3])
Wheat, grain	0.02	0.02	0.02
Wheat, straw	0.1	0.1	0.03

[1] Total residues of aldrin and dieldrin, resulting from application of aldrin.

[2] The limits in parentheses, which were being used by FDA for enforcing the "zero" tolerances, took into account current analytical methodology capabilities and anticipated unavoidable, background levels of these residues.

[3] Covered by the action level of 0.10 ppm which is recommended to replace the existing action level or 0.15 ppm in melons.

[4] Covered by the action level of 0.05 ppm in commodities in the crop group "small fruits and berries" (as defined in 40 CFR 180.34(f)) which is recommended to replace the existing action level of 0.05 ppm in small fruits.

EPA is recommending to FDA the following action level for the sum of aldrin and dieldrin residues to replace the existing action level for residues of aldrin and dieldrin in melons.

TABLE 2.—RECOMMENDED REPLACEMENT ACTION LEVEL

Commodity	Existing action level (ppm) Aldrin/Dieldrin	Recommended action level (ppm) Aldrin/Dieldrin
Melons	0.15	0.10

EPA is recommending that FDA, FSIS, and AMS retain the following action levels for the sum of aldrin and dieldrin residues. Commodities affected, and listed below, include processed food and feed commodities as well as raw agricultural commodities. There are no established food additive tolerances in 21 CFR Parts 193 or 561 for residues of aldrin or dieldrin which would be subject to revocation under section 409(h) of the Federal Food, Drug, and Cosmetic Act; therefore, a separate **Federal Register** notice addressing food additive tolerances or replacement action levels will not be published.

TABLE 3.—ACTION LEVELS TO REMAIN IN EFFECT

Commodities	Existing and Recommended Action Levels (ppm) Aldrin/Dieldrin
Animal feed (processed)	0.03

TABLE 3.—ACTION LEVELS TO REMAIN IN EFFECT—Continued

Commodities	Existing and Recommended Action Levels (ppm) Aldrin/Dieldrin
Artichokes	0.05
Eggs	0.03
Fat, meat, and meat byproducts of cattle, goats, horses, sheep, swine, poultry, and rabbits (fat basis)	0.3
Fats and oils (animal and vegetable) (animal feed)	0.3
Figs	0.05
Hay	0.03
Milk, raw (fat basis)	0.3
Small fruits and berries [5]	0.05
Sugarbeet pulp	0.1

[5] Refer to 40 CFR 180.34(f) for the list of commodities covered by the crop group "small fruits and berries."

The commodity definition "Fat of calves, cattle, chickens, ducks, geese, goats, horses, rabbits, sheep, swine, and turkeys," which was listed in the proposed rule, has been modified as shown in Table 3 above to agree with the commodity definition used by FSIS.

The proposal to revoke the tolerances for aldrin and dieldrin discussed action levels for the crops blackberries, blueberries, boysenberries, currants, dewberries, elderberries, gooseberries, huckleberries, loganberries, and raspberries. FDA now indicates that the current FDA Compliance Policy Guide, which lists pesticide action levels, uses the crop group name "small fruits" in lieu of the individual crop names; therefore, FDA has requested that EPA revise its recommendations for action levels for aldrin and dieldrin to reflect the crop group rather than the individual crops which comprise the group. The crop group name, as it appears in the current 40 CFR 180.34(f), is "small fruits and berries."

The proposal to revoke the tolerances for aldrin and dieldrin also discussed the action levels of 0.3 ppm for residues in butter and manufactured dairy products, as well as raw milk. FDA now indicates that the action level in raw milk will automatically apply to any processed milk product and, therefore, separate action levels for the processed products such as butter are not necessary. EPA is recommending that FDA retain the current action level of 0.3 ppm for residues of aldrin and dieldrin in raw milk.

As discussed earlier in this document, EPA is not making a recommendation to FDA at this time regarding the current 0.3 ppm action level for the sum of aldrin and dieldrin residues in fish (edible portion).

Any person adversely affected by this regulation revoking the tolerances may, within 30 days after the date of publication of this regulation in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

This document has been reviewed by the Office of Management and Budget as required by section 3 of Executive Order 12291.

In order to satisfy requirements for analysis as specified by Executive Order 12291 and the Regulatory Flexibility Act, the Agency has analyzed the costs and benefits of the revocation of tolerances for this chemical. This analysis is available for public inspection in Room 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Executive Order 12291

As explained in the proposal published on March 13, 1985, the Agency has determined, pursuant to the requirements of Executive Order 12291, that the revocation of these tolerances will not cause adverse economic impacts on significant portions of U.S. enterprises.

Regulatory Flexibility Act

This rulemaking has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96–354; 94 Stat. 1164, 5 U.S.C. 601 *et seq.*) and it has been determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. The reasons for this conclusion are discussed in the March 13, 1985 proposal.

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: December 15, 1986.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 180.135 [Removed]

2. Section 180.135 is removed.

§ 180.137 [Removed]

3. Section 180.137 is removed.

[FR Doc. 86-28745 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 180

[OPP-300123A; FRL-3131-7]

Revocation of Chlordane Tolerances

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document (1) revokes all interim tolerances and permanent tolerances for residues of the insecticide chlordane; (2) lists the action levels EPA is recommending to the Food and Drug Administration (FDA) to replace the revoked tolerances; and (3) lists EPA's recommendations to FDA and the Food Safety and Inspection Service (FSIS) of the U.S. Department of Agriculture (USDA) regarding existing action levels for commodities bearing residues for which tolerances had not been established. This rule was initiated by the Environmental Protection Agency to remove pesticide tolerances for which related registered uses have been cancelled.

EFFECTIVE DATE: Effective on December 24, 1986.

ADDRESS: Written objections, identified by the document control number [OPP-300123A], may be submitted to the: Hearing Clerk, Environmental Protection Agency, Rm. 3708 (A-110), 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Patricia Critchlow, Registration Division (TS-767), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

Office location and telephone number: Rm. 716, CM #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-1806).

SUPPLEMENTARY INFORMATION: EPA issued a notice, published in the **Federal Register** of June 5, 1985 (50 FR 23717), which proposed the revocation of all tolerances in 40 CFR 180.122 and the interim tolerances in 40 CFR 180.319 for residues of the insecticide chlordane.

The June 5 **Federal Register** notice also listed the action levels which EPA intended to recommend to FDA to replace the tolerances once the rule revoking the tolerances is final. The action levels would cover unavoidable pesticide residues which can continue to occur in the tolerance related food and feed commodities because of the persistence of the pesticide in the environment. The notice also listed EPA's intended recommendations to FDA and FSIS regarding retention of existing action levels for food and feed commodities for which tolerances had not been established and which may contain unavoidable residues of the pesticide because of environmental contamination.

No requests for referral to an advisory committee were received. However, several interested persons submitted comments regarding the proposed revocation action.

The National Food Processors Association (NFPA) and the Pineapple Growers Association of Hawaii (PGAH) indicated their opposition to EPA's revocation of the existing tolerances for residues of persistent pesticides such as chlordane before such residues have fully dissipated from the environment. These organizations also expressed concern that the setting of replacement action levels may not be legal under the recent decision of the United States Court of Appeals for the District of Columbia in *Community Nutrition Institute (CNI)* v. *Young*, 757 F. 2d 354 (D.C. Cir. 1985).

In order to eliminate any implied sanctioning of the use of pesticides whose registrations have been cancelled for food safety reasons and of the presence of residues in food and feed commodities from such use, EPA considers it appropriate to revoke tolerances for residues of such pesticides. There are major differences between tolerances and action levels. A tolerance is set before the fact to cover residues which will result from legal and purposeful use of the pesticide. An action level is a more appropriate mechanism for situations involving residues which persist in the environment after the once-legal use of that pesticide has been halted. With regard to the concern of NFPA and PGAH that the setting of replacement action levels may not be legal in light to the Court of Appeals decision in the CNI case, the Agency notes that the Supreme Court has recently reversed the Court of Appeals decision. The Court gave deference to FDA's interpretation that the Federal Food, Drug, and Cosmetic Act provides flexibility to set action levels under section 402(a) rather than promulgate tolerances by formal rulemaking pursuant to section 406. The Agency also notes that it does not interpret section 406 as applying to residues of pesticide chemicals in food; rather, sections 402(a)(2)(B), 402(a)(2)(C), 408, and 409 govern the issue of whether food bearing such residues is adulterated.

The NFPA also stated that action levels do not provide sufficient legal protection to food producers (but did not specify in what manner) and further indicated that NFPA also opposed the 1982 policy statement (47 FR 42956, September 29, 1982) which describes EPA's policy on the revocation of tolerances for cancelled pesticides and the replacement of these tolerances with action levels for unavoidable residues of these pesticides. The basis for their opposition was that the setting and revising of action levels does not afford the public the same hearing rights and procedural protections provided for tolerance rulemaking actions under section 408 of the FFDCA.

EPA believes that its procedures regarding the recommendation of replacement action levels afford adequate legal protection to food producers. As a matter of policy, the Agency will provide notice and the opportunity to comment on recommended action levels at the proposal stage of a tolerance revocation action. When a determination is reached to further decrease action levels, the Agency will publish a notice in the **Federal Register** of that determination and provide an opportunity to comment before making its final recommendations on action levels to FDA or USDA.

The Regional Administrator for EPA's Region VII (which includes the states of Iowa, Kansas, Missouri, and Nebraska) expressed concern about the proposal that FDA continue to enforce the current action level of 0.3 part per million for residues of chlordane in fish, indicating that this action level might not be sufficiently low to provide adequate protection of human health and that possibly it was inconsistent with Agency policy on replacement action levels as well as with human health protection processes in other EPA programs. The Regional Administrator also recommended that the Agency conduct a thorough review of fish residue data, collected on a nationwide basis, to better determine the extent of chlordane contamination in the U.S., and further suggested that the action level risk assessment process, particularly regarding fish, be critically examined.

EPA has been advised of the availability of additional regional fish residue data and fish consumption statistics which need to be submitted for analysis and consideration before the Agency makes its final recommendation on the fish action level.

Until this additional information is received and can be evaluated, the Agency has decided to make no recommendation at this time regarding the current chlordane action level in fish. When EPA has accumulated more data and studied the situation throughly, the Agency will reassess the fish action level and determine what recommendation to make to FDA for the action level.

As part of this reassessment, EPA intends also to study further the concerns about pesticides in fish in various regional areas where members of specific population subgroups may consume fish at rates above the "national average." Because action levels enforced by FDA apply to fish in interstate commerce, it would be very difficult, if not impossible, for FDA to enforce and defend in court differing "regional" limits. However, EPA recognizes that some population groups may be at higher risk because of the frequency and amount of fish consumed locally. It is usually not possible, however, to set an enforcement limit for this situation while also satisfying the criteria for setting an appropriate national limit.

If a potential local health problem exists, a state or locality may issue guidance on the quantity of contaminated fish which may be consumed without appreciable risk to the health of local consumers, based on an assessment of the level of the contaminant and on fish consumption patterns.

EPA believes that the factors listed in the 1982 policy statement for setting appropriate action levels are basically sound and need not be changed. Therefore, these factors will continue to be used as guidance by the Agency in assessing the appropriate action level for fish.

This final rule revoking the tolerances for chlordane is being issued in accordance with EPA's 1982 policy statement and the action levels being recommended are based on the factors cited in that statement, i.e., the action levels are set at the level necessary to protect the public health while taking into account the extent to which the residues cannot be avoided. As environmental residues continue to dissipate, risk will gradually decrease and action levels may be lowered. EPA plans to reassess all its recommended action levels in the future on a regular basis so that the action levels may be lowered as residues decline.

It is EPA's opinion that during the period of time that residues of chlordane and its degradation products continue to occur in food, the potential risk from dietary exposure to such residues will be low. Based on the monitoring data which were used to formulate its action level recommendations, EPA has determined that most foods and feeds contain no detectable residues of chlordane and its degradation products, or contain residues which are generally below the recommended action levels. It is important to recognize that only a few foods and feeds on the action level list contain residues at or near the maximum limits being recommended. In fact, most of the foods and feeds contain residues well below the recommended action level. Thus, the occurrence of unavoidable residues is not a widespread or commonplace situation. In addition, the level of exposure will, continue to decrease as environmental residues decrease.

Based on the information considered by the Agency and discussed in detail in the June 5, 1985, proposal and in this final rule, the Agency is hereby: (1) Revoking all tolerances for residues of chlordane listed in 40 CFR 180.122, and (2) revoking the interim tolerances listed in 40 CFR 180.319 specifically for residues of chlordane.

EPA is recommending to FDA the action levels listed below, expressed in parts per million (ppm), to replace the following tolerances which are being revoked for residues of chlordane. For consistency with existing FDA action levels, all recommended action levels are for "the sum of residues of *cis*- and *trans*-chlordane, *cis*- and *trans*-nonachlor, oxychlordane (octachlor epoxide), alpha, beta, and gamma chlordene, and chlordene."

TABLE 1.—RECOMMENDED ACTION LEVELS

Commodities	Tolerances (ppm,) being revoked, Chlordane	Recommended action levels (ppm), Chlordane
Apples	0.3	0.1
Apricots	0.3	0.1
Beans	0.3	0.1
Beets (with or without tops)	0.3	0.1
Beets, greens alone	0.3	0.1
Blackberries	0.3	0.1
Blueberries (huckleberries)	0.3	0.1
Boysenberries	0.3	0.1
Broccoli	0.3	0.1
Brussels sprouts	0.3	0.1
Cabbage	0.3	0.1
Carrots	0.3	0.1
Cauliflower	0.3	0.1
Celery	0.3	0.1
Cherries	0.3	0.1
Citrus fruits	0.3	0.1
Collards	0.3	0.1
Corn	0.3	0.1
Cucumbers	0.3	0.1
Dewberries	0.3	0.1
Eggplant	0.3	0.1
Grapes	0.3	0.1
Kale	0.3	0.1
Kohlrabi	0.3	0.1
Lettuce	0.3	0.1
Loganberries	0.3	0.1
Melons	0.3	0.1
Nectarines	0.3	0.1
Okra	0.3	0.1
Onions	0.3	0.1
Papayas	0.3	0.1
Peaches	0.3	0.1
Peanuts	0.3	0.1
Pears	0.3	0.1
Peas	0.3	0.1
Peppers	0.3	0.1
Pineapples	0.3	0.1
Plums (fresh prunes)	0.3	0.1
Potatoes	0.3	0.1
Quinces	0.3	0.1
Radishes (with or without tops)	0.3	0.1
Radishes, tops	0.3	0.1
Raspberries	0.3	0.1
Rutabagas (with or without tops)	0.3	0.1
Rutabagas, tops	0.3	0.1
Squash	0.3	0.1
Strawberries	0.3	0.1
Summer squash	0.3	0.1
Sweet potatoes	0.3	0.1
Tomatoes	0.3	0.1
Turnips (with or without tops)	0.3	0.1
Turnips, greens	0.3	0.1
Youngberries	0.3	0.1

EPA is recommending to FDA the action levels listed below to replace the following interim tolerances for residues of chlordane, listed in 40 CFR 180.319, which are being revoked.

TABLE 2.—RECOMMENDED ACTION LEVELS (FOR INTERIM TOLERANCES)

Commodities	Interim tolerances (ppm) being revoked, Chlordane	Recommended action levels (ppm), Chlordane
Asparagus	0.1	0.1
Bananas	0.03	0.1
Mustard greens	0.1	0.1
Parsnips	0.2	0.1
Pumpkins	0.1	0.1
Spinach	0.1	0.1
Swiss chard	0.1	0.1

The proposed rule (50 FR 23717, June 5, 1985) stated that EPA planned to recommend that FDA retain its existing action level of 0.8 ppm in rendered animal fat. FDA has since indicated that a lower action level of 0.3 ppm would be adequate, based on residue monitoring data from 1982 through 1985, and would also be consistent with FSIS' action level in fat of livestock.

Therefore, EPA is recommending to FDA the following action level to replace the current action level for residues of chlordane in the processed feed commodity, rendered animal fat.

TABLE 3.—RECOMMENDED REPLACEMENT ACTION LEVEL

Commodity	Existing action level (ppm), Chlordane	Recommended action level (ppm), Chlordane
Animal fat (rendered)	0.8	0.3

EPA is recommending that FDA and FSIS retain the following action levels for residues of chlordane.

TABLE 4.—ACTION LEVELS TO REMAIN IN EFFECT

Commodities	Existing and recommended action levels (ppm), Chlordane
Animal feed (processed)	0.1
Fat, meat, and meat byproducts from cattle, goats, horses, sheep, swine, poultry, and rabbits (fat basis)	0.3

The commodity definition "Fat of meat from cattle, goats, hogs, horses, sheep, poultry, and rabbits," which was listed in the proposed rule, has been modified as shown in Table 4 above to agree with the commodity definition used by FSIS.

Commodities affected by the action level recommendations listed above in Tables 3 and 4 include processed animal feed and the processed feed commodity rendered animal fat, which is used as an animal feed ingredient. There are no established feed additive tolerances in 21 CFR Part 561 for residues of chlordane which would be subject to revocation under section 409(h) of the Federal Food, Drug, and Cosmetic Act; therefore, a separate **Federal Register** notice addressing feed additive tolerances or replacement action levels will not be published.

As discussed earlier in this document, EPA is not making a recommendation to FDA at this time regarding the current 0.3 ppm action level for chlordane residues on fish (edible portion).

Any person adversely affected by this regulation revoking the tolerances may, within 30 days after the date of publication of this regulation in the **Federal Register**, file written objections with the Hearing Clerk, at the address given above. Such objections submitted must specify the provisions of the regulation deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supported by grounds legally sufficient to justify the relief sought.

This document has been reviewed by the Office of Management and Budget as required by section 3 of Executive Order 12291.

In order to satisfy requirements for analysis as specified by Executive Order 12291 and the Regulatory Flexibility Act, the Agency has analyzed the costs and benefits of the revocation of tolerances for this pesticide. This analysis is available for public inspection in Rm. 236, CM #2, 1921 Jefferson Davis Highway, Arlington, VA.

Executive Order 12291

As explained in the proposal published on June 5, 1985, the Agency has determined, pursuant to the requirements of Executive Order 12291, that the revocation of these tolerances will not cause adverse economic impacts on significant portions of U.S. enterprises.

Regulatory Flexibility Act

This rulemaking has been reviewed under the Regulatory Flexibility Act of 1980 (Pub. L. 96–354; 94 Stat. 1164, 5 U.S.C. 601 *et seq.*) and it has been determined that it will not have a significant economic impact on a substantial number of small businesses, small governments, or small organizations. The reasons for this conclusion are discussed in the June 5, 1985, proposal.

List of Subjects in 40 CFR Part 180

Administrative practice and procedure, Agricultural commodities, Pesticides and pests, Recordkeeping and reporting requirements.

Dated: December 15, 1986.

J.A. Moore,

Assistant Administrator for Pesticides and Toxic Substances.

PART 180—[AMENDED]

Therefore, 40 CFR Part 180 is amended as follows:

1. The authority citation for Part 180 continues to read as follows:

Authority: 21 U.S.C. 346a.

§ 180.122 [Removed]

2. Section 180.122 is removed.

§ 180.319 [Amended]

3. Section 180.319 is amended by removing the entries for "Chlordane".

[FR Doc. 86-28746 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 261

[SW-FRL-3133-7]

Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Correction

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; correction.

SUMMARY: EPA is correcting an error presented in a final rule denying delisting petitions from five petitioners which appeared in the Federal Register on November 13, 1986 (51 FR 41100).

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

SUPPLEMENTARY INFORMATION: EPA is correcting an error in one paragraph presented in a final rule on November 13, 1986 which denied delisting petitions filed by five petitioners. One petitioner addressed in that rule, Lacks Industries, located in Grand Rapids, Michigan, was erroneously identified as having been previously granted a temporary exclusion for its petitioned waste. The notice should have correctly identified the Light Metals Coloring Company, Inc., located in Southington, Connecticut, as one of the three facilities that had previously been granted a temporary exclusion for their petitioned waste. As a result of this correction, the paragraph now correctly identifies the effective date of Light Metals Coloring Company's petition denial as May 13, 1987, and the effective date of Lacks Industries petition as November 13, 1986. This notice corrects the discussion presented in the November 13, 1986 final rule.

* * * * *

Dated: December 18, 1986.

J.W. McGraw,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

The following correction is made to SW-FRL-3108-8, the Hazardous Waste Management System: Identification and Listing of Hazardous Waste final rule published in the Federal Register on November 13, 1986 (51 FR 41101). The paragraph entitled "EFFECTIVE DATE" should be corrected to read:

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

[FR Doc. 86-28895 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

46 CFR Part 515

[Docket No. 86-15]

Filing of Tariffs by Marine Terminal Operators Exculpatory Provisions

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its rules governing the filing of terminal tariffs by marine terminal operators to prohibit tariff provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that imposed upon others the obligation to indemnify or hold harmless terminal operators from liability for their own negligence.

EFFECTIVE DATE: February 23, 1987.

FOR FURTHER INFORMATION CONTACT: Robert D. Bourgoin, General Counsel, Federal Maritime Commission, 1100 L Street NW., Washington, DC 20573, (202) 523-5740.

SUPPLEMENTARY INFORMATION: By the publication of a Notice of Proposed Rulemaking in the Federal Register on April 25, 1986 (51 FR 15655-56) the Commission gave notice of its intent to prohibit exculpatory provisions in tariffs filed by marine terminal operators. Specifically, the proposed rule would add a new section to the Commission's regulations governing the filing of tariffs by marine terminal operators contained in Part 515, CFR. As proposed the new § 515.7, "Exculpatory Tariff Provisions," would provide as follows:

> No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

The Commission also requested comments on a possible exception to the general prohibition. The exception would allow terminal operators and users to negotiate an arrangement whereby the user may voluntarily assume liability for certain operations in exchange for operational and rate concessions from the operator. The proposed form of the exception was stated as follows:

> Terminal tariffs may contain hold-harmless and indemnification provisions for specific risks and hazards in terminal operations that port facility users have agreed to assume from the terminal operator but only if such provisions plainly indicate that such assumption by the users is in consideration for the terminal operator's specific concomitant concessions in rates or relinquishment of control to the user over the operations for which the user is assuming liability or providing indemnification.

Comments in response to the Notice were filed by fifteen parties representing both terminal operators [1] and users [2]

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[1] The following terminal operators filed comments: Board of Trustees of the Galveston Wharves, Galveston, Texas; Board of Port Commissioners, City of Oakland, California; Port of Houston Authority of Harris County, Texas; Lake Charles Harbor and Terminal District; Massachusetts Port Authority; Port of Seattle; South Carolina State Ports Authority; and, Global Terminal and Container Service, Inc.

[2] The following terminal users filed comments: Hampton Roads Shipping Association; Hampton Roads Maritime Association; West Gulf Maritime Association; Crowley Maritime Corporation; Master Contracting Stevedore Association of the Pacific Coast, Inc.; Association of Ship Brokers and Agents (U.S.A.), Inc.; and, Matson Navigation Company, Inc. (for itself and on behalf of its terminal operating subsidiary, Matson Terminals, Inc.)

reflecting a range of opinion on the proposed rule and possible exception.

Two commenters, Hampton Roads Shipping Association and Hampton Roads Maritime Association, support the proposal. Crowley Maritime Corporation and Lake Charles Harbor and Terminal District endorse the exception to the proposed rule, thereby presumably also supporting the underlying rule.

Several commenters express support for the rule but oppose the exception as published. The Board of Trustees of the Galveston Wharves, Galveston, Texas requests that the exception include terminal agreements containing liability insurance requirements. West Gulf Maritime Association and the Association of Ship Brokers & Agents (USA), Inc. oppose exceptions of any kind. The Master Contracting Stevedore Association of the Pacific Coast, Inc. also opposes any exceptions, and would extend the rule to apply to terminal agreements and leases and specify the various forms of exculpatory provisions prohibited by the rule. In its initial comments, Matson Navigation Company, Inc./Matson Terminals, Inc. (Matson) opposes the exception as it applies to terminal tariffs and argues that any understanding permitted by the exception should be required to be filed as an agreement. Subsequently, Matson filed supplemental comments stating it had given this matter "further consideration" and now supports the position of the Master Contracting Stevedore Association of the Pacific Coast, Inc.

Several commenters express dissatisfaction with the rule and exception as proposed and suggest revisions or clarifications. The Port of Houston Authority of Harris County, Texas argues that ports need protection from nuisance suits and that the Commission should: (1) Consider a comparative negligence rule; (2) allow terminal operators to require users to obtain liability insurance; and, (3) not require a formal agreement for the exception to apply. The Port of Seattle agrees and further points out that the exception overrides any need for the rule. The Board of Port Commissioners, City of Oakland and the South Carolina State Ports Authority urge the Commission to clarify the proposed rule to specify that terminal users may not use the regulation to exculpate themselves from liability for which they are responsible.

Global Terminal and Container Services, Inc. (Global) opposes the rule as it applies to its particular terminal services. Its terminal facility is said to be a "wheeled" container holding yard, which allegedly renders it a "bailee" of containers. Global believes that under the proposed rule it could be held liable for damages without a showing of negligence on its part. Exculpatory clauses which would limit a bailee's liability to cases of actual negligence are alleged to be reasonable and lawful. Global submits that the published exception is insufficient to remedy the situation.

Massachusetts Port Authority (MPA) opposes any regulation in this area. It argues that the free market should dictate port tariff practices. Alternatively, MPA takes the position that if the rule is adopted then the exception should also be adopted.

Upon review of the comments, the Commission has determined to promulgate a final rule in this proceeding prohibiting exculpatory clauses in terminal tariffs with no exceptions permitted. The discussion in the Notice of Proposed Rulemaking, which is incorporated here by reference, made clear that the prohibition against any form of exculpatory provisions in terminal tariffs is one that has been firmly established by the Commission in its decisions. Nothing presented in the comments filed in this proceeding prompts the Commission to alter its position on such provisions. Accordingly, that prosition will be codified in a Commission regulation.

Specific liability-shifting agreements between terminal operators and users will only be permitted, if at all, in marine terminal agreements filed with the Commission under section 15 of the 1916 Act or section 5 of the 1984 Act. By separate Notice issued this date in response to a Petition for Rulemaking by the Master Contracting Stevedore Association of the Pacific Coast, Inc. the Commission is instituting a proceeding on the question of the lawfulness of exculpatory clauses in terminal leases and agreements and whether a rule should be promulgated addressing such provisions. Docket No. 86-32, *Exculpatory Provisions in Marine Terminal Agreements and Leases.*

As was noted in the Notice of Proposed Rulmaking in this proceeding, in all but one of the several Commission cases which addressed liability-shifting tariff provisions, those provisions were held to be unlawful under section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 816, and section 10(d) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1709(d).[3] The provisions were found to have been unfairly imposed by the terminal operator through the exercise of greatly superior bargaining power resulting from public-utility-type market conditions for terminal facilities. We therefore see little validity to the suggestion advanced in some comments that "free market forces" exist and should govern the promulgation of liability provisions in terminal tariffs.

Similarly, the argument that the proposed rule would somehow allow terminal users to exculpate themselves from liability for their own negligence is unfounded. There is no indication in the language of the rule or in the case law giving rise to the rule that would lend any support to this argument.

We also find unpersuasive the contention that the rule somehow infringes on the comparative negligence doctrine in maritime and admiralty law. Under that doctrine, negligence is measured in terms of percentage, and any damages allowed are diminished in proportion to the amount of negligence attributable to the person for whose injury recovery is sought. *Black's Law Dictionary* 255 (5th ed. 1979). Exculpatory tariff provisions are, in fact, an attempt to override the traditional application of the comparative negligence doctrine in damage suits resulting from terminal accidents.

Some comments argue, however, that there is nothing unreasonable, and hence unlawful, about a terminal operator and user agreeing upon a liability-shifting arrangement after an arms-length negotiation over the terms and conditions for the use of such facilities. In support of this argument, some commenters allege that actual industry conditions at particular terminal facilities are compatible with the so-called "quid pro quo" exception noted in the Notice of Proposed Ruelmaking.

No exception to the general rule prohibiting exculpatory clauses in terminal tariffs is being adopted or will be permitted. The reason favoring a "quid pro quo" exception is that if there generally exists a rough equality of

[3] The only decision in which the Commission found that a liability-shifting tariff provision was justified on the basis of the arrangement between the terminal operator and the user is *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420, 453 (1980). However, it is important to note that, in that case, it was specifically found that the liability-shifting provision was "not imposed for the purpose of escaping liability for one's own negligence." *Id.* Accordingly, this case is not viewed as involving a truly *exculpatory* tariff provision.

bargaining power between terminal users and operators in the negotiation of the terms and conditions of the use of terminal facilities, reflected in terminal tariffs, then "users" will obtain some significant consideration for their assumption of the port authorities' potential liability. Theoretically, the exception would impose no additional burdens or significant restrictions on the commercial flexibility of the parties; it would only affect terminal tariffs in situations where there is an imbalance of bargaining power. The problem is that if there is, in fact, a general absence of equality of bargaining power between "users" and operators, the exception might only serve to foster litigation over whether negotiations over the provisions are "*bona fide*" and whether consideration flowing to the "user" is adequate. In short, if general equality of bargaining power existed between operators and "users," the exception would be superfluous and unnecessary. Alternatively, where there is a general inequality of bargaining power, as we find to be the case in the promulgation of exculpatory liability-shifting provisions in terminal tariffs, the exception would be ineffective. In either event, there appears to be no basis for providing an exception to the general rule prohibiting exculpatory provisions, at least insofar as terminal tariffs are concerned.[4]

As noted above, any exception to a general rule prohibiting exculpatory clauses in tariffs would most appropriately be permitted, if at all, through an agreement between the parties filed pursuant to the 1916 or 1984 Acts. The appropriate vehicle to consider the general propriety of such exceptions in terminal lease agreements is the separate rulemaking proceeding which the Commission is concurrently instituting.

Finally, it should be noted that the effective date of this final rule is 60 days after its publication in the **Federal Register**, rather than the customary 30 days. This extended period should allow those subject to the final rule's requirements ample time to conform their tariffs to those requirements.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, dated February 17, 1981, because it will not result in:

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

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

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

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small government organizations.

The Paperwork Reduction Act, 44 U.S.C. 3501–3502, does not apply to this Notice of Final Rulemaking because the amendments to Part 515 of Title 46, Code of Federal Regulations, do not impose any additional reporting or recordkeeping requirements or collection of information from members of the public which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 515

Freight, Harbors, Reporting and recordkeeping requirements, Warehouses.

PART 515—[AMENDED]

Therefore, for the reasons set forth above, Part 515 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation to Part 515 is revised to read as follows:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 816, 820, 841a, 1709, 1714 and 1716.

2. A new § 515.7, entitled "Exculpatory Tariff Provisions," is added to read as follows:

§ 515.7 Exculpatory Tariff Provisions.

No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 86–28929 Filed 12–23–86; 8:45 am]

BILLING CODE 6730-01-M

[4] Exception to the rule, although suggested as a possibility in dicta in *I. Charles Lucidi v. Stockton Port District*, 22 F.M.C. 20, 29 (I.D. 1979), has never been formally accepted by the Commission.

DEPARTMENT OF DEFENSE

Department of the Navy

48 CFR Parts 5242 and 5252

Department of the Navy Federal Acquisition Regulations; Policy Concerning Navy Requests for Refunds

AGENCY: Department of the Navy, DOD.

ACTION: Final rule.

SUMMARY: The Department of the Navy is amending its policy and associated clause concerning refunds for overpriced spare parts and items of support equipment. This revision clarifies the definition of intrinsic value, establishes a time limit for mandatory refunds, establishes conditions under which a contractor is not liable for a refund, and establishes a maximum unit price for items subject to the clause.

EFFECTIVE DATE: December 4, 1986.

FOR FURTHER INFORMATION CONTACT: Mr. Sidney Tronic, Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics), Contracts and Business Management (CBM–BPC) Washington, DC. 20360–5000, Telephone (202) 692–3558/9.

SUPPLEMENTARY INFORMATION:

1. Background

As published on June 3, 1986 at 51 FR 19842–19843, the Navy promulgated guidance and a clause effective April 28, 1986 which provides for the Navy to be entitled to mandatory refunds in the event that the price paid by the Navy for a spare part or item of support equipment exceeds the part's or item's intrinsic value. On October 16, 1986 at 51 FR 36828–36830, the Navy published a proposed revision to its policy and clause, and invited comments by 17 November 1986 on the proposed changes. Comments were received from eight companies and two industrial associations. The following summarizes significant comments, suggestions, and actions taken regarding the Navy's proposed revision of its spares refunds policy and clause.

Policy and Clause are Unnecessary

It was suggested that many of the spare parts pricing problems that prompted the Navy to issue its policy and clause have now been corrected by voluntary industry action and that there is no need for a mandatory refunds clause. The Navy recognizes that some companies have taken constructive steps to deal with spare parts pricing problems, but believes that overpricing problems may continue and that voluntary refunds are inadequate to protect the Navy's interests.

Navy Should Wait For DOD-wide Policy

It was suggested that a DOD-wide policy may be forthcoming and that the Navy should suspend its mandatory refund requirement until a DOD-wide policy is issued. Although other DOD activities are aware of its initiative, there has been no effort to pursue a DOD-wide policy on refunds, other than a case at the DAR Council that permanently lowers the level required to approve a voluntary refund and also restates DOD policy to pursue contractual remedies before non-contractual ones.

Inconsistent With Concept of Fixed Pricing

It was again suggested that the Navy's clause is contrary to the concept of fixed pricing in that it allows the Government after completion of negotiations to reopen the contract pricing process. The Navy recognizes industry's concern and, although the Navy considers this a problem inherent in any mandatory refund policy, has taken steps to eliminate potential uses of its refunds policy for unintended purposes. The policy has been revised to indicate that it is not intended to diminish the responsibility of Navy contracting personnel to properly price spares, nor is it intended to serve as a mechanism for recovery of excess profits. In addition, the policy and the clause have been revised to indicate that, for purposes of determining the Navy's entitlement to a refund, an item's intrinsic value is considered as of the date of agreement on price.

Replace "Intrinsic Value" with "Reasonable Value"

It was suggested that for consistency the concept of intrinsic value should be replaced with the concept of reasonable value, since the objective of DOD pricing policy is to negotiate fair and reasonable prices. It was also suggested that the definition of intrinsic value should be revised to recognize the quantity ordered. The Navy disagrees with both suggestions. For a number of reasons, including the quantity ordered and the nature of the contractor's primary business, a price that is considered to be reasonable in accordance with FAR cost principles for a particular procurement may exceed what a person would normally expect to pay for the item. The Navy's use of "intrinsic value", as defined in the clause, is intended to insure that the Navy is fully aware if it pays a price that is considered to be "reasonable" in accordance with cost principles but that significantly exceeds what a person normally would expect to pay for the item.

Time Limit For Refund Requests Is Too Long

Concern was expressed that a four year period after delivery of an item was too long for the Navy to be able to request refunds. The Navy has reduced the refund period to two years after delivery of the item.

Return of Unusuable Parts Or Items

Concern was expressed that the Navy's unilateral right to return an item to the contractor for a refund of the price in full would allow the Navy to return obsolete or otherwise unusable parts. The Navy understands this concern and has revised the clause so that the Navy can return an item for a full refund only if the contractor agrees.

Definition Of Support Equipment

It was suggested that a definition of the support equipment intended to be covered by the clause should be provided. Rather than define "support equipment", the Navy has revised the clause to make it inapplicable to items with unit prices in excess of $100,000 (or $25,000 in some instances). It is felt that this change satisfies the basic concern that prompted the suggestions to define "support equipment".

Contractor Notification That Price Exceeds Intrinsic Value

Concern was expressed that the proposed new paragraph which provided contractors with relief from refund liability created a conflict between the contractor's obligation to perform under an unpriced order and the contractor's obligation to perform an intrinsic value analysis. The paragraph has been revised in three ways: (i) It is revised to require timely notice from the contractor, (ii) It is revised such that the contractor's obligation to deliver an item after the contractor notifies the contracting officer that the proposed price will exceed intrinsic value is not dependent on receiving additional direction from the contracting officer, and (iii) It is revised to delete language limiting the Government's libility for incurred costs.

Identification Of Alternative Items Or Sources

Concern was expressed about contractors having to identify alternative items or sources in the event that the contractor notified the contracting officer that the price the contractor would propose would exceed intrinsic value. The Navy did not intend to force a contractor to perform a detailed analysis of potential alternative items or sources. Therefore, the clause has been revised to require notification of "known" alternative items or sources, "if any".

Exemption For Items Covered By Cost Or Pricing Data

It was suggested that the clause should not apply to items covered by certified cost or pricing data, or for which prices were established after a Government cost analysis. The Navy disagrees because cost or pricing data is used to establish the "reasonableness" of an item and not necessarily its "intrinsic value" (as defined in the clause). In addition, the Navy believes that an item may technically be covered by certified cost or pricing data when it is purchased as part of a larger procurement, and, yet, not be the subject of detailed cost or pricing data specific to it. Nevertheless, the Navy has elected to make the clause inapplicable to items with a unit price in excess of $100,000, or in excess of $25,000 if the contractor submitted, and certified the currency, accuracy, and completeness of, cost or pricing data applicable to the the item.

2. Statutory and Regulatory Requirements

This rule will not have a significant economic effect on a substantial number of small entities and therefore the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) is not applicable. The Paperwork Reduction Act (44 U.S.C. 3501 et seq.) does not apply to this rule because it does not impose any additional reporting requirements on the public.

List of Subjects in 48 CFR Parts 5242 and 5252

Government procurement.

Adoption of Amendments

For the reasons set out in the preamble, Parts 5242 and 5252 of Title 48, Code of Federal Regulations, are amended as follows.

1. Part 5242 is revised to read as follows:

PART 5242—CONTRACT ADMINISTRATION

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DOD Directive 5000.35

Subject 5242.90—Refunds Requirements (Spares and Support Equipment)

5242.9000 Requests for refunds.

(a) *Policy.* (1) This subpart establishes uniform policy and procedures on requesting refunds for spare parts or items of support equipment. This policy is not intended to diminish the responsibility of Navy contracting personnel to properly price spare parts and items of support equipment. Further, it is not intended to serve as a mechanism for the recovery of excess profits.

(2) In accordance with the guidance set forth in paragraph (c) below, contracting activities shall request a refund whenever the contract price of any spare part or item of support equipment significantly exceeds the item's intrinsic value as defined in the clause at 5252.242–9000. Refunds shall be requested only for the difference between the intrinsic value of the item at the time an agreement on price was reached and the contract price. Refunds will not be requested to recoup the amount of cost decreases that occur over time due to productivity gains (beyond economic quantity considerations) or changes in market conditions.

(b) *Examples.* The following are examples of circumstances which may establish a basis for a refund request or pricing adjustment:

(1) A technical or engineering analysis results in a determination that the intrinsic value is significantly lower than the historical price.

(2) The price paid for an item bought competitively in similar quantity and circumstances (e.g., urgency, delivery terms) is significantly less than the former sole source price.

(3) Prices paid to the manufacturer of an item indicate the amount previously charged by the prime contractor for the item significantly exceeded the intrinsic value of the prime contractor's efforts in providing the item.

(c) *Solicitation provisions.* The contracting officer shall insert the clause at 5252.242–9000 in solicitations, Basic Ordering Agreements, and contracts (as defined in FAR 2.101) which contain or may contain requirements for spare parts or items of support equipment, except those contracts awarded as a result of competitive small purchase procedures and orders under federal supply schedules. If added to existing contracts, the clause will not apply to items or components ordered by the Government prior to the date of incorporation of the clause into the contract. Heads of Contracting Activities (HCAs) are delegated, without power of redelegation, authority to establish monetary thresholds below which refunds will not be requested.

2. Part 5252 is revised to read as follows:

PART 5252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Authority: 5 U.S.C. 301, 10 U.S.C. 2202, DOD Directive 5000.35

Subpart 5252.2—Texts of Provisions and Clauses

5252.242-9000 Refunds.

As prescribed in 5242.9000 insert the following clause:

Refunds (Spares and Support Equipment) (Dec. 86)

(a) In the event that the price of a spare part or item of support equipment delivered under this contract significantly exceeds its intrinsic value, the contractor agrees to refund the difference. Refunds will only be made for the difference between the intrinsic value of the item at the time an agreement on price was reached and the contract price. Refunds will not be made to recoup the amount of cost decreases that occur over time due to productivity gains (beyond economic purchase quantity considerations) or changes in market conditions.

(b) For purposes of this clause, the intrinsic value of an item is defined as follows:

(1) If the item is one which is sold, or is substantially similar or functionally equivalent to one that is sold in substantial quantities to the general public, intrinsic value is the established catalog or market price, plus the value of any unique requirements, including delivery terms, inspection, packaging, or labeling.

(2) If there is no comparable item sold in substantial quantities to the general public, intrinsic value is defined as the price an individual would expect to pay for the item based upon an economic quantity as defined in FAR 52.207–4, plus the value of any unique requirements, including delivery terms, inspection, packaging, or labeling.

(c) At any time up to two years after delivery of a space part or item of support equipment, the contracting officer may notify the contractor that based on all information available at the time of the notice, the price of the part or item apparently exceeds its intrinsic value.

(d) If notified in accordance with paragraph (c) above, the contractor agrees to enter into good faith negotiations with the Government to determine if, and in what amount, the Government is entitled to a refund.

(e) If agreement pursuant to paragraph (d) above cannot be reached, and the Navy's return of the new or unused item to the contractor is practical, the Navy, subject to the contractor's agreement, may elect to return the item to the contractor. Upon return of the item to its original point of government acceptance, the contractor shall refund in full the price paid. If no agreement pursuant to paragraph (d) above is reached, and return of the item by the Navy is impractical, the contracting officer may, with the approval of the Head of the Contracting Activity, issue a contracting officer's final decision on the matter, subject to contractor appeal as provided in the Disputes clause.

(f) The contractor will make refunds, as required under this clause, in accordance with instructions from the contracting officer

(g) The contractor shall not be liable for a refund if the contractor advised the contracting officer in a timely manner that the price it would propose for a spare part or item of support equipment exceeded its intrinsic value, and with such advice, specified the estimated proposed price, the estimated intrinsic value, and known alternative sources or items, if any, that can meet the requirement.

(h) This clause does not apply to any spare parts or items of support equipment whose price is determined through adequate price competition. This clause also does not apply to any spare part or item of support equipment with a unit price in excess of $100,000; or in excess of $25,000 if the contractor submitted, and certified the currency, accuracy and completeness of, cost or pricing data applicable to the item.

(End of Clause)

December 17, 1986.

Harold L. Stoller, Jr.,

CDR, JAGC, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 86–28863 Filed 12–23–86; 8:45 am]

BILLING CODE 3810-AE-M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

49 CFR Parts 171 and 172

[Docket HM–145F, Amdt. Nos. 171–90, 172–108]

Hazardous Substances; Delay of Effective Date

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Final rule; delay of effective date.

SUMMARY: This document changes the effective date for compliance with the final rule issued under Docket HM–145F, Amendment Numbers 171–90 and 172–108, entitled *Hazardous Substances,* which was published in the Federal Register on Friday, November 21, 1986 (51 FR 42174), by delaying its effective date to afford shippers sufficient time to comply with the rule and to permit continued use, for a limited period of time, of preprinted shipping paper descriptions and package markings which would otherwise be rendered obsolete by the final rule. The effect of

this action is to relieve shippers of some of the costs associated with complying with new requirements for hazardous substances.

EFFECTIVE DATE: July 1, 1987, except as follows: Any material which is subject to the Hazardous Materials Regulations as a hazardous substance under the regulations in effect on December 31, 1986, for which the reportable quantity was not changed by Amendment No. 172–108, may be offered for transportation and transported in accordance with the regulations in effect on December 31, 1986, until January 1, 1988. However, immediate compliance with Amendment Nos. 171–90 and 172–108 is authorized.

The provisions of 49 CFR 172.101(j) do not apply to Amendment No. 172–108.

FOR FURTHER INFORMATION CONTACT: Lee Jackson (202) 366–4488 or George Cushmac (202) 366–4545, Office of Hazardous Materials Transportation, RSPA, Washington, DC 20590. Questions about hazardous substance designations or reportable quantities should be directed to the Environmental Protection Agency (EPA). Call the RCRA/ Superfund hotline at (800) 424–9346 or, in Washington, DC (202) 382–3000.

SUPPLEMENTARY INFORMATION: On November 17, 1986, RSPA issued a final rule amending the Hazardous Materials Regulations (HMR) to incorporate into the HMR, as hazardous materials, all substances designated as hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). This action was necessary to comply with the Superfund Amendments and Reauthorization Act of 1986. In the final rule, hazardous substances and their reportable quantities (RQs) were listed in an Appendix to § 172.101. In addition, the final rule contained amendments making the HMR applicable to these hazardous substances. The effective date in the rule was January 1, 1987.

At the time of the adoption of the final rule, there were approximately 300 hazardous substances with their reportable quantities, designated by EPA in 1978 pursuant to section 311 of the Federal Water Pollution Control Act (FWPCA), which were placed in the HMR in 1980. Under CERCLA, additional hazardous substances and reportable quantities were designated, and the original substances that were designated under the FWPCA were retained, but some of their reportable quantities were changed.

The final rule changes the requirements for designating hazardous substances on shipping papers and for package markings for the original hazardous substances (those designated under the FWPCA), as well as for hazardous substances more recently designated under CERCLA. The final rule under Docket HM–145F allows, under the provisions of § 172.101(j), the continued use of shipping papers prepared, and packages marked, under existing requirements in the HMR (i.e., for the original FWCPA hazardous substances) for up to one year *provided that the RQ designation had not changed* (see discussion at 51 FR 42175).

The RQs for several widely used chemicals, which were hazardous substances under the FWPCA, have been adjusted (changed) by EPA under section 102 of CERCLA. For example, the RQ for calcium hypochlorite has been lowered from 100 pounds to 10 pounds. Other chemicals which were not designated hazardous substances under the FWPCA are designated hazardous substances under CERCLA and would otherwise be subject to the new requirements after January 1, 1987. However, RSPA has learned that many thousands of packages of chemicals, whose RQ's were changed, or which were not designated hazardous substances, have been prepared, overpacked, and palletized. To require compliance with the new requirements by January 1, 1987, would require that these overpacked units be broken down and the individual boxes be marked and re-overpacked. RSPA believes that this burden is unreasonable and is extending until July 1, 1987, the effective date of the final rule adopted under Docket HM–145F for hazardous substances whose RQ's have changed or which are newly designated. However, shipping descriptions for hazardous substances whose RQ's were not changed and which conform to the regulations in effect on December 31, 1986, may be used until January 1, 1988.

These provisions allow shippers to use up existing stocks of preprinted shipping papers and package markings which would otherwise be rendered obsolete. If RSPA were to provide relief only from shipping papers and package marking requirements, similar to that provided under § 172.101(j), then carriers would be faced with the possibility of being offered materials which are regulated as hazardous substances without their being identified as such. For this reason, RSPA believes it necessary to provide temporary relief from all provisions of the final rule that pose a new burden. It should be noted that the effective date permits immediate compliance with the final rule even though not required until the dates specified.

Administrative Notices

1. The relief adopted herein is applicable to regulations mandated by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499, October 17, 1986). Because those regulations were to be adopted within 30 days of enactment, I find under 5 U.S.C. 553, that notice and public procedure on the rule and the delay in effective date are contrary to the public interest. In addition, due to the limited time available to prepare the final rule and this delay in effective date, no determinations have been made under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.).*

2. Under the terms of "DOI Regulatory Policies and Procedures" (44 FR 11034, February 26, 1979), I have determined that the rulemaking was an emergency rulemaking because it was governed by a short-term statutory deadline, therefore, no determination is made as to whether it is "significant".

3. I certify that neither this rulemaking nor the delay in effective date requires an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*

Although the provisions of Pub. L. 99–499 provide insufficient time for RSPA to perform required analyses and make required findings under the statutory, regulatory, and executive authorities noted above, the agency is aware that a rulemaking of such broad and immediate applicability may produce significant impacts on industry segments, a substantial number of which may be small enterprises. In order to comply with the mandate of Pub. L. 99–499, RSPA has chosen a regulatory approach which both complies with the purpose of the Congress and presents the least possible disruption to the regulatory scheme of the HMR.

Because RSPA's role in regulating hazardous substances is directly tied to EPA's ongoing hazardous substances responsibility, primarily through that agency's determination of reportable quantities, there will be a mechanism for RSPA's oversight of the transportation impacts of these amendments as the agency conducts rulemaking to provide concordance with EPA requirements. As the need for adjustments to these amendments is demonstrated, RSPA will modify the requirements to the extent consistent with the intent of Congress expressed in Pub. L. 99–499.

A number of errors in the List of Hazardous Substances and Reportable Quantities have been brought to RSPA's attention. RSPA is preparing a correction document on the final rule which will correct errors in the List and in the regulatory language of the rule. It is planned for publication before the end of January, 1987

Issued in Washington, DC on December 19, 1986 under authority delegated in 49 CFR 1.53.

M. Cynthia Douglass,
Administrator, Research and Special Programs, Administration.

[FR Doc. 86-29014 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-60-M

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49 CFR Part 173

[Docket No. HM-166V; Amdt. No. 173-198]

Hazardous Materials: Uranium Hexafluoride: Petitions for Reconsideration; Notice of Public Meeting

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Revision to the final rule (Amendment No. 173-198).

SUMMARY: This document revises the final rule published on November 18, 1986, in the **Federal Register** (51 FR 41631) under Docket HM-166V, Amendment Nos. 172-107 and 173-198, regarding the transportation of uranium hexafluoride (UF_6) to permit the continued use of all packagings for UF_6 until June 30, 1987 after which time UF_6 packaging must meet the design, fabrication and marking requirements specified in American National Standards Institute (ANSI) Standard N14.1-1982 or an earlier edition thereof. Also, RSPA is announcing a public meeting and soliciting comments on the standards applicable to, and the use of, packaging that do not meet these ANSI standards, the effect of requiring these packagings to meet these ANSI standards or other restrictions, and information on standards to which these packagings may have been manufactured. This action is in response to petitions for reconsideration which have been received by RSPA and is necessary to avoid a potential disruption in defense and civilian nuclear activities that would be caused by immediate implementation of the packaging standards promulgated under Docket 166V for all UF_6 shipments.

DATES: The efffective date is January 1, 1987. The public meeting will be held on March 2, 1987, beginning at 9:00 a.m. Comments for use at the public meeting should be received by February 15, 1987.

ADDRESSES: The public meeting will be held at the U.S. Department of Transportation, Nassif Building, Room 2230, 400 Seventh Street SW., Washington, DC. Address comments to Dockets Branch, Office of Hazardous Materials Transportation (DHM-53), U.S. Department of Transportation, Washington, DC 20590. Comments should identify the docket and be submitted in five copies. The Dockets Branch is located in Room 8426 of the Nassif Building, 400 Seventh Street SW., Washington, DC. Office hours are 8:30 a.m. to 5:00 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Michael E. Wangler, Technical Division, Office of Hazardous Materials Transportation, 400 Seventh Street SW., Washington, DC 20590, (202) 366-4545.

SUPPLEMENTARY INFORMATION: On November 18, 1986, RSPA published a final rule under Docket HM-166V, Amendment Nos. 172-107 and 173-198, in the **Federal Register** (51 FR 41632), which adopted standards for the design, fabrication, inspection, testing and marking of packagings used for the transport of UF_6. The final rule followed a notice of proposed rulemaking (NPRM) under Docket HM-166V, which was published on April 11, 1986 (51 FR 12529). Since the publication of the final rule, RSPA has received 5 petitions for reconsideration in accordance with the provisions of 49 CFR 106.35. The petitioners requested reconsideration of the application of packaging standards and extension of the effective date of the final rule. This document modifies a requirement addressing design and fabrication of packaging used for the transport of UF_6 (§ 173.420(a)(2)). Packaging not manufactured in accordance with ANSI Standard N14.1-1982 or an earlier edition of this standard may not be used after June 30, 1987. All other provisions of the final rule will remain unchanged.

Two petitioners have indicated that approximately 50,000 cylinders are currently being used as packaging for the transport of UF_6. Most of these cylinders were manufactured before the publication of ANSI Standard N14.1-1982. Most of these cylinders are owned by the U.S. Department of Energy (USDOE), whose uranium enrichment program provides UF_6 for national defense programs as well as the domestic and foreign nuclear power industry. RSPA acknowledged in the final rule that some cylinders, manufactured before 1982, would not meet the new requirement. RSPA proposed to permit continued use of the cylinders through exemptions granted under the provisions of Part 107 of the Hazardous Materials Regulations (HMR). However, all petitioners have noted that the time period between the publication date and the effective date of the final rule is too short to obtain exemptions. RSPA agrees with the petitioners. A delay in the implementation of the requirement for design and fabrication of all UF_6 packaging is justified.

Although RSPA acknowledged in the final rule that some packagings may not conform to the packaging requirements and, therefore, could be continued in use only under the terms of exemptions, RSPA believed that the number would be small and promulgation of the design and fabrication requirement covering all other cylinders would enhance safety. RSPA had received comments on the NPRM addressing the potential impact on existing cylinders, but RSPA was not aware of the degree of impact. Based upon the new information submitted by the petitioners for reconsideration, RSPA now believes that § 173.420(a)(2) of the final rule could have an adverse effect on the entire industry and requires further consideration before its implementation. RSPA also believes that the transport of UF_6 cylinders is a matter of such general applicability and future effect that it should be addressed by means of the rulemaking process rather than the exemption process. In addition, upon reexamination of packaging standards, RSPA believes that packagings manufactured in accordance with ANSI Standard 14.1-1971 are acceptable for transportation UF_6.

To facilitate RSPA revaluation of the requirements of UF_6 cylinders not manufactured in accordance with ANSI Standard 14.1-1982 or an earlier edition of the standard, the public is invited to submit information regarding (1) the effects of the requirement that all packagings be designed and fabricated in accordance with ANSI standards, including the technical and economic impacts of implementing the requirements; (2) the effect of permitting continued use of existing cylinders that do not conform to ANSI standards (grandfathering) and any restrictions or conditions that should be placed on their continued use; (3) all of the standards to which existing cylinders have been manufactured; and (4) any other relevant information regarding design and fabrication of non-ANSI packagings. Comments should be submitted to RSPA by February 15, 1987. Additionally, RSPA will hold a public meeting on March 2, 1987, beginning at 9 a.m. at the U.S. Department of Transportation (Room 2230 of the Nassif Building, 400 Seventh Street SW., Washington, DC) to explore more fully the information submitted by the public.

In consideration of the factors discussed above, the RSPA is revising Amendment 173-198 in the following manner: After June 30, 1987, packagings used for transport of UF_6 must be designed, fabricated, and marked in accordance with ANSI Standard N14.1-1982, or a previous edition thereof.

Administrative Notices

The RSPA has determined that the rulemaking and this amendment (1) are not "major" under Executive Order 1291; (2) are not "significant" under DOT's regulatory policies and procedures (44 FR 11034); (3) will not affect not-for-profit enterprises, or small governmental jurisdictions; and (4) do not require an environmental impact statement under the National Environmental Policy Act (40 U.S.C. 4321 et seq.). A regulatory evaluation is available for review in the docket. Based on limited information concerning the size and nature of entities likely affected, I certify that the regulation and this amendment will not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 49 CFR Part 173

Hazardous materials transportation, Packaging, Radioactive materials. In consideration of the foregoing, 49 CFR Part 173 is amended as follows:

PART 173—SHIPPERS—GENERAL REQUIREMENTS FOR SHIPMENTS AND PACKAGINGS

1. The authority citation for 49 CFR Part 173 continues to read as follows:

Authority: 49 U.S.C. 1803, 1804, 1805, 1808; 49 CFR 1.53(e), unless otherwise noted.

2. § 173.420(a)(2) is revised to read as follows:

§ 173.420 Uranium hexafluoride (fissile and low specific activity).

(a) * * *

(2) After June 30, 1987, packagings must be designed, fabricated, and marked in accordance with American National Standard N14.1-1982, or a previous edition thereof.

* * * * *

Issued in Washington, DC, on December 19, 1986 under authority delegated in 49 CFR Part 1.

M. Cynthia Douglass,

Administrator, Research and Special Programs Administration.

[FR Doc. 86-29013 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-60-M

INTERSTATE COMMERCE COMMISSION

49 CFR Part 1039

[Ex Parte No. 346 Sub-No. 20]

Exemption From Regulation Storage Leases

AGENCY: Interstate Commerce Commission.

ACTION: Notice of final rules [exemption].

SUMMARY: The Commission is adopting final rules exempting the leasing of railroad equipment for non-transportation storage purposes from the provisions of 49 U.S.C. Subtitle IV, except for the car shortage and traffic emergency situations specified at 49 U.S.C. 11123. The exemption will enable railroads to make more efficient use of their rail assets and remove potential interpretive conflicts in existing case law. It will not have an adverse effect on any of the goals of the rail transportation policy of 49 U.S.C. 10101a. A new § 1039.20 of Title 49 of the Code of Federal Regulations is added.

EFFECTIVE DATE: These rules will be effective on January 23, 1987.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245.

SUPPLEMENTARY INFORMATION: Proposed rules in this proceeding were published at 51 FR 7964, March 7, 1986. Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commmission Building, Washington, DC 20423, or call 289-4357 (DC Metropolitan area) or toll free (800) 424-5403.

This decision will not significantly affect either the quality of the human environment or energy conservation. We certify that this decision will not have a significant economic effect on a substantial number of small entities.

List of Subjects in 49 CFR 1039

PART 1039—[AMENDED]

Railroads.

Title 49 of the CFR is amended as follows:

1. The authority citation for 49 CFR Part 1039 continues to read as follows:

Authority: 49 U.S.C. 10321, 10505, 10708, 10713, 10762, and 11105; 5 U.S.C. 553.

2. A new § 1039.20 is added to read as follows:

§ 1039.20 Storage leases.

Storage leases for all equipment for all carrriers are exempt from the provisions of 49 U.S.C. Subtitle IV except for 49 U.S.C. 11123. Nothing in this exemption should be construed to affect our jurisdiction under section 10505 or our ability to enforce this decision or any subsequent decision made under authority of this exemption section. This exemption shall remain in effect, unless modified or revoked by a subsequent decision of this Commission.

Decided: December 8, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissoners Sterrett, Andre, and Lamboley. Commissioner Lamboley dissented with a separate expression.

Noreta R. McGee,

Secretary.

[FR Doc. 86-28874 Filed 12-23-86; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 604 and 653

[Docket No. 60617-6230]

Red Drum Fishery of the Gulf of Mexico

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: NOAA issues this final rule to implement the Fishery Management Plan for the Red Drum Fishery of the Gulf of Mexico (FMP). The rule (1) establishes quotas and harvest limitations for the directed and non-directed commercial red drum fisheries, harvest limits for the recreational fishery, and procedures for annual modification of the quotas, and (2) establishes permitting and reporting requirements for certain participants in the fishery. The intended effect of this rule is to prevent overfishing while achieving optimum yield from the red drum fisheries on a continuing basis.

EFFECTIVE DATE: December 19, 1986.

ADDRESS: The final regulatory impact review/regulatory flexibility analysis may be obtained from Donald W. Geagan, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, FL 33702.

FOR FURTHER INFORMATION CONTACT: Donald W. Geagan, 813-893-3722.

SUPPLEMENTARY INFORMATION: The Secretary of Commerce (Secretary) prepared the Fishery Management Plan for the Red Drum Fishery of the Gulf of Mexico (FMP) under the authority of section 304(c) of the Magnuson Fishery Conservation and Management Act (Magnuson Act). Proposed regulations to implement the FMP were published on October 8, 1986 (51 FR 36035). Comments on the FMP and proposed rule were invited through November 8, 1986. These regulations implement the FMP. The Secretary promulgated an emergency rule (51 FR 23551, June 30, 1986) that limited the directed net harvest of red drum from the exclusive economic zone (EEZ) to one million pounds during its 90-day effective period (June 25 to September 23, 1986); it also limited non-directed fisheries to five percent of red drum by weight of the total catch aboard a vessel. The directed fishery was closed on July 20, 1986 (51 FR 26554, July 24, 1986; corrected at 51 FR 27413, July 31, 1986). The Secretary extended the emergency regulations (51 FR 34219, September 26, 1986) for a second 90-day period, until December 22, 1986

The preamble to the proposed rulemaking contained a description of the red drum fishery, the condition of the stocks, and the historical participation of the recreational and commercial sectors in the fishery. Major problems in the fishery, including limited scientific data, increased harvest of the spawning stock in the EEZ, and growth overfishing in nearshore waters, were also discussed. This background information is not repeated here.

Comments and Responses

Sixty comments on the proposed rule were received from 28 commenters. Commenters included the U.S. Coast Guard, Florida Department of Natural Resources, a recreational fishing organization, two local chapters of conservation organizations, recreational fishermen, and two commercial fishing organizations. Most of the comments were critical of the proposed rule, however, comments from the two conservation organizations and the two commercial fishing organizations were generally supportive. Approximately 250 commenters provided comments on the FMP related to the proposed rule during the comment period for the rule, which are addressed in and appended to the final environmental impact statement.

Incidental Catch Allowance

A recreational fishing organization and several recreational fishermen opposed an incidental catch allowance by recommending no allowable catch in the EEZ. Two commercial fishing organizations favored an incidental catch allowance. Objections were based on the need to protect the spawning stock while the status of the offshore stock is determined through a stock assessment program. The Secretary does not agree. Elimination of an incidental catch provision would unduly disrupt the fisheries for black drum, blue runner, crevalle jack, ladyfish, and shrimp which often take red drum as an incidental catch. Disallowance of an incidental catch of red drum would disrupt the prosecution of a fishery for these species and result in wastage from discarding a valuable resource.

About 200,000 pounds of the incidental catch of red drum is from the shrimp trawl fishery. This estimate is based upon historical landings which have been, for the most part, in compliance with State law. Because incidental catch from individual shrimp trawl vessels is small, the number of vessels is large, and the places of landing are widely distributed along the Gulf of Mexico coast, it would be impossible for Federal agents to enforce a Federal limit fairly and effectively. Furthermore, it is not practicable to attempt to estimate the total incidental catch of red drum in the shrimp fishery contemporaneously with the harvest so as to require discard of red drum when 200,000 pounds of red drum are caught. Therefore, the incidental catch allowance of 200,000 pounds of red drum for shrimp trawl vessels will be implemented by requiring that landings of red drum caught incidentally to the trawl fishery be landed in compliance with the laws of the State of landing. This method of regulation should encourage trawl fishermen to adhere to historical fishing patterns and discourage efforts to increase their incidental catch of red drum above historical levels.

Landings of incidental catch by purse seine, trammel net, and gill net vessels are limited to 5 percent by weight of other species per trip with a limit of 100,000 pounds for the fishing year for all vessels using this gear. The 100,000-pound limit was determined to be reasonable, based upon historical levels of incidental catch in these fisheries. This limit should avoid severe disruption of directed fisheries while ensuring that the impact on the red drum resource is minimal.

The recreational catch allowance (bag limit) is one red drum per person per trip from the EEZ, or the limit provided by State law, whichever is more restrictive. Compliance with this limit should reduce the recreational catch in the EEZ from an estimated 850,000 pounds to 350,000 per year.

Resource Assessment Program

The Florida Department of Natural Resources (FDNR) questioned the motive for the proposed sale of one million pounds of red drum harvested for research, and a recreational fishing organization and several recreational fishermen objected to the harvest level as excessive and unnecessary. Two commercial fishing organizations generally favored the proposed research program. NOAA's proposal to allow sale of the harvest was based on the fact that high mortality would result from the proposed tag recovery methods and that sale would minimize research costs. However, to ensure that the stock would not be harmed, NOAA has redesigned its research program for tag recovery to minimize mortality of red drum and will fund the entire cost of the program. This is a prudent course of action in the face of existing uncertainties regarding the status of the stock.

Supersession of State Laws

The FDNR, a recreational fishing organization, and several recreational fishermen urged that fish harvested in the EEZ in compliance with Federal law should nonetheless be subject to the laws of each State in which they are landed or to which they are ultimately delivered. To do this would require that the regulations applicable in the EEZ be modified for each fisherman according to his domicile, the place of landing, and the ultimate destination of the fish landed.

Several commentors on the FMP or regulations characterized the provision in the proposed rule and the draft FMP which allowed red drum lawfully harvested in the EEZ to be landed without regard to State laws as "preemption" of State laws. This characterization is wrong. Neither the proposed regulations nor these final regulations would affect State laws applicable to fishing in State waters. A State will continue to be able to regulate the catching, retention, or disposition of red drum harvested in its waters as it sees fit, consistent with its laws and constitution, and the Constitution of the United States. The Federal Government has a responsibility to manage fisheries in the EEZ. Nevertheless, State laws would effectively nullify Federal fishing regulations in the EEZ if States could prohibit not only the landing of fish caught in State waters, but the landing of fish legally caught in the EEZ under Federal regulations.

It may become more difficult for States to enforce their landing laws if fish caught beyond State waters under a more liberal Federal regime can be landed. On the other hand, it would not ordinarily be fair, absent circumstances justifying such treatment, to apply different rules to people fishing in the EEZ based solely upon their State of citizenship. Inconsistent Federal and State regulations may legally exist in the EEZ and in State waters, but that is not usually the best way to regulate a fishery ranging over a wide geographical area. Experience in other fisheries has led to the conclusion that the best way to regulate is by Federal regulations and State regulations which are as similar as possible. When Federal regulations and State regulations are consistent, the question of conflict between Federal harvesting laws and State landing laws does not arise, and the ability of each jurisdiction to enforce its laws is not diminished by problems of proving where the fish were caught. However, it is impossible to harmonize Federal law with the laws of each of the States on the Gulf of Mexico when these State laws differ significantly from each other. We will therefore continue to encourage that all the Gulf States adopt compatible regulations so that Federal and State regulations applicable to red drum could more easily be harmonized throughout the Gulf. NOAA plans to continue to work with the States to that end.

Recognizing State conservation efforts and desiring to cooperate, NOAA decided that all landings except the incidental catch taken by gill nets, trammel nets, and purse seines should remain subject to State laws. Landings of red drum lawfully harvested in the EEZ by gill nets, trammel nets, and purse seines are exempt from State landing, possession, and sales laws. Vessels using such gear must provide six hours' advance notice of landing any incidental catch of red drum and are subject to permitting and recordkeeping requirements. Because shrimp trawl vessels are excluded from the definitions of the directed and non-directed red drum fisheries, these vessels are exempt from the permitting and reporting requirements. Additional reporting and recordkeeping requirements for dealers and processors may be imposed by the States to ensure that only legally harvested fish move through commercial channels. If, as the result of further research, a directed commercial harvest quota is ultimately established, NOAA intends to cooperate with the States so that supersession of State laws with respect to the landing of the harvest of the directed fishery can be accomplished with the minimum of disruption of laws applicable to State waters.

Eliminate Commercial Fishing

Numerous recreational fishermen recommended eliminating all directed commercial fishing for red drum and commercial utilization of the incidental catch of red drum. Directed commercial fishing will not be permitted during the first year of the regulations, but an incidental catch of red drum will be allowed as explained above.

Eliminate Net Fishing

Numerous recreational fishermen recommended eliminating gill nets and purse seines from the fishery. Primary objections to nets were their efficiency and the fear of overfishing. Directed fishing will be prohibited, but an incidental catch of red drum will be allowed as explained above. Banning a type of gear solely because it is efficient could be inconsistent with National Standard 5 of the Magnuson Act. Overfishing will be prevented by quotas. NMFS will monitor catches through the stringent recordkeeping and reporting requirements, and will prohibit the landing of incidental catch if the quota is reached. If a directed fishery is permitted in 1988 or later, it will be monitored to ensure that the quota is not exceeded.

Other Species in the Fishery

The proposed rule identified four other species of fishes (black drum, blue runner, crevalle jack, and ladyfish) that occur in close association with red drum and are often taken by the same gear. These species were included in the fishery for data collection purposes only.

Although comments on the proposed rule were silent on including these other species in the fishery (except for two commercial fishing organizations that supported their inclusion), numerous objections were received from State marine resource agencies and government officials, the Council, and the conservation community in commenting on the FMP. They largely believed that these species were included to establish predominance of the fishery in the EEZ, and thereby lay the groundwork for future preemption of State law. Since the inclusion of these species would not masurably facilitate NOAA's ability to respond to a sudden and unexpected need to regulate one of these other species (an FMP amendment would be required), NOAA removed these species from the FMP. NOAA believes that the emergency authority of the Secretary is available in the event that an unforeseen need to regulate these species arises, and has included only red drum in the definition of the fishery. Removing these additional species from the FMP eliminates the need for their inclusion in the final rule.

At-sea Enforcement and Permit Requirements

The U.S. Coast Guard pointed out that the regulations will be difficult to enforce because of non-uniform requirements in State and Federal waters.

This problem is inherent in every fishery management plan where Federal and State laws differ. Differing restrictions for State and Federal jurisdictions generally require at-sea enforcement capability. However, the requirement of permits and recordkeeping and reporting for vessels using purse seines and entanglement gear (gill nets and trammel nets) should alleviate many of the problems associated with enforcing and monitoring the incidental catch allowance. Certain technical inconsistencies between the FMP and proposed regulations have been corrected in accordance with Coast Guard recommendations.

1987 Commercial Quota

Two commercial fishing organizations maintained that a reasonable commercial quota for the directed net fishery should be allowed for 1987. These organizations argued that aerial survey data gathered over the past six to eight months, coupled with the 1986 fishing effort data, would demonstrate that a directed net fishery for 1987 could be allowed. The Secretary does not agree that a directed net fishery should be permitted, while the status of the stock is still uncertain. The empirical data from aerial surveys will not be fully analyzed until March 1987 and aerial surveys are only a portion of the research to be conducted by NOAA in 1987. The Secretary, therefore, has decided that no directed net harvest in the EEZ for 1987 is in the best interest of conservation of the resource. For subsequent years, the quota adjustment procedures will be used for annual preseason specification of a commercial quota, if any.

Changes From Proposed Rule

The final rule differs from the proposed rule in the following respects for the reasons discussed above and to clarify other minor aspects of the regulations.

Section 653.2.

Definitions of "Commercial fishing" and "Recreational fishing" have been added to clarify the distinction between recreational and commercial activities.

The definitions of "Directed red drum fishery" and "Non-directed red drum fishery" have been deleted and replaced by definitions of "Directed commercial red drum fishing (fishery)" and "Non-directed commercial red drum fishing (fishery)". A definition has been added for "Recreational fishing". The new definitions delineate more clearly the specific user groups subject to various provisions of the regulations.

The definition of "Fishery Conservation Zone (FCZ)" has been deleted and replaced by a definition of "Exclusive Economic Zone (EEZ)". "EEZ" has been substituted for "FCZ" throughout the regulations.

Section 653.4.

This section applies to all commercial fishing vessels which may take red drum. Paragraphs have been added regarding issuance and duration of permits. The wording has been clarified and simplified.

Section 653.5.

Paragraph (b) has been restructured. Paragraph (b)(1) contains the original logbook requirement, and a new paragraph (b)(2) has been added to require advance notification of intent to land red drum. Paragraphs (b)(1) through (b)(10) have been redesignated (b)(1)(i) through (b)(1)(x).

Paragraph (c) has been reworded to provide more flexibility regarding submission of reports.

Paragraph (g) has been added regarding reports to States.

Section 653.7.

A new paragraph (a)(1) is added to address violations of the Magnuson Act and paragraphs (a) (1) through (15) are renumbered (a) (2) through (16).

Section 653.21.

The total allowable harvest in paragraph (a) has been reduced from 300,000 pounds to 100,000 pounds. This reduction reflects the deletion of shrimp trawls, which are expected to have an incidental red drum catch of 200,000 pounds, from the definition of non-directed commercial red drum fishing. Shrimp vessels landing incidental catches of red drum will be subject to State laws.

Section 653.22.

The existing paragraph has been designated as paragraph (a). New paragraphs (b), (c), and (d) have been added to address harvest limitations applicable to the non-directed commercial, directed commercial, and recreational fisheries, respectively.

A new paragraph (e) has been added to indicate that red drum taken from the EEZ by shrimp vessels will be subject to State landing and possession laws.

Section 653.23.

Paragraph (c) has been deleted as unnecessary.

Section 653.24.

The second sentence of paragraph (c) has been revised by inserting the words "and affected States" after the word "Council."

Paragraph (d)(2) has been revised to read "Implementing or modifying quotas and associated harvest limitations." This will ensure that harvest limitations will be compatible with the preseason adjustments of quotas. This paragraph is not limited to commercial vessels.

Classification

The Secretary determined that the FMP is necessary for the conservation and management of the red drum fishery and that it is consistent with the Magnuson Act and other applicable law.

The Secretary prepared a final environmental impact statement for this FMP; a notice of availability was published on December 12, 1987 (51 FR 44834).

The Administrator, NOAA, determined that this rule is not a "major rule" requiring a regulatory impact analysis under Executive Order 12291.

The Administrator also finds that, to avoid a period of unregulated fishing after the expiration of the emergency rule, it is impracticable and contrary to the public interest to delay for 30 days the effective date of this rule, under section 553 (b) and (d) of the Administrative Procedure Act.

The Secretary prepared a final regulatory flexibility analysis which describes the effects this rule will have on small business entities. You may obtain a copy of the combined final regulatory flexibility analysis and regulatory impact review from the address above.

This rule contains a collection of information requirement subject to the Paperwork Reduction Act. The collection of this information has been approved by the Office of Management and Budget, OMB Control Number 0648-0177.

The Secretary determined that this rule will be implemented in a manner that is consistent to the maximum extent practicable with the approved coastal zone management programs of Alabama, Florida, Louisiana, and Mississippi. Texas does not have an approved coastal zone management program. This determination was submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act. Mississippi, Louisiana and Florida responded that the FMP was inconsistent with their NOAA-approved coastal zone management programs. The consistency concerns of each of these States was addressed by NOAA prior to this final rule's being approved by the Secretary. To the extent permitted under Federal law, the final rule has been modified to eliminate any inconsistencies. The Secretary concluded that this final rule is consistent, to the maximum extent practicable, with the enforceable and approved policies of the coastal zone management programs of Mississippi, Louisiana, and Florida.

NOAA initiated a section 7 consultation under the Endangered Species Act and a biological assessment was prepared, submitted, and reviewed. It was concluded that the management measures in this final rule will not affect any endangered or threatened species.

List of Subjects

50 CFR Part 604

OMB control numbers, Paperwork Reduction Act, Reporting and recordkeeping requirements.

50 CFR Part 653

Fisheries, Fishing, Reporting and recordkeeping requirements.

Dated: December 19, 1986.

William E. Evans,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR Part 604 is amended and 50 CFR Part 653 is revised as follows:

PART 604—[AMENDED]

1. The authority citation for Part 604 continues to read as follows:

Authority: Paperwork Reduction Act of 1980, 44 U.S.C. 3501-3520 (1982).

2. The table in § 604.1 is amended by adding the following entry in numerical order by section number:

§ 604.1 OMB control numbers assigned under the Paperwork Reduction Act.

* * * * *

50 CFR part or section where the information collection requirement is located	Current OBM control No. (all numbers begin 0648–)
* * * * *	
§ 653.5	-0177
* * * * *	

3. Part 653 is revised to read as follows:

PART 653—RED DRUM FISHERY OF THE GULF OF MEXICO

Subpart A—General Provisions

Sec.
653.1 Purpose.
653.2 Definitions.
653.3 Relation to other laws.
653.4 Permits and fees.
653.5 Reporting requirements.
653.6 Vessel identification. [Reserved]
653.7 Prohibitions.
653.8 Enforcement.
653.9 Penalties.

Subpart B—Management Measures

653.20 Seasons.
653.21 Commercial quotas.
653.22 Harvest limitations.
653.23 Closures.
653.24 Quota adjustment procedures.
653.25 Specifically authorized activities.
Appendix—Figure 1.

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

Subpart A—General Provisions

§ 653.1 Purpose.

The purpose of this part is to implement the Fishery Management Plan for the Red Drum Fishery of the Gulf of Mexico prepared by the Secretary of Commerce.

§ 653.2 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:

Acceptable biological catch (ABC) means a range of harvest levels which can be taken from a stock of fish while maintaining the stock at or near maximum sustainable yield and ensuring that recruitment overfishing does not occur. ABC may vary due to fluctuating recruitment, abundance, and intensity of fishing effort.

Authorized officer means—

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

(b) Any 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 Secretary of Transportation 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 Director, Southeast Fisheries Centers, NMFS, 75 Virginia Beach Drive, Miami, FL 33149; telephone 305–361–5761, or a designee.

Commercial fishing means fishing or fishing activities which result in the harvest of fish one or more of which (or parts thereof) are sold, traded or bartered.

Commercial quota means the maximum permissible level of annual commercial harvest of red drum in the EEZ specified after consideration of biological, social, and economic factors within the range of ABC.

Dealer means the person who first receives fish by way of purchase, trade, or barter from a fisherman.

Directed commercial red drum fishing (fishery) means any commercial fishing activity, other than shrimp trawling, in which the weight of red drum landed exceeds five (5) percent of the total weight of all other fish on board.

Exclusive economic zone (EEZ) means the area adjacent to the United States which, except where modified to accommodate international boundaries, encompasses 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 including aircraft which is used or equipped to be used for, or of a type which is normally used for

(a) Fishing; or

(b) Aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing.

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

NMFS means the National Marine Fisheries Service.

Non-directed commercial red drum fishing (fishery) means any commercial fishing activity, except shrimp trawling, in which the weight of red drum landed does not exceed five percent of the total weight of all other fish on board.

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 or fish products or parts thereof for commercial use or consumption.

Recreational fishing means fishing or fishing activities which result in the harvest of fish and none which fish (or part thereof) is sold, traded, or bartered.

Red drum means *Sciaenops ocellatus*, also called redfish.

Regional Director means the Director, Southeast Region, NMFS, Duval Building, 9450 Koger Boulevard, St. Petersburg, FL 33702 (telephone 813–893–3141), or a designee.

Secretary means the Secretary of Commerce or a designee.

Trip means a fishing trip, regardless of duration, which begins with departure from a dock, berth, beach, seawall, or ramp and which terminates with return to a dock, berth, beach, seawall, or ramp.

Vessel of the United State means—

(a) Any vessel documented under Chapter 121 of Title 46, United States Code; or

(b) Any vessel numbered under Chapter 123 of Title 46, United States Code, and measuring less than five tons;

(c) Any vessel numbered under Chapter 123 of Title 46, United States

Code, and used exclusively for pleasure; and

(d) Any vessel not equipped with propulsion machinery of any kind and used exclusively for pleasure.

§ 653.3 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.

§ 653.4 Permits and fees.

(a) *Applicability.* Permits are required for all vessels fishing in the EEZ in the directed and non-directed commercial red drum fisheries which possess or land red drum.

(b) *Issuance.* Except as provided in Subpart D of 15 CFR Part 904, permits will be issued by the Regional Director. Permits must be applied for by the owner or operator of such vessel on forms provided by the Regional Director. The owners and operators of vessels issued such permits must comply with the terms and conditions stated thereon.

(c) *Fees.* A fee may be assessed for any permit issued under this section. The cost of the permit, if any, will be posted on the application form and will be limited to the administrative cost of issuing the permit, which may not exceed $10.00.

(d) *Display.* A permit issued under this section must be carried aboard the vessel at all times and presented for inspection upon request of an authorized officer.

(e) *Transfer.* A permit issued under this section is not transferable or assignable and is valid only for the vessel for which it is issued.

(f) *Duration.* Permits will remain valid for the term specified thereon unless revoked, suspended, or modified under Subpart D of 15 CFR Part 904.

(g) *Sanctions.* Permits are subject to sanction and denial under the procedures found at Subpart D of 15 CFR Part 904.

§ 653.5 Reporting requirements.

(a) *Directed commercial red drum fishery.* [Reserved]

(b) *Non-directed commercial red drum fishery.* Owners or operators of vessels fishing in the non-directed commercial red drum fishery, if selected by the Center Director, must—

(1) Maintain logbooks as provided by the Center Director and submit to the Center Director as required all information specified therein. The information submitted must include, but not necessarily limited to, the following:

(i) Name and address of owner or operator;

(ii) Name and official number of vessel and vessel's home port;

(iii) Port and time of departure and arrival;

(iv) Pounds of total catch by species;

(v) Pounds of red drum landed;

(vi) Location of catch either by latitude and longitude, loran, or by grid zone (Appendix—Figure 1) as specified on logbook form;

(vii) Gear used;

(viii) Depth of water fished;

(ix) Number and time of sets; and

(x) To whom the red drum catch was sold.

(2) Report the following information by radiotelephone or other suitable means to Dr. Andrew Kemmerer, NMFS, or his designee, at 601–762–4591, at least six hours prior to landing:

(i) Name and address of owner or operator;

(ii) Name of vessel; and

(iii) Port and time of arrival.

(c) *Dealers and processors.* Dealers and processors of red drum harvested from or landed in the Gulf of Mexico and who are selected by the Center Director must report to the Center Director such information as he may request and in the form and manner as he may require. The information required to be submitted must include, but is not necessarily limited to, the following:

(1) Dealer's or processor's name and address;

(2) State and county where red drum were landed;

(3) Total poundage of red drum received during the reporting period;

(4) Total poundage of red drum from State waters by each gear type; and

(5) Total poundage of red drum landed from the EEZ by each gear type.

(d) *Spotter aircraft.* [Reserved]

(e) *Inspection.* The owner or operator of commercial, charter, or recreational vessels, and dealers or processors of red drum are required upon request to make red drum or parts thereof available for inspection by the Center Director or his designee for the collection of additional information or for inspection by an authorized officer.

(f) *Observers.* [Reserved]

(g) *State reports.* A State may require such additional reports from dealers and processors as may be necessary to enforce State laws applicable to the harvesting of red drum in State waters.

§ 653.6 Vessel identification. [Reserved]

§ 653.7 Prohibitions.

(a) It is unlawful for any person to do any of the following:

(1) Fish for, take, retain, or land red drum in the commercial directed or non-directed red drum fishery without a permit as required by § 653.4(a) or in violation of the Magnuson Act, this part, or any regulation or permit issued under the Magnuson Act or this part;

(2) Fail to display the permit aboard a permitted vessel as required by § 653.4(d);

(3) Fail to comply with a term or condition stated on a permit issued under § 653.4;

(4) Falsify or fail to report information required to be submitted by § 653.4 and § 653.5;

(5) Fail to make fish available for inspection as required by § 653.5(e);

(6) Fail to comply immediately with enforcement and boarding procedures specified in § 653.8;

(7) Fail to comply with the limitations specified in § 653.22;

(8) Retain on board a vessel, land, sell, trade, or barter red drum taken in the EEZ after any closure as specified in § 653.23 has been invoked;

(9) 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;

(10) Refuse to allow 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 or permit issued under the Magnuson Act;

(11) Forcibly assault, resist, oppose, impede, intimidate, threaten, or interfere with any authorized officer in the conduct of any search or inspection described in paragraph (a)(10) of this section;

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

(13) 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;

(14) Transfer directly or indirectly, or attempt to so transfer, any U.S. harvested red drum to any foreign fishing vessel, while such vessel is in the EEZ, 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 red drum;

(15) Interfere with, obstruct, delay, or prevent by any means a lawful investigation or search in the process of enforcing this part; or

(16) Interfere with, obstruct, delay, or prevent in any manner the seizure of illegally taken red drum or the final disposition of such red drum through the sale of the red drum.

(b) It is unlawful to violate any other provision of this part, the Magnuson Act, or any regulation or permit issued under the Magnuson Act.

§ 653.8 Enforcement.

(a) *General.* The operator of, or any other person aboard any fishing vessel subject to this part must immediately comply with instructions and signals issued by an authorized officer to stop the vessel and with instructions to facilitate safe boarding and inspection of the vessel, its gear, equipment, fishing record (where applicable), and catch for purposes of enforcing the Magnuson Act and this part.

(b) *Communications.* (1) Upon being approached by a U.S. Coast Guard vessel or aircraft or other vessel or aircraft with an authorized officer aboard, the operator of a fishing vessel must be alert for communications conveying enforcement instructions.

(2) If the size of the vessel and the wind, sea, and visibility conditions allow, loudhailer is the preferred method of communicating between vessels. If use of a loudhailer is not practicable, and for communications with an aircraft, VHF-FM or high frequency radiotelephone will be employed. Hand signals, placards, or voice may be employed by an authorized officer and message blocks may be dropped from an aircraft.

(3) If other communications are not practicable, visual signals may be transmitted by flashing light directed at the vessel signaled. Coast Guard units will normally use the flashing light signal "L" as the signal to stop.

(4) Failure of a vessel's operator to stop his vessel when directed to do so by an authorized officer using loudhailer, radiotelephone, flashing light signal, or other means constitutes *prima facie* evidence of the offense of refusal to permit an authorized officer to board.

(5) The operator of a vessel who does not understand a signal from an enforcement unit and who is unable to obtain clarification by loudhailer or radiotelephone must consider the signal to be a command to stop the vessel instantly.

(c) *Boarding.* The operator of a vessel directed to stop must:

(1) Guard Channel 16, VHS-FM, if so equipped;

(2) Stop immediately and lay to or maneuver in such a way as to allow the authorized officer and his party to come aboard;

(3) Except for those vessels with a freeboard of four feet or less, provide a safe ladder, if needed, for the authorized officer and his party to come aboard;

(4) When necessary to facilitate the boarding or when requested by an authorized officer, provide a manrope or safety line, and illumination for the ladder; and,

(5) Take such other action as necessary to facilitate boarding and ensure the safety of the authorized officer and the boarding party.

(d) *Signals.* The following additional signals, extracted from the International Code of Signals, may be sent by flashing light by an enforcement unit when conditions do not allow communications by loudhailer or radiotelephone. Knowledge of these signals and appropriate action by a vessel operator is not required. However, knowledge of these signals by a vessel operator may preclude the necessity of sending the signal "L" and the necessity for the vessel to stop instantly.

(1) "AA" repeated (·– ·–) [1] is the call to an unknown station. The operator of the signaled vessel should respond by identifying the vessel by radiotelephone or by illuminating the vessel's identification.

(2) "RY–CY" (·–· –·–– –·–· –·––) means "you should proceed at slow speed, a boat is coming to you." This signal is normally employed when conditions allow an enforcement boarding without the necessity of the vessel being boarded coming to a complete stop, or, in some cases, without retrieval of fishing gear which may be in the water.

(3) "SQ3" (··· ––·– ···––) means "you should stop or heave to; I am going to board you."

(4) "L" (·–··) means "you should stop your vessel instantly."

§ 653.9 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, to 15 CFR Part 904 (Civil Procedures), and other applicable law.

[1] Period (·) means a short flash of light; dash (–) means a long flash of light.

Subpart B—Management Measures

§ 653.20 Seasons.

The initial fishing season for red drum is from 0001 hours (local time) December 23, 1986, until 2400 hours (local time) December 31, 1987. Subsequent fishing seasons correspond to the calendar year.

§ 653.21 Commercial quotas.

(a) The total allowable harvest of red drum for the directed commercial red drum fishery in the EEZ is zero.

(b) The total allowable harvest of red drum for the non-directed commercial red drum fishery in the EEZ is 100,000 pounds.

§ 653.22 Harvest limitations.

(a) *Directed commercial red drum fishery.* No red drum may be harvested from the EEZ in the directed commercial red drum fishery.

(b) *Non-directed commercial red drum fishery.* Fishing vessels fishing in the non-directed commercial fishery may not land red drum the total weight of which exceeds five percent of the total weight of all other fish aboard such vessel. Vessels fishing in the non-directed commercial fishery must conduct their operations in a way that minimizes wastage of red drum.

(c) *Recreational red drum fishery.* Fishing vessels fishing in the recreational red drum fishery may not have on board in the EEZ or land red drum harvested from the EEZ in excess of one red drum per person per trip. A State landing or possession law that is more restrictive than this limitation applies to red drum taken in the recreational fishery in the EEZ and landed in that State. Red drum in excess of the applicable bag limit must be released immediately with a minimum of harm.

(d) *Transfer at sea.* Red drum harvested from or possessed in the EEZ may not be transferred from a fishing vessel to any other vessel.

(e) The landing and possession laws of the State where landed will apply to red drum taken from the EEZ by shrimp vessels.

§ 653.23 Closures.

(a) The Secretary, by publication of a notice in the **Federal Register,** will close the directed commercial red drum fishery when the quota as specified in § 653.21(a)(1) is reached or is projected to be reached.

(b) The Secretary, by publication of a notice in the **Federal Register,** will prohibit the landing of red drum from the non-directed commercial red drum fishery when the quota for such fishery as specified in § 653.21(a)(2) is reached or is projected to be reached.

§ 653.24 Quota adjustment procedures.

(a) The Southeast Fisheries Center, NMFS, will assess the condition of the red drum stock on an annual basis. The Center Director will provide the Regional Director with an assessment report by October 1 which includes a recalculation of maximum sustainable yield (MSY), if necessary, and a range of ABC for the EEZ for the upcoming fishing year along with a description of the biological consequences of levels of harvest within the ABC range.

(b) The Regional Director will consider economic, social, and biological impacts of various levels of harvest within the ABC range and will recommend quotas in the EEZ for the next fishing year that are consistent with the objectives of the FMP. If changes are needed in MSY or the quotas from the previous year, NMFS will advise the Secretary of any recommendations.

(c) The Secretary will review NMFS' recommendations, supporting rationale, and other relevant information. If, after consulting with the Gulf of Mexico Fishery Management Council and affected States, the Secretary concurs that NMFS' recommendations are consistent with the objectives of the FMP, the national standards, and other applicable law, he will publish in the **Federal Register** any proposed preliminary changes prior to the appropriate fishing year. A 30-day period for public comment will be afforded. After consideration of public comments, the Secretary may publish in the **Federal Register** any final changes for that fishing year.

(d) Appropriate preseason changes in the regulations which may be implemented by the Secretary in the **Federal Register** include:

(1) Adjusting the estimate of MSY for red drum.

(2) Establishing or modifying quotas and associated harvest limitations.

§ 653.25 Specifically authorized activities.

The Secretary may authorize, for the acquisition of information and data, activities otherwise prohibited by these regulations.

BILLING CODE 3510-22-M

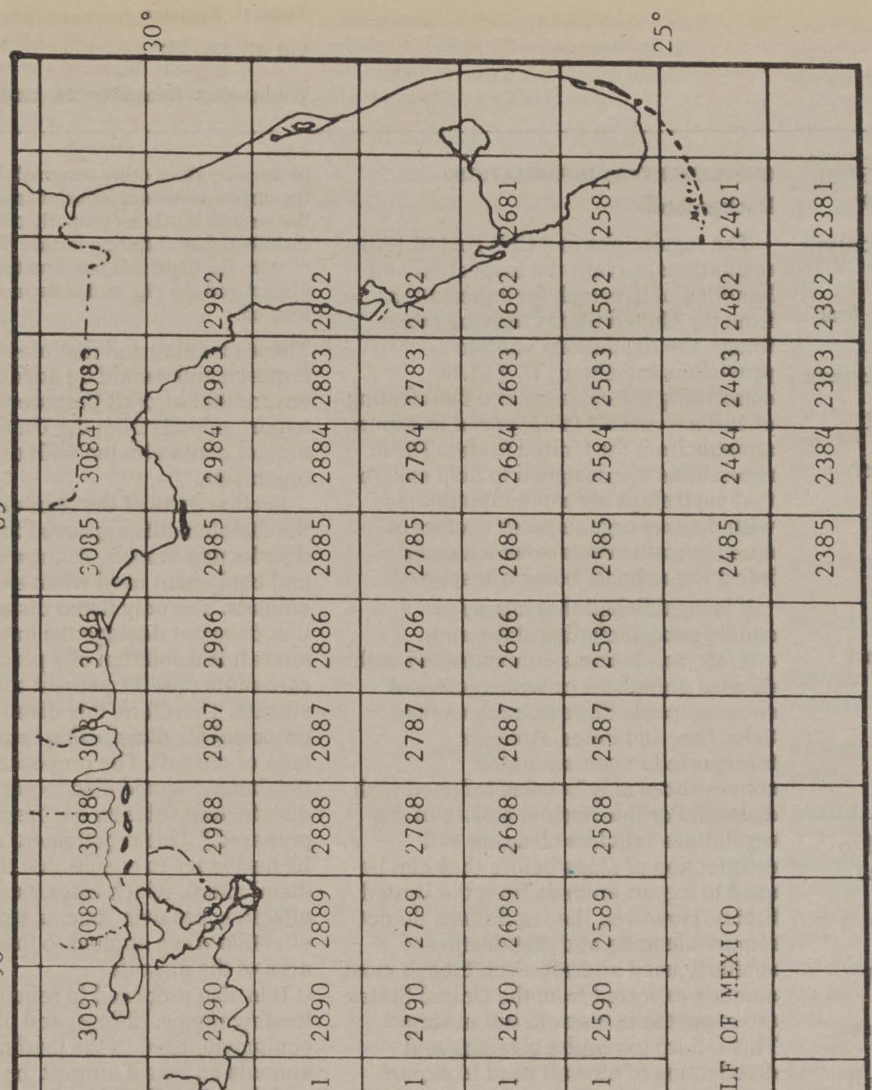

FIGURE 1 - STATISTICAL GRIDS FOR REPORTING THE HARVEST OF RED DRUM

[FR Doc. 86-28903 Filed 12-19-86; 3:35 pm]

BILLING CODE 3510-22-C

Proposed Rules

Federal Register
Vol 51, No. 247
Wednesday, December 24, 1986

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

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 91

[Docket No. 84-042]

Cleaning and Disinfecting of Export Aircraft

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposed to amend the regulations governing the exportation of animals and animal products from the United States by adding regulations to require the cleaning and disinfecting of aircraft prior to their being used to export animals from the United States. These proposed regulations appear to be necessary to help ensure that aircraft used to export animals from the United States are not contaminated with disease and to encourage international trade in animals from the United States.

DATE: Your written on this proposed rule will be considered if we receive them no later than February 23, 1987.

ADDRESS: Send written comments to Steven R. Poore, Acting Assistant Director, Regulatory Coordination, APHIS, UDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Please state that your comments are in response to Docket Number 84-042. Written comments received may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holdays.

FOR FURTHER INFORMATION CONTACT: Dr. Najam Q. Faizi, Import-Export Operations Staff, VS, APHIS, USDA, Room 762, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782, 301-436-8383.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR Part 91 (the regulations) govern the inspection and handling of livestock for exportation from the United States. Among other things, the regulations contain provisions in Subpart D, § 91.18, concerning the cleaning and disinfecting of surface vessels (ships) used to export animals from the United States. These regulations are designed to help ensure that such ships are not contaminated with disease organisms or vectors of communicable disease which could infect the animals being transported.

It is established that means of conveyance, including ships and aircraft, can become contaminated with disease organisms or with vectors of communicable disease, such as flies, ticks, lice, and mites. Animals transported in contaminated conveyances may become infected with disease. For this reason, § 91.18 of the regulations requires cleaning and disinfection of ships before they can be used to export animals from the United States. However, the regulations do not require cleaning and disinfecting of similarly used aircraft, even though most animals exported from the United States are exported in aircraft, not in ships. This failure to require cleaning and disinfecting of aircraft used to export animals from the United States could result in a serious disease outbreak, and could discourage international sales of animals from the United States.

Therefore, it is proposed to add a new Subpart E to require the cleaning and disinfecting of aircraft prior to their use to export animals from the United States. The proposed Subpart E would read as follows:

Subpart E—Cleaning and Disinfection of Aircraft

§ 91.41 Cleaning and disinfecting of aircraft

Immediately prior to loading, the stowage area of aircraft to be used to export animals under the provisions of this part shall, under the supervision of an inspector, be cleaned and disinfected using a freshly prepared solution of 4 percent sodium carbonate and 0.1 percent sodium silicate. In addition, immediately prior to loading, all loading ramps, fittings, and equipment to be used in loading the animals on the aircraft shall be cleaned and disinfected using approved disinfectant listed in § 71.10 of this Chapter. After such cleaning and disinfecting, the inspector shall sign and deliver to the captain of the aircraft or other responsible official of the airline involved, a document stating that the aircraft has been properly cleaned and disinfected, and stating further the date, the carrier, the flight number, and the name of the airport and the city and state in which it is located.

These cleaning and distinfection requirements would be adequate to ensure that aircraft that are used to export animals from the United States are not contaminated with disease organisms.

Section 91.18 of the regulations lists the disinfectants approved for disinfecting vessels, fittings, utensils, and equipment used when exporting animals. The only listed disinfectant that does not damage the interior of the aircraft is a solution of 4 percent sodium carbonate plus 0.1 percent sodium silicate. Therefore, this disinfectant is proposed for disinfecting the stowage area of aircraft. The proposed regulations would also require that the disinfectant solution be "freshly prepared." This requirement appears to be necessary to ensure that the disinfectant, which loses its effectiveness over time, is strong and effective when applied to the stowage area of the aircraft.

It is also proposed to require that loading ramps, fittings, and other equipment, used in the loading of export animals on board aircraft, be cleaned and disinfected. This appears to be necessary to help ensure that such ramps, fittings, and equipment are not contaminated by disease organisms, which could be transmitted to animals in later shipment when the same ramps, fittings, and equipment are used. It is proposed that any of the disinfectants approved for use on vehicles under § 71.10 of the regulations could be used for this purpose. These disinfectants have all been shown to be effective.

It is also proposed to provide that the inspector who supervises the cleaning and disinfecting shall sign and deliver to the responsible airline official a document stating that the aircraft has been properly cleaned and disinfected. This provision appears necessary so that the responsible airline official can prove that the cleaning and disinfecting was properly completed.

It appears that adoption of the regulations would help to protect and encourage international trade in animals from the United States by providing a mechanism whereby foreign buyers could be assured that aircraft and equipment used to load animals on the aircraft for export from the United States are not contaminated with disease organisms.

Inspector

The regulations in Part 9, Subpart A, § 91.1(d) define "inspector" as "[a]n inspector of Veterinary Services." The Animal and Plant Health Inspection Service, of which Veterinary Services is a part, employs inspectors of both Veterinary Services and Plant Protection and Quarantine. All these inspectors are trained and qualified to perform the inspections required under the regulations in Part 91, including the provisions of proposed new Subpart E. Therefore, it is proposed to amend the definition of "inspector" to read: "An inspector of the Animal and Plant Health Inspection Service."

Miscellaneous

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

Executive Order 12291 and Regulatory Flexibility Act

This 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 would not have an effect on the economy of $100 million of more; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and would have no 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.

It is not anticipated that the proposed regulations, if adopted, would have any significant economic impact on any entities. No delay in the departure of aircraft would be caused by these requirements. In addition, most airlines already clean and disinfect the stowage area of their aircraft prior to transporting animals from the United States. Therefore, the Administrator of the Animal and Plant Health Inspection Service has determined that this action would not have a significant economic impact on a substantial number of small entities.

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR Part 3015)

List of Subjects in 9 CFR Part 91

Animal disease, Animal welfare, Exports, Humane animal handling, Livestock and livestock products, Transportation.

PART 91—INSPECTION AND HANDLING OF LIVESTOCK FOR EXPORTATION

Accordingly, it is proposed to amend the regulations in 9 CFR Part 91 as follows:

The authority citation for Part 91 would continue to read as follows:

Authority: 21 U.S.C. 105, 112, 113, 114a, 120, 121, 134b, 612, 613, 614, 618; 46 U.S.C. 466a, 466b; 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 91.1, the terms would be rearranged alphabetically without paragraph designations and the definition of "inspector" would be revised to read as follows:

§ 91.1 Definitions.

* * * * *

Inspector. An inspector of the Animal and Plant Health Inspection Service.

* * * * *

§ 91.18 [Amended]

3. In § 91.18, paragraph (b) would be revised to read as follows:

* * * * *

(b) 4 percent sodium carbonate plus 0.1 percent sodium silicate.

* * * * *

4. In Part 91, a new Subpart E consisting of § 91.41 would be added to read as follows:

Subpart E—Cleaning and Disinfecting of Aircraft

Sec.
91.41 Cleaning and disinfectiong of aircraft.

Subpart E—Cleaning and Disinfecting of Aircraft

§ 91.41 Cleaning and disinfecting of aircraft.

Immediately prior to loading, the stowage area of aircraft to be used to export animals under the provisions of this part shall, under the supervision of an inspector, be cleaned and then disinfected using a freshly prepared solution of a 4 percent sodium carbonate plus 0.1 percent sodium silicate. In addition, immediately prior to loading, all loading ramps, fittings, and equipment to be used in loading the animals on the aircraft shall be cleaned and disinfected using an approved disinfectant listed in § 71.10 of this chapter. After such cleaning and disinfecting, the inspector shall sign and deliver to the captain of the aircraft or other responsible official of the airline involved, a document stating that the aircraft has been properly cleaned and disinfected, and stating further the date, the carrier, the flight number, and the name of the airport and the city and state in which it is located.

Done at Washington, DC, this 17th day of December 1986.

J.K. Atwell,

Deputy Administrator, Veterinary Services

[FR Doc. 86-28667 Filed 12-23-86; 8:45 am]

BILLING CODE 3410-34-M

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9 CFR Parts 160 and 161

[Docket No. 86-048]

Requirements and Standards for Accredited Veterinarians

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Proposed rule.

SUMMARY: This document proposes to prohibit an accredited veterinarian from performing official duties associated with livestock in which the accredited veterinarian or any member of the accredited veterinarian's immediate family has a financial interest. This action appears necessary to help ensure that accredited veteranarians avoid both conflicts of interest and the appearance of conflicts of interest in performing their official duties.

DATE: Written comments must be received on or before February 23, 1987.

ADDRESS: Written comments concerning this proposed rule should be submitted to Steven R. Poore, Acting Assistant Director, Regulatory Coordination, APHIS, USDA, Room 728, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782. Comments should state that they are in response to Docket Number 86-048. Written comments received may be inspected at Room 728 of the Federal Building between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays.

FOR FURTHER INFORMATION CONTACT: Dr. Robert E. Wagner, Senior Staff Veterinarian, Regulatory Communications and Compliance Policy Staff, VS, APHIS, USDA, Room 827, Federal Building, 6505 Belcrest Road, Hyattsville, MD 20782; (202) 436-8565.

SUPPLEMENTARY INFORMATION:

Background

The regulations in 9 CFR, Subchapter I, contain, among other things, a code of ethics, called "Standards for Accredited Veterinarians," by which accredited veterinarians are required to conduct their official duties. This code of ethics currently does not prohibit an accredited veterinarian from performing official duties associated with livestock in which the accredited veterinarian or any member of the accredited veterinarian's immediate family has a financial interest. However, any accredited veterinarian performing official duties associated with these livestock could have a potential conflict of interest, since family ties could influence the accredited veterinarian to misrepresent facts concerning the livestock.

Departmental experience indicates that most accredited veterinarians voluntarily refrain from performing official duties associated with livestock in which they or members of their immediate family have a financial interest. Nevertheless, the Department believes that unethical behavior, or even the appearance of impropriety, by some accredited veterinarians could seriously undermine Federal and cooperative veterinary programs. The Department proposes, therefore, to amend Part 161 by adding a new provision to the "Standards for Accredited Veterinarians" which would prohibit an accredited veterinarian from performing official duties associated with livestock in which the accredited veterinarian or any member of the accredited veterinarian's immediate family has a financial interest.

If adopted, this proposal should help ensure that accredited veterinarians avoid both conflicts of interest and the appearance of conflicts of interest in conducting their official duties.

In conjunction with the proposed provision, the Department also proposes to add two definitions to 9 CFR Part 160 as follows:

"Immediate family." An accredited veterinarians spouse, parents and step-parents, parents-in-law and step-parents-in-law, brothers and sisters and their spouses, step-brothers and step-sisters and their spouses, brothers-in-law and sisters-in-law and their spouses, and children and step-children and their spouses.

"Official duies." Functions specifically assigned to accredited veterinarians by Subchapters A, B, C, and D of this chapter, and by cooperative State-Federal disease control and eradication programs.

The proposed definition of "immediate family" includes the relatives of an accredited veterinarian who, the Department believes, are most likely to be in a position to influence the accredited veterinarian if the accredited veterinarian performs official duties associated with livestock in which they have a financial interest.

The proposed definition of "official duties" includes only duties specifically assigned to accredited veterinarians by Subchapters A, B, C, and D of Chapter 1, Title 9, Code of Federal Regulations; and by cooperative State-Federal disease control and eradication programs. The definition does not include general veterinary services, which may be provided by any licensed veterinarian.

This proposal also would correct minor inconsistencies in a definition and a footnote in Part 160.

Executive Order 12291 and Regulatory Flexibility Act

This action has been review in conformance with Executive Order 12291 and has been determined to be not a "major rule." The Department has determined that this action would not have a significant effect on the economy; would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and should have no 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.

Also, it appears that the amendments proposed by this document are consistent with the practices of the vast majority of accredited veterinarians.

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

Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 7 CFR 3015, Subpart V.)

List of Subjects in 9 CFR Parts 160 and 161

Veterinarians.

Accordingly, it is proposed to amend Parts 160 and 161, Title 9, Code of Federal Regulations, as follows:

PART 160—DEFINITION OF TERMS

1. The authority citation for Part 160 would be revised to read as set forth below:

Authority: 15 U.S.C. 1828; 21 U.S.C. 102, 105, 111–114, 114a, 114a–1, 115, 116, 120, 121, 125, 134b, 134f, 612, and 613; and 7 CFR 2.17, 2.51, and 371.2(d).

2. In § 160.1, all paragraph designations would be removed and all definitions placed in alphabetical order.

3. In § 160.1, the definition of "Accredited veterinarian" would be amended by replacing the words "Parts 1, 2, 3, and 11 of Subchapter A, and Subchapters" with "Subchapters A,".

4. In § 160.1, footnote 1 would be amended by replacing the words "Part 11 of Subchapter A, and Subchapters" with "Subchapters A," by adding a parenthesis after "employed veterinarians"; and by adding the word "veterinarians" before the phrase "are authorized to perform. . . ."

5. In § 160.1, two new definitions would be added in alphabetical order to read as follows:

§ 160.1 Definitions.

* * * * *

"Immediate family." An accredited veterinarian's spouse, parents and step-parents, parents-in-law and step-parents-in-law, brothers and sisters and their spouses, step-brothers and step-sisters and their spouses, brothers-in-law and sisters-in-law and their spouses, and children and step-children and their spouses.

"Official duties." Functions specifically assigned to an accredited veterinarian by Subchapters A, B, C, and D of this chapter, and by cooperative State-Federal disease control and eradication programs.

PART 161—REQUIREMENTS AND STANDARDS FOR ACCREDITED VETERINARIANS AND SUSPENSION OR REVOCATION OF SUCH ACCREDITATION

6. The authority citation for Part 161 would continue to read as set forth below:

Authority: 15 U.S.C. 1828; 21 U.S.C. 105, 111–114, 114a, 114a–1, 116, 120, 121, 125, 134b, 134f; 7 CFR 2.17, 2.51, and 371.2(d).

7. In § 161.3, a new paragraph (m) would be added to read as follows:

§ 160.3, Standards for Accredited Veterinarians.

* * * * *

(m) An accredited veterinarian shall not perform official duties associated with livestock in which the accredited veterinarian or any member of the accredited veterinarian's immediate family has a financial interest.

Done at Washington, DC, this 17th day of December, 1986.

J.K. Atwell, Deputy Administrator,

Veterinary Services.

[FR Doc. 86-28666 Filed 12-23-86; 8:45 am]

BILLING CODE 3410-34-M

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 30, 40 and 70

Materials Safety Regulation Review Study Group Report; Correction

AGENCY: Nuclear Regulatory Commission.

ACTION: Availability of report and request for comment; correction.

SUMMARY: This document corrects a notice of availability appearing in the **Federal Register** on December 17, 1986 (51 FR 45122) that requests public comment on the report developed by the Materials Safety Regulation Review Study Group. This action is necessary to correct an inadvertent error in the computation of the comment closing date. The comment closing date for this document should be changed from January 16, 1987 to February 17, 1987.

DATE: Submit comments by February 17, 1987. Comments received after this date 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 this date.

ADDRESSES: Mail comments or suggestions to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555. Copies of comments received may be examined at the NRC Public Document Room, 1717 H Street NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Richard E. Cunningham, Director, Division of Fuel Cycle and Material Safety, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 427-4485.

Dated at Bethesda, Maryland, this 19th day of December, 1986.

For the U.S. Nuclear Regulatory Commission.

Donnie H. Grimsley,

Director, Division of Rules and Records, Office of Administration.

[FR Doc. 86-28920 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 86-NM-215-AD]

Airworthiness Directives: Boeing Model 747 and 757 Series Airplanes.

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This notice proposes to adopt an airworthiness directive (AD), applicable to Boeing Models 747 and 757 airplanes, which would require inspection of the passenger door emergency power reservoir for integrity of the pressure relief rupture disk, repair, if necessary, and replacement of defective disk retainers. This action is prompted by numerous reports of emergency power reservoirs found to be prematurely discharged. This condition, if not corrected, would render the emergency power reservoir incapable of providing power to assist in opening the door quickly when required for emergency evacuation.

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

ADDRESSES: Send comments on the proposal in duplicate to the Federal Aviation Administration, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-215-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168. The applicable Boeing service information may be obtained from the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124; the applicable H. R. Textron service information may be obtained from H. R. Textron, 25200 West Rye Canyon Road, Valencia, California 91355. This information may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certificate Office, 9010 East Marginal Way South, Seattle, Washington.

FOR FURTHER INFORMATION CONTACT: Mr. Pliny Brestel, Airframe Branch, ANM-120S; telephone (206) 431-1931.

Mailing address: FAA, Northwest Mountain Region, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

SUPPLEMENTARY INFORMATION:

Comments Invited

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

Availability of NPRM

Any person may obtain a copy of this Notice of Proposed Rulemaking (NPRM) by submitting a request to the FAA, Northwest Mountain Region, Office of the Regional Counsel (Attn: ANM-103), Attention: Airworthiness Rules Docket No. 86-NM-215-AD, 17900 Pacific Highway South, C-68966, Seattle, Washington 98168.

Discussion

Operators of Boeing Models 747 and 757 airplanes have reported a number of instances in which the passenger door emergency power reservoir was found to be discharged. Investigation revealed a sharp edge defect on the pressure relief rupture disk retainer which had scored the pressure relief rupture disk, causing it to rupture prematurely. Further investigation revealed that the defective retainers are installed only on certain emergency power reservoirs, the serial numbers of which are listed in H. R. Textron Service Bulletin Number 803300-52-05. A discharged emergency power reservoir would be incapable of providing power to assist in opening the door quickly during an emergency evacuation.

The FAA has reviewed and approved Boeing Alert Service Bulletins 747-52A2201 (for Model 747 airplanes), and 757-52A0022 (for Model 757 airplanes), both dated September 15, 1986, which reference H. R. Textron (manufacturer of the emergency power reservoir) Service Bulletin No. 803300-52-05, dated September 15, 1986, which describes procedures for the inspection and repair, if necessary, of the passenger door emergency power reservoirs to ensure installation of acceptable pressure relief rupture disks and retainers.

Since this condition is likely to exist or develop on other airplanes of the same type design, an AD is proposed that would require inspection of the emergency power reservoir, repair, if necessary, and replacement in accordance with the service bulletins referenced above.

It is estimated that 157 Boeing Model 747 and 64 Boeing Model 757 airplanes of U.S. registry would require inspection and repair, if necessary, of the passenger door emergency power reservoirs, which would require a maximum of 2,182 total manhours to accomplish. At an estimated cost of $40 per manhour, the cost impact of this AD on U.S. operators is estimated to be $87,280.

For the reasons discussed above, the FAA has determined that this document involves a proposed regulation which is not major under Executive Order 12291 and is not a signficant rule pursuant to the Department of Transportation Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and it is certified under the criteria of the Regulatory Flexibility Act that this proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities because few, if any, Boeing Model 747 and 757 airplanes are operated by small entities. A copy of a draft regulatory evaluation prepared for this action is contained in the regulatory docket.

List of Subjects in 14 CFR Part 39

Aviation safety, Aircraft.

The Proposed Amendment

PART 39—[AMENDED]

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

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

Authority: 49 U.S.C 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97-499, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. By adding the following new airworthiness directive:

Boeing: Applies to all Model 747 and 757 series airplanes, certificated in any categorty. To ensure proper passenger door operation during emergency evacuation, accomplish the following, unless previously accomplished:

A. Within 60 days after the effective date of this AD, inspect the serial number on the passenger door emergency power reservoirs in accordance with Boeing Service Bulletin 747-52A2201 (for Model 747 airplanes) or 757-52A0022 (for Model 757 airplanes), both dated September 15, 1986, or later FAA-approved revisions.

1. If no serial number is found which matches one listed in H. R. Textron Service Bulletin 803300-52-05, dated September 15, 1986, no further action is necessary.

2. For any reservoir on which the serial number matches one listed in the H. R. Textron Service Bulletin referenced above, determine if the reservoirs is fully charged. If any discharged emergency power reservoir is found, modify before further flight in accordance with the applicable Boeing Service Bulletin referenced above.

Note: These units may have been installed on airplanes other than those listed in the Boeing Service Bulletins referenced above.

B. For each emergency power reservoir with a serial number listed in H. R. Textron Service Bulletin 803300-52-05, dated Setember 15, 1986, determine on a daily basis that the reservoir is fully charged. This daily procedure may be discontinued once the reservoir is modified in accordance with the applicable Boeing Service Bulletin referenced above. If any discharged emergency power reservoir is found, modify before further flight in accordance with the applicable Boeing Service Bulletin referenced above.

C. Within 12 months after the effective date of this AD, modify all emergency power reservoirs listed in H. R. Textron Service Bulletin 803300-52-05, dated September 15, 1986, in accordance with the applicable Boeing Service Bulletin referenced above.

D. An alternate means of compliance or adjustment of the compliance time, which provides an acceptable level of safety, may be used when approved by the Manager, Seattle Aircraft Certifciation Office, FAA, Northwest Mountain Region.

E. Special flight permits may be issued in accordance with FAR 21.197 and 21.199 to operate airplanes to a base for the accomplishment of inspections and/or modifications required by this AD.

All persons affected by this proposal who have not already received the appropriate service documents from the manufacturer may obtain copies upon request to the Boeing Commercial Airplane Company, P.O. Box 3707, Seattle, Washington 98124-2207. These documents may be examined at the FAA, Northwest Mountain Region, 17900 Pacific Highway South, Seattle, Washington, or the Seattle Aircraft Certification Office, 9010 East Marginal Way South, Seattle, Washington.

Issued in Seattle, Washington, on December 17, 1986.

Frederick M. Isaac,

Acting Director Northwest Mountain Region.

[FR Doc. 86-28878 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[INTL-88-86]

Withholding Upon Dispositions of U.S. Real Property Interests by Publicly Traded Partnerships, Publicly Traded Trusts and Real Estate Investment Trusts

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations.

SUMMARY: This document provides proposed Income Tax Regulations relating to the withholding that is required upon the disposition of a U.S. real property interest by publicly traded partnerships, publicly traded trusts and real estate investment trusts. In the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to these matters. The text of those temporary regulations also serves as the comment document for this proposed rulemaking.

DATE: Written comments and requests for a public hearing must be delivered or mailed before February 23, 1987.

ADDRESS: Send comments and requests for a public hearing to Commissioner of Internal Revenue, Attention, CC:LR:T (INTL-88-86), Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: John M. Zoscak, Jr. of the Office of the Associate Chief Counsel (International) within the Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attn: CC:INTL:Br2); Telephone 202-566-3289 (not a toll-free call).

SUPPLEMENTARY INFORMATION: The temporary regulations published in the Rules and Regulations portion of this issue of the **Federal Register** add new § 1.1445-8T to 26 CFR Part 1. The final regulations that are proposed to be based on the temporary regulations would amend 26 CFR Part 1 by placing the rules of these temporary regulations at an appropriate place in the final regulations under section 1445 of the Internal Revenue Code. For the text of the temporary regulations, see T.D. 8114 published in the Rules and Regulations portion of this issue of the **Federal Register**.

Regulatory Flexibility Act and Executive Order 12291

The Commissioner of Internal Revenue has determined that these proposed rules are not major rules as defined in Executive Order 12291 and that a Regulatory Impact Analysis is therefore not required. Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein the interpretative and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Paperwork Reduction Act

The collection of information requirements contained in this notice of proposed rulemaking have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act. Comments on these collection of information requirements may be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Executive Office Building, Washington, DC 20503. The Internal Revenue Service requests that persons submitting comments on these requirements to OMB also send copies of those comments to the Service.

Comments and Requests for a Public Hearing

Before adopting these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Drafting Information

The principal author of these regulations is John M. Zoscak, Jr., of the Office of the Associate Chief Counsel (International) within the Office of Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and Treasury Department participated in developing the regulations, both on matters of substance and style.

List of Subjects

26 CFR §§ 1.1441–1 through 1.14465–1

Income taxes, Aliens, Foreign corporations.

26 CFR Part 602

Reporting and recordkeeping requirements.

Proposal of Regulations

The temporary regulations, [T.D. 8114], published in the Rules and Regulations portion of this issue of the **Federal Register**, are hereby also proposed as final regulations under section 1445 of the Internal Revenue Code of 1954.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 86–28510 Filed 12–18–86; 4:48 pm]

BILLING CODE 4830-01-M

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26 CFR Parts 1 and 602

[LR–132–86]

Deposit of Estimated Income Tax by Certain Private Foundations and Tax-Exempt Organizations

AGENCY: Internal Revenue Service, Treasury.

ACTION: Notice of proposed rulemaking by cross reference to temporary regulations.

SUMMARY: This document provides proposed regulations regarding deposits of estimated income taxes by certain private foundations and tax-exempt organizations. Changes to the applicable tax law were made by the Tax Reform Act of 1986. In the Rules and Regulations portion of this **Federal Register**, the Internal Revenue Service is issuing temporary regulations relating to deposits of estimated taxes by such entities; the text of those temporary regulations also serves as the comment document for this notice of proposed rulemaking.

DATE: Written comments and requests for a public hearing must be delivered or mailed by January 23, 1987, due to the imminent effective date set by section 1542 of the Tax Reform Act of 1986.

ADDRESS: Please mail or deliver comments to: Commissioner of Internal Revenue, Attention: CC:LR:T (LR–132–86), 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: John A. Tolleris of the Legislation and Regulations Division, Office of Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC 20224 (Attention: CC:LR:T) (202–566–3590, not a toll-free call).

SUPPLEMENTARY INFORMATION:

Background

The temporary regulations in the Rules and Regulations portion of this issue of the **Federal Register** amend Parts 1 and 602 of Title 26 of the Code of Federal Rgulations. New § 1.6302–1T is added to Part 1 of Title 26 of the Code of Federal Regulations. When the substance of § 1.6302–1T is promulgated as a final regulation, § 1.6302–1(a) will be revised to reflect the new provisions. For the text of the temporary regulations, see FR Doc. 86–28935 (TD 8117) published in the Rules and Regulations portion of this issue of the **Federal Register.** The preamble to the temporary regulations explains this addition to the Income Tax Regulations.

Non-Applicability of Executive Order 12291

The Commissioner of Internal Revenue has determined that this proposed rule is not a major rule as defined in Executive Order 12291 and that a regulatory impact analysis therefore is not required.

Regulatory Flexibility Act

The Secretary of the Treasury has certified that this rule will not have a significant impact on a substantial number of small entities because the economic and any other secondary or incidental impact of the requirement for quarterly tax payments flows directly from the underlying statute. A regulatory flexibility analysis, therefore, is not required under the Regulatory Flexibility Act (5 U.S.C. Chapter 6).

Paperwork Reduction Act

The collection of information requirements contained in this regulation have been submitted to the Office of Management and Budget (OMB) for review under section 3504(h) of the Paperwork Reduction Act of 1980. Comments on these requirements should be sent to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Internal Revenue Service, New Executive Office Building, Washington, DC 20503. The Internal Revenue Service requests that persons submitting comments on the requirements to OMB also send copies of those comments to the Service.

Drafting Information

The principal author of these proposed regulations is John A. Tolleris of the Legislation and Regulations Division of the Office of the Chief Counsel, Internal Revenue Service. However, personnel from other offices of the Internal Revenue Service and the Treasury Department participated in developing the regulations, on matters of both substance and style.

Comments and Requests for a Public Hearing

Before adoption of these proposed regulations, consideration will be given to any written comments that are submitted (preferably eight copies) to the Commissioner of Internal Revenue. All comments will be available for public inspection and copying. A public hearing will be held upon written request to the Commissioner by any person who has submitted written comments. If a public hearing is held, notice of the time and place will be published in the **Federal Register**.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

[FR Doc. 86-28936 Filed 12-23-86; 8:45 am]

BILLING CODE 4830-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 917

Reopening of the Public Comment Period on a Modification to the Kentucky Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Reopening of comment period.

SUMMARY: OSMRE is reopening the public comment period on the substantive adequacy of certain program amendments submitted by the Commonwealth of Kentucky as a modification to the Kentucky permanent regulatory program (herinafter referred to as the Kentucky program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The amendments pertain to the establishment of a bond pool and bond pool fund.

This notice sets forth the times and locations that the Kentucky program and the proposed amendments are available for public inspection and the comment period during which interested persons may submit written comments on the proposed program elements.

DATE: Written comments not received on or before January 8, 1987, will not necessarily be considered.

ADDRESS: Written comments should be mailed or hand delivered to: W. Hord Tipton, Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504.

FOR FURTHER INFORMATION CONTACT: W. Hord Tipton, Director, Lexington Field Office, Office of Surface Mining Reclamation and Enforcement, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504; Telephone: (606) 233-7327.

SUPPLEMENTARY INFORMATION:

I. Public Coment Procedures

Availability of Copies

Copies of the Kentucky program, the proposed modifications to the program, and all written comments received in response to this notice will be available for review at the OSMRE Offices and the Offices of the State regulatory authority listed below, Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding holidays.

Lexington Field Office, Office of Surface Mining, 340 Legion Drive, Suite 28, Lexington, Kentucky 40504;

Office of Surface Mining Reclamation and Enforcement, Room 5315A, 1100 L Street, N.W., Washington, D.C. 20240;

Bureau of Surface Mining Reclamation and Enforcement, Capitol Plaza Tower, Third Floor, Frankfort, Kentucky 40601.

Pursuant to 30 CFR 732.17(h)(2)(ii), each requester may receive, free of charge, one single copy of the proposed amendment by contacting OSMRE's Lexington Field Office listed under "ADDRESSES."

Written Comments

Written comments should be specific, pertain only to the issues proposed in this rulemaking, and include explanation in support of the commenter's recommendations. Comments received after the time indicated under "DATES" or at locations other than the Lexington, Kentucky Field Office will not necessarily be considered and included in the Administrative Record for the final rulemaking.

II. Background on the Kentucky State Program

On December 30, 1981, Kentucky resubmitted its proposed regulatory program to OSMRE. On April 13, 1982, the Secretary approved the program subject to the correction of 12 minor deficiencies. The approval was effective upon publication of the notice of conditional approval in the May 18, 1982 **Federal Register** (47 FR 21404-21435). Information pertinent to the general background on the Kentucky State Program, including the Secretary's findings, the disposition of comments and a detailed explanation of the conditions of approval of the Kentucky program can be found in the May 18, 1982 **Federal Register** notice. Subsequenty actions concerning the conditions of approval and program amendments are identified at 30 CFR 917.11, 917.15, 917.16 and 917.17.

III. Submission of Program Amendments

On September 5, 1986, Kentucky submitted to OSMRE, pursuant to 30 CFR 732.17, certain revisions to the Kentucky regulatory program. The revisions were intended to implement Kentucky Senate Bill No. 130 (codified at KRS 350.700 through 350.990) which was approved by OSMRE on July 18, 1986 (51 FR 26002). The proposed rules were intended to address the requirement at 30 CFR 917.16(c)(1) that requires Kentucky, prior to implementation of Senate Bill No. 130, to submit and obtain OSMRE approval or regulations to implement the bill. The submission included emergency rules at 405 KAR 10:200E and regular rules at 405 KAR 10:200 which would supersede the emergency rules upon promulgation and approval.

On October 6, 1986, OSMRE announced receipt of the rules and opportunity for public comment and a public hearing in the **Federal Register** (51 FR 35532). The public comment period closed on November 5, 1986. The public hearing scheduled for October 31, 1986, was not held because no one requested an opportunity to testify.

On December 4, 1986, Kentucky submitted modifications to its September 5 submission. The December 4 submission contains modifications to 405 KAR 10:200. These proposed amendments have completed Kentucky's promulgation process and therefore, replace and supersede the emergency rules at 405 KAR 10:200E. Language has been added at 405 KAR 10:200 section 4 and 6 concerning financial statements. Revisions have been made at 405 KAR 10:200 sections 7(1)(g) and (2)(g) concerning the exclusion of the applicant's worst 12-month period from consideration when determining the applicant's compliance record. Revisions have been made to 405 KAR 10:200 section 8 concerning the transition of bonded areas is existing permits to the bond pool fund. Changes have been made in section 9 concerning record keeping, reporting of extraction tonnages and payment of tonnage fees. The provisions in section 9 for deferral of fees for stockpile coal have been deleted.

Therefore, OSMRE is reopening the public comment period for a period of fifteen days to allow public comments on the proposed program amendments as modified. Comments should specifically address the issue of whether the proposed amendments are in accordance with SMCRA and no less effective than its implementing regulations.

List of Subjects in 30 CFR Part 917

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: December 18, 1986.

H. Leonard Richeson,

Acting Assistant Director, Program Policy.

[FR Doc. 86-28887 Filed 12-23-86 8:45 am]

BILLING CODE 4310-05-M

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30 CFR Part 935

Public Comment Procedures and Opportunity for Public Hearing on Proposed Modifications to the Ohio Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSMRE), Interior.

ACTION: Proposed rule.

SUMMARY: OSMRE is announcing procedures for a public comment period and for requesting a public hearing on the substantive adequacy of a program amendment submitted by Ohio as an amendment to the State's permanent regulatory program (hereinafter referred to as the Ohio program) under the Surface Mining Control and Reclamation Act of 1977 (SMCRA).

The amendment submitted consists of proposed changes to Ohio's excess spoil rules. The amendment is proposed to address deficiencies in Ohio's regulatory program with regard to the disposal of excess spoil and to correct typographical and grammatical errors that were noted in OSMRE's September 18, 1986 approval of Ohio's excess spoil rules (51 FR 33034).

This notice sets forth the times and locations that the Ohio program and proposed amendment will be available for public inspection, the comment period during which interested persons may submit written comments on the proposed amendment, and the procedures that will be followed for the public hearing.

DATES: Written comments from the public not received by 4:30 p.m., January 23, 1987, will not necessarily be considered in the decision on whether the proposed amendment should be approved and incorporated into the Ohio regulatory program. If requested, a public hearing on the proposed amendment has been scheduled for January 13, 1987. Any person interested in speaking at the hearing should contact Ms. Rose Hatfield at the address or telephone number listed below by January 8, 1987. If no person has contacted Ms. Hatfield by that date to express an interest in the hearing, the hearing will be cancelled. If only one person requests an opportunity to speak at the public hearing, a public meeting, rather than a hearing, may be held and the results of the meeting included in the Administrative Record.

ADDRESS: The public hearing if requested, is scheduled for 1:00 p.m. in Room 202, Columbus Field Office, 2242 South Hamilton Road, Columbus, Ohio 43227.

Written comments and requests for an opportunity to speak at the hearing should be directed to Ms. Nina Rose Hatfield, Field Office Director, Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43227; Telephone: (614) 866-0578.

Copies of the Ohio program, the proposed amendment to the program, a listing of any scheduled public meetings, and all written comments received in response to this notice will be available for public review at the OSMRE Field Office listed above and at the OSMRE Headquarters Office and the office of the State regulatory authority listed below, during normal business hours Monday through Friday, excluding holidays.

Office of Surface Mining Reclamation and Enforcement, Room 5315A, 1100 "L" Street NW., Washington, DC 20240

Ohio Division of Reclamation, Building B, Fountain Square, Columbus, Ohio 43224

FOR FURTHER INFORMATION CONTACT: Ms. Nina Rose Hatfield, Director, Columbus Field Office, Office of Surface Mining Reclamation and Enforcement, Room 202, 2242 South Hamilton Road, Columbus, Ohio 43227; Telephone: (614) 866-0578.

SUPPLEMENTARY INFORMATION:

I. Background on the Ohio Program

The Ohio program was approved effective August 16, 1982, by notice published in the August 10, 1982 **Federal Register** (47 FR 34688). Information pertinent to the general background, revisions, modifications, and amendments to the Ohio program submission, as well as the Secretary's findings, the disposition of comments, and a detailed explanation of the conditions of approval of the Ohio program can be found in the August 10, 1983 **Federal Register.** Subsequent actions concerning the conditions of approval and program amendments are identified at 30 CFR 935.11 and 935.15.

II. Submission of Revisions

By letter dated October 8, 1986, the Ohio Department of Natural Resources, Division of Reclamation submitted a proposed amendment to Ohio's regulatory program at 1501:13-9-07. The proposed changes to OAC section 1501:13-9-07 include the requirement to analyze the foundation conditions of an excess spoil fill for the possible effects on underground mine workings. This amendment was required by OSMRE in the September 18, 1986 approval of Ohio's excess spoil regulations (51 FR 33034). There are also some minor editorial changes and typographical corrections.

The full text of the proposed program amendment submitted by Ohio is available for public inspection at the addresses listed above. Upon request to OSMRE's Field Office Director, each person may receive, free of charge, one single copy of the proposed amendment. The Director now seeks public comment on whether the proposed amendment is no less effective than the Federal regulations. If approved, the amendment will become part of the Ohio program.

III. Procedural Matters

1. *Compliance with the National Environmental Policy Act:* The Secretary has determined that, pursuant to Section 702(d) of SMCRA, 30 U.S.C., 1292(d), no environmental impact statement need be prepared on this rulemaking.

2. *Executive Order No. 12291 and the Regulatory Flexibility Act:* On August 28, 1981, the Office of Management and Budget (OMB) granted OSMRE an exemption from Sections 3, 4, 7 and 8 of Executive Order 12291 for actions directly related to approval or conditional approval of State regulatory programs. Therefore, this action is exempt from preparation of a Regulatory Impact Analysis and regulatory review by OMB.

The Department of the Interior has determined that this rule would not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule would not impose any new requirements; rather, it would ensure that existing requirements established by SMCRA and the Federal rules would be met by the State.

3. *Paperwork Reduction Act:* This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

List of Subjects in 30 CFR Part 935

Coal mining, Intergovernmental relations, Surface mining, Underground mining.

Dated: December 15, 1986.

James W. Workman,

Deputy Director, Operations and Technical Services, Office of Surface Mining Reclamation and Enforcement.

[FR Doc. 86-28889 Filed 12-23-86; 8:45 am]

BILLING CODE 4310-05-M

DEPARTMENT OF THE TREASURY

Fiscal Service

31 CFR Part 357

[Department of the Treasury Circular, Public Debt Series, No. 2-86]

Regulations Governing Book-Entry Treasury Bonds, Notes, and Bills

AGENCY: Bureau of the Public Debt, Fiscal Service, Department of the Treasury.

ACTION: Notice of extension of time for submission of comments.

SUMMARY: This document extends until January 30, 1987, the deadline for submission of comments on the proposed new rules governing Treasury securities maintained in the commercial book-entry system known as the Treasury/Reserve Automated Debt Entry System ("TRADES"). The proposed rulemaking was published in the **Federal Register** on November 28, 1986 (51 FR 43027), and comments were to be received on or before December 29, 1986.

DATE: Comments must be received on or before January 30, 1987.

ADDRESS: Send comments to the Office of the Chief Counsel, Bureau of the Public Debt, E Street Building, Washington, DC 20239-0001.

FOR FURTHER INFORMATION CONTACT: Virginia Rutledge, Attorney-Advisor (202/535-4890) or Cynthia Reese, Senior Attorney and Special Assistant (202/376-4320).

SUPPLEMENTARY INFORMATION: The Department has received a number of requests to extend the comment period on the proposed TRADES regulations. Given the complexity of the issues and the desire of the Department of the Treasury to receive comprehensive, carefully considered comments from as wide a group of participants in the Government securities market as possible, the Department has decided to extend the comment period to January 30, 1987.

Dated: December 22, 1986.

W.M. Gregg,

Commissioner of the Public Debt.

[FR Doc. 86-28997 Filed 12-23-86; 8:45 am]

BILLING CODE 4810-35-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[A-5-FRL-3133-4]

Approval and Promulgation of Implementation Plans; Illinois

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Proposed rulemaking.

SUMMARY: USEPA proposes to approve a revision to the Illinois State Implementation Plan (SIP) for Volatile Organic Compound (VOC). The revision, if finally approved, would provide for a compliance date extension from Illinois' Rule 35 IAC 215.204(h) from October 1, 1982, until April 1, 1986, for Fedders-USA's facility, which is located in Effingham, Illinois. This SIP revision would allow Fedders-USA additional time to reformulate the coatings used in manufacturing large appliances. This action is taken in response to a February 13, 1986, request from the State of Illinois.

DATE: Comments on this revision and on the proposed USEPA action must be received by January 23, 1987.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review: (It is recommended that you telephone Uylaine E. McMahan, at (312) 886-6031, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604

Illinois Environmental Protection Agency, Division of Air Pollution Control, 2200 Churchill Road, Springfield, Illinois 62706

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.)

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604

FOR FURTHER INFORMATION CONTACT: Uylaine E. McMahan (312) 886-6031.

SUPPLEMENTARY INFORMATION: On February 13, 1986, the Illinois Environmental Protection Agency (IEPA) submitted a proposed revision to its ozone SIP for Fedders-USA's facility located in Effingham, Effingham County, Illinois. Effingham County is designated as an attainment area for ozone.

This SIP revision request is in the form of a January 9, 1986, Opinion and Order of the Illinois Pollution Control Board (IPCB), PCB 83-47. It grants Fedders-USA a compliance date extension for VOC control requirements from October 1, 1982, until April 1, 1986, and provides for a legally enforceable compliance program. The variance is intended to provide Fedders-USA with additional time to comply, through development of low solvent coating technology.

Under the existing federally approved SIP, each of Fedders-USA's large appliance coating lines is subject to a limit of 2.8 pounds of VOC per gallon of coating, the emission limitation contained in Rule 35 IAC 35 215.204(h) of Chapter 2: Air Pollution of the Illinois Pollution Control Board Rules and Regulations. Final compliance with this emission limitation is required by October 1, 1982. The proposed SIP revision would extend the date for final compliance for Fedders-USA to no later than April 1, 1986.

USEPA is proposing approval of this SIP revision compliance until April 1, 1986, because the proposed SIP revision will not interfere with the maintenance of the ozone national ambient air quality standards (NAAQS). Fedders-USA is located in Effingham County, which has always been designated as an attainment area for the pollutant ozone. This proposed SIP revision does not include a permanent relaxation or a compliance date extension past April, 1, 1986. Approval of this proposed SIP revision will not cause any increase in emissions; and, therefore, maintenance of the NAAQS will not be affected by the compliance date extension. USEPA's policies with regard to compliance date extensions are directed toward those areas not having attained the NAAQS and are not applicable to this revision, because Effingham County is now and has always been designated attainment for ozone. If USEPA ultimately approves the compliance date extension, the waiver from the requirement of 1 year of preconstruction ozone monitoring required by the Prevention of Significant Deterioration (PSD) regulations is terminated for Effingham County, for the period of the variance.

USEPA is providing a 30-day comment period on this notice of proposed rulemaking. Public comments receieved on or before (30 days from date of publication) will be considered in USEPA's final rulemaking. All comments will be available for inspection during normal business hours at the Region V office listed at the front of this notice.

Under 5 U.S.C. 605(b) the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Authority: 42 U.S.C. 7401-7462.

Dated: August 5, 1986.

Valdas V. Adamkus,

Regional Administrator.

[FR Doc. 86-28896 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

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40 CFR Part 52

[A-5-FRL-3132-3]

Approval and Promulgation of Implementation Plans; Ohio

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Proposed rulemaking.

SUMMARY: USEPA is proposing to approve a draft revision to the Ohio State Implementation Plan (SIP) for the Coulton Chemical Plant in Toledo, Ohio and for the E.I. duPont de Nemours and Company facility in Miami, Ohio. The revision is in the form of Permits to Operate for the two facilities. The permits require the installation and operation of continuous emission monitors for sulfur dioxide.

This revision was submitted by the State to satisfy section 110(a)(2)(F) of the Clean Air Act and 40 CFR 51.19, and to address a remand from the Sixth Circuit Court of Appeals concerning continous emission monitoring for sulfur dioxide. (*Northern Ohio Lung Association* v. *U.S. Environmental Protection Agency*, 572 F.2d 1182 (6th CIR. 1978), Hereafter "Nola Remand.") The revision that USEPA proposes action on today is a draft. Before USEPA can take final action on the plan, the State must submit a final plan which is substantially identical to the plan on which USEPA is proposing action today.

DATE: Comments on this revision and on the proposed USEPA action must be received by January 23, 1987.

ADDRESSES: Copies of the SIP revision are available at the following addresses for review: (It is recommended that you telephone Debra Marcantonio, at (312) 886-6088, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch, 230 South Dearborn Street, Chicago, Illinois 60604

Ohio Environmental Protection Agency, Office of Air Pollution Control, 361 East Broad Street, Columbus, Ohio 43216

Comments on this proposed rule should be addressed to: (Please submit an original and three copies, if possible.)

Gary Gulezian, Chief, Regulatory Analysis Section, Air and Radiation Branch (5AR-26), U.S. Environmental Protection Agency, Region V, 230 South Dearborn Street, Chicago, Illinois 60604

FOR FURTHER INFORMATION CONTACT: Debra Marcantonio (312) 886-6088.

SUPPLEMENTARY INFORMATION: Section 110(a)(1) of the Clean Air Act (Act) requires each State to adopt and submit to USEPA a plan which provides for attainment and maintenance of the primary and secondary national ambient air quality standards. The plan for achieving the secondary standard may be submitted as part of a State's plan for achieving the primary standard or as a separate plan. The primary standard plan must provide for attainment no later than 3 years from plan approval. Attainment of the secondary standard must be within a reasonable time.

Under section 110(c) of the Act, USEPA promulgated its substitute sulfur dioxide plan for the State of Ohio on August 27, 1976, which set emission limitations for Ohio sources to assure that the State of Ohio attain and maintan the national ambient air quality standards for sulfur dioxide (SO_2). See 41 FR 36324, 41 FR 52155, and 42 FR 27588. The Federal was designed to ensure attainment of both the primary and secondary sulfur dioxide standards within 3 years of plan approval.

On February 9, 1978, the United States Court of Appeals for the Sixth Circuit remanded to USEPA for its further consideration two aspects of the plan. *Northern Ohio Lung Association* v. *USEPA*, 572 F.2d 1182 (6th Cir. 1978). The Court held that the plan did not comply with the requirements of section 110(a)(2)(F) of the Act and did not include specific provisions for meeting the secondary ambient air quality standards for SO_2.

USEPA previously addressed the secondary standard portion of the remand on October 6, 1981 (46 FR 49123), and July 26, 1982 (47 FR 32121). This notice address the portion of the sulfur dioxide remand regarding section 110(a)(2)(F) of the Clean Air Act which requires appropriate sources to monitor their own emissions.

On January 27, 1981 (46 FR 8481), USEPA approved a significant portion of Ohio's sulfur dioxide SIP which replaced USEPA's August 27, 1976, plan. (Effective date was subsequently delayed until April 13, 1982 (47 FR 15782)). Amendments were approved by USEPA on April 20, 1982 (47 FR 16784), and May 13, 1982 (47 FR 20586). The SO_2 plan in Ohio is no longer the Federal plan promulgated by USEPA but, in most cases, is the revised State SO_2 plan. Therefore, Ohio submitted a draft revision to the SIP to satisfy both section 110(a)(2)(F) of the Clean Air Act and 40 CFR 51.19 as they pertain to sulfur dioxide emissions, and to address the remand from the Sixth Circuit Court of Appeals. Before USEPA can take final action on the plan, the State must submit a final plan which is substantially identical to the draft on which USEPA is proposing action today.

Section 110(a)(2)(F)

According to section 110, SIPs must require the installation of equipment to monitor emissions from stationary sources, the periodic reporting of such emissions, and the correlation of such reports with any emission limitations. To implement this provision of section 110, USEPA promulgated regulations identifying the minimum emission monitoring requirements (40 CFR Part 51, Appendix P). For SO_2, continuous emission monitoring is required for the following source categories:

(1) Fossil fuel-fired steam generators greater than 250 Million British Thermal Units per hour (MMBTU/HR) which have installed SO_2 pollution control equipment control equipment, and

(2) Sulfuric acid plants of greater than 30 tons per day production capacity.

(1) Fossil Fuel-Fired Generating Units—Ohio SIP

Currently, there are only two fossil fuel-fired steam generating units greater than 250 MMBTU/HR that have SO_2 pollution control equipment in Ohio: C&SOE Conesville—Units 5 and 6.

Continuous emission monitoring of SO_2 for Conesville Units 5 and 6 were already installed to satisfy New Source Performance Standards (NSPS) requirements at 40 CFR Part 60 Subpart D.

On December 21, 1976 (41 FR 55575), and December 22, 1981 (46 FR 62065), USEPA delegated authority to implement NSPS to Ohio. Because Subpart D (fossil fuel-fired generators which commenced construction after August 17, 1971) and Subpart Da (electric utility steam operating units which commenced construction after September 18, 1978) both require the installation and operation of continuous emission monitors for SO_2, and new fossil fuel-fired generator greater than 250 MMBTU/HR in Ohio will be required to have continuous emission monitors. Thus, all existing and future fossil fuel-fired generating units in Ohio subject to the control requirements of Subpart D, and Da, will comply with the requirements of Section 110(a)(2)F).

(2) Sulfuric Acid Plants—Ohio SIP

As noted in a letter dated September 5, 1985, from Ohio EPA, there are only two sulfuric acid plants with greater than 300 tons per day production capacity in Ohio (Coulton Chemical and E.I. duPont). This letter is contained in the docket for this proposed action. On April 30, 1986, Ohio EPA submitted a draft revision to the Ohio SIP in the form of operating permits for Coulton Chemical and for E.I. duPont.

A. Coulton Chemical Company

The State submitted two permits to operate (identified as A-Plant and B-Plant) for the Coulton Chemical Company in Lucas County. The State required that Terms and Conditions listed in item 3 of the permits be incorporated into the Ohio SIP.

Condition 3 references a compliance time schedule for installing and operating continuous emission monitoring equipment. The schedule requires completing of testing and calibration of installed continuous emission monitoring within 18 months of issuance of the permit for A-Plant, and by July 3, 1987, for B-Plant. Ohio EPA requested USEPA to act on these compliance schedules as part of Condition 3. Additionally, Condition 3 requires these facilities to submit quarterly reports pursuant to 40 CFR Part 51, Appendix P. Paragraph 4 documenting all instances of sulfur dioxide emissions in excess of the limitations specified in OAC Rule 3745-18-53(X). This rule is indentical to the currently effective SIP for this source as contained in 40 CFR 52.1881(b)(39)(vi)(B). USEPA finds that the continuous emission monitoring requirements for SO_2 in these permits satisfy 40 CFR Part 51, Appendix P.

B. E.I. DuPont

The State submitted a permit to operate for the E.I. DuPont Fort Hill Plant in Miami. The State requested that Terms and Conditions listed in item 3 of the permits be incorporated into the Ohio SIP. Condition 3 requires the source to operate and maintain existing equipment to continuously monitor and record the SO_2 emission from the source as required by 40 CFR 60.13. Additionally, Condition 3 requires this facility to submit quarterly reports pursuant to 40 CFR 60.7 and 60.84, documenting all instances of sulfur dioxide emission in excess of the Ohio SIP. The continuous emission monitoring requirements for SO_2 in these permits satisfy 40 CFR Part 51, Appendix P.

As noted above, USEPA delegated authority to implement NSPS to Ohio. Because 40 CFR Part 60 Subpart H requires the installation and operation of continuous emission monitors for SO_2, any new sulfuric acid production unit in Ohio will be required to have continuous emission monitors. Thus, all existing and future applicable sulfuric acid plants in Ohio will comply with the requirements of section 110(a)(2)(F).

USEPA Action

USEPA is proposing to approve the requirements for SO_2 continuous emission monitors in the operational permits for Coulton Chemical and E.I. duPont as a revision to the Ohio SIP. These SIP revisions, coupled with Ohio's NSPS delegation, satisfy the requirements of section 110(a)(2)(F) for the SO_2 SIP and respond to the NOLA remand.

The revision that USEPA proposes action on today is a draft. Before USEPA can take final action on the plan, the State must submit a final plan which is substantially identical to the plan on which USEPA is proposing action today.

Under 5 U.S.C. 605(b), the Administrator has certified that SIP approvals do not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Authority: 42 U.S.C. 7401-7642.

Dated: June 30, 1986
Valdas V. Adamkus,
Regional Administrator.

[FR Doc. 86-28897 Filed 12-3-86; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL MARITIME COMMISSION

46 CFR Parts 560 and 572

[Docket No. 86-32]

Filing of Agreements by Persons Subject to Shipping Act, 1916 and Shipping Act of 1984—Exculpatory Provisions in Marine Terminal Agreements and Leases

AGENCY: Federal Maritime Commission.

ACTION: Petition for Rulemaking Referred to Administrative Law Judge for Hearing.

SUMMARY: The Federal Maritime Commission has determined to hold evidentiary hearings on the possible necessity of promulgating a rule prohibiting marine terminal operators from including exculpatory provisions in agreements and leases for terminal facilities and services. This matter is therefore being referred to an Administrative Law Judge for hearing and decision.

ADDRESS: Office of Administrative Law Judges, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5750.

FOR FURTHER INFORMATION CONTACT: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573, (202) 523-5725.

SUPPLEMENTARY INFORMATION: The Master Contracting Stevedore Association of the Pacific Coast, Inc. (MCSA) has filed a Petition for Rulemaking (Petition) requesting that the Commission promulgate a rule prohibiting exculpatory clauses in terminal leases and agreements. Specifically, MCSA requests either: (1) A separate rulemaking prohibiting exculpatory provisions in terminal leases and agreements; or, (2) extending the rule proposed in Docket No. 86-15—*Filing of Tariffs by Marine Terminal Operators—Exculpatory Provisions*, 51 FR 15655; April 26, 1986 to prohibit exculpatory provisions in agreements and leases; [1] or, (3) consolidating its

[1] In Docket No. 86-15 the Commission proposed to include in its rules governing the filing of tariffs by marine terminal operators, a prohibition against the publication of exculpatory liability-shifting provisions in such tariffs. The Commission also requested comments on whether an exception to this prohibition, that would allow "quid pro quo"

Continued

requested rulemaking with Docket No. 86–15.

The Commission published MCSA's Petition in the **Federal Register** (51 FR 25101; July 10, 1986) and requested comments from interested parties. Comments have been filed by the National Association of Stevedores (NAS); the American Association of Port Authorities; the Port of Seattle; the Port of Houston Authority of Harris County, Texas; the Port of Long Beach; the Board of Trustees of the Galveston Wharves, Galveston, Texas; the Port Authority of New York and New Jersey; the Port of Oakland; the Port of Corpus Christi Authority of Nueces Country, Texas; and the Puerto Rico Ports Authority (hereinafter collectively referred to as "the Ports").

The Petition for Rulemaking

In its Petition, MCSA argues that the underlying premises for the Commission's proposed rule in Docket No. 86–15 are equally applicable to terminal leases and agreements. MCSA claims that local port authorities exercise monopoly control over public facilities and that, as a result, terminal users seeking to enter into leases or agreements for the use of such facilities have no choice but to accede to liability and indemnity provisions dictated by the port authority.

MCSA states that such exculpatory provisions take several forms, including: (1) The basic "red letter" clause; (2) the "port as named assured" clause; and, (3) the "loaned equipment/borrowed servant" clause. These are explained as follows. "Red letter" clauses are those that require the lessee to indemnify and hold-harmless the lessor from all claims arising out of the use of the leased premises, including those due to the negligence of the lessor, in part or in whole. "Named assured" provisions require the lessee to obtain liability insurance naming the lessor as the insured. These latter clauses are said to have the effect of exculpating the lessor because the insurance company generally does not pursue a subrogation claim against its insured, the lessor, and attributes the loss to the lessee. "Borrowed servant" provisions impute control over all facilities and personnel subject to the lease or agreement to the lessee, thereby shifting all liability to the lessee even though the lessor maintains substantial authority and control over the premises.

MCSA submits that all three types of clauses are equally exculpatory and should be prohibited by rule. A flat prohibition on exculpatory clauses, with no exception, is urged.

Position of Commenters

NAS generally supports the Petition. It argues that the conditions described by MCSA exist not only on the West Coast but nationwide. NAS believes exculpatory provisions should be banned from terminal tariffs as proposed in Docket No. 86–15, without any exceptions. It submits that the rationale of the rule proposed in Docket No. 86–15 applies equally to terminal leases and agreements.

The Ports oppose the relief requested. They generally argue that there is no factual basis supporting MCSA's allegations of the exercise of monopoly power by the port authorities and that, unlike tariffs that are unilaterally imposed, leases and agreements are generally the product of "arms-length" negotiations. It is argued that there is keen competition between port authorities in attempting to obtain long-term use agreements and leases for the terminal facilities they own. The Ports generally contend that the prohibition suggested by MCSA would give the terminal user an unfair advantage in bargaining with port authorities.

Finally, the Ports argue that there is allegedly no similarity between the process by which terminal tariffs are promulgated and the negotiation of terminal leases and agreements. Moreover, market conditions relevant to the use of terminal facilities pursuant to a port authority tariff are said to be dissimilar to those applicable to leases and agreements.

Discussion

The Petition and comments filed in response to the Petition reflect a polarization of opinion as to whether the Commission should regulate the use of exculpatory provisions in terminal leases and agreements. The stevedoring interests, representing the terminal facility "users" most affected by such provisions, favor an absolute ban on the practice. The public port authority interests, representing the chief beneficiaries of such provisions, oppose any Commission regulation in this area.

The primary source of the Commission's authority to regulate the practices of marine terminal operators is found in section 10(d)(1) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1709(d), and section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 816, depending on whether the foreign commerce or the domestic offshore commerce is involved. Both sections require marine terminal operators to "establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property."

Therefore, the issue raised by the Petition and comments in response is whether the inclusion of liability-shifting provisions in terminal leases and agreements constitutes an unjust and unreasonable practice in violation of section 10(d)(1) of the 1984 Act or section 17 of the 1916 Act. Because this is essentially a factual question, reliable information on not only the prevailing market conditions but all relevant facts and circumstances concerning terminal lease and agreement negotiations is essential to a proper disposition of the Petition. That type of information is lacking here. The Petition and comments mostly argue broad generalities concerning the existence or absence of monopolistic bargaining power on the part of marine terminal operators. The mere fact that such provisions are common, or even prevalent, in marine terminal agreements and leases does not, in and of itself, establish that the practice is unjust or unreasonable.

In light of the current absence of any reliable factual information, denying *or* granting the Petition at this time would not appear appropriate. As noted above, more information concerning the facts and circumstances surrounding the negotiating process that gives rise to these provisions is necessary in order to determine their lawfulness. This would necessarily include consideration of whether the terminal operator in negotiating terminal leases and agreements exercises "monopolistic bargaining power." [2]

Additionally, there may be other considerations which, in a particular fact situation, may bear on the legality of exculpatory liability-shifting clauses in terminal leases and agreements. These considerations and circumstances also were not discussed in the Petition or comments to any sufficient degree. Accordingly, no factual basis exists here to support either granting or denying MSCA's Petition.

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agreements concerning such provisions, should be allowed. By separate notice published this date the Commission is issuing a final rule prohibiting exculpatory provisions in terminal tariffs without exception.

[2] The Commission has found that liability-shifting provisions in terminal tariffs are unreasonable if they are unilaterally imposed on a "take it or leave it" basis under conditions where there is an inequality of bargaining power between "users" and the terminal operators and where there is an obvious lack of consideration flowing to the "user" in exchange for assuming the terminal operator's liability. *See. Southeastern Maritime Co. v Georgia Ports Authority*, 23 S.R.R. 530, 546 (I.D. 1985), *adopted*, 23 S.R.R. 941, 944 (FMC 1986).

Therefore, it appears that some form of evidentiary proceeding is necessary to develop a full factual record upon which a reasoned decision on the Petition can be made. An informal notice and comment rulemaking does not produce the kind of factual record that, in the Commission's opinion, is necessary in this matter.

Formal or evidentiary rulemaking on the other hand provides for the taking of evidence concerning the issues that the Commission deems to be relevant at public hearings before an Administrative Law Judge and the issuance of an initial decision, with any recommended rule. *See*, 46 CFR 502.141. This would appear to be the most appropriate procedure here.

Therefore, the Commission has determined that the Petition for Rulemaking should be referred to an Administrative Law Judge to conduct an evidentiary hearing and issue an initial decision, based upon the entire record developed herein, including recommending any appropriate rule. Specifically, the hearing should address the following issues:

(1) Whether the practice of including exculpatory liability-shifting provisions in marine terminal leases and agreements is unjust and unreasonable in violation of section 10(d)(1) of the 1984 Act, or section 17 of the 1916 Act;

(2) Whether the Commission should by rule prohibit exculpatory liability-shifting provisions in marine terminal agreements and leases; and,

(3) Whether the Commission should allow any exceptions to such a prohibition if a prohibition is found to be warranted and necessary.

Therefore, it is ordered, that the Petition for Rulemaking is referred to the Commission's Office of Administrative Law Judges for the purpose of conducting a hearing and issuing an initial decision in accordance with this Order; and,

It is further ordered, that the hearing in this proceeding shall commence no later than May 4, 1987, an initial decision shall be issued no later than November 9, 1987 and a final decision shall be issued by the Commission no later than March 7, 1988; and,

It is further ordered, that all parties that filed comments in response to the original Petition for Rulemaking in this proceeding shall be permitted to participate in the hearing ordered above; and,

It is further ordered, that the Commission's Bureau of Hearing counsel is also made a party to this proceeding; and,

It is further ordered, that additional interested parties may be granted intervention in this proceeding in accordance with Rule 72 of the Commission's Rules of Practice and Procedure (46 CFR 502.72). By the Commission.

Joseph C. Polking,

Secretary.

[FR Doc. 86-28931 Filed 12-23-86; 8:45 am]

BILLING CODE 6730-01-M

Notices

Federal Register
Vol. 51, No. 247
Wednesday, December 24, 1986

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

December 19, 1986.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) An indication of whether section 3504(h) of Pub. L. 96-511 applies; (9) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, Room 404-W Admin. Bldg., Washington, DC 20250, (202) 447-2118.

Comments on any of the items listed should be submitted directly to: Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, Attn: Desk Officer for USDA.

If you anticipate commenting on a submission but find that preparation time will prevent you from doing so promptly, you should advise the OMB Desk Officer of your intent as early as possible.

Extension

• *Agricultural Marketing Service*
Dairy Promotion and Research Order
DA-15, DA-16, DA-17, DA-18, DA-19, DA-20, and DA-26
Recordkeeping; On occasion; Monthly; Annually
State or local governments; Farms; Businesses or other for-profits; Small businesses or organizations; 16,260 responses 8,412 hours; not applicable under 3504(h)
Vern Burkholder (202) 447-6932

• *Animal and Plant Health Inspection Service*
7 CFR 319, 321, 352—Foreign Quarantine Notices
PPQ 368, 533, 546, 564, 587 and 587(MD)
On occasion
Individuals or households; State or local governments; Farms; Businesses or other for-profit; Non-profit institution; Small businesses or organizations; 164,545 responses; 32,919 hours; not applicable under 3504(h)
Mr. William Forster (301) 436-5233

• *Animal and Plant Health Inspection Service*
9 CFR Part 166 Swine Health Protection
VS Form 13-15 and VS Form 13-16
Recordkeeping; On occasion
Farms; Small businesses or organizations; 224 responses; 136 hours; not applicable under 3504(h)
D.F. Schwindaman (301) 436-8438

New

• *Food and Nutrition Service*
Study of Implementation and Impact of Current School Lunch Income Verification Requirements
One-time survey
Individuals or households; 12,608 responses; 6,304 hours; not applicable under 3504(h)
David Goodwin (703) 756-3115

Reinstatement

• *Farmers Home Administration*
7 CFR 1951-G, Borrower Supervision, Servicing and Collection of Single Family Housing Loan Accounts
FmHA-1951-23
On occasion
Individuals or households; 13,000 responses; 5,665 hours; not applicable under 3504(h)
Jack Holston (202) 382-9736

• *Farmers Home Administration*
7 CFR 1951-A, Account Servicing Policies
FmHA-1951-39
On occasion
Individuals or households; Farms; Businesses or other for-profit; Small businesses or organizations; 28,030 responses; 51,024 hours; not applicable under 3504(h)
Jack Holston (202) 382-9736

Revision

• *Agricultural Marketing Service*
Honey Research, Promotion, and Consumer Information Order
Recordkeeping; On occasion; Monthly; semi-annually
Individuals or households; Farms; Businesses or other for-profit; Small businesses or organizations; 61,023 responses; 2,259 hours; not applicable under 3504(h)
Jerry Brooks (202) 447-5057

• *Animal and Plant Health Inspection Service*
National Animal Health Monitoring System (NAHMS)
NAHMS 1, NAHMS 2, NAHMS 3, CLOSEOUT NAHMS
Monthly; Annually
Farms; 22,500 responses, 6,750 hours; not applicable under 3504(h)
Dr. L.J. King (301) 436-8087

Donald E. Hulcher,
Acting Departmental Clearance Officer.

[FR Doc. 86-28932 Filed 12-23-86; 8:45 am]
BILLING CODE 3410-01-M

Office of the Secretary

Privacy Act of 1974; System of Records

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of New Privacy Act system of records.

SUMMARY: Notice is hereby given that USDA proposes to create a new Privacy Act system of records USDA/ASCS-28, entitled "Claims Data Base (Automated), USDA/ASCS."

EFFECTIVE DATE: This notice will be adopted without further publication in the **Federal Register** on January 23, 1987, unless modified by a subsequent notice to incorporate comments received from the public. A waiver of the review period provided for in 5 U.S.C. 552a(o), has been requested of the Office of Management and Budget. Although the Privacy Act requires only that the portion of the system which describes the "routine uses" of the system be published for comment, USDA invites comment on all portions of this notice. Comments must be received by the contact person listed below on or before January 23, 1987.

FOR FURTHER INFORMATION CONTACT: Dale R. Phillips, Department of Agriculture, Agricultural Stabilization and Conservation Service (ASCS), Fiscal Division, P.O. Box 2415, Washington, DC 20013, telephone (202) 447-4039.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act, 5 U.S.C. 552a, USDA is creating a new system of records to be maintained by the Agricultural Stabilization and Conservation Service (ASCS). The purpose of this notice is to announce the creation and character of this system of records maintained by ASCS for ASCS and Commodity Credit corporation (CCC). The system contains data on delinquent debts of agricultural producers. The purpose of this system is to provide ASCS Fiscal Division with the necessary information to ensure collection of the overdue debts of agricultural producers. Maintenance and use of this system is intended to increase the efficiency of the Fiscal Division in collecting these overdue debts.

A "Report on New System," required by 5 U.S.C. 552a(o), as implemented by OMB Circular A-130, was sent to the President of the Senate, the Speaker of the House of Representative and the Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget on December 19, 1986.

Signed at Washington, DC on December 17, 1986.

Richard E. Lyng,

Secretary of Agriculture.

USDA/ASCS-28

SYSTEM NAME:

Claims Data Base (Automated), USDA/ASCS.

SYSTEM LOCATION:

Kansas City Management Office, USDA/ASCS, 8930 Ward Parkway, Kansas City, MO 64114.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Agricultural producers.

CATEGORIES OF RECORDS IN THE SYSTEM:

Information identifying the delinquent debtor, such as name, address, producer identification number (social security number or taxpayer identification number); information relating to claim identification, such as claim control number, which is comprised of a State and county code and an alpha-numeric control number; codes identifying the type of claim and the basis for establishing the claim; identification of programs under which the claim arose; date the claim arose; loan, farm or contract number; interest rate applied to claim; the date interest on the claim starts and the principal amount of the claim; information related to claims actions and status changes which have occurred since the claims was initially established, such as transfers from originating ASCS office to other ASCS State or county offices and referrals to the Office of the General Counsel for legal action; termination of claims actions; changes in claim amount resulting from compromises, addition of collection or court costs and brief remarks which identify or clarify actions being taken by the ASCS office submitting the claim information.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

7 U.S.C. 1281-1393; 7 U.S.C. 1421-1449 and 15 U.S.C. 714-714p.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

USDA employees maintain and update the system with expanded claims data for assistance in preparation of the SF-220 report (Report on Status of Accounts and Loans Receivable from the Public) and the production of other debt management reports. (1) Referral to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting a violation of law, or of enforcing or implementing the statute, rule, regulation or order issued pursuant thereto, of any record within this system when information available indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by rule, regulation or order issued pursuant thereto. (2) Referral to the Department of Justice when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (3) Disclosure in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the court is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (4) Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office at the request of the individual. (5) Referral of delinquent commercial debt information, which is filed in the system, to a commercial credit reporting agency for it to make the information publicly available. Only that information directly related to the identity of the debtor and history of the claim will be released. Debtor information will consist of the following: the debtor's name, address, taxpayer identification number, and other information necessary to establish the identity of the debtor; the amount, status, and history of the claim, and the program under which the claim arose. (6) Referral to a collection or servicing contractor, or a local, State, or Federal agency, when ASCS determines a referral is appropriate for servicing or collecting the debtor's account or as provided for in contracts with servicing or collection agencies. (7) Referral to the Internal Revenue Service to enable it to offset and satisfy past-due, legally enforceable debts owed to USDA against Federal income tax refunds.

DISCLOSURES PURSUANT TO 5 U.S.C. 552A(B)(12):

Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the

Federal Claims Collection Act (31 U.S.C. 3701(a)(3)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Claims Data Base records are stored on disk files.

RETRIEVABILITY:

Records can be accessed by producer identification number (if available), farm number or State, county and claim number.

SAFEGUARDS:

On-line access to data in the Claims Data Base (Automated) is controlled by password protection. The data base is duplicated on magnetic tape files.

RETENTION AND DISPOSAL:

Claim records remain on the data base for four months after a claim has been zero-balanced, at which time the data is transferred from disk to tape files. The data is retained on tape files for one year. Data on magnetic tape files is then written over for disposal.

SYSTEM MANAGER(S) AND ADDRESS:

Director, Kansas City Management Office, ASCS, USDA, 8930 Ward Parkway, Kansas City, Missouri 64114.

NOTIFICATION PROCEDURE:

An individual may request information as to whether the system contains records pertaining to such individual from the Director, Kansas City Management Office, ASCS, USDA, 8930 Ward Parkway, Kansas City, Missouri 64114. A request for information regarding an individual should include: Full name, address, ZIP code, producer identification number (if available), farm number or claim number, and any other pertinent information to help identify the file. Before information about any record is released, the System Manager may require the individual to provide proof of identity or require the requester to furnish an authorization from the individual to permit release of information.

RECORD ACCESS PROCEDURES:

Same as notification procedure. An individual who wishes to request access to records in the system relating to that individual or who wishes to request correction of records believed to be in error should submit a written request to the System Manager. (The regulations governing access to records and contesting contents of records are set forth at 7 CFR 1.110–1.123).

CONTESTING RECORD PROCEDURES:

Same as record access procedures.

RECORD SOURCE CATEGORIES:

Records in this system come primarily from documents submitted by the ASCS county office maintaining farm records on the individual producer. Information in these records is obtained directly from the individuals in the system.

[FR Doc. 86-28870 Filed 12-23-86; 8:45 am]

BILLING CODE 3410-16-M

Privacy Act of 1974; Systems of Records; Debt Collection Act of 1982

AGENCY: Office of the Secretary, USDA.

ACTION: Notice of Revision of Privacy Act Systems of Records.

SUMMARY: The USDA hereby provides notice of intent to disclose certain information in the Privacy Act systems of records USDA/ASCS-7, entitled "County Office Employees Administrative Expense File—USDA/ASCS", and USDA/ASCS—24, entitled "Subsidiary Personnel, Pay and Travel Records-USDA/ASCS", on delinquent consumer debts to consumer credit reporting agencies, and to revise the routine uses of the system of records from which these disclosures will be made.

EFFECTIVE DATE: January 23, 1987. Written comments must be received by the contact person listed below on or before January 23, 1987.

FOR FURTHER INFORMATION CONTACT: Dale R. Phillips, Department of Agriculture, Agricultural Stabilization and Conservation Service (ASCS), Fiscal Division, P.O. Box 2415, Washington, DC 20013, telephone (202) 447-4039.

SUPPLEMENTARY INFORMATION: Pursuant to the Privacy Act, 5 U.S.C. 552a, ASCS maintains the systems of records, USDA/ASCS-7, entitled "County Office Employees Administrative Expense File" and USDA/ASCS-24, entitled "Subsidiary Personnel, Pay and Travel Records". The records that are kept in USDA/ASCS-7 consist of personnel, travel and pay information on ASCS county and community committee members, and ASCS county office employees. The records that are kept in USDA/ASCS-24 consist of personnel, travel and pay information on ASCS employees.

USDA is publishing notice of "Disclosures Pursuant to 5 U.S.C. 552a(b)(12)" related to overdue debts of employees and individuals. Disclosure may now be made from these systems to "consumer reporting agencies", as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act (31 U.S.C. 3701(a)(3)).

Before disclosing delinquent consumer debtor information, ASCS will follow the due process requirements established in 31 U.S.C. 3711(f), as implemented by 4 CFR 102.5 of the Federal Claims Collection Standards. Only that information directly related to the identity of the debtor and the history of the claim will be released. Debtor information will consist of the following: name, address, taxpayer identification number, and other information necessary to establish the identity of the individual or employee; the amount, status, and history of the claim, and the program under which the claim arose.

Two new routine uses are to be added to USDA/ASCS-24. The first allows release of information from the system to congressional offices from the record of an individual in response to an inquiry from the congressional office at the request of that individual. The second routine use allows release, in limited circumstances, of information to federal, state, local or foreign agencies charged with investigating or prosecuting a violation of law, or of enforcing or implementing a statute, rule or regulation issued pursuant to that law.

In addition, USDA is also publishing new routine uses to inform the public of the uses to be made of information in the system.

Four routine uses are being added to both USDA/ASCS-7 and USDA/ASCS-24. The first routine use allows information contained in both systems of records to be reported to collecting or servicing contractors or other government agencies when ASCS or CCC determines that it is appropriate for servicing a debtor's account. Release of information under this routine use is authorized by the Debt Collection Act. The second and third routine uses allow information which is relevant and necessary to litigation to be disclosed, in certain limited circumstances, to the Department of Justice and in proceedings before a court or adjudicative body. These uses are being promulgated to address concerns expressed by the district court in *Krohn v. Department of Justice*, Civil No. 78-1536 (D.D.C. March 19, 1984) and is designed to restrict the amount of information released during litigation. The fourth routine use is authorized by the Spending Reduction Act of 1984 which established a tax refund offset program by which agencies could request that tax refunds of persons indebted to it be reduced by the amount of the debt with the amount offset being paid instead to the creditor agency. The CCC and ASCS are participating in this program.

Accordingly, USDA revises the full texts of the systems of records, USDA/ASCS-7, "County Office Employees Administrative Expense File, USDA/ASCS", (Privacy Act Issuances, 1984 Compilation, Volume 1, page 8) and USDA/ASCS-24, "Subsidiary Personnel, Pay and Travel Records—USDA/ASCS", (Privacy Act Issuances, 1984 Compilation, Volume 1, page 14) to read as printed below.

Signed at Washington, DC on December 17, 1986.

Richard E. Lyng,

Secretary of Agriculture.

USDA/ASCS-7

SYSTEM NAME:

County Office Employees Administrative Expense File, USDA/ASCS.

SYSTEM LOCATION:

Kansas City Management Office, USDA/ASCS, 8930 Ward Parkway, Kansas City, MO 64114.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

ASCS county and community committee members, and employees who are employed in county ASCS offices on a full or part-time basis.

CATEGORIES OF RECORDS IN THE SYSTEM:

The system contains the names of all county ASCS committee members and employees and information such as: Identifying number (social security number); race code; sex code; county code; biweekly amount of payroll check, including deduction amounts for FICA, Federal, State and local withholding, FEHBA, FEGLI (Optional), NASCOE dues, and bonds. Also records of the date of birth; CO grade and step; service computation; date of last WGI; health code; cumulative and current retirement deduction; and date severance pay ceases.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

16 U.S.C. 590.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) Referral to Internal Revenue Service for total annual income as required by the Internal Revenue Code. (2) Referral to State Revenue Board and local tax authorities for tax withholding or as required by Internal Revenue Code. (3) Referral to Office of Personnel Management for fringe benefits withholdings, 5 U.S.C. 8331, 8701, 8901. (4) Referral to Social Security Administration for FICA withholdings. (5) Referral to the general public in annual directories of county committee members. (6) Referral annually of summary data produced on microfilm to the Federal Civilian Personnel Records Center, St. Louis, Missouri, as a permanent record of employee's service with ASCS. (7) Referral to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting a violation of law, or of enforcing or implementing the status, rule, regulation or order issued pursuant thereto, of any record within this system when information available indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by rule, regulation or order issued pursuant thereto. (8) Referral to the Department of Justice when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (9) Disclosure in a proceeding before a court of adjudicative body before which the agency is authorized to appear, when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the court is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (10) Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office at the request of the individual. (11) Referral to a collection or servicing contractor, or a local, State, or Federal agency, when ASCS determines a referral is appropriate for servicing or collecting the debtor's account or as provided for in contracts with servicing or collection agencies. (12) Referral to the Internal Revenue Service to enable it to offset and satisfy past-due, legally enforceable debts owed to USDA against Federal income tax refunds.

DISCLOSURES PURSUANT TO 5 U.S.C. 552A(B)(12):

Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act (31 U.S.C. 3701(a)(3)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEMS:

STORAGE:

Stored on magnetic tape by the Kansas City Computer Center, 8930 Ward Parkway, Kansas City, Missouri 64114.

RETRIEVABILITY:

Records are indexed by social security number.

SAFEGUARDS:

Records are kept in a fireproof vault in a secured area of the building.

RETENTION AND DISPOSAL:

Maintained indefinitely on a currently updated basis.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Administrator, Management, ASCS, USDA, P.O. Box 2415, Washington, DC 20013.

NOTIFICATION PROCEDURE:

An individual may inquire as to whether this system contains records pertaining to such individual from the Director, Kansas City Management Office, ASCS, USDA, 8930 Ward Parkway, Kansas City, Missouri 64114. A request for information regarding an individual should include: full name, address, ZIP code, social security number, and the ASCS county office where the employee/committee member is employed. Before information about any record is released, the System

Manager may require the individual to provide proof of identity or require the requester to furnish an authorization from the individual to permit release of information.

RECORD ACCESS PROCEDURES:

Same as notification procedures. An individual who wishes to request access to records in the system relating to that individual or who wishes to request correction of records believed to be in error should submit a written request to the appropriate official referred to in the preceding paragraph. (The regulation governing access to records and contesting contents of records are set forth at 7 CFR 1.110–1.123).

CONTESTING RECORD PROCEDURES:

Same as record access procedure.

RECORD SOURCE CATEGORIES:

Information in these records is based primarily on information obtained directly from the employee, and comes from scannable documents prepared by the ASCS county office where the individual is employed.

USDA/ASCS-24

SYSTEM NAME:

Subsidiary Personnel, Pay and Travel Records—USDA/ASCS.

SYSTEM LOCATION:

Any ASCS office where individual is employed at the address shown in the local telephone directory under the heading, "United States Government, Department of Agriculture, Agricultural Stabilization and Conservation Service."

CATEGORIES OF INDIVIDUAL COVERED BY THE SYSTEM:

Individual employed by ASCS, except county office employees and committee members.

CATEGORIES OF RECORDS IN THE SYSTEM:

Agency copies of personnel actions, training records, performance ratings, earnings statements, time and attendance reports, travel authorizations and vouchers, payroll deduction records, service record cards, record of accountable documents charged to employee, appeal cases, and conflict of interest statements.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301; 7 CFR 2.65.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

(1) Answer inquiries from prospective employers when employee gives immediate supervisor or co-worker as reference. (2) Referral to the appropriate agency, whether Federal, State, local or foreign, charged with the responsibility of investigating or prosecuting a violation of law, or of enforcing or implementing the statute, rule, regulation or order issued pursuant thereto, of any record within this system when information available indicates a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by rule, regulation or order issued pursuant thereto. (3) Referral to the Department of Justice when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the Department of Justice has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the use of such records by the Department of Justice is deemed by the agency to be relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the Department of Justice is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (4) Disclosure in a proceeding before a court or adjudicative body before which the agency is authorized to appear, when (a) the agency, or any component thereof; or (b) any employee of the agency in his or her official capacity; or (c) any employee of the agency in his or her individual capacity where the agency has agreed to represent the employee; or (d) the United States, where the agency determines that litigation is likely to affect the agency or any of its components, is a party to litigation or has an interest in such litigation, and the agency determines that use of such records is relevant and necessary to the litigation, provided, however, that in each case, the agency determines that disclosure of the records to the court is a use of the information contained in the records that is compatible with the purpose for which the records were collected. (5) Disclosure may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office at the request of the individual. (6) Referral to a collection or servicing contractor, or a local, State, or Federal agency, when ASCS determine a referral is appropriate for servicing or collecting the debtor's account or as provided for in contracts with servicing or collection agencies. (7) Referral to the Internal Revenue Service to enable it to offset and satisfy past-due, legally enforceable debts owed to USDA against Federal income tax refunds.

DISCLOSURES PURSUANT TO 5 U.S.C. 552A(B)(12):

Disclosures may be made from this system to "consumer reporting agencies" as defined in the Fair Credit Reporting Act (15 U.S.C. 1681a(f)) or the Federal Claims Collection Act (31 U.S.C. 3701(a)(3)).

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Maintained in file folders at addresses referenced above.

RETRIEVABILITY:

Indexed by name of individual employee.

SAFEGUARDS:

Kept in file cabinets at addresses referenced above.

RETENTION AND DISPOSAL:

Maintained in active status during the employee's tenure at the organizational entity. After transfer or separation, maintained in inactive status to be used to answer employment inquiries. Conflict of interest statement retained 2 years after employee is separated.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Administrator, Management, ASCS, USDA, P.O. Box 2415, Washington, DC 20013.

NOTIFICATION PROCEDURE:

An individual may inquire as to whether this system contains records pertaining to him by contacting the head of the office where the records are located. If the specific location of the records is not known, the individual should address his request to the Director, Information Division, ASCS, USDA, P.O. Box 2415, Washington, DC 20013, who, if necessary, will refer it to the appropriate office. A request for information pertaining to an individual should contain: full name, address, ZIP code, taxpayer identification number, name of the system of records, year of records in question, and any other pertinent information to help identity the file. Before information about any record is released, the System Manager may require the individual to provide proof of identify or require the requester to furnish an authorization from the individual to permit release of information.

RECORD ACCESS PROCEDURES:

Same as notification procedure. An individual who wishes to request access to records in the system relating to that individual or who wishes to request correction of records believed to be in error should submit a written request to the System Manager. (The regulations governing access to records and contesting contents of records are set forth at 7 CFR 1.110–1.123).

CONTESTING RECORD PROCEDURES:

Same as record access procedures.

RECORD SOURCE CATEGORIES:

Information in these records is obtained directly from the employee, the Office of Personnel Management, and agency-initiated documents.

[FR Doc. 86-28871 Filed 12-23-86; 8:45 am]

BILLING CODE 3410-18-M

Federal Grain Inspection Service

Advisory Committee Meeting

Pursuant to the provisions of section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), a notice is hereby given of the following committee meeting:

Name: Federal Grain Inspection Service Advisory Committee.

Date: January 20, 1987.

Place: U.S. Department of Agriculture, 1400 Independence Avenue SW., Room 3501 South Building, Washington, DC 20250.

Time: 8:30 a.m.

Purpose: To provide advice to the Administrator of the Federal Grain Inspection Service on the efficient and economical implementation of the U.S. Grain Standards Act of 1976, in order to assure the normal movement of grain in an orderly and timely manner.

The agenda includes: (1) An FGIS update on the "Commitment to Quality" report, (2) financial matters, (3) implementation of the Grain Quality Improvement Act of 1986, (4) a wheat classification update, and (5) other matters.

The meeting will be open to the public. Public participation will be limited to written statements unless otherwise requested by the Committee Chairman. Persons, other than members, who wish to address the Committee at the meeting or submit written statements before or at the meeting should contact W. Kirk Miller, Administrator, FGIS, U.S. Department of Agriculture, Washington, DC 20250, telephone (202) 382-0219.

Dated: December 19, 1986.

W. Kirk Miller,

Administrator.

[FR Doc. 86-28933 Filed 12-23-86; 8:45 am]

BILLING CODE 3410-EN-M

DEPARTMENT OF COMMERCE

Agency Form Under Review by the Office of Management and Budget (OMB)

DOC has submitted to OMB for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: Economic Development Administration, Commerce.

Title: Special Adjustment Assistance Application

Form Number: Agency—ED-540; OMB—0610-0058

Type of Request: Revision of a currently approved collection

Burden: 75 respondents; 406 reporting hours

Needs and Uses: The information is needed to receive funds under the Title IX Program of the Economic Development Administration. The Program responds to both sudden and long-term economic dislocation in particular communities. New and specific information is required from each applicant to identify the problems to be addressed and possible solutions. No other program in the Agency is designed to address these special adjustment needs.

Affected Public : State or local and non-profit institutions

Frequency: Annually

Respondent's Obligation: Required to obtain or retain a benefit

OMB Desk Officer: Timothy Sprehe, 395-4814

Copies of the above information collection proposal can be obtained by calling or writing DOC Clearance Officer, Edward Michals, (202) 377-4217, Department of Commerce, Room 6622, 14th and Constitution Avenue NW., Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent to Timothy Sprehe, OMB Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503.

Dated: December 17, 1986.

Ed Michaels,

Departmental Clearance Officer, Information Management Division, Office of Information Resources Management.

[FR Doc. 86-28914 Filed 12-23-86; 8:45 am]

BILLING CODE 3510-CW-M

National Oceanic and Atmospheric Administration

[Modification No. 1 to Permit No. 467]

Marine Mammals; Permit Modification; Dr. Herman M. Louis (P166B)

Notice is hereby given that, pursuant to the provisions of § 216.33 (d) and (e) of the Regulationis Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), Scientific Research Permit No. 467 issued to Dr. Louis M. Herman, Kewalo Basin Marine Mammal Laboratory, University of Hawaii, 1129 Ala Moana Boulevard, Honolulu, Hawaii 96814, on May 18, 1984 (49 FR 22369) is modified as follows:

Section B.5 is replaced by:

5. This Permit is valid with respect to the taking authorized herein until December 31, 1988. The terms and conditions of this Permit (Sections B and C) shall remain in effect as long as one of the marine mammals taken hereunder is maintaned in captivity under the authority and responsibility of the Permit Holder.

This modification becomes effective December 24, 1986.

Documents submitted in connection with the above Permit and modification are available for review in the following offices:

Protected Species Division, National Marine Fisheries Service, 1825 Connecticut Avenue NW., Room 805, Washington, DC;

Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, California 90731-7415; and

Director, Southeast Region, National Marine Fisheries Service, 9450 Koger Boulevard, St. Petersburg, Florida 33702.

Dated: December 16, 1986.

Richard B. Roe,

Director, Office of Fisheries Management, National Marine Fisheries Service.

[FR Doc.86-28904 Filed 12-23-86; 8:45 am]

BILLING CODE 3510-22-M

[Modification No. 1 to Permit No. 564]

Marine Mammals; Permit Modification; Dr. Sidney Lees (P382)

Notice is hereby given that, pursuant to the provisions of § 216.33 (d) and (e) of the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR Part 216), and § 220.24 of the regulations on endangered species (50 CFR Parts 217 through 227), Scientific Research Permit No. 564 issued to Dr. Sidney Lees, Bioengineering

Department, Forsyth Dental Center, 140 Fenway, Boston, Massachusetts 02115, on August 28, 1986 (51 FR 31962) is modified as follows:

Section B.5 is replaced by:

5. The authority to import this material shall extend from the date of issuance through March 31, 1987. The terms and conditions of this Permit shall remain in effect as long as the material imported hereunder is maintained under the authority and responsibility of the Pemit Holder.

The modification becomes effective December 24, 1986.

As required by the Endangered Species Act of 1973 issuance of this modification is based on a finding that such modification:

(1) Was applied for in good faith, (2) will not operate to the disadvantage of the endangered species which is the subject of the modification, and (3) will be consistent with the purposes and policies set forth in section 2 of the Endangered Species Act of 1973. This modification was issued in accordance with, and is subject to Parts 220 through 222 of Title 50 CFR of the National Marine Fisheries Service regulations governing endangered species permits (39 FR 41367), November 27, 1974.

Documents submitted in connection with the above Permit and modification are available for review in the following offices:

Protected Species Division, National Marine Fisheries Service, 1825 Connecticut Avenue NW., Room 805, Washington, DC; and
Director, Northeast Region, 14 Elm Street, Federal Building, Cloucester, Massachusetts 01930.

Date: December 16, 1986.

Richard B. Roe,

Director, Office of Fisheries Management, National Marine Fisheries Service.

[FR Doc. 86-28905 Filed 12-23-86 8:45 am]

BILLING CODE 3510-22-M

DEPARTMENT OF DEFENSE

Corps of Engineers, Department of the Army

Intent To Prepare a Draft Environmental Impact Statement (DEIS) for Navigation Improvements at Bayou La Batre, AL

AGENCY: U.S. Army Corps of Engineers, DOD.

ACTION: Notice of intent to prepare a DEIS.

SUPPLEMENTARY INFORMATION:

1. Proposed Action

The proposed action is to prepare a DEIS to evaluate the environmental impact of providing navigation improvements at Bayou La Batre, Alabama.

2. Alternatives

The following basic alternatives will be evaluated:

a. No action—This alternative will be the "without" project conditions against which impacts will be measured.

b. Deepening and widening of the Bayou La Batre Harbor channels to include depths up to 22 feet.

c. Various dredged material disposal concepts including: upland, Gulf of Mexico, open water in Mississippi Sound, and island nourishment.

3. Scoping Process

a. The scoping process, as outlined by the Council on Environmental Quality in the November 29, 1978 **Federal Register**, National Environmental Policy Act—Regulations, will be utilized to involve Federal, State, and local agencies and other interested persons. Identification of significant issues to be addressed in the EIS will be determined through the scoping process. The agencies and individuals' views and concerns will be obtained through personal, telephone, and mail contact in lieu of a formal scoping meeting.

b. Coordination with the U.S Fish and Wildlife Service, as required by the Fish and Wildlife Coordination Act and the Endangered Species Act, is being undertaken. Coordination required by other laws and regulations will also be conducted.

4. DEIS Preparation

It is estimated that the DEIS will be available to the public in September 1987.

ADDRESS: Questions about the proposed action and DEIS can be answered by: Dr. Susan Ivester Rees, PD-EC, U.S. Army Engineer District, Mobile, P.O. Box 2288, Mobile, Alabama 36628.

Dated: December 10, 1986.

Roy A. Prince,

Lieutenant Colonel, CE, Acting District Engineer.

[FR Doc. 86-28858 Filed 12-23-86; 8:45 am]

BILLING CODE 3710-CR-M

Department of the Navy

Public Information Collection Requirement Submitted to OMB for Review

SUMMARY: The Department of Defense has submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Each entry contains the following information: (1) Type of Submission; (2) Title of Information Collection and Form Number if applicable; (3) Abstract statement of the need for and the uses to be made of the information collected; (4) Type of Respondent; (5) An estimate of the number of responses; (6) An estimate of the total number of hours needed to provide the information; (7) To whom comments regarding the information collection are to be forwarded; (8) The point of contact from whom a copy of the information proposal may be obtained.

Extension

Marine Corps Advertising Awareness and Attitude
Tracking Study
None

The collection of information will provide unique data on the awareness of Marine Corps Advertising, the awareness of benefits and advantages offered for joining the Marine Corps, perceptions of specific attributes and benefits of joining the Marine Corps and the general opinion of the Marine Corps.

Individuals
Responses 500
Burden hours 165

ADDRESSES: Comments are to be forwarded to Mr. Edward Springer, Office of Management and Budget, Desk Officer, Room 3235, New Executive Office Building, Washington, DC 20503 and Mr. Daniel J. Vitiello, DOD Clearance Officer, WHS/DIOR, 1215 Jefferson-Davis Highway, Suite 1204, Arlington, VA 22202-4302, telephone (202) 746-0933.

FOR FURTHER INFORMATION CONTACT: A copy of the information collection proposal may be obtained from Captain Frank L. Henry, Headquarters, U.S. Marine Corps, Washington, DC 20380-0001, telephone (202) 694-1786.

Patricia H. Means,

OSD Federal Register Liaison Officer, Department of Defense.

December 18, 1986.

[FR Doc. 86-28836 Filed 12-23-86; 8:45 am]

BILLING CODE 3810-01-M

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Federal Acquisition Regulation (FAR); Information Collection Under OMB Review

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Notice.

SUMMARY: Under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. Chapter 35), the Federal Acquisition Regulation (FAR) Secretariat has submitted to the Office of Management and Budget (OMB) a request to review and approve a new information collection.

ADDRESS: Send comments to Franklin S. Reeder, FAR Desk Officer, Room 3235, NEOB, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Mr. C.W. Mathews, Office of Federal Acquisition and Regulatory Policy, GSA, (202) 523-3856.

SUPPLEMENTARY INFORMATION:

a. Purpose

Rights in Data is a regulation which concerns the rights of the Government and organizations, with which the Government contracts, to information developed under such contracts. The delineation of such rights is necessary in order to protect the contractor's rights to not disclose proprietary data, and to ensure that data developed with public funds is available to the public.

b. Annual Reporting Burden

This is estimated as follows: Respondents, 1,100; responses per respondent, 1; total annual responses, 1,100; hours per response, 2.7; total reporting hours, 3,000; and total recordkeeping hours, 27,000.

Obtaining Copies of Proposals

Requesters may obtain copies from the FAR Secretariat (VRS), Room 4041, GSA Building, Washington, DC 20405, telephone (202) 523-4755. Please cite proposal pending OMB approval of recordkeeping requirements concerning FAR Subpart 27.4, Rights in Data and Copyrights.

Dated: December 18, 1986.

Margaret A. Willis,

FAR Secretariat.

[FR Doc. 86-28869 Filed 12-23-86; 8:45 am]

BILLING CODE 6820-61-M

DEPARTMENT OF EDUCATION

Intergovernmental Advisory Council on Education; Meeting

AGENCY: Intergovernmental Advisory Council on Education.

ACTION: Notice of meeting.

SUMMARY: This notice sets forth the schedule and proposed agenda of a forthcoming meeting of the Intergovernmental Advisory Council on Education. This notice also describes the functions of the Council. Notice of this meeting is required under section 10(a)(2) of the Federal Advisory Committee Act. This document is intended to notify the general public of their opportunity to attend and that a portion of the meeting will be closed to the public.

DATE: January 12, 1987.

ADDRESS: Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: Dr. James G. Horn, Executive Director (A), Intergovernmental Advisory Council on Education, 513 Reporter's Building, 300 7th Street, SE., Washington, DC 20202.

SUPPLEMENTARY INFORMATION: The Intergovernmental Advisory Council on Education was established under section 213 of the Department of Education Organization Act (20 U.S.C. 3423). The Council was established to provide assistance and make recommendations to the Secretary and the President concerning intergovernmental policies and relations pertaining to education.

A portion of the Council meeting on January 12, 1987 will be closed to the public for discussions about the Council's recommendation to the Secretary for the appointment of an Executive Director. The meeting will be closed under the authority of section 10(d) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. Appendix 2) and under exemption (6) of section 3(a) of the Government in the Sunshine Act (Pub. L. 94-409; 5 U.S.C. 552b(c)(6). The discussion of the recommendation to the Secretary will touch upon matters that would disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy if conducted in an open session.

A summary of the activities at the closed session and related matters which are informative to the public consistent with the policy of Title 5 U.S.C. 552b will be available to the public within fourteen days of the meeting.

The proposed agenda includes:

—Recommendation to the Secretary for appointment of an Executive Director
—Old and New Business

Records are kept of all Council proceedings, and are available for public inspection at the Intergovernmental Advisory Council on Education, 513 Reporter's Building, 300 7th Street, SW., from 9:00 a.m. to 5:00 p.m.

Signed at Washington, DC on December 19, 1986.

Peter R. Greer,

Deputy Under Secretary.

Tentative Agenda—Intergovernmental Advisory Council On Education, January 12, 1987, Department of Education, 400 Maryland Avenue, SW., Washington, DC 22020

I. Discussion of Council's recommendation to the Secretary for the appointment of an Executive Director
II. Old Business
A. Committee Reports
1. Update of efforts to place IACE under GEPA
2. Review of Job Training Task Force Report
3. Reports from other Committees
III. New Business

Agenda item I will be closed to the public.

[FR Doc. 86-28902 Filed 12-23-86; 8:45 am]

BILLING CODE 4000-01-M

DEPARTMENT OF ENERGY

Bonneville Power Administration

Extension of Public Comment Period on the Proposed Intertie Access Policy and the Draft Intertie Development and Use Environmental Impact Statement

AGENCY: Bonnville Power Administration (BPA), DOE.

ACTION: Extension of public comment period.

SUMMARY: In response to public inquiries and comments, BPA is extending the public comment period on both the Proposed Intertie Access Policy and the Draft Intertie Development and Use Environmental Impact Statement (51 FR 39904, November 3, 1986).

DATES: The comment period will end at 5 p.m., January 16, 1987.

ADDRESS: Written comment should be submitted to Ms. Donna L. Geiger, Public Involvement Manager, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Danley, Public Involvement office, at the address listed above, 503–230–3478. Oregon callers may use 800–452–8429; callers in California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming may use 800–547–6048. Information may also be obtained from:

Mr. George Gwinnutt, Lower Columbia Area Manager, Suite 288, 1500 Plaza Building, 1500 NE. Irving Street, Portland, Oregon 97232, 503–230–4551;

Mr. Ladd Sutton, Eugene District Manager, Room 206, 211, East Seventh Avenue, Eugene, Oregon 97401, 503–687–6952;

Mr. Wayne Lee, Upper Columbia Area Manager, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509–456–2518;

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406–329–3060;

Mr. Ronald K. Rodewald, Wenatchee District Manager, P.O. Box 741, Wenatchee, Washington 98801, 509–662–4377, extension 379;

Mr. Terry Esvelt, Puget Sound Area Manager, 415 First Avenue North, Room 250, Seattle, Washington 98109, 206–442–4130;

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, West 101 Poplar, Walla Walla, Washington 99362, 509–522–6226;

Mr. Robert N. Laffel, Idaho Falls District Manager, 531 Lomax Street, Idaho Falls, Idaho 83401, 208–523–2706; and

Mr. Friederic D. Rettenmund, Boise District Manager, Room 376, 550 West Fort Street, Boise, Idaho 83724, 208–334–9137.

Issued in Portland, Oregon, on December 19, 1986.

Roger E. Seifert,

Deputy Assistant Administrator, Bonneville Power Administration, Washington, DC Office.

[FR Doc. 86–29086 Filed 12–23–86; 8:54 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket No. CP83-14-123]

Northern Natural Gas Co., Division of Internorth Inc.; Request for Public Comment

December 19, 1986.

On December 8, 1986, the U.S. Court of Appeals for the District of Columbia Circuit remanded the record in *Northern Natural Gas Company* v. *F.E.R.C.*, 780 F.2d 59 (D.C. Cir. 1985), *on rehearing en banc*, No. 84–1516, to the Federal Energy Regulatory Commission. Under review in that proceeding are two Commission orders: *Northern Natural Gas Company*, Docket No. CP83–14–000, "Order Approving Flexible Rates," 27 FERC ¶ 61,299 (1984), and *Northern Natural Gas Company*, Docket No. CP83–14–039, "Order Denying Rehearing," 28 FERC ¶ 61,230 (1984).

In the orders under review, the Commission granted Northern Natural Gas Company, Division of Internorth Inc. (Northern) a certificate of public convenience and necessity pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. 717 f(c), to sell natural gas under two new rate schedules at flexible, discount rates to existing customers with alternate fuel capability. The Commission conditioned the certificate to require that Northern credit to its non-discount customers all fixed costs recovered by the discount sales until Northern's next rate case.

In *Northern Natural* v. *F.E.R.C.*, a panel of the court held that the revenue crediting requirement fell outside the scope of the Commission's authority in a section 7 certification proceeding as delineated by the court's opinion in *Panhandle Eastern Pipeline Company* v. *F.E.R.C.*, 613 F.2d 1120 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 889 (1980). The issue before the *en banc* court on rehearing is wherther the court should continue to adhere to its decision in *Panhandle* that the Commission may not, when issuing a certificate, use its conditioning authority under section 7(e) of the Natural Gas Act to alter rates previously approved by the Commission for customers that will not receive service under that certificate.

The court's order directs the Commission to respond to the following questions regarding Northern's application to implement its discount, flexible rate sales program for existing customers:

1. Whether the Commission has jurisdiction pursuant to 7 of the Natural Gas Act to entertain petitioner's application or whether such an application must be filed pursuant to 4 of the Act.

2. Whether petitioner's application sought authorization to provide a new sale or service and, if so, what new sale or service would be provided pursuant to that authorization.

3. What criteria the Commission employs in determining whether an application submitted pursuant to 7 seeks authorization to provide a new sale or service.

4. If the Commission determines that it may entertain an application pursuant to 7 for a reason other than that the provision of a new sale or service is involved, what criteria are used in making that determination.

The court's order suggests that the Commission, prior to preparing its responses, invite comment as to whether the Commission has jurisdiction pursuant to section 7 of the Natural Gas Act to entertain Northern's application. Accordingly, the Commission invities all interested persons to submit written comments, views, and arguments on the issues raised by the court's questions. Since the court's order directs the Commission to respond by February 17, 1987, all comments must be received by the Commission by 4:30 p.m., January 15, 1987, to allow time for their consideration.

Comments must be submitted to the Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, and reference Docket No. CP83–14–123. An original and 14 copies should be filed.

All comments will be placed in the public file for Docket No. CP83–14–123 and available for public inspection in the Division of Public Information, Room 1000, 825 North Capitol Street, NE., Washington, DC., during regular business hours.

Kenneth F. Plumb,

Secretary.

[FR Doc. 86–28924 Filed 12–23–86; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. ER87-59-000 et al.]

San Diego Gas & Electric Co. et al.

December 18, 1986

Take notice that the following filings have been made the Commission:

1. San Diego Gas and Electric Co.

[Docket No. ER87–59–000]

Take notice that on December 5, 1986 San Diego Gas and Electric Company (SDG&E) tendered for filing Amended Exhibit A to the Interchange Agreement between SDG&E and Deseret Generation and Transmission Cooperative (Deseret).

In addition, SDG&E tendered for filing an Amended Exhibit A as supplements to the following Rate Schedules:

(1) Interconnection and Exchange Agreement with Imperial Irrigation District (IID); Supplement No. 1 to Supplement No. 6 to Rate Schedule FERC No. 65.

(2) Interconnection Agreement with Public Service Company of New Mexico

(PNM); Supplement No. 2 to Supplement No. 1 to Rate Schedule FERC No. 68.

(3) Power Coordination Agreement with Arizona Public Service Company (APS); Supplement No. 1 to Rate Schedule FERC No. 70.

Amended Exhibit A provides that incremental fuel cost is to be based on current, rather than historical, fuel expenses.

SDG&E requests Waiver of the Commission's prior notice requirements and an effective date of November 1, 1986 for each Amended Exhibit A.

Copies of this filing were served upon the Public Utilities Commission of the State of California, Deseret, IID, PNM and APS.

Comment date: December 31, 1986, in accordance with Standard Paragraph E at the end of this notice.

2. Boston Edison Co.)

[Docket No. ER87-159-000]

Take notice that on December 15, 1986, Boston Edison Company (Boston Edison) of Boston, Massachusetts, submitted Supplement 1 to its Rate Schedule No. 68 for the sale of unit power from its Pilgrim Nuclear unit to Commonwealth Electric Company (Commonwealth). The purpose of this filing is to implement Section C-6.3.1 of the Unit power contract to charge for decommissioning charges.

Boston Edison requests waiver of the sixty day notice period. Boston Edison states that copies of this filing have been served on Commonwealth and on the Massachusetts Department of Public Utilities.

Comment date: December 31, 1986, in accordance with Standard Paragraph E at the end of this notice.

3. Bolston Edison Co.

[Docket No. ER87-160-000]

Take notice that on December 15, 1986, Boston Edison Company (Boston Edison) of Boston, Massachusetts, submitted Supplement 1 to its Rate Schedule No. 113 for the sale of unit power from its Pilgrim Nuclear unit to Reading Municipal Light Department (Reading). The purposes of this filing is to implement Section C-6.3.1 of the Unit power contract to charge for decommissing charges.

Boston Edison requests waiver of the sixty day notice period. Boston Edison states that copies of this filing have been served on Reading an d on the Massachusetts Department of Public Utilities.

Comment date: December 31, 1986, in accordance with Standard Paragraph E at the end of this notice.

4. Kansas Gas and Electric Co.

[Docket No. ER86-696-001]

Take notice that Kansas Gas and Electric Company (KG&E) on November 10, 1986 tendered for filing additional data with respect to a Settlement Agreement and proposed Transmission Service Agreement superseding FERC Rate Schedule No. 157 between KG&E and the City of Girard, Kansas (City).

This filing is necessary as a result of a deficiency letter issued by the Director of the Division of Electric Power Application Review.

Copies of the filing were served upon the City of Girard, Kansas and the Utilities Division of the Kansas Corporation Commission.

Comment date: December 31, 1986, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

Kenneth F. Plumb,

Secretary.

[FR Doc. 86-28872 Filed 12-23-86; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP87-128-000, et al.]

Transcontinental Gas Pipe Line Corp., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Transcontinental Gas Pipe Line Corp.

[Docket No. CP87-128-000]

December 17, 1986.

Take notice that on December 15, 1986, Transcontinental Gas Pipe Line Corporation (Applicant), P.O. Box 1396, Houston, Texas 77251, filed in Docket No. CP87-128-000 an application pursuant to section 7 of the natural Gas Act, as amended, and the rules and regulations of the Federal Energy Regulatory Commission for a limited-term certificate of public convenience and necessity, with pre-granted abandonment authority, authorizing Applicant to transport natural gas to its distribution customer, Union Gas Company (Union), for the account of Carbonaire Co., Inc. (Carbonaire), all as more fully set forth in the application which is on file with the Commission and open for public inspection.

Specifically, Applicant is requesting authorization to transport to Union on behalf of Carbonaire, quantities of natural gas up to 4,000 dt equivalent of natural gas per day pursuant to a transportation agreement among Transco, Carbonaire and Union.

It is explained that Carbonaire would purchase the gas to be transported hereunder from Transco Energy Marketing Company (TEMCO) and/or Mississippi Fuel Gas Company (Mississippi Fuel), each of which can deliver gas to Applicant. Applicant indicates that pursuant to the transportation agreement, Applicant would receive the gas at the existing points of interconnection between Applicant and the TEMCO producer-sellers and/or Mississippi Fuel's delivery point, and would deliver equivalent quantities (less quantities retained for compressor fuel and line loss make-up) at the existing point of delivery to Union at Palmerton near Wind Gap, Monroe County, Pennsylvania, and that Union would in turn deliver such gas to Carbonaire for use in its production facilities in Palmerton, Pennsylvania (Palmerton facilities).

Applicant states that its Compressor Station No. 65, located on its main line at the Louisiana-Mississippi border, represents the terminu of its gas production area and the beginning of the market area. Applicant indicates that the proposed transportation from Station No. 65 north to Union would be on a firm basis and from south of Station No. 65, in the production area, would be on an interruptible basis.

Applicant avers that the instant application is closely related to its proceeding in Docket No. CP86-747-000, wherein Applicant was authorized to transport up to the dt equivalent of 3,000 Mcf of gas per day for New Jersey Zinc Company, Inc. (New Jersey Zinc), on a firm basis. It is indicated that Carbonaire's Palmerton facilities are located at, and totally enclosed within, New Jersey Zinc's plant at Palmerton, which furnished Carbonaire with a variety of services, including steam, water and electicity, but not natural gas which Carbonaire requires as a feedstock for the production of carbon dioxide and ammonia.

It is stated that absent transportation by Applicant of a reliable supply of economically priced gas purchased by Carbonaire from producers or marketers, feedstock costs will force the closure of the Palmerton facilities. As in the proceeding in Docket No. CP86–747–000, Applicant avers that it does not view its request for authority to transport gas for Carbonaire as establishing some type of precedent with regard to the method of awarding available capacity and priority of transportation service on Applicant's system in the context of Order No. 436. Rather, Applicant states that it views the instant application as a solution to the unique situation in which Carbonaire finds itself.

For the firm transportation downstream of Station No. 65, Applicant proposes to charge Carbonaire initially the maximum rates and charges set forth in Rate Schedule FT, accepted subject to refund in Docket No. RP87–9–000. It is indicated that the maximum FT rate includes a monthly demand charge of $3.20 per dt equivalent of gas and a charge of 14.4 cents for each dt equivalent of gas transported, plus 3.6 percent fuel retention. Applicant also indicates that all transportation upstream of Station No. 65, which is interruptible, would be based initially upon the maximum rates and charges applicable to Applicant's Part 284 transactions, accepted subject to refund in Docket No. RP86–111–000. It is indicated that such rate is 2.4 cents per dt equivalent of gas for each 25-miles increment of haul with a minimum charge of 4.8 cents per dt equivalent of gas. Applicant indicates that it would also collect the current Gas Research Institute surcharge. For gas received in the production area and delivered to Union, Transco states that it would initially retain 6.6 percent of the quantities for fuel and line loss make-up.

It is averred that the transportation agreement provides for a limited term expiring on November 15, 1990. Applicant requests pre-granted authority to abandon the transportation service on such date. However, if during the term Carbonaire should discontinue any of the processes at the Palmerton facilities and its gas requirements be reduced accordingly, Applicant requests pre-granted authority to then abandon the service to the extent of such reduction. And, if during the term Carbonaire's Palmerton facilities should cease operation, Applicant requests pre-granted authority to abandon the service as of the date of such cessation of operation.

It is indicated that no additional facilities are required to render the proposed firm transportation service. Applicant indicates that in Docket No. CP86–406–000, authorization was issued permitting and approving partial abandonment of service to Union, which reduced Union's firm Rate Schedule CD–3 allocation from 19,560 dt equivalent of gas per day to 10,350 dt equivalent of gas per day. Such reduction furnishes more than adequate capacity to accommodate the maximum 4,000 dt equivalent per day transportation service proposed herein.

Applicant further states that by filing the subject application, it is not electing "non-discriminatory access" as such term is described and defined in §§ 284.8(b) and 284.9(b) of the Commission's Regulations (promulgated in Order No. 436).

Comment date: December 31, 1987, in accordance with Standard Paragraph F at the end of this notice.

Texas Gas Transmission Corp.

[Docket No. CP87–114–000]

December 18, 1986

Take notice that on December 8, 1986, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42301, filed in Docket No. CP87–114–000 a request pursuant to §§ 157.205 and 157.212 of the Regulations under the Natural Gas Act (18 CFR 157.205 and 157.212) to add two (2) receipt points to serve Consolidated Gas Supply Corporation (Consolidated), under the authorization issued to it in Docket No. CP82–407–000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with the Commission and open to public inspection.

Texas Gas states one new point of receipt is located at the existing interconnection between Texas Gas's and Texas Eastern Transmission Corporation's (Texas Eastern's) pipeline facilities in Jefferson Davis Parish, Louisiana (Iowa Point), and the second new point of receipt is located at the existing interconnection between Texas Gas's and Texas Eastern's pipeline facilities in Evangeline Parish, Louisiana (Evangeline Point), as more fully described in the amendment to the transportation agreement between Consolidated and Texas Gas.

Texas Gas is presently authorized to transport up to 50,000 Mcf per day of natural gas on a best-efforts interruptible basis for Consolidated, pursuant to a Transportation Agreement dated March 20, 1978, and a Certificate of Public Convenience and Necessity issued August 22, 1978, in Docket No. CP78–331–000. Texas Gas further states the addition of these two receipt points will not affect the quantity of natural gas transported. Texas Gas asserts that such natural gas will be used by Consolidated as part of its system supply.

Comment date: February 2, 1987, in accordance with Standard Paragraph G at the end of this notice.

3. ANR Pipeline Co.

[Docket No. CP87–127–000]

December 18, 1986.

Take notice that on December 2, 1986, ANR Pipeline Company (ANR), 500 Renaissance Center, Detroit, Michigan 48243, filed in Docket No. CP87–127–000 an application pursuant to section 7(c) of the Natural Gas Act for a certificate of public convenience and necessity authorizing greater flexibility for an existing exchange and transportation and a new transportation service on behalf of Midwestern Gas Transmission Company (Midwestern), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

ANR states that it presently provides a natural gas exchange service on behalf of Midwestern pursuant to a contract dated July 17, 1967, certificated by the Federal Power Commission in Docket No. CP66–109, and filed as Rate Schedule X–1 of ANR's FERC Gas Tariff Original Volume No. 2.

ANR states that pursuant to the existing exchange service Midwestern may deliver up to 30,000 Mcf of natural gas per day from its northern system to ANR at Marshfield, Wisconsin, and ANR exchanges such volumes into Midwestern's southern system near Joliet in Will County, Illinois.

ANR proposes to continue the exchange of system supply gas (exchange gas) and to transport and exchange volumes (transportation gas) for Midwestern, in each case from Midwestern's northern system at Marshfield, Wisconsin, to Midwestern's southern system in Will County, Illinois. The aggregate maximum daily quantity on each day shall be the lesser of 30,210 dekatherm (dt) equivalent or a quantity of natural gas equal to the difference between ANR's contract demand under Midwestern's Rate Schedule CD–2 and ANR's purchases on that day under Midwestern's Rate Schedule CD–2; the mix of exchange gas and transportation gas on each day to be determined by Midwestern. ANR proposes to charge Midwestern 5.9 cents per dt equivalent of natural gas for the volumes of transportation gas, and to retain 1.9 percent of such volumes for fuel and use. The exchange of exchange gas would continue to be performed on a fee-free basis.

ANR also proposes to provide transportation and exchange services on behalf of Midwestern incident to Midwestern's transportation for Minnegasco, Inc. ANR proposes to transport for Midwestern from Midwestern's southern system in Will County, Illinois, to its northern system at Marshfield, Wisconsin, up to 50,385 dt equivalent of natural gas per day, for which ANR proposes to charge Midwestern 4.4 cents per dt equivalent transported.

Comment date: January 8, 1987, in accordance with Standard Paragraph F at the end of this notice.

4. Midwestern Gas Transmission Co.

[Docket No. CP87-106-000]

December 18, 1986.

Take notice that on December 2, 1986, Midwestern Gas Transmission Company (Midwestern), P.O. Box 2511, Houston, Texas 77001, filed in Docket No. CP87-106-000 an application for a certificate of public convenience and necessity pursuant to sections 7(b) and 7(c) of the Natural Gas Act authorizing firm and interruptible transportation services and permission to abandon service of certain contract demand sales volumes, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Midwestern states that it proposes to render a firm transportation service for Minnegasco, Inc. (Minnegasco) of the dekatherm (dt) equivalent of 50,000 Mcf of natural gas per day from the point of interconnection of Midwestern and TransCanada PipeLines, Ltd. (TransCanada) near Emerson, Manitoba (the Emerson Receipt Point), to a point on Midwestern's northern system near Cambridge, Minnesota (the Delivery Point). Midwestern also states that it proposes to render an interruptible transportation service for Minnegasco of volumes of natural gas containing up to 111,000 dt equivalent of natural gas per day. For such interruptible service Midwestern states that natural gas is to be made available by Minnegasco at either the Emerson Receipt Point or at the interconnection of Midwestern and ANR Pipeline Company (ANR) near Marshfield, Wisconsin (the Marshfield Receipt Point), and is to be redelivered by Midwestern at the Delivery Point. In addition, Midwestern proposes to construct and operate a tap to deliver gas to Minnegasco on its existing 24-inch line near Cambridge, Isanti County, Minnesota, at an estimated cost of $45,000,00.

For the service proposed herein, Midwestern proposes to charge Minnegasco an initial rate of $2.54 per dt equivalent as the monthly demand charge for the firm transportation service and a commodity rate of 4.07 cents per dt equivalent actually delivered, fuel and use costs, and appropriate revenue credits and gas supply refunds. Midwestern also proposes a minimum monthly bill that provides for a minimum monthly commodity charge at a 75 percent load factor, but, Midwestern states, allows credits for volumes transported on an interruptible basis. Midwestern proposes to charge an initial rate for the interruptible transportation service of 12.42 cents per dt equivalent delivered, plus fuel and use costs, and appropriate revenue credits and gas supply refunds.

Midwestern further states that it proposes to reduce its presently authorized firm sale of dt equivalent of 271,000 Mcf of natural gas per day to ANR under Midwestern's Rate Schedule CD-2 to the dt equivalent of 221,000 Mcf of natural gas per day. Midwestern states that this reduction is necessary to provide the proposed firm transportation service to Minnegasco. Midwestern also avers that TransCanada has agreed to reduce its daily contract demand for sales to Midwestern, and ANR has agreed to Midwestern reducing Midwestern's sales obligation under Rate Schedule CD-2 to ANR, by an amount corresponding to 50,000 Mcf of natural gas per day.

Comment date: January 8, 1987, in accordance with Standard Paragraph F at the end of this notice.

5. Midwestern Gas Transmission

[Docket No. CP87-107-000]

December 18, 1986.

Take notice that on December 2, 1986, Midwestern Gas Transmission Company (Midwestern), P.O. Box 2511, Houston, Texas 77001, filed in Docket No. CP87-107-000 an application for a certificate of public convenience and necessity pursuant to section 7(c) authorizing increased flexibility for existing transportation, increased availability of transportation, and additional interruptible transportation on behalf of ANR Pipeline Company (ANR), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Midwestern states that it seeks authority to provide more flexibility in the transportation for ANR of quantities of natural gas delivered to Midwestern by TransCanada Pipelines Ltd. (TransCanada) at Emerson, Manitoba, and redelivered to ANR by Midwestern at Marshfield, Wisconsin. It is stated that under existing authorizations, all such quantities must be sold by TransCanada either to Midwestern, for resale to ANR under Midwestern's Rate Schedule CD-2, or directly by TransCanada to ANR with transportation supplied by Midwestern under Rate Schedule T-2. Midwestern here proposes to provide transportation for ANR, from Emerson to Marshfield, of gas purchased by ANR from sellers other than TransCanada. Midwestern further proposes to increase the quantity of natural gas that ANR can designate as transportation (within the 321,000 Mcf of natural gas per day capacity currently available to ANR) from the current firm dekathern (dt) equivalent of 50,000 Mcf of natural gas per day available under Midwestern's presently existing Rate Schedule T-2, to that firm quantity plus "priority interruptible" transportation quantity of 151,050 dt equivalent of natural gas per day. It is stated that at no time would deliveries to ANR of sales, firm transportation, and "priority interruptible" transportation quantities exceed ANR's firm capacity entitlement. Finally, Midwestern proposes to allow ANR further interruptible overrun transportation rights of 50,350 dt equivalent of natural gas per day with no priority over any other interruptible transporters on the northern system.

Midwestern proposes to charge ANR Midwestern's effective 100 percent load factor daily demand rate for "priority interruptible" and interruptible transportation services. Midwestern further proposes to credit charges to ANR under Midwestern's Rate Schedule CD-2 a portion of the revenues received.

Comment date: January 8, 1987, in accordance with Standard Paragraph F at the end of this notice.

6. Southern Natural Gas Co.

[Docket No. CP87-61-000]

December 18, 1986.

Take notice that on November 10, 1986, Southern Natural Gas Company (Southern), P.O. Box 2563, Birmingham, Alabama 35202-2563, filed in Docket No. CP87-61-000 an application pursuant to section 7(c) of the Natural Gas Act for a limited-term certificate of public convenience and necessity authorizing Southern to transport natural gas on behalf of West Point Pepperell, Atlanta Gas Light Company (Atlanta) and Alabama Gas Corporation (Alagasco), all as more fully set forth in the application which is on file with the

Commission and open to public inspection.

Southern proposes to transport up to 0.65 billion Btu equivalent of gas per day for West Point Pepperell to West Point Pepperell's plant in LaGrange, Georgia and up to 6.8 billion Btu equivalent of gas per day for West Point Pepperell to West Point Pepperell's plants in Fairfax, Langdale, Lanett, Shawmut and Riverview, Alabama. Additionally, Southern proposes to transport up to 1.0 billion Btu equivalent of gas per day for Atlanta, acting as agent for West Point Pepperell, to West Point Pepperell's plants in Milledgeville and Newnan, Georgia, and up to 6.4 billion Btu equivalent of gas per day for Alagasco acting as agent for West Point Pepperell, to West Point Pepperell's plants in Opelika, Fairview, and Lanier, Alabama.

It is stated that gas purchased by West Point Pepperell from SNG Trading, Inc., would be delivered to Southern for transportation at numerous existing points on Southern's contiguous pipeline system in offshore Louisiana, Louisiana, Alabama and Mississippi. Southern indicates that it would redeliver the gas to West Point Pepperell at existing interconnections in Troup County, Georgia (LaGrange Transportation) and in Fairfax, Shawmut, Lanett, Langdale and Riverview, Alabama (Fairfax Transportation). Southern states that it would redeliver the gas to Atlanta at an existing interconnection in Paldwin County, Georgia, and to Alagasco at various existing interconnections in the general areas of Opelika and Fairfax-Shawmut, Alabama.

Southern requests that the proposed transportations be authorized for a term of one year from the date of any Commission order issued herein.

Southern would charge Atlanta 48.2 cents per million Btu equivalent for the transportation service except that it would charge 77.6 cents per million Btu equivalent for volumes transported and redelivered by Southern on any day to Atlanta under any and all transportation agreements with Southern, when added to the volumes of gas delivered under Southern's Rate Schedule OCD on such day to Atlanta, exceeded the daily contract demand of Atlanta.

Southern would charge Alagasco 39.9 cents per million Btu equivalent for the transportation service except that it would charge 64.9 cents per million Btu equivalent for volumes transported and redelivered by Southern on any day to Alagasco under any and all transportation agreements with Southern (excluding that certain long-term transportation agreement among Southern, Alagasco, and Alabama Interstate Supply dated October 1, 1984), when added to the volumes of gas delivered under Southern's OCD Rate Schedule on such day to Alagasco, exceeded the daily contract demand of Alagasco.

Southern would charge West Point Pepperell 77.6 cents per million Btu equivalent for the proposed transportation of up to 0.65 billion Btu equivalent of gas (LaGrange Transportation), and 64.9 cents per million Btu equivalent for the proposed transportation of up to 6.8 billion Btu equivalent of gas (Fairfax Transportation).

It is stated that Southern would also collect from West Point Pepperell, Atlanta, and Alagasco the GRI surcharge of 1.35 cents per Mcf, or such other GRI funding unit or surcharge as the Commission or other governmental authority may from time to time by order of general or specific applicability or otherwise prescribe or approve.

Southern indicates that all transportation services would be conditioned upon the availability of capacity sufficient for Southern to perform the proposed services without detriment or disadvantage to Southern's obligations to its customers.

Comment date: January 8, 1986, in accordance with Standard Paragraph F at the end of this notice.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Kenneth F. Plumb,

Secretary.

[FR Doc. 86-28873 Filed 12-23-86; 8:45 am]

BILLING CODE 6717-01-M

Office of Hearings and Appeals

Proposed Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of special procedures.

SUMMARY: The Office of Hearings and Appeals (OHA) of the Department of Energy (DOE) announces the proposed procedures for disbursement of a total of $812,491.16 (plus accrued interest) obtained from Kalama Chemical, Inc. (Case No. HEF-0507), Landsea Holding Company (Case No. HEF-0573), and Oil-Tex Petroleum Co., Inc./David E. Myres (Case No. KEF-0082). The OHA has tentatively determined that the funds will be distributed in accordance with the DOE's Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 FR 27899 (August 4, 1986).

DATE AND ADDRESS: Comments must be filed in duplicate within 30 days from the date of publication of this notice in the Federal Register and should be addressed to: Federal Register and should be addressed to: Office of

Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585. All comments should display a reference to the applicable case number.

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, 100 Independence Avenue, SW. Washington, DC. 20585 (202) 252-2860.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(b) of the procedural regulations of the Department of Energy (DOE), notice is hereby given of the issuance of the Proposed Decision and Order set out below. The Proposed Decision and Order sets forth the procedures that the DOE has tentatively formulated to distribute monies obtained from Kalama Chemical, Inc., Landsea Holding Company, and Oil-Tex Petroleum, Co./David E. Myres. These firms remitted monies to the DOE to settle possible pricing violations with respect to their sales of crude oil. The firm's payments are being held in an interest-bearing escrow account pending distribution by the DOE.

The DOE has tentatively decided that distribution of the monies received from the three consent order firms will be governed by the DOE's Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 F.R 27899 (August 4, 1986). That policy states that crude oil overcharge monies will be divided among the states, the Federal Government, and eligible purchasers of petroleum products.

Under the plan we are proposing, refunds to the states would be distributed in proportion to each state's consumption of petroleum products. Refunds to eligible purchasers would be based on the number of gallons of crude oil or refined products which they purchased and the extent to which they can demonstrate injury.

Applications for refund should not be filed at this time. Appropriate public notice will be given when the submission of claims is authorized.

Any member of the public may submit written comments regarding the proposed refund procedures. Commenting parties are requested to submit two copies of their comments. Comments must be submitted within 30 days of publication of this notice in the **Federal Register** and should be sent to the address set forth at the beginning of this notice. All comments received will be available for public inspection between the hours of 1:00 p.m. and 5:00 p.m., Monday through Friday, except federal holidays, in the Public Reference Room of the Office of Hearings and Appeals, located in Room 1E-234, 1000 Independence Avenue, SW., Washington, DC 20585.

Dated: December 17, 1986.

George B. Breznay,

Director, Office of Hearings and Appeals.

Proposed Decision and Order of the Department of Energy

Implementation of Special Refund Procedures

Names of Firm:
Kalama Chemical, Inc.
Landsea Holding Company
Oil-Tex Petroleum Co., Inc./David E. Myres

Dates of Filing:
August 8, 1984
March 18, 1985
November 19, 1986

Case Numbers:
HEF-0507
HEF-0573
KEF-0082

Under the procedural regulations of the Department of Energy (DOE), the Economic Regulatory Administration (ERA) may request that the Office of Hearings and Appeals (OHA) formulate and implement special refund procedures. *See* 10 CFR Part 205, Subpart V. These procedures enable the DOE to refund monies to those injured by alleged violations of the DOE pricing regulations.

The ERA has filed Petitions for the Implementation of Special Refund Procedures with respect to funds obtained from Kalama Chemical, Inc., Landsea Holding Company, and Oil-Tex Petroleum Company/David E. Myres. To date, these three firms have remitted to the DOE a total of $812,491.16 pursuant to consent orders entered into by the firms and the DOE.[1] As of October 31, 1986, $80,920.10 in interest has accrued on that amount. This Proposed Decision sets forth the OHA's tentative plan to distribute these funds. Comments are solicited.

The general guidelines which the OHA may use to formulate and implement a plan to distribute funds are set forth in 10 CFR Part 205, Subpart V. The Subpart V process may be used in situations where the DOE cannot readily identify the persons who may have been injured as a result of alleged or adjudicated violations or cannot ascertain the amount of each person's injury. For a more detailed discussion of Subpart V and the authority of the OHA to fashion procedures to distribute refunds, see *Office of Enforcement*, 9 DOE ¶ 82,508 (1981), and *Office of Enforcement*, 8 DOE ¶ 82,597 (1981).

We have considered the ERA's requests to implement Subpart V procedures with respect to the monies received from the three firms and have determined that such procedures are appropriate.

These three cases involve alleged violations of the crude oil reseller regulations, 10 CFR Part 212, Subparts F and L, or the entitlements regulations, 10 CFR 211.66, 211.67 and 211.69. They are therefore subject to the DOE's Modified Statement of Restitutionary Policy in Crude Oil Cases, issued on July 28, 1986 51 FR 27899 (August 4, 1986) (hereinafter referred to as the "MSRP"). The MSRP was issued in conjunction with the approval by the United States District Court for the District of Kansas of a settlement agreement in *The DOE Stripper Well Litigation*, M.D.L. 378.[2] On August 8, 1986, the OHA announced its intention to follow the MSRP, 51 FR 29686 (August 20, 1986).[3]

The MSRP provides that a refund process will be employed for restitution of alleged crude oil violation amounts held in escrow by the DOE or received in the future, using the special refund procedures codified at 10 CFR Part 205, Subpart V. Under that process, the OHA will accept and process refund applications from persons who claim they were injured by alleged crude oil violations. Up to 20 percent of the alleged crude oil violation amounts may be reserved initially for refunds to claimants who prove injury. The MSRP calls for the remaining 80 percent of the funds to be disbursed to the state and federal governments for indirect restitution. After all valid claims are paid, any remaining funds from the reserve will also be divided between the state and federal governments. The federal government's share of the funds will ultimately be deposited into the general fund of the Treasury of the United States.

The OHA will institute a claims process, pursuant to the MSRP, for the $812,491.16 involved in these proceedings. We have decided to reserve initially the full 20 percent—$162,498.23—of the alleged crude oil violation amounts for direct refunds to claimants, in order to ensure that sufficient funds will be available for

[1] One of the firms, Kalama Chemical, Inc., is making quarterly payments to the DOE with a final payment due on October 1, 1988. As noted in the Appendix, Kalama has an outstanding liability of $302,508.84 plus interest. We propose that these funds, when remitted to the DOE, be disbursed pursuant to the procedures proposed in this Decision.

[2] For a detailed discussion of the events in the Stripper Well Litigation which brought about the MSRP, see *Stripper Well Exemption Litigation*, 14 DOE ¶ 85,382 (1986).

[3] The OHA is evaluating comments on that notice.

refunds to injured persons. The amount of the reserve may be adjusted later if circumstances warrant such action. In order to receive a refund from the crude oil funds involved in this Decision, we propose that a claimant will be required to file an application for refund. The application should be clearly labelled "Application for Crude Oil Refund" and should contain: (1) The name or names of the applicant's business and a short description of the applicant's use of petroleum products; (2) a statement identifying the petroleum products which the applicant purchased during the period of crude oil price controls (August 19, 1973 through January 27, 1981), the number of gallons of each product purchased, and the total number of gallons on which the applicant bases its claim; (3) a description of the method by which the applicant determined its purchase volumes, and a description of its method of estimation if the applicant used estimates to determine its purchase volumes; (4) a showing that the applicant was injured by the alleged overcharges; and (5) a statement that neither the applicant, its parents, subsidiaries, affiliates, successors nor assigns has waived any right it may have to receive a refund in the case.[4] *MAPCO, Inc.*, 15 DOE ¶ ______, No. HEF-0577 (November 7, 1986).

The OHA will evaluate applications for refund from purchasers of refined petroleum products using methods similar to those which the OHA has used to evaluate claims based on refined product overcharges pursuant to 10 CFR Part 205, Subpart V. *Mountain Fuel Supply Co.*, 14 DOE ¶ 85,475 at 88,869 (1986) (*Mountain Fuel*). As in non-crude oil cases, applicants will be required to document their purchase volumes and to prove that they were injured by the alleged overcharges (i.e., that they did not pass the overcharges on to their own customers). *Id.* However, end-users of petroleum products whose businesses are unrelated to the petroleum industry will be presumed to be injured. *Greater Richmond Transit Company*, 15 DOE ¶ 85,028 (1986). The standards for showing injury which the OHA has developed in analyzing and deciding non-crude oil claims will also apply to claims based on crude oil overcharges. *See, e.g., Dorchester Gas Corp.*, 14 DOE ¶ 85,240 (1986).

Refunds will be calculated on the basis of a per gallon refund amount derived by dividing the crude oil overcharge monies received to date in these three cases ($812,491.16) by the total U.S. consumption of petroleum products during the period of federal petroleum price controls.[5] *Mountain Fuel*, 14 DOE at 88,867–68. The volumetric refund amount in each of these three proceedings is set out in the Appendix to this Decision and Order. The total volumetric refund amount for the three proceedings is $0.00000040202 per gallon, to which interest will be added.

We propose that the remaining 80 percent of the funds—$649,992.93—be immediately disbursed to the state and federal governments for indirect restitution. We propose to direct the DOE's Office of the Controller to segregate this amount and distribute $162,498.23 plus appropriate interest to the states and $487,494.70 plus appropriate interest to the federal government.[6] The share or ratio of the funds in the state account which each state will receive if these procedures are adopted, based on each state's consumption of petroleum products during the period of price control, is listed in Exhibit H to the Final Settlement Agreement in the *Stripper Well Litigation, reprinted in* 6 Fed. Energy Guidelines ¶ 90,509 at 90,687.

Before taking the action we have proposed in this Decision, we intend to publicize our proposal and solicit comments on it. Comments regarding the tentative distribution process set forth in this Proposed Decision should be filed with the OHA within 30 days of publication in the **Federal Register**.

It Is Therefore Ordered That:

The refund amounts remitted by Kalama Chemical, Inc., Landsea Holding Company, and Oil-Tex Petroleum Co., Inc./David E. Myres shall be distributed in accordance with the foregoing Decision.

APPENDIX

OHA case	Name of firm	Consent order No.	Date of filing	Principal remitted as of Oct. 31, 1986	Volumetric refund
HEF-0507	Kalama Chemical, Inc	N00S90474	Aug. 8, 1984	[1] $697,491.16	$0.00000034512
HEF-0573	Landsea Holding Company	940X00220	Mar. 18, 1985	55,000.00	.00000002721
KEF-0082	Oil-Tex Petroleum Co., Inc./David E. Myres.	6A0X00312	Nov. 19, 1986	60,000.00	.00000002969
Total				812,491.16	.00000040202

[1] Kalama's total consent order amount is $1,000,000.00. The amount still owed is $302,508.84 plus interest on the unpaid balances.

[FR Doc. 86-28867 Filed 12-23-86; 8:45 am]

BILLING CODE 6450-01-M

Implementation of Special Refund Procedures

AGENCY: Office of Hearings and Appeals, DOE.

ACTION: Notice of implementation of special refund procedures..

SUMMARY: The Office of Hearings and Appeals of the Department of Energy announces the procedures for disbursement of $100,000 obtained as the result of a Consent Order which the DOE entered into with the Winston Refining Company (currently Amber Refining, Inc.) located in Forth Worth, Texas.

DATE AND ADDRESS: Applications for refund of a portion of the Winston Consent Order fund must be filed within 90 days of publication of this notice in the **Federal Register** and should be addressed to: Winston Refining Company Hearings and Appeals, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

FOR FURTHER INFORMATION CONTACT: Richard W. Dugan, Associate Director, Office of Hearings and Appeals, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 252-2860.

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[4] Pursuant to the Settlement Agreement, escrow funds were established for refiners, resellers, retailers, agricultural cooperatives, airlines, privately owned utilities, surface transporters, and rail and water transporters. Firms which claim refunds for crude oil overcharges from those escrow funds waive their rights to receive refunds from Subpart V cases based on alleged oil overcharges.

[5] It is estimated that 2,020,997,335,000 gallons of petroleum products were consumed in the United States during the period August 1973 through January 1981. *Mountain Fuel*, 14 DOE at 88,868 n.4 (1986).

[6] This distribution reflects a ratio of 25 percent to the state governments and 75 percent to the federal government. Under the terms of the Stripper Well Settlement Agreement, the states received an advance of $200 million from funds which would otherwise have been disbursed to the DOE. In order to reimburse the DOE for this advance, the Settlement Agreement provides that for amounts which the OHA transfers to the state and federal governments in excess of $100 million, the DOE shall receive 75 percent and the states shall receive 25 percent. This arrangement shall continue until the OHA has distributed the next $400 million under the 75/25 arrangement. Settlement Agreement, paragraph II.B.3.c.ii.

SUPPLEMENTARY INFORMATION: In accordance with § 205.282(c) of the procedural regulations of the Department of Energy, 10 CFR 205.282(c), notice is hereby given of the issuance of the Decision and Order. set forth below. The Decision relates to a consent order entered into by Winston Refining Company (Winston) of Forth Worth, Texas, which settled possible pricing violations in the firm's sales of covered petroleum products to customers during the August 19, 1973 through January 27, 1981 consent period.

A proposed Decision and Order tentatively establishing refund procedures and soliciting comments from the public concerning the distribution of the Winston consent order funds was issued on October 2, 1986. 51 FR 36285 (October 9, 1986).

As the Decision and Order published with this Notice indicates, applications for refunds may now be filed by customers who purchased covered products from Winston during the audit period. Applications will be accepted provided they are filed no later than 90 days after publication of this Decision and Order in the **Federal Register.** The specific information required in an application for refund is set forth in the Decision and Order.

Dated: December 17, 1986.

George B. Breznay,

Director, Office of Hearings and Appeals.

Decision and Oder of the Department of Energy

Special Refund Procedures

Name of Firm: Winston Refining Company
Date of Filing: July 19, 1985
Case Number: HEF-0589

Under the procedural regulations of the Department of Energy, the Economic Regulatory Administration (ERA) of the DOE may petition the Office of Hearings and Appeals (OHA) to formulate and implement special refund procedures in order to remedy the effect of alleged violations of the DOE price and allocation regulations. See 10 CFR Part 205, Subpart V. The ERA filed such a petition on July 19, 1985 requesting that OHA establish special refund procedures for the distribution of monies received pursuant to a consent order entered into by the DOE and Winston Refining Co. (Winston) of Forth Worth, Texas.[1]

[1] Reference in this proceeding to Winston Refining Company also refer to Amber Refining, Inc. and Forth Worth Refining Co. (Winston's successor and predecessor firms respectively).

I. Background

Winston is a "refiner" of crude oil as that term was defined in 10 CFR 212.31. During the relevant time period, Winston was subject to the Mandatory Petroleum Price Regulations, and specifically to the refiner price rule provisions of 10 CFR Part 212, Subpart E. An ERA audit of Winston's business records uncovered probable violations of the price regulations with respect to Winston's sales of refind petroleum products during the period from August 19, 1973 through January 27, 1981 (the audit period). In order to settle all claims and disputes between Winston and the DOE regarding Winston's compliance with DOE price regulations in sales of covered products during the audit period (hereinafter referred to as consent order period), the DOE and Winston entered into a consent order, effective December 30, 1983, in which Winston agreed to pay $100,000 to the DOE.[2] According to the ERA's Petition, Winston has complied with the terms of the consent order. The $100,000 paid by Winston is currently being held by the U.S. Treasury in an interest-bearing escrow account pending distribution by the DOE.

On October 2, 1986, we issued a Proposed Decision and Order in which we determined that it was appropriated to establish a special refund proceeding with respect to the Winston consent order fund. In that Proposed Decision, we tentatively set forth procedures to distribute refunds to parties which were injured by Winston's alleged pricing violations in sales of refined petroleum products during the consent order period. Specifically, we proposed to disburse funds in the first stage of the proceeding to claimants who could demonstrate that they were adversely affected by Winston's alleged overcharges during the consent order period. We indicated that we would consider claims from any individual or firm that could show that it purchased covered products from Winston during the consent order period. We also stated that the money available after payment of refunds to eligible claimants in the first stage would be distributed during a second-stage process and we pointed out that the ultimate disposition of those second stage funds would not be determined until after completion of the first stage.

The Proposed Decision was published in the **Federal Register** on October 9, 1986 (51 FR 36285), and comments on the proposed refund mechanism were due to be submitted within 30 days of publication. Comments were received from the States of Arkansas, Delaware, Iowa, Louisiana, North Dakota, Rhode Island and West Virginia. These comments requested that any monies remaining in the Winston settlement fund after refunds are made to Winston customers which filed meritorious claims be distributed to the states for use in energy-related projects. No comments were received which addressed the proposed mechanics of the refund process itself.

The purpose of this Decision and Order is to establish procedures to be used for filing and processing claims in the first stage of the Winston refund proceeding. This Decision sets forth the information that a purchaser of Winston covered products should submit in order to establish eligibility for a portion of the consent order funds.[3] Any funds remaining after all refund applications have been considered will be disbursed in accordance with the provisions of the Petroleum Overcharge Distribution and Restitution Act of 1986, Pub. L. 99-509, Title III, Fed. Energy Guidelines, ¶ 11,700.

[2] The consent order does not apply to Winston's compliance with the DOE allocation regulations, including the Crude Oil Entitlements Program.

II. Jurisdiction

The Subpart V regulations set forth general guideliens by which OHA may formulate and implement a plan of distribution for funds received as a result of enforcement proceedings. It is the DOE policy to use the Subpart V process to distribute such funds. For a detailed discussion of Subpart V and the authority of OHA to fashion procedures to distribution refunds as part of settlement agreements, *see Office of Enforcement*, 9 DOE ¶ 82,508 (1981). As we stated in the Proposed Decision, we have determined that a Subpart V proceeding is an appropriate method for distributing the Winston consent order fund. Therefore, we will grant the FRA's petition and assume jurisdiction over

[3] Information in the Winston audit file indicates that three Winston customers, McLean Trucking Company, E-Z Serve Inc., and Energy specialist, Inc., are firms which had corporate affiliations with Winston. On the basis of this information, in the Proposed Decision, we proposed to establish a rebuttable presumption that these firms were not injured by Winston's alleged overcharges and therefore should receive no refund in this proceeding. We have received no comments in opposition to this proposal, and will therefore adopt this presumption. *See Warren Holding Co./Puritan Oil Co.*, 13 DOE ¶ 85,337 (1985). Similarly, we have received no objections to our proposal that Basin Products, Inc., a firm which served as Winston's sales agent during portions of the consent order period, should be excluded from participation in the proceeding. Accordingly, this proposal will be adopted.

the funds received pursuant to the Winston consent order.

III. Refund Procedures

A. Eligible Claimants

In the first stage, refund monies will be distributed to firms and individuals who were injured by Winston's pricing practices during the consent order period. A partial list of former Winston customers is attached to this Decision as an Appendix. In order to be eligible for a refund, each claimant will be required to provide information concerning the volume of Winston covered products it purchased during the consent order period. As in previous Subpart V Decisions, we find that those customers who purchased covered products from Winston during the consent order period for ultimate consumption (end-users) absorbed Winston's alleged overcharges. They will therefore not be required to make a further demonstration of injury in order to receive a refund. In contrast, firms who resold the covered products purchased from Winston (i.e., retailers, wholesalers and refuners, collectively referred to as "resellers") will be required to demonstrate that they did not pass on cost increases implemented by Winston to their own customers. *See, e.g., Office of Enforcement,* 8 DOE ¶ 82,597 (1981). This can be done by showing that during the period covered by the consent order they would have kept their prices at the same level had the alleged overcharges not occurred. While there are a variety of means by which a claimant could make this showing, a reseller should generally demonstrate that at the time it purchased covered products from Winston, market conditions would not permit it to increase its prices to pass through the additional costs associated with the alleged overcharges. In addition, the claimant must show that it had a "bank" of unrecovered costs in order to demonstrate that it did not subsequently recover these costs by increasing its prices.[4] The maintenance of a bank would not, however, automatically establish injury. *See Tenneco Oil Co.,* 10 DOE ¶ 85,014 (1982); *Vickers Energy Corp./Standard Oil Co.,* 10 DOE ¶ 85,036 (1982); *Vickers Energy Corp./Koch Industries, Inc.,* 10 DOE ¶ 85,038 (1982).

In the Proposed Decision, we suggested that resellers which made spot purchases from Winston should be presumed to have suffered no injury. We received no adverse comments on this proposal. Accordingly, we have established a rebuttable presumption that any spot purchaser of Winston's covered products during the consent order period was able to pass through to its customers any overcharges it incurred. We will, however, consider evidence from a spot purchaser which establishes that it was unable to recover the product prices it paid to Winston and the extent to which it was injured by the spot purchase(s). *See Office of Special Counsel,* 10 DOE ¶ 85,048 at 88,200 (1982).

In the Proposed Decision, we indicated our intention to establish a presumption of injury with respect to small claims made by resellers. Under thest presumption, resellers whose refund claims were at, or below a threshold amount of $5,000 would be presumed to have absorbed the alleged overcharges and would not be required to provide further evidence of injury in order to be eligible for a refund. This presumption is based on our belief that with small claims the cost to the firm of gathering evidence of injury could exceed the expected refund and that consequently, without simplified procedures, some injured parties would be effectively denied opportunity to obtain a refund. Since we have received no adverse comments regarding this presumption, we shall adopt it for this proceeding. This presumption will also apply to those firms whose potential claim may exceed the $5,000 threshold but who elect to forego that portion of their claim in excess of $5,000. However, in view of our presumption that spot purchasers were not injured by the alleged Winston overcharges, no threshold will apply to applications filed by spot purchasers, since, regardless of the magnitude of their refund claims, all spot purchases must demonstrate that they absorbed Winston's alleged overcharges.

As we indicated in the Proposed Decision, we will establish a minimum amount of $15 for refund claims. We have found through our experience in prior refund cases that the cost of processing claims in which refunds are sought for amounts less than $15 outweighs the benefits of restitution in these situations. *See, e.g., Uban Oil Co.,* 9 DOE ¶82,541 at 85,225 (1982). *See also* 10 CFR 205.286(b)

B. Calculation of Refund Amounts

In the Proposed Decision, we indicated our intention to use a volumetric method to divide the consent order fund among applicants who demonstrate that they are eligible to receive refunds. This method presumes that the alleged Winston overcharges were spread equally over all of the gallons of covered products sold by Winston during the consent order period. We shall adopt this method since we did not receive any adverse comments regarding this subject. The per gallon volumetric factor is equal to the consent order fund divided by the total volume of covered products which Winston sold during the consent order period.[5] In this case, the volumetric factor equals $0.00013 ($100,000 divided by 769,031,896 gallons). Refunds will be calculated by multiplying the volumetric factor by the total volume of the covered products purchased by the applicant during the consent order period deemed eligible for refunds. The interest that has accrued on the money in the escrow account will be added to the refund of each successful claimant in proportion to the size of its refund.

C. Application for Refund Procedures

We have concluded that applications for refunds should now be accepted from parties who purchased covered products during the consent order period and believed they have been injured by Winston's pricing practices. Applications must be filed within 90 days after publication of this Decision and Order in the Federal Register. *See* 10 CFR 205.286. An application must be in writing, signed by the applicant, and specify that it pertains to the Winston Refining Company Consent Order Fund, Case No. HEF-0589.

All applications for refund must be filed in duplicate. A copy of each

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[4] Some of the motor gasoline sales covered by the consent order occurred subsequent to the amendments of the reseller/retailer price rule that eliminated the bank requirement for retailers and most resellers. *See* 10 CFR 212.93(a)(2), 44 FR 42542 (July 19, 1979) (effective July 15, 1979); 45 FR 29546 (May 2, 1980) (effective May 1, 1980); 45 FR 81255 (December 10 1980)). Accordingly, retailers and most resellers will not be required to submit bank information concerning any purchases of motor gasoline they may have made after July 15, 1979 and May 1, 1980, respectively.

[5] The volmetric method, which attributes injury on a uniform basis to each gallon of covered product sold, recognizes that the computation of specific overcharges in individual transactions is extremely difficult. In any event the consent order was intended to resolve the doe allegations by means of a negotiated settlement. A continuation of the attempt to establish specific overcharge amounts would therefore be contrary to the purposes of the consent order. Since the volumetric method places all refund claimants on an equal footing and is relatively easy to administer, previous special refund Decisions have concluded that it is equitable, efficient, and the best general method of distributing refund monies. *Office of Special Counsel,* 10 DOE ¶ 85,048 at 88,198–99 (1982). However, we recognize that the impact on any individual purchaser could have been greater than that estimated using the volumetric factor and ny purchaser may file a refund application based on a claim that it suffered a disproportionate share of the alleged overcharges. *See, Amtel, Inc.,* 12 DOE ¶ 85,073 at 88,233–34 (1984).

application will be available for public inspection in the Public Reference Room of the Office of Hearings and Appeals, Room 1E–234, 1000 Independence Avenue, SW., Washington, DC. Any applicant who believes that its application contains confidential information must so indicate on the first page of its application and submit two additonal copies of its application from which the information which the applicant claims is confidential has been deleted, together with a statement specifying why any such information is privileged or confidential. Each application must indicate whether the applicant or any person acting on its instructions has filed or intends to file any other application or claim of whatever nature regarding the matters at issue in the underlying Winston enforcement proceeding. Each application must also include the following statement: "I swear (or affirm) that the information submitted is true and accurate to the best of my knowledge and belief." *See* 10 CFR 205.283(c); 18 U.S.C. Section 1001. In addition, the applicant should furnish us with the name, title, and telephone number of a person who may be contacted by the OHA for additional information concerning the application. All applications should be sent to: Winston Refining Company Consent Order Refund Proceeding, Office of Hearings and Appeals, Department of Energy, Washington, D.C. 20585. All applications for refund received within the time limit specified will be processed pursuant to 10 CFR 205.284 and the procedures set forth in this Decision and Order.

In order to assist applicants in establishing eligibility for a portion of the consent order funds, the following subjects should be covered in each application:

A. Each applicant should certify that it purchased covered product(s) from Winston during the consent order period and list its purchase volumes by product for each month of the consent order period for which a refund is claimed.

B. Each applicant should specify how it used the Winston covered product(s) which form the basis for its refund claim—i.e., whether it was a reseller or ultimate consumer.

C. If the applicant is a reseller who wishes to claim a refund in excess of $5,000, it should also

(i) State whether it maintained banks of unrecouped product cost increases from November 1, 1973 through the termination of the applicable banking regulations, and furnish OHA with quarterly bank calculations.

(ii) State whether it or any of its affiliates have filed any other applications for refund in which they have referred to their banks to demonstrate injury.

(iii) Submit evidence to establish that it did not pass on the alleged injury to its customers. For example, a firm may submit market surveys to show that price increases to recover alleged overcharges were infeasible.

D. The applicant should report whether it is or has been involved as a party in any DOE or private section 210 enforcement actions. If these actions have terminated, the applicant should furnish a copy of any final order issued in the matter. If the action is ongoing, the applicant should briefly describe the action and its current status. Of course, the applicant is under a continuing obligation to keep the OHA informed of any change in status while its application for refund is pending. *See* 10 CFR 205.9(d).

It is Therefore Ordered That:

(1) Applications for refund from the funds remitted to the Department of Energy by Winston Refining Company pursuant to the Consent Order executed on December 30, 1983 may now be filed.

(2) All applications must be filed no later than 90 days after publication of this Decision and Order in the **Federal Register.**

Dated: December 17, 1986.

George B. Breznay,

Director, Office of Hearings and Appeals.

Appendix

Alvarando Oil Company
Advance Petroleum Dist. co.
Alkek Oil Corporation
Astro Gas & Oil, Inc.
D.W. Ball Oil Company
B&B Petroleum Products
Bob-O-Link Oil Company
Bolivar Oil Company
J.H. Briscoe Oil Company
James Browder Oil Company
Marvin Browder Oil Company
R.E. Buckley Oil Co., Inc.
Carroll & Perkins Oil Co.
Christopher Oil Company
Caruthers Oil Co.
Cleburne Oil Co.
County Line Service Station
Dee and Dee Oil Co.
East Texas Petroleum, Inc.
Dixie Petroleum Company
Enderby Gas Company
Erwin Oil Company
Enterprise Products Inc.
Felts Distributing Company
Foremost Petroleum Co. Inc.
Fort Worth Butane Gas Co.
General Fuel Oil Co.
W.L. Gipson
Guthrie Oil Company
Gas house Company
Stratoflex Inc.
Hampton Molasses Company
Hampton Oil Co.
H–M–M Distributing Corp.
Bob Hams Oil Company
Coastal Transport Co., Inc.
Home Petroleum Corporation
Hi–Low Corporation
Tauber Oil Company
Barney Holland Oil Co.
Hollis Distributing Company
Independent Oil Company
Industrial Fuels, Inc.
J–Mc Oil Company
Krum Oil Company
Kemp Oil Company
Lone Star Gas Company
Paul Little Distributing
M&A Petroleum Company
Jack Long
Magic City Petroleum Co., Inc.
Marco Distributors
Michener Oil Co.
M&M Oil Co.
MU-Way Oil Company
Oils Unlimited
Petroleum Industries, Inc.
Petroleum Products Dist.
Pioneer Oil Company
Powell Grain & Gin Co.
Quality Oil Company
Ed Prather
Red Hat oil Company
C.B. Rogers, Jr.
Paul Rogers
Snager Oil Company
Sello Petroleum Co.
Southwest Oil & Gas Co.
Solvent Specialty Co.
Spindor Bros. Tire Co.
Supreme Oil Dist. Co.
Teague Oil Company
Thomas Oil Distributing Company
Thrift Oil Company
Thrift Mart, Inc.
Thunderbird Petroleum Company
United Petroleum Company
Union Texas Petroleum
Western Commercial Transport
Astro, Inc.
Permian Corporation
V.A. Hospital (Dallas)
General Fuel Oil Company
Southern Asphalt Company
Texas Creosote Company
Dallas Power & Light Co.
Texas Electric Service Company
Wright Asphalt Company
Trumbull Asphalt Co.
H.L. Gage
L.P.G., Inc.
Pride Refining, Inc.
Longview Refining Company
Crystal Oil Co.
Wood County Refining Co.
Tenneco Oil Co.
Trinagle Reefineries, Inc.
Vickers Petroleum Company
Sun Oil Company
Humble Oil and Refining Co.
Mobil Oil Corporation
M.K.T. Railroad
C.R.I.&P. Railroad
A.T.&S.F. Railroad
Fort Worth Petroleum Prod. Corp.
Carswell A.F.B.
Exxon Corporation

General Dynamics
Naval Air Station (Grand Prairie)
Continental Oil Company
Grand Forks A.F.B.
Southwest Airmotive
Bell Oil & Gas Co.
Barksdale A.F.B.
H.T. Dodson
Fort Hood
Fort Walters
Sheppard A.F.B.
Biggs Field
VAnce A.F.B.Bob Harris Oil Co.

APPENDIX.—CALCULATION OF RATIOS FOR DISTRIBUTION TO STATES AND TERRITORIES—M.D.L. 378

State	Consumption	Ratio
Alabama	626,803,520	0.01534512450
Alaska	158,047,980	.00386926023
American Samoa	7,275,000	.00017810331
Arizona	418,994,930	.01025764719
Arkansas	519,811,670	.01272579770
California	3,739,318,300	.09154432453
Colorado	439,201,380	.01075233249
Connecticut	693,689,220	.01698259040
Delaware	193,932,730	.00474777469
District of Columbia	97,574,660	.00238877935
Florida	1,887,260,600	.04620307312
Georgia	909,619,880	.02226890861
Guam	60,196,000	.00147369165
Hawaii	280,655,260	.00687087703
Idaho	167,643,790	.00410418057
Illinois	1,876,159,080	.04593129065
Indiana	1,006,156,560	.02463227660
Iowa	532,229,530	.01302980621
Kansas	457,905,310	.01121023378
Kentucky	523,601,010	.01281856663
Louisiana	971,591,210	.02378606310
Maine	300,279,730	.00735131456
Maryland	731,363,020	.01790490359
Massachusetts	1,398,309,100	.034323278036
Michigan	1,391,772,090	.03407274419
Minnesota	708,814,590	.01735288297
Mississippi	557,786,510	.01365548081
Missouri	806,514,320	.01974472423
Montana	184,882,510	.00452621123
Nebraska	301,217,700	.00737427752
Nevada	165,454,200	.00405057600
New Hamphshire	190,375,330	.00466068401
New Jersey	1,507,862,710	.03691482302
New Mexico	267,574,460	.00655063871
New York	3,162,994,520	.07743502253
No. Mariana Islands	3,763,000	.00009212409
North Carolina	916,800,700	.02244470625
North Dakota	149,717,090	.00366530709
Ohio	1,534,904,170	.03757684000
Oklahoma	504,488,400	.01235066023
Oregon	404,894,790	.00991245384
Pennsylvania	1,901,863,900	.04656058461
Puerto Rico	389,132,000	.00952655624
Rhode Island	161,953,570	.00396487514
South Carolina	486,978,850	.01192199923
South Dakota	146,053,670	.00357562087
Tennessee	660,920,850	.01618036977
Texas	3,013,545,120	.07377626891
Utah	240,978,330	.00589952410
Vermont	97,762,860	.00239338678
Virgin Islands	188,953,000	.00462586316
Virginia	1,048,324,650	.02566416199
Washington	623,786,920	.01527127344
West Virginia	244,121,480	.00597647330
Wisconsin	718,698,070	.01759484593
Wyoming	166,569,650	.00407788395
Totals	40,847,079,480	1.00000000000

[FR Doc 86-28866 Filed 12-23-86; 8:45 am]

BILLING CODE 6450-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPP-64007; FRL-3130-7]

Intent To Cancel Certain Pesticide Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of intent to cancel.

SUMMARY: EPA is issuing a notice of intent to cancel certain pesticide registrations under section 6(b) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The registrations which the Agency intends to cancel are held by registrants whom the Agency, after a good faith effort, has been unable to contact. Persons adversely affected by this notice may request a hearing in accordance with the provisions of 40 CFR Part 164.

DATES: All registrations will be cancelled at the end of 30 days from the date of publication or receipt of this notice by registrants, unless a hearing has been requested by a person adversely affected by this notice, or the Agency is provided with a correct and current address of an affected registrant.

A request for a hearing by an affected registrant or the registrant's correct and current address must be received by the Agency on or before January 23, 1987, or 30 days after receipt by mail by the affected registrant of this notice, whichever is the later date.

A request for a hearing submitted by any other adversely affected person must be received on or before January 23, 1987.

ADDRESS: Hearing requests must be submitted to: Hearing Clerk (A-110), Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: By mail: Stanley J. Austin, Registration Support and Emergency Response Branch, Registration Division (TS-767C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Office location and telephone number: Rm. 716C, Crystal Mall Building #2, 1921 Jefferson Davis Highway, Arlington, VA, (703-557-4360).

SUPPLEMENTARY INFORMATION: Over the years, EPA has been unable to contact certain pesticide registrants at the addresses on file at the Agency or appearing on current pesticide product labels. EPA's inability to communicate with these registrants impairs the Agency's ability to discharge its statutory mandate to regulate pesticide products and their impact on the environment. Furthermore, it creates an undesirable situation in that some registrants may unknowingly be in violation of the Act and escape burdens assumed by other registrants in compliance with the Act.

Section 6(b) of FIFRA allows the Administrator to issue a notice of intent to cancel a pesticide's registration if that ". . . pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act. . . ."

Section 3(c)(1)(A) of FIFRA and 40 CFR 162.10(a)(1)(ii) make it a condition of registration that a registrant's address be filed with the Agency and appear on the label of the registrant's pesticide product. In addition, section 12(a)(1)(E) of FIFRA makes it unlawful to distribute, sell, offer for sale, hold for sale, ship, deliver or offer for delivery to any person a misbranded pesticide. Under FIFRA section 2(q)(2)(C)(i), failure to have the registrant's correct address on the label of its pesticide product constitutes misbranding. Therefore, failure of a registrant to submit a correct and current address and include such address as part of the label of its pesticide products is in violation of the Act's provisions and is grounds for cancellation of that registrant's registrations.

EPA issued a policy statement, published in the **Federal Register** of March 5, 1986 (51 FR 7634), indicating that the Agency may decide to initiate cancellation proceedings for registrations held by registrants whom the Agency has, after good faith efforts, been unable to contact by mail. This notice implements that policy.

This notice will be sent to all affected registrants by certified mail to the most current addresses the Agency has in its files. For the purposes of this notice, the Agency will consider validated non-delivery as receipt and the date of validated non-delivery as the date of receipt in those instances where actual receipt is not accomplished.

The impact of these cancellations on the agricultural economy is difficult to determine. It is believed that some or all of the pesticide products subject to this cancellation action are no longer on the market. Some of the pesticide products have no agricultural uses. At worst, the impact on the agricultural economy is expected to be slight.

Pursuant to section 6(b), the Secretary of Agriculture has reviewed this notice and has no comments. The Science Advisory Panel has waived its right (under section 25(d)) to review this notice.

Registrations Subject To Cancellation

The following registrations are subject to cancellation under this notice.

Registrant	Registration Nos.
ADCO Chemical & Supply Co., 2301 W. Board Street, Columbus, OH 43204.	33276-01
Alcor Products, 109 N. Vineland, City of Industry, CA 91744.	36238-9559
Alladin Laboratories, Inc., 3030 S. Ocean Ave., Box 569, Freeport, NY 11520.	34858-04, 34858-05, 34858-06, 34858-07
American Maintenance Equip., 178 South Kalamath Street, Denver, CO 80223.	17912-01, 17912-02, 17912-03
Amsco Solvents & Chemical Co., 4619 Reading Road, Cincinnati, OH 45229.	34894-01, 34894-03
Anco Refining Company, 681 Main Street, Belleville, NJ 07109.	20957-01, 20957-02, 20957-05
Andy's Independent Pest Control; P.O. Box 32514401, S.I. 35- & Country Mall, Temple, TX 76501.	45997-01
Aqualar, P.O. Box 3780, Oak Park, MI 48237.	34696-01
Aqua Marine Pools, Inc., 740 Creative Dr., Box 68332, Lakeland, FL 33805.	48028-01
A to Z Products, P.O. Box 8, Dunedin, FL 33528.	32338-01
Aquarius Pool Repair & Service Co., 987 State Road, 434 Winn-Dixie Shopping Plaza, Longwood, FL 32750.	45327-01
Aquatherm Inc., 2233 West 2nd Street, Santa Ana, CA 92703.	12468-01, 12468-03, 12468-04
Arizona Sulphur Company, 5340 West Bethany Road, Box 863, Glendale, AZ 85311.	35377-01, 35r377-02, 35377-5663 35377-5664, 35377-7184
Atlanta Chemex Company, 217 Whitehall St., Atlanta, GA.	14167-9294, 14167-9313
A.T.S. Laboratories, 936 Ledge Road, Medina, OH 44256.	35376-01
Avervoe Chemical Co., Inc., 416 Aldo Ave., Box 263, Santa Clara, CA 95050.	34746-01
Axon Corporation, P.O. Box 171222, Memphis, TN 38117.	34771-02, 34771-06, 34771-07
B&M International, Inc., P.O. Box 1116, Thibodaux, LA 70301.	36999-01, 36999-02, 39999-03, 36999-04, 36999-05, 39999-06, 36999-07, 36999-08, 39999-09, 36999-10, 36999-11, 39999-12, 36999-13, 36999-14, 39999-15, 36999-16, 36999-17, 39999-18, 36999-33, 36999-34, 39999-35,
Barton Pool and Patio Supplies, 1400 W. Broadway, Barton, FL 33830.	46489-01
Basco Products Company, P.O. Box 142, Highway 49, S., Clarksdale, MS 38614.	18960-02, 18902-03
Bayside Pools, Inc., 1991 N.E. 147th Terrace, N. Miami, FL 33181.	47913-01
Biggers & Associates, P.O. Box 2819, Columbus, OH 43204.	32494-01
Biodet, Inc., Box A, Schaumburg, IL 60193.	40054-01, 40054-02, 40054-03, 40054-04, 40054-05, 40054-06, 40054-07, 40054-08, 40054-09, 40054-10, 40054-11, 40054-12
Braco Products, 901 Utica, #38, Corpus Christi, TX 78418.	52853-01
Brand Development Corp., P.O. box 483, New York, NY 10021.	33801-01
Cam Chem Inc., P.O. Box 295, 21636 Road 152, Tulare, CA 93274.	10969-8835, 10969-8836, 10969-8837
Can AM Industries, 13635 Alondra Blvd., Santa Fe Springs, CA 90607.	34319-6801, 34319-6802, 34319-6803, 34319-6804
Capsule Products, Inc., Box 20431, 2645 Perth St., Dallas, TX 75220.	42784-01
Carrillo & Company, 6th Ave., Pedro D. Correa, Rio Piedras, PR 00923.	22521-01
Castle Chemical Corp., 830 Grand Blvd., Deer Park, NY 11729.	29910-01, 29910-02, 29910-03, 29910-04, 29910-05, 29910-06, 29910-07
Cato Chemical Company, 1728 Mary Street, Honolulu, HI 96819.	35031-5397, 35031-10287, 35031-10288
Cealin Chemicals, 6501 Arlington Expressway, Bldg. A, Suite 106, Arlington Ctr., Jacksonville, FL 33211.	34132-01, 34132-02 34132-06
Central Arkansas Industrial Service, Inc., P.O. Box 223, Conway, AR 72032.	36406-01, 36406-02
Chem-Tech International, Inc., 2037 West 14th Avenue, Denver, CO 80204.	45025-03
Climaco Corporation, Two North Riverside Plaza, Chicago, Il 60606.	42875-01
Clinipad Corporation, 75 Camp Ave., Stamford, CT 06907.	31973-01
Club Chemical Corporation, 1542 Fayette, El Cajon, CA 92029.	48478-01
Cominex Inc., 30 Main Street, Box 336, Warrenton, VA 22186.	47873-01
Consumer Chemical Corporation, 9 Bridle Lane, Poughkeepsie, NY 12603.	19214-01
Consumer Economics, 129 St. Andrews Blvd., Charleston, SC 29407.	33562-01
Critter Chemco, Inc., 10685 E. 51st Ave., Denver, CO 802391.	35958-01, 35958-02
Crouch Chemicals, 8755 S.W. 129th St., Miami, FL 33165.	17814-9544
Crystal Clear Co., 6043 Jackson Rd., Ann Arbor, MI 48103.	42397-01
Delta Chemicals, Chempac Division, Lucon Dr., Deer Park, NY 11729.	23611-01, 23611-02, 23611-03, 23611-04, 23611-05, 23611-06,
Desert Fly Control of Arizona, Inc., 5303 E. Fairview, Chandler, AZ 85224.	45055-01, 45055-02
De Oxx Inc., 1032 W. Robinson Street, Orlando, FL 32805.	34179-01 34179-9547
De Tranna Enterprises, 63 Eastman Raod, Memphis, TN 38109.	45079-01
Dillon Chemical Co., Division of V.A. Snell & Comapny, 1622 S. San Marcos, San Antonio, TX 78207.	17873-3943
Diversey Hawaii Ltd., 980115 Kanehameha Highway, Aiea, HI 96701.	35034-6809, 35034-6810, 35034-6811, 35034-6812, 35034-6813
3-D Petroleum Products, Inc., 560 Hudson Street, Hackensack, NJ 07601.	45090-01, 45090-02, 45090-03, 45090-04, 45090-05, 45090-06

Dated: December 12, 1986.

Edwin F. Tinsworth,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 86-28995 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-51654; FRL 3133-5]

Certain Chemicals Premanufacture Notices

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: Section 5(a)(1) of the Toxic Substances Control Act (TSCA) requires any person who intends to manufacture or import a new chemical substance to submit a premanufacture notice (PMN) to EPA at least 90 days before manufacture or import commences. Statutory requirements for section 5(a)(1) premanufacture notices are discussed in the final rule published in the **Federal Register** of May 13, 1983 (48 FR 21722). This notice announces receipt of nineteen such PMNs and provides a summary of each.

DATES: Close of Review Period:

P 87-306 and 87-307—March 4, 1987

P 87-308—March 7, 1987

P 87-309, 87-310, 87-311, 87-312, 87-313, 87-314, 87-315, 87-316 and 87-317—March 8, 1987

P 87-318, 87-319, 87-320, 87-321 and 87-322—March 9, 1987

P 87-323 and 87-324—March 11, 1987.

Written comments by:

P 87-306 and 87-307—February 2, 1987

P 87-308—February 5, 1987

P 87-309, 87-310, 87-311, 87-312, 87-313, 87-314, 87-315, 87-316 and 87-317—February 6, 1987

P 87-318, 87-319, 87-320, 87-321 and 87-322—February 7, 1987

P 87-323 and 87-324—February 8, 1987.

ADDRESS: Written comments, identified by the document control number "[OPTS-51654]" and the specific PMN number should be sent to: Document Control Officer (TS-790), Confidential Data Branch, Information Management Division, Office of Toxic Substances, Environmental Protection Agency, Rm. E-201, 401 M Street SW., Washington, DC 20460, (202) 382-3532.

FOR FURTHER INFORMATION CONTACT: Wendy Cleland-Hamnett, Premanufacture Notice Management Branch, Chemical Control Division (TS-794), Office of Toxic Substances, Environmental Protection Agency, Rm. E-611, 401 M Street SW., Washington, DC 20460, (202) 382-3725.

SUPPLEMENTARY INFORMATION: Effective with this notice, a non-substance change in format is being initiated for information published under sections 5(d)(2) and 5(h)(6) of the Toxic Substances Control Act. Toxicity data will only appear in the notice when submitted with the PMN. Exposure and environmental release/disposal information will no longer be published in the notice. The following notice contains information extracted from the non-confidential version of the submission provided by the manufacturer on the PMNs received by EPA. The complete non-confidential document is available in the Public Reading Room NE-G004 at the above address between 8:00 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays.

P 87–306

Manufacturer. Confidential.
Chemical. (S) Humic acids, calcium salts.
Use/Production. (G) Open, non-dispersive. Prod. range: Confidential.

P 87–307

Manufacturer. Dow Corning Corporation.
Chemical. (G) Silicone glycol copolymer.
Use/Production. (S) Surfactant. Prod. range: Confidential.
Toxicity Data. Acute oral: 4.1 g/kg; Acute dermal: > 2.0 g/kg; Irritation: Skin—Slight-irritant, Eye—Moderate conjunctival iritis.

P 87–308

Manufacturer. Confidential.
Chemical. (G) Aliphatic linear segmented polyurethane prepolymer.
Use/Production. (S) Site-limited precursor for preparation of water based coating. Prod. range: Confidential.

P 87–309

Importer. CIBA-GEIGY Corporation.
Chemical. Benzophenonetetracarboxylic anhydride—aromatic amine polyimide.
Use/Importer. (S) Industrial coatings for semiconductor devices, liquid crystal displays and hybrid circuit manufacturing. Import range: Confidential.
Toxicity Data. Acute oral: > 5,000 mg/kg; Irritation: Skin—Non-irritant, Eye—Non-irritant, Skin sensitization: Non-sensitizer.

P 87–310

Manufacturer. Confidential.
Chemical. (G) Polyamide/styrene—maleic copolymer.
Use/Production. (G) Lacquer resin. Prod. range: Confidential.

P 87–311

Manufacturer. American Hoechst Corporation.
Chemical. (g) Substituted azo naphthalene sulfonic acid.
Use/Production. (S) Industrial fiber reactive dye. Prod. range. Confidential.
Toxicity Data. Acute oral: > g/kg; Irritation: Skin—Non-irritant, Eye—Mild.

P 87–312

Manufacturer. American Hoechst Corporation.
Chemical. (G) Substituted azo napthalene sulfonic acid.
Use/Production. (S) Fiber reactive dye for cellulosic and nylon fibers. Prod. range: Confidential.
Toxicity Data. Acute oral: > 5 g/kg; Irritation: Skin—Non-irritant, Eye—Mild.

P 87–313

Manufacturer. American Hoechst Corporation.
Use/Production. (S) Industrial fiber reactive dye. Prod. range: Confidential.
Toxicity Data. Acute oral: > g/kg; Irritation: Skin—Mild Eye—Mild.

P 87–314

Manufacturer. Interchem, Incorporated.
Chemical. (G) Dicyanate ester oligomer.
Use/Production. (S) Industrial thermoset resin for use in fiber reinforced structural and electrical composites; encapsulation of electronic components; and heat curable adhesives. Prod. range: Confidential.
Toxicity Data. Skin Sensitization; Sensitizer.

P 87–315

Manufacturer. Interchem, Incorporated.
Chemical. (G) Dicyanate ester oligomer.
Use/Production. (S) Industrial thermoset resin for use in fiber reinforced structural and electrical composites; encapsulation of electronic components; and heat curable adhesives. Prod. range: Confidential.
Toxicity Data. Skin Sensitization; Sensitizer.

P 87–316

Manufacturer. Interchem, Incorporated.
Chemical. (G) Dicyanate ester oligomer.
Use/Production. (S) Industrial thermoset resin for use in fiber reinforced structural and electrical composites; encapsulation of electronic components; and heat curable adhesives. Prod. range: Confidential.
Toxicity Data. Skin Sensitization; Sensitizer.

P 87–317

Importer. Confidential.
Chemical. (G) Isoindoline yellow.
Use/Importer. (G) Colorant. Import range: Confidential.
Toxicity Data. Acute oral: 5,000 mg/kg; Irritation: Skin—Non-irritant, Eye—Slight, Ames test—Non-mutagenic.

P 87–318

Importer. Parexel International Corporation.
Chemical. (S) Benzene, 1,1'-[ethanediylbis(oxy)]bis[3-methyl-.
Use/Import. (S) Site-limited and industrial sensitizer in coating agent for thermal papers. Import range: 25,000 to 40,000 kg/yr.
Toxicity Data. Acute oral: > 5,000 mg/kg; Acute dermal: > 2,000 mg/kg; Irritation: Skin—Non-irritant, Eye—Irritant, Inhalation: 2.98 g/m³ air.

P 87–319

Manufacturer. Confidential.
Chemical. (G) Methacrylate capped polyurethane-polyester/polyether oligomer.
Use/Import. (S) Graphic-arts printing plate. Prod. range: Confidential.

P 87–320

Manufacturer. Confidential.
Chemical. (G) Modified (alkyl) carboxylic acid.
Use/Import. (S) Industrial extreme pressure additive (component) for metal working fluids. Import range; Confidential.

P 87–321

Manufacturer. The Dow Chemical Company.
Chemical. (G) MDI Polyurethane prepolymer.
Use/Production. (S) Industrial manufacture of polyurethane elastomers. Prod. range: Confidential.

P 87–322

Manufacturer. The Dow Chemical Company.
Chemical. (G) Modified ABS.
Use/Production. (S) Industrial extrusion and injection molding of plastic articles. Prod. range: Confidential.

P 87–323

Manufacturer. Confidential.
Chemical. (G) Poly(oxy-1,2-ethanediyl),-substituted-hydroxy-, C 16–20 alkyl ethers.
Use/Production. (G) Industrial surfactant. Prod. range: Confidential.

P 87–324

Importer. Fallek Chemical Company.
Chemical. (S) 2 Hexyl decanol (2-hexa decanol).
Use/Import. (S) Industrial base for ethoxylation; solvent for perfumes others emollients; emollient for cosmetics; and lubricant machinery, etc. Import range: 40,000 to 500,000 kg/yr.
Toxicity Data. Acute oral: < 33/kg.

Dated: December 16, 1986.

Denise Devoe,

Acting Division Director, Information Management Division.

[FR Doc. 86–28898 Filed 12–23–86; 8:45 am]

BILLING CODE 6560-50-M

[OPTS-42092; FRL-3134-9]

Testing Consent Agreement Development for Alkyl Phthalates; Solicitation for Interested Parties

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA's procedures for requiring the testing of chemical substances and mixtures under section 4 of the Toxic Substances Control Act (TSCA) include the adoption of enforceable consent agreements (ECAs) and the promulgation of test rules. ECAs may be adopted where consensus on an industry test program is reached in a timely manner by EPA, affected manufacturers and/or processors, and other interested parties. If timely consensus cannot be reached or appears unlikely, and the Agency makes certain statutory findings under TSCA, EPA issues test rules. In this notice, EPA announces its tentative evaluation of environmental effects and chemical fate testing needs for the alkyl phthalates chemical category, announces a public meeting to discuss such testing, and requests all persons desiring to have the status of "interested parties" in any negotiations of an ECA for the alkyl phthalates to notify EPA of that interest.

DATES: Submit written notice of interest to be designated an interested party on or before January 21, 1987. A public meeting will be held on January 7, 1987.

ADDRESS: Submit written request to be an "interested party" in triplicate, identified by the document control number (OTPS-42-92) to:

TSCA Public Information Office (TS-793), Office of Pesticides and Toxic Substances, Environmental Protection Agency, Rm. NE-G004, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Edward A. Klein, Director, TSCA Assistance Office (TS-799), Office or Toxic Substances, Rm. E-543, 401 M St. SW., Washington, DC 20460, (202) 554-1404.

Persons interested in attending the public meeting should notify EPA by telephone on or before January 6, 1987.

SUPPLEMENTARY INFORMATION: EPA has issued amendments to the procedural regulation in 40 CFR Part 790 (51 FR 23706; June 30, 1986), which govern the development and implementation of testing requirements under section 4 of TSCA. These amendments establish procedures for using ECAs to develop testing requirements under section 4 of the Act. This notice serves three purposes under those procedures. First, it requests "interested parties" who wish to participate in testing negotiations for the alkyl phthalates to identify themselves to EPA. Second, it announces a public meeting to initiate testing negotiations for this chemical. Third, it proposes a target schedule for implementation of the consent agreement process.

I. Identification of Interested Parties

Under 40 CFR 790.22, the testing negotiation procedures are initiated by the publication of a **Federal Register** notice which invites persons interested in participating in or monitoring negotiations for the development of an ECA to notify the Agency in writing. Those individuals and groups who respond to EPA's notice by the deadline established in the notice will have the status of "interested parties" and will be afforded opportunities to participate in the negotiations process. These "interested parties" will not incur any obligations by being designated "interested parties." The procedures for these negotiations are described in 40 CFR 790.22. Individuals and groups desiring to have the status of "interested parties" in the development of the ECA for the alkyl phthalates should submit a written request to the Agency at the address given above on or before January 7, 1987.

II. Public Meeting

A public meeting will be held on January 7, 1987, in Rm. 103, Notheast Mall, EPA Headquarters, 401 M St., SW., Washington, DC 20460, to announce EPA's preliminary testing determination for environmental effects and chemical fate testing of the alkyl phthalates and to initiate testing negotiations. Persons interested in attending this meeting should notify the EPA TSCA Assistance Office by telephone at the number listed above on or before January 6, 1987.

III. Timetable for Negotiating Test Agreement

In accordance with the procedures for the development of ECAs established in 40 CFR 790.22, and the Agency's plans to propose a test rule for the alky phthalates by late 1987 (if an ECA cannot be developed in that time), the following target schedule is established for the alkyl phthalates:

January 7, 1987—Public meeting to initiate testing negotiations. Also, deadline for notice of interested party designations.

April 9, 1987—Decision by EPA on whether to use consent order or test rule.

May 14, 1987—Draft consent order sent to interested parties (if EPA decides to use consent order).

September 14, 1987 Issuance of consent order.

Authority: 15 U.S.C. 2603.

Dated: December 19, 1986.

Joseph J. Merenda,

Director, Existing Chemical Assessments Division.

[FR Doc. 86-29012 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

[FRL-3131-2]

Science Advisory Board; Closed Meeting

Under Pub. L. 92-463, notice is hereby given that a meeting of an ad-hoc Subcommittee of the Science Advisory Board will be held in Washington, DC on January 12-13, 1987 to determine the recipients of the Agency's 1986 Scientific and Technological Achievement Cash Awards. These awards are established to give honor and recognition to EPA employees who have made outstanding contributions in the advancement of science and technology through their research and development activities, and who have published their results in peer-reviewed journals.

Pursuant to the appropriate provision of the Federal Advisory Committee Act, section 10(d) of 5 U.S.C. Appendix 1, and the appropriate provision of the Government in the Sunshine Act, 5 U.S.C. 552b(d)(6), I have determined that this meeting may be closed to the public. In determining the actual cash amount of each award, the Agency requires full and frank advice from the Science Advisory Board. This advice will involve professional judgments on those employees whose published research results are deserving of a cash award as well as those that are not. In addition, the Board will advise on the amount of money to be allocated for each award. Discussions of such a personal nature, where disclosure would constitute an unwarranted invasion of personal privacy, may be closed to the public under section 10(d) of 5 U.S.C. Appendix 1. In accordance with the provision of the Federal Advisory Committee Act, minutes of the meeting will be kept for Agency and Congressional review.

The Science Advisory Board shall be responsible for maintaining records of the meeting and for providing an annual report setting forth a summary of the meeting consistent with the policy of 5 U.S.C. Appendix 1 section 10(d).

For further information contact: Terry Yosie at (202) 382-4126.

Dated: December 16, 1986.

Lee M. Thomas,

Administrator.

[FR Doc. 85-28747 Filed 12-23-85; 8:45 am]

BILLING CODE 6560-50-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Statement of Policy Regarding Disclosure by the FDIC of Statutory Enforcement Actions

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Change in effective date.

SUMMARY: The Federal Deposit Insurance Corporation (the "FDIC") is postponing until July 1, 1987, implementation of its May 6, 1985 statement of policy which provides for the FDIC to publicly disclose the final orders it issues in conjunction with formal enforcement actions. This delay will provide the FDIC with additional time to develop a uniform disclosure approach with the other Federal banking agencies that may make the policy statement unnecessary.

EFFECTIVE DATE: December 24, 1986.

FOR FURTHER INFORMATION CONTACT: Robert F. Storch, Planning and Program Development Specialist, Division of Bank Supervision, Federal Deposit Insurance Corporation, Washington, DC 20429, telephone (202) 898-6905.

SUPPLEMENTARY INFORMATION: On May 6, 1985, the Board of Directors of the FDIC adopted a statement of policy, originally scheduled to become effective on January 1, 1986, which provides for the FDIC to publish and make available to the public in press releases the names of all banks and persons to whom the FDIC has issued final orders in conjunction with formal enforcement actions. In addition, brief descriptions of the nature of the enforcement actions taken and summaries of the orders are to be incorporated into the press releases for each action disclosed. This policy applies to insurance termination orders, cease-and-desist orders, removal orders, suspension orders, civil money penalty orders, and capital directives.

The statement of policy was originally scheduled to become effective on January 1, 1986. However, the effective date was postponed first to July 1, 1986, and then to January 1, 1987, to provide an opportunity for the FDIC to work with the other federal banking agencies to develop an approach for disclosures by banks that would make the policy statement unnecessary. The FDIC finds that additional time is needed to pursue that alternative and is, therefore, delaying the effective date of its existing policy statement on disclosure of enforcement actions for an additional six months.

Accordingly, the Statement of Policy Regarding Disclosures by the FDIC of Statutory Enforcement Actions that was adopted by the FDIC Board of Directors on May 6, 1985 (50 FR 20619) and amended by the Board of Directors on December 16, 1985 (50 FR 52557) and June 23, 1986 (51 FR 22866) is further amended by removing the date "January 1, 1987" from the seventh paragraph and inserting in its place the date "July 1, 1987."

By order of the Board of Directors. Dated at Washington, DC, this fifth day of December, 1986.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[FR Doc. 86-28907 Filed 12-23-86; 8:45 am]

BILLING CODE 6714-01-M

FEDERAL MARITIME COMMISSION

Notice of Agreements Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreements pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street NW., Room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington DC 20573, within 10 days after the date of the **Federal Register** in which the notice appears. The requirements for comments are found in § 572.603 of the Title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: 224-003939-002

Title: Long Beach Terminal Agreement.

Parties:

City of Long Beach
Metropolitan Stevedoring Company

Synopsis: The proposed amendment would delete a portion of the preferentially assigned premises and adjust the compensation to be paid pursuant to the agreement. The parties have requested a shortened review period.

Agreement No.: 224-004070-003.

Title: San Francisco Terminal Agreement.

Parties:

San Francisco Port Commission (Port)
Stevedoring Services of America (SSA).

Synopsis: The proposed amendment would permit SSA to provide terminal and stevedoring services, on a case-by-case basis at Port marine terminal facilities which are otherwise unassigned.

Agreement No.: 202-009648A-035.

Title: Inter-American Freight Conference.

Parties:

A. Bottacchi S.A. De Navegacion C.F.I. e.I.
A/S Ivarans Rederi
Brazil-America Container Line
Companhia Maritima Nacional
Companhia De Navegacao Lloyd Brasileiro
Companhia De Navegacao Maritima Netumar
Empresa Lineas Maritimas Argentinas Sociedad Anonima (ELMA S/A)
Empresa De Navegacao Allianca S.A.
Flota Mercante Del Estado
Frota Amazonica S.A.
Georgia-Aztec Line
Van Nievelt Goudriaan & Co. B.V.
Kimberly Navigation Company
Reefer Express Lines Pty. Ltd.
R.M.C. Lines, Inc.
Transportacion Maritima Mexicana S.A.
United States Lines, Inc.

Synopsis: The proposed amendment would permit the parties to offer intermodal service under single-factor, through rates in the agreement trade.

Agreement No.: 224-010736-001.

Title: Long Beach Terminal Agreement.

Parties:

City of Long Beach (Port)
Long Beach Container Terminal, Inc.

Synopsis: The proposed amendment would revise the agreement's compensation formula to account for additional construction costs of the Port's marine terminal at berths 6 to 10 inclusive, Pier A. The parties have requested a shortened review period.

Agreement No.: 224-010902-001.

Title: San Francisco Terminal Agreement.

Parties:

San Francisco Port Commission
Zim American Israeli Shipping Co., Inc.

Synopsis: The proposed amendment would establish a per container wharfage rate for "By-Pass Containers."

Agreement No.: 224-011044.

Title: Tampa Terminal Agreement.

Parties:

Tampa Port Authority
Bermuda Star Line, Inc. (BSL)

Synopsis: The proposed amendment would grant BSL non-exclusive, preferential use of a passenger terminal facility in Tampa, Florida.

Agreement No.: 212–011045.
Title: Trans-Atlantic Revenue Apportionment Agreement.
Parties:

Atlantic Container Line (G.I.E.)
Gulf Container Line (GCL), B.V.
Compagnie Generale Maritime (CGM)
Dart-ML Limited
Hapag-Lloyd AG
Trans Freight Lines
Sea-Land Service, Inc.
Nedlloyd Lijnen, B.V.

Synopsis: The proposed amendment would provide for the averaging and apportionment of net revenue among the parties in respect to the transport of specified commodities in the trade between U.S. Atlantic ports and inland and coastal points via such ports, and ports and points in the United Kingdom and Republic of Ireland, Denmark, Scandinavia, Poland, U.S.S.R. Baltic Ports, East and West Germany, Belgium, France (Bayonne/Dunkirk range) and the Netherlands.

By Order of the Federal Maritime Commission.

Dated: December 19, 1986.

Joseph C. Polking,
Secretary.

[FR Doc. 86–28926 Filed 12–23–86; 8:45 am]

BILLING CODE 6730–01–M

[Docket No. 86–31]

New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District; Filing of Complaint and Assignment

Notice is given that a complaint filed by the New Orleans Steamship Association against the Plaquemines Port, Harbor and Terminal District was served December 19, 1986. Complainant alleges, among other matters, that respondent has violated sections 10(b)(11), 10(b)(12) and 10(d)(1) of the Shipping Act of 1984 through the application of its current terminal tariff which, in turn, was amended to comply with the Commission's decision in Docket No. 83–2—New Orleans Steamship Association v. Plaquemines Port, Harbor and Terminal District. (Order Adopting Initial Decision served September 16, 1986).

This proceeding has been assigned to Administrative Law Judge Norman D. Kline Hearing in this matter, if any is held, shall commence within the time limitations prescribed in 46 CFR 502.61. The hearing shall include oral testimony and cross-examination in the discretion of the presiding officer only upon proper showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statement, affidavits, depositions, or other documents or that the nature of the matter in issue is such that an oral hearing and cross-examination are necessary for the development of an adequate record. Pursuant to the further terms of 46 CFR 502.61, the initial decision of the presiding officer in this proceeding shall be issued by December 21, 1987, and the final decision of the Commission shall be issued by April 21, 1988.

Joseph C. Polking,
Secretary.

[FR Doc. 86–28930 Filed 12–23–86; 8:45 am]

BILLING CODE 6730–01–M

Ocean Freight Forwarder License; Revocations

Notice is hereby given that the following ocean freight forwarder licenses have been revoked by the Federal Maritime Commission pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. App. 1718) and the regulations of the Commission pertaining to the licensing of ocean freight forwarders, 46 CFR 510.

License Number: 2628
Name: Spatzer International, Inc.
Address: 11 John Street, New York, NY 10038
Date Revoked: November 1, 1986
Reason: Failed to maintain a valid surety bond

License Number: 2780
Name: Muller Air Freight, Inc. (also dba Muller Air Freight, Inc. Ocean Division)
Address: 5341 W. 104th St., Los Angeles, CA 90045
Date Revoked: November 10, 1986
Reason: Requested revocation voluntarily

License Number: 1729
Name: Bostrum-Warren, Inc. (A Washington Corporation)
Address: c/o 3200 4th Ave., South, Seattle, WA 98124
Date Revoked: November 22, 1986
Reason: Failed to maintain a valid surety bond

License Number: 2309
Name: American Shipping Company
Address: 9410 W. Flager St., Unit #110, Miami, FL 33174
Date Revoked: November 22, 1986
Reason: Failed to maintain a valid surety bond

License Number: 2013
Name: Personal Forwarding, Inc.
Address: 51 East 42nd Street, New York, NY 10017
Date Revoked: November 25, 1986
Reason: Surrendered license voluntarily

License Number: 1263
Name: Donald W. Reichow dba Expires International Forwarding
Address: 17350 E. Temple Ave. #436, La Puente, CA 91744
Date Revoked: November 26, 1986
Reason: Surrendered license voluntarily

License Number: 1021
Name: Melvin Export Shipping Services, Inc.
Address: 40 Rector St., #1525, New York, NY 10006
Date Revoked: November 26, 1986
Reason: Surrendered license voluntarily

License Number: 2916
Name: American Freight Exchange, Inc.
Address: 149–10 183rd Street, #228, Jamacia, NY 11413
Date Revoked: November 5, 1986
Reason: Surrendered license voluntarily

License Number: 1946
Name: Jose A. Fernandez, dba Ultramar Forwarding
Address: 854 N.W. 87th Ave., #509, Miami, FL 33172
Date Revoked: December 4, 1986
Reason: Surrendered license voluntarily

License Number: 900
Name: AFI/PASHA Worldwide Forwarders, Inc.
Address: 5725 Paradise Drive, Corte Madera, CA 94925
Date Revoked: December 5, 1986
Reason: Surrendered license voluntarily

License Number: 2131
Name: The A. W. Fenton Company, Inc., a New York corporation
Address: 19 Rector Street, New York, NY 10006
Date Revoked: December 5, 1986
Reason: Surrendered license voluntarily

License Number: 3003
Name: General Gumina dba International
Address: 10,700 Northwest Freeway, Houston, TX 77092
Date Revoked: December 6, 1986
Reason: Failed to maintain a valid surety bond

Robert G. Drew,
Director, Bureau of Tariffs.

[FR Doc. 86–28927 Filed 12–23–86; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 86N-0251]

Bioequivalence of Solid Oral Dosage Forms; Notice of Availability of Transcript and Extension of Comment Period

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of the written transcript of the public hearing recently held on the bioequivalence of solid oral dosage forms. The hearing was held on September 29 through October 1, 1986, in Washington, DC. FDA is also announcing that written comments to the public docket on this matter may not be submitted.

DATE: Written comments by February 23, 1987.

ADDRESS: Written requests for a copy of the transcript or comments concerning the transcript to the Dockets Management Branch (HFA-305), Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857. (Send two self-addressed adhesive labels to assist the Branch in processing your requests.)

FOR FURTHER INFORMATION CONTACT: Donald B. Hare or Edwin V. Dutra, Jr., Center for Drugs and Biologics (HFN-203), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-2784.

SUPPLEMENTARY INFORMATION:

Background

On September 29 through October 1, 1986, FDA held a Bioequivalence Hearing in Washington, DC. The primary purpose of the hearing was to provide an opportunity for all interested persons to express their views on the scientific principles and procedures FDA uses to make a finding of bioequivalence between immediate release solid oral dosage forms. Over 50 formal presentations were made at the hearing by representatives from, among others, various segments of the pharmaceutical industry, professional societies, governmental agencies, and academia.

Transcript

A transcript of the hearing was made from an audio recording. The transcript, which is approximately 800 pages in length, is on public display in the Dockets Management Branch (address above) under docket number 86N-0251. Photocopies of the transcript made by FDA will cost 10 cents per page plus postage. Printed, bound copies of the transcript are available from a private source at a cost of $50 per copy postpaid. The address for the private source is "Proceedings," FDA Bioequivalence Hearing, P.O. Box 100, Maple Glen, PA 19002. A check in U.S. funds made out to "Proceedings" must be enclosed with orders for copies from the private source.

Comment Period

The public docket for the hearing will be kept open until February 23, 1987. On or before that date, any interested person may submit written comments concerning the issues discussed at the Bioequivalence Hearing. Persons who made presentations at the hearing may also submit comments to supplement their presentations or make additional points. Comments should identify the docket number 86N-0251. Handling of comments will be expedited if the docket number is also printed in the lower left-hand corner of the mailing envelope.

Task Group

The agency has formed a task group to evaluate the presentations, comments, questions, and suggestions made at the 3-day hearing. This group will also review all comments submitted to the public docket. After this group evaluates and reviews these materials it will submit a report to the Office of the Commissioner. This report will include a recommendation for what, if any, actions it considers appropriate for the agency to take concerning the bioequivalence program.

Dated: December 18, 1986.

John M. Taylor,

Associate Commissioner for Regulatory Affairs.

[FR Doc. 86-28911 Filed 12-19-86; 3:14 pm]

BILLING CODE 4160-01-M

[Docket No. 79P-0060 et al.]

Approved Variances for Laser Light Shows; Availability

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administraiton (FDA) is announcing that variances from the performance standard for laser products have been approved by FDA's Center for Devices and Radiological Health (CDRH) for 13 organizations that manufacture and produce laser light shows, light show projectors, or both. The projectors provide a laser light display to produce a variety of special lighting effects. The principal use of these products is to provide entertainment to general audiences.

DATES: The effective dates and termination dates of the variances are listed in the table below under "**SUPPLEMENTARY INFORMATION.**"

ADDRESS: The applications and all correspondence on the applications have been placed on display in the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Sally Friedman, Center for Devices and Radiological Health (HFZ-84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4874.

SUPPLEMENTARY INFORMATION: Under § 1010.4 (21 CFR 1010.4) of the regulations governing establishment of performance standards under section 358 of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f), FDA has granted each of the 13 organizations listed in the table below a variance from the requirements of § 1040.11(c) (21 CFR 1040.11(c)) of the performance standard for laser productions.

Each variance permits the listed manufacturer to introduce into commerce a demonstration laser product assembled and produced by the manufacturer, which is its particular variety of laser light show, laser light show projector, or both. Each laser product involves levels of accessible laser radiation in excess of Class II levels but not exceeding those required to perform the intended function of the product.

CDRH has determined that suitable means of radiation safety and protection are provided by constraints on the physical and optical design and by warnings in the user manual and on the products. Therefore, on the effective dates specified in the table below, FDA approved the requested variances by a letter to each manufacturer from the Deputy Director of CDRH.

So that each product may show evidence of the variance approved for the manufacturer of the product, each product shall bear on the certification label required by § 1010.2(a) (21 CFR 1010.2(a)) a variance number, which i the FDA docket number, and the effective date of the variance as specified in the table below.

Docket No.	Organization granted the variance	Demonstration laser product	Effective date/ termination date
79P-0060 (renewal)	Laser Presentations, Inc., 1009C McKinley Avenue, Columbus, OH 43222.	Laser Presentations Call IIIb or Class IV LP Model Series laser projectors and the laser light shows known as Laser 1 or Laser Space Theatre assembled and produced by Laser Presentations, Inc., containing the Model LP-4 or LP-4K(1) projectors.	Oct. 20, 1986-Sept. 19, 1988.
79P-0192 (renewal)	Jacksonville Museum of Arts and Sciences, Alexander Brest Planetarium, 1025 Gulf Life Drive, Jacksonville, FL 32207.	Jacksonville Museum of Arts and Sciences, Alexander Brest Planetarium laser light show incorporating the firm's Class IV argon/krypton and helium-neon laser projection system.	Oct. 20, 1986-June 26, 1988.
80P-0174 (renewal)	Laser Artistry, Inc., 402 East Oak Street, P.O. Box 220, Oak Creek, WI 53154.	Model L-100 laser projector and laser light shows incorporating this projector which are produced by Laser Artistry, Inc.	Nov. 4, 1986-Oct. 30, 1988.
80P-0448 (renewal)	Laser Presentations, Inc., 1009C McKinley Avenue, Columbus, OH 43222.	Room Laser Shows produced by Laser Presentations, Inc, utilizing projectors from their LP series.	Oct. 20, 1986-Dec. 15, 1988.
80P-0214 (renewal)	Laser Presentations, Inc., 1009C McKinley Avenue, Columbus, OH 43222.	Laser Space Theatre Sky Beacon Display manufactured, assembled, and produced by Laser Presentations, Inc., containing an argon ion laser with a maximum output power of 2 watts (all lines).	Oct. 7, 1986-Oct. 7, 1988.
81P-0044 (renewal)	Laser Art Productions, 909 East Trafficway Street, Springfield, MO 65802.	Laser Art Productions laser, light show incorporating the firm's Model Series LAP 265 laser projectors using kryton, argon, helium-neon, and/or helium-cadmium lasers with a maximum power of up to 8 watts.	Oct. 29, 1986-Apr. 9, 1988.
82P-0141 (renewal)	Fiske Planetarium, University of Colorado, Box 408, Boulder, CO 80309.	Fiske Planetarium laser light show which incorporates Class IV argon and HeNe laser projection systems.	Oct. 7, 1986-June 8, 1987.
84V-0290 (renewal)	J.C.I.L. Laser Systems, 6669 Gatehouse Lane, Las Vegas, NV 89108.	J.C.I.L. Laser Systems laser light show which incorporates the Laser Media Model LMS laser projection system.	Oct. 29, 1986-Nov. 29, 1988.
84V-0357 (renewal)	Dallas Sidekicks, c/o Reunion Arena, 777 Sports Street, Dallas, TX 75207.	Sidekicks Laser Show and the incorporated Class IV argon laser projection system.	Oct. 20, 1986-Oct. 29, 1988.
86V-0194	Lasertainment, 551 N.E. 49th Avenue, Columbia Heights, MN 55421.	Lasertainment laser light show using the Laser Fantasy Class IIIb Model Rainbow HeNe laser projection system.	Oct. 16, 1986-Oct. 16, 1988.
86V-0226	Visulux, 2665 South Drive, Santa Clara, CA 95051	Visulux Model LASER 1000 Large Screen Color Display Projector and displays assembled and produced by Visulux with this laser projector. The projector contains Class IV argon and dye lasers.	Aug. 19, 1986-Aug. 19, 1988.
86V-0370	Wrather Port Properties, Ltd., Queen Mary, Long Beach, CA 90801.	Wrather Port Properties, Limited laser light show for the Queen Mary Exhibit incorporating the Class IV Laser Media LMS laser projector system with Class IV argon and krypton ion lasers and Class III helium-neon lasers.	Oct. 7, 1986-Oct. 7, 1988.
86V-0394	Omni Ventures, 440 North Omni International, Atlanta, GA 30335.	Omni Ventures' laser light show, "Canis Major I," incorporating the firm's Canis Major laser projection system containing a Coherent Radiation Model CR-12 argon laser.	Nov. 4, 1986-Nov. 4, 1988.

In accordance with § 1010.4, the applications and all correspondence on the applications have been placed on public display under the designated docket numbers in the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Public Health Service Act as amended by the Radiation Control for Health and Safety Act of 1968 (sec. 358, 82 Stat. 1177-1179 (42 U.S.C. 263f) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.86).

Dated: December 15, 1986.

John C. Villforth,

Director, Center for Devices and Radiological Health.

[FR Doc. 86-28860 Filed 12-23-86; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 86M-0481]

Sarns Inc./3M; Premarket Approval of the Therapore™ Therapeutic Apheresis System

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing its approval of the application by Sarns Inc./3M, Ann Arbor, MI, for premarket approval, under the Medical Device Amendments of 1976, of the Therapore™ Therapeutic Apheresis System. After reviewing the recommendation of the Gastroenterology-Urology Devices Panel, FDA's Center for Devices and Radiological Health (CDRH) notified the applicant of the approval of the application.

DATE: Petitions for administrative review by January 23, 1987.

ADDRESS: Written requests for copies of the summary of safety and effectiveness data and petitions for administrative review to the Dockets Management Branch (FHA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Susanne R. Rohrer, Center for Devices and Radiological Health (HFZ-420), Food and Drug Administration, 8757 Georgia Ave., Silver Spring, MD 20910, 301-427-7750.

SUPPLEMENTARY INFORMATION: On December 18, 1985, Sarns Inc./3M. Ann Arbor, MI 48106, submitted to CDRH an application for premarket approval of the Therapore™ Therapeutic Apheresis System. The device is a cross-flow plasma filtration system for therapeutic plasma exchange. The Therapore™ Therapeutic Apheresis System, consisting of a pump console, control panel, and tubeset, is indicated for use in performing therapeutic plasma separation from whole blood in a clinical setting to remove circulating plasma components or protein bound toxins.

On July 29, 1986, the Gastroenterology-Urology Devices Panel, an FDA advisory committee, reviewed and recommended approval of the application. On November 18, 1986, CDRH approved the application by a letter to the applicant from the Director of the Office of Device Evaluation, CDRH.

A summary of the safety and effectiveness data on which CDRH based its approval is on file in the Docket Management Branch (address above) and is available from that office upon written request. Requests should be identified with the name of the device and the docket number found in brackets in the heading of this document.

A copy of all approved labeling is available for public inspection at CDRH—contact Susanne R. Rohrer (HFZ-420), address above.

Opportunity for Administrative Review

Section 515(d)(3) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 360e(d)(3)) authorizes any interested person to petition, under section 515(g) of the act (21 U.S.C. 360e(g)), for administrative review of CDRH's decision to approve this application. A petitioner may request either a formal hearing under Part 12 (21 CFR Part 12) of FDA's administrative practices and procedures regulations or a review of the application and CDRH's action by an independent advisory committee of experts. A petition is to be in the form of a petition for reconsideration under § 10.33(b) (21 CFR 10.33(b)). A petitioner shall identify the form of review requested (hearing or independent advisory committee) and shall submit with the petition supporting data and information showing that there is a genuine and substantial issue of material fact for resolution through administrative review. After reviewing the petition, FDA will decide whether to grant or deny the petition and will publish a notice of its decision in the **Federal Register**. If FDA grants the petition, the notice will state the issue to be reviewed, the form of review to be used, the persons who may participate in the review, the time and place where the review will occur, and other details.

Petitioners may, at any time on or before January 23, 1987, file with the Dockets Management Branch (address above) two copies of each petition and supporting data and information, identified with the name of the device and the docket number found in brackets in the heading of this document. Received petitions may be seen in the office above between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Federal Food, Drug, and Cosmetic Act (secs. 515(d), 520(h), 90 Stat. 554–555, 571 (21 U.S.C. 360e(d), 360j(h))) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.53).

Dated: December 12, 1986.

John C. Villforth,

Director, Center for Devices and Radiological Health.

[FR Doc. 86–28861 Filed 12–23–86; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 76P-0418]

Approved Variance for the Model LS-4 Mammographic X-Ray System; Availability; Elscint, Inc.

AGENCY: Food and Drug Administration.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that an amendment to a variance from the performance standard for radiographic equipment has been approved by FDA's Center for Devices and Radiological Health (CDRH) for the Model LS–4 Mammographic X-Ray System manufactured by Elscint, Inc. The radiographic system incorporates microfocus X-ray tubes and is used in magnification radiography of the breast.

DATES: The amendment to the variance became effective August 19, 1986, and terminates March 27, 1989.

ADDRESS: The application and all correspondence on the application have been placed on display in the Dockets Management Branch (HFA–305), Food and Drug Administration, Rm. 4–62, 5600 Fishers Lane, Rockville, MD 20857.

FUR FURTHER INFORMATION CONTACT: Tracy Donovan, Center for Devices and Radiological Health (HFZ–84), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4874.

SUPPLEMENTARY INFORMATION: Under § 1010.4 (21 CFR 1010.4) of the regulations governing establishment of performance standards under section 358 of the Radiation Control for Health and Safety Act of 1968 (42 U.S.C. 263f), CDRH has granted Elscint, Inc., 751 Expressway Dr., Itasca, IL 60143, an amendment to its variance from a provision of the performance standard for radiographic equipment (21 CFR 1020.31) for the Model LS–4 Mammographic X-Ray System. This system is similar to the product that was covered under Elscint's original variance, the MAM III Mammographic X-Ray System.

The specific provision of the standard from which a variance has been granted pertains to the provision of § 1020.31(h)(2) that mobile or portable x-ray systems (other than dental) be provided with a means to limit the source-to-skin distance to not less than 30 centimeters. All other provisions of the performance standard remain applicable to the product.

CDRH has determined that the X-ray system (1) provides suitable means of radiation safety and protection; and (2) is intended for the special purpose of direct radiographic magnification, which cannot be accomplished with equipment meeting all requirements of the standard. Therefore, on August 19, 1986, CDRH approved the requested variance by a letter to the manufacturer from the Deputy Director of CDRH.

So that the product may show evidence of the variance approved for the manufacturer, the product shall bear on the certification label required by § 1010.2(a) (21 CFR 1010.2(a)) a variance number, which is the FDA docket number appearing in the heading of this notice, and the effective date of the variance.

In accordance with § 1010.4, the application and all correspondence on the application have been placed on public display under the designated docket number in the Dockets Management Branch (address above) and may be seen in that office between 9 a.m. and 4 p.m., Monday through Friday.

This notice is issued under the Public Health Service Act as amended by the Radiation Control for Health and Safety Act of 1968 (sec. 358, 82 Stat. 1177–1179 (42 U.S.C. 263f)) and under authority delegated to the Commissioner of Food and Drugs (21 CFR 5.10) and redelegated to the Director, Center for Devices and Radiological Health (21 CFR 5.86).

Dated: December 15, 1986.

John C. Villforth,

Director, Center for Devices and Radiological Health.

[FR Doc. 86–28862 Filed 12–23–86; 8:45 am]

BILLING CODE 4160-01-M

National Institutes of Health

National Cancer Institute; Meetings

Pursuant to Pub. Law 92–463, notice is hereby given of the meetings of the Board of Scientifc Counselors and its Subcommittees of the Division of Cancer Prevention and Control, National Cancer Institute, National Institutes of Health.

These meetings will be open to the public to discuss administrative details or other issues relating to committee activities as indicated in the notice. Attendance by the public will be limited to space available.

Mrs. Winifred Lumsden, the Committee Management Officer, National Cancer Institute, Building 31, Room 10A–06, National Institutes of Health, Bethesda, Maryland 20892–3100 (301/496–5708) will provide summaries of meetings and rosters of members upon request. Other information pertaining to the meetings can be obtained from the Executive Secretary, Linda Bremerman, National Cancer Institute, Building 31, Room 4A–32, National Institutes of Health, Bethesda, Maryland 20892–3100 (301/496–9569).

Meeting on January 8, 1987, is being published less than 15 days before the meeting due to the conflicting schedules of the members.

Name of Committee: Center and Community Oncology Subcommittee.

Date of Meeting: January 8, 1987, 8:30 a.m.–4 p.m.

Place of Meeting: Building 31, Conference Room 7, 9000 Rockville Pike, Bethesda, Maryland 20892–3100.

Agenda: Discuss current and future programs of the Centers and Community Oncology Program.

Name of Committee: Cancer Control Science Subcommittee.

Date of Meeting: January 9, 1987, 10 a.m.–4 p.m.

Place of Meeting: Building 31, Room 5A-16, 9000 Rockville Pike, Bethesda, Maryland 20892-3100.

Agenda: Discuss current and future programs of the Cancer Control Science Program.

Name of Committee: Prevention Subcommittee.

Date of Meeting: January 21, 1987, 2-5 p.m.

Place of Meeting: Building 31, Room 11A-10, 9000 Rockville Pike, Bethesda, Maryland 20892-3100.

Agenda: Discuss current and future programs of the Prevention Program.

Name of Committee: Budget and Evaluation Subcommittee.

Date of Meeting: January 21, 1987, 7:30-9:30 p.m.

Place of Meeting: Building 31A, Conference Room 2, 9000 Rockville Pike, Bethesda, Maryland 20892-3100.

Agenda: Review of budgetary and fiscal items.

Name of Committee: Board of Scientific Counselors, Division of Cancer Prevention and Control.

Date of Meeting: January 22-23, 1987, 8:30 a.m.—adjournment.

Place of Meeting: Building 31, Room 10, 9000 Rockville Pike, Bethesda, Maryland 20892-3100.

Agenda: Review progress of programs within the Division and review of concepts being considered for funding.

Dated: December 18, 1986.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 86-28960 Filed 12-23-86; 8:45 am]

BILLING CODE 4140-01-M

National Cancer Insitutute; Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of the meeting of the National Cancer advisory Board Subcommittee on Cancer Inforamtion, National Cancer Institute, January 5, 1987, at the Embassy Suites Hotel, 555 N.W. 62nd Street, Fort Lauderdale, Florida, 33309, Conference Room, Second Floor.

The entire meeting will be open to the public from 8 a.m. to 3 p.m. to develop a proposal for Board sponsored Public Participation Hearings. Attendance by the public will be limited to space available.

Mrs. Winifred Lumsden, the Committee Management Officer, National Cancer Institute, Building 31, Room 10A06, National Institutes of Health, Bethesda, Maryland 20892 (301/496-5708) will provide summaries of the meeting and rosters of committee members, upon request.

Mr. J. Paul Van Nevel, Executive Secretary, Subcommittee on Cancer Information, National Cancer Advisory Board, National Cancer Institute, National Institutes of Health, Building 31, Room 10A29, Betheda, Maryland 20892 (301/496-6631) will furnish substantive program information.

This notice is being published less than 15 days prior to the meeting because of the difficulty of coordinating the attendance of the members as they had conflicting commitments.

Dated: December 18, 1986.

Betty J. Beveridge,

Committee Management Officer, NIH.

[FR Doc. 86-28961 Filed 12-23-86; 8:45 am]

BILLING CODE 4140-01-M

Public Health Service

Health Resources and Services Administration; Statement of Organization, Functions and Delegations of Authority

Part H, Chapter HB (Health Resources and Services Administration) of the Statement of Organization, Functions, and Delegations of Authority of the Department of Health and Human Services (47 FR 38409-24, August 31, 1982, as amended most recently at 51 FR 44380-81, December 9, 1986) is amended to change the name of the California, Bemidji, and Nashville Program Offices to California, Bemidji, and Nashville Area Offices in the Indian Health Service.

Uder *Section HB-10, Organization and Functions,* amend the statement for the Indian Health Service (HBN) by deleting the functional statement for the Indian Health Service Area Offices, HBNFL-HBHFW, and substitute the following: Aberdeen Area Office (HBNFL); Albuquerque Area Office (HBNFM); Billings Area Office (HBNFP); Navajo Area Office (HBNFN); California Area Office (HBNFQ); Oklahoma City Area Office (HBNFR); Phoenix Area Office (HBNFS); Alaska Native Health Area Office (HBNFT); Nashville Area Office (HBNFU); Bemidji Area Office (HBNFV); Portland Area Office (HBNFW).

The mission of IHS is accomplished in the field through line elements called Area Offices. Within these can be Subarea Offices, Service Units, Special Programs, Hospitals, Medical Centers, Health Centers, Health Stations, and other elements. Each Area Office is headed by a Director who reports to the Director of IHS. For the population serviced by their respective health delivery systems, each Area Office is responsible for: (1) Participating in and establishing goals and objectives, and interpreting and determining policies and priorities within the framework of IHS policy in pursuit of the IHS mission; (2) delivering and assuring the delivery of high quality comprehensive health services; (3) providing coordination or assuring the coordination of IHS activities and resources internally and externally with those of other governmental and nongovernmental program, and promoting optimum utilization of all available health resources; (4) participating in the development and demonstration of alternative means and techniques of health services management and delivery to provide Indian tribes and other Indian community groups with optimal ways of participating in the Indian Health programs; and (5) assuring the development of individual and tribal capacities to participate in the operation of IHS commensurate with the means and modalities which Indian tribal groups deem appropriate to their needs and circumstances.

Dated: December 16, 1986.

Robert E. Windom,

Assistant Secretary for Health.

[FR Doc. 86-28890 Filed 12-23-86; 8:45 am]

BILLING CODE 4160-15-M

Social Security Administration

Disability Advisory Council; Meetings

AGENCY: Social Security Administration, HHS.

ACTION: Notice of meetings.

SUMMARY: In accordance with the Federal Advisory Committee Act (Pub. L. 92-463), this notice announces the schedule and proposed agenda of forthcoming meetings of the Disability Advisory Council (the Council). The Council is scheduling regular meetings in Washington, DC at which medical and vocational experts will be invited to speak. In addition, the Council is scheduling field hearings at which public officials, representatives of civic and public interest organizations, and concerned citizens may speak. This notice also describes the purpose, structure, and termination date of the Council.

DATES: See **SUPPLEMENTARY INFORMATION.**

ADDRESSES: See **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Douglas Badger, Executive Director, Disability Advisory Council, P.O. Box

17064, Baltimore, Maryland 21203, (301) 594-8177.

SUPPLEMENTARY INFORMATION:

A. Regular Council meetings are scheduled as follows:

Place: Department of Health and Human Services, Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, DC 20201.

Dates: January 15, 1987, 10:00 a.m. to 5:00 p.m.; January 16, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Vocational Rehabilitation.

Dates: February 19, 1987, 10:00 a.m. to 5:00 p.m.; February 20, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Vocational Rehabilitation.

Dates: March 19, 1987, 10:00 a.m. to 5:00 p.m.; March 20, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Use of Medical Specialists in Disability Determinations.

Dates: April 23, 1987, 10:00 a.m. to 5:00 p.m.; April 24, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Work Evaluation.

Dates: May 21, 1987, 10:00 a.m. to 5:00 p.m.; May 22, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Work Incentives and Disincentives.

Dates: June 18, 1987, 10:00 a.m. to 5:00 p.m.; June 19, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Work Incentives and Disincentives.

Dates: July 16, 1987, 10:00 a.m. to 5:00 p.m.; July 17, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Work Incentives and Disincentives.

Dates: August 20, 1987, 10:00 a.m. to 5:00 p.m.; August 21, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Work Incentives and Disincentives.

Dates: September 16, 1987, 10:00 a.m. to 5:00 p.m.; September 17, 1987, 9:00 a.m. to 5:00 p.m.; September 18, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Prepare and Review Report.

Dates: October 15, 1987, 10:00 a.m. to 5:00 p.m.; October 16, 1987, 9:00 a.m. to 4:00 p.m.

Agenda: Review and Review Report.

B. Field hearing scheduled as follows:

Place, Date, and Agenda

Place: Federal Building, Room 8544, (8th Floor), 300 N. Los Angeles Street, Los Angeles, CA 90012.

Date: January 7, 1987, 9:00 a.m. to 5:00 p.m.

Agenda: Vocational Rehabilitation.

Additional field hearings will be scheduled in other major cities across the nation. These additional field hearings will be announced by a notice in the **Federal Register.**

The Council is established and governed by the provisions of section 12102 of Pub. L. 99-272.

The purposes of the Council are to study and make recommendations on the medical and vocational aspects of disability under the Social Security and Supplemental Security Income (SSI) programs. The Council may engage technical assistance in order to carry out its purposes. Studies must include: (1) The effectiveness of vocational rehabilitation programs for Social Security and SSI beneficiaries; (2) the question of using specialists to complete medical and vocational evaluations at the State agency disability decisionmaking level, including the question of requiring medical specialists to complete the medical portion of each case review and any assessment of residual functional capacity in other than mental impairment cases; (3) alternative approaches to work evaluation, the feasibility of providing work evaluation stipends, and screening criteria for work evaluation referrals; and (4) possible criteria for assessing the probability that an applicant or recipient of benefits based on disability will benefit from rehabilitation services.

The Council is to submit a report, specified in Pub. L. 99-272, consisting of the findings and any recommendations to the Secretary of Health and Human Services (the Secretary). The Secretary, in turn, is to submit the report to the Congress and to the Board of Trustees of the Federal Disability Insurance Trust Fund.

The statute provides that the Council terminate after the specified report is submitted to the Congress.

The Secretary has appointed the members of the Council in accordance with the provisions of the statute. The Council is chaired by Dr. John E. Affeldt.

The Council meetings announced in this notice and all field hearings are open to the public to the extent that space is available. Transcripts of the Council meetings and of the field hearings are available to the public on an at-cost-of duplication basis. The transcripts can be ordered from the Executive Director of the Council. The transcripts and all written submissions will become part of the record for these proceedings.

Regular Council Meetings

The regular Council meetings are to conduct the business of the Council and to hear testimony of medical and vocational experts who are invited to speak. However, anyone wishing to submit his or her views and/or questions for consideration by the Council should send them to the Executive Director of the Council at the address shown above.

Field Hearings

The Council will conduct these field hearings as an informal forum. After an opening statement by the chairperson, the public comment portion of the hearing will begin. The Council will accept requests to speak from public officials, representatives of civic and public interest organizations, and concerned citizens. As many speakers will be scheduled at each meeting site as time permits. Because the meeting hours will be limited, individuals are encouraged to speak about the issues on which they feel most strongly and to submit further written comments on other issues. Persons unable to speak at the meetings may submit written comments. In order to assure that everyone wishing to speak will be given the opportunity, the chairperson may limit the time allotted to each speaker.

Any public official, representative of an organization, or individual desiring to participate at a field hearing should write or telephone the Executive Director of the Council for the specific meeting information and provide the following: (1) Name; (2) business address; (3) telephone number during normal working hours; (4) capacity in which presentation will be made, i.e., public official, organization presentation, or citizen; and (5) time desired. Late requests and requests to speak received on the day of the meeting will be honored as time permits.

Dated: December 19, 1986.

W. Douglas Badger,

Executive Director, Disability Advisory Council.

[FR Doc. 86-28891 Filed 12-23-86; 8:45 am]

BILLING CODE 4190-11-M

INTERSTATE COMMERCE COMMISSION

[Finance Docket No. 30948]

Central of Georgia Railroad Company, et al., Joint Project for Relocation of a Line of Railroad; Exemption

On November 26, 1986, Central of Georgia Railroad Company (CG), CSX Transportation, Inc. (CSX), and Southern Railway Company (Southern) filed a notice of exemption under 49 CFR 1180.2(d)(5) for a joint project to relocate a line of railroad.

CG operates over approximately 3,886.7 feet of track, known as the "Spring Track," extending from Survey Station 0+94.5 to Survey Station 39+81.2 in Atlanta, GA. CSX has operated over the "Spring Track" under a trackage rights agreement with CG approved in Finance Docket No. 26311 (not printed) served November 9, 1970. The line is used by CSX to move only overhead or bridge traffic. No CSX served shippers are located on the line. The State of Georgia (Georgia) has exercised an option to purchase a portion of the "Spring Track" right-of-way in the vicinity of the Georgia World Congress Center.[1] This necessitates relocation of CSX's operations to Southern and CG lines which parallel CG's "Spring Track." To facilitate this relocation, Southern has constructed an 800-foot long track segment off its main line to connect with CSX at Jones Avenue and states that this is spur track exempt from Commission jurisdiction under 49 U.S.C. 10907.[2] This connection will require CSX to install a standard crossover between its track in the area of Jones Avenue and to construct about 200 feet of new track.[3] To complete the relocation, CSX proposes to acquire overhead trackage rights over the following line segments of Southern and CG:

Segment I—Survey Station 381+30 to Survey Station 401+53 on Southern's No. 1 main, a distance of 2,023 feet;

Survey Station 396+50 to Survey Station 418+50 on Southern's track No. 153–68, a distance of 2,200 feet;

Survey Station 403+37 to Survey Station 408+46 on Southern's track No. 153–72, a distance of 509 feet; and

Survey Station 401+53 to Survey Station 419+40 on Southern's track No. 153–73, a distance of 1,787 feet.

Segment II—Survey Station 373+69 to Survey Station 381+30 on Southern's new connecting track, a distance of 761 feet.

Segment III—Survey Station 15513+15 to Survey Station 15518+95 on CG's Spring Track, a distance of 580 feet.

Segment IV—Survey Station 15518+95 to Survey Station 15530+68 on CG's Spring Track, a distance of 1,173 feet; and

Survey Station 15530+68 to Survey Station 15535+65 on CG's Circle Track, a distance of 497 feet.

[1] This will result in CG's abandonment of this portion of the line. Although this abandonment could possibly be exempted here as an incident of the relocation proposal [*see* Finance Docket No. 30639, *Louisiana & Ark. Ry. Co—Track. Rights Exempt.—Illinois C.G. R.R. Co. and New Orleans Term. Co.* (not printed), served April 17, 1985]. CG intends to seek separate abandonment authority.

[2] This notice should in no way be interpreted as determinative of the issue of whether this track is an exempt spur track.

[3] Construction of and operation over connecting tracks to not fall under an existing class exemption. That part of the transaction requires approval under 49 U.S.C. 10901 or exemption under 49 U.S.C. 10505. A separate decision will follow concerning the construction phase of the transaction.

Under these trackage rights, CSX will continue to transport only overhead or bridge traffic, and will serve no shippers located on Southern or CG's lines.

The joint project involves the relocation of a line of railroad that does not disrupt service to shippers. Accordingly, it falls within the class of transactions identified at 49 CFR 1180.2(d)(5). The Commission categorically exempted these transactions under 49 U.S.C. 10505 in *Railroad Consolidation Procedures*, 366 I.C.C. 75 (1982). The Commission determined that line relocations embrace trackage rights transactions such as the one proposed here. *See D.T. & I.R.—Trackage Rights*, 363 I.C.C. 878 (1981).

Use of this exemption will be conditioned on appropriate labor protection. Any employees affected by the trackage rights agreement will be protected by the conditions in *Norfolk and Western Ry. Co.—Trackage Rights—BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

Petitions ro revoke the exemption under 49 U.S.C. 10505(d) may be filed at any time. The filing of a petition to revoke will not stay the transaction.

Decided: December 15, 1986.

By the Commission, Jane F. Mackall, Director, Office of Proceedings.

Noreta R. McGee,

Secretary.

[FR Doc. 86–28734 Filed 12–23–86; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 30936]

Delaware Otsego Corporation, et al; exemption from Prior Approval Requirements

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission grants an exemption under 49 U.S.C. 10505 from the prior approval requirements of 49 U.S.C. 11343: (1) For Staten Island Railway Corporation (SIRY) to purchase substantially all of the common stock of Rahway Valley Railroad Company (RVRR) and Rahway Valley Railroad Company (RVC) and thereby acquire control of RVRR and RVC; and (2) for The New York, Susquehanna and Western Railway Corporation, and the Delaware Otsego Corporation to obtain indirect control of RVRR and RVC through the purchase.

DATES: This decision will be effective on December 26, 1987. Petitions to reopen must be filed by January 13, 1987.

ADDRESSES: Send pleadings referring to Finance Docket No. 30936 to:.

(1) Office fo the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423

and

(2) Petitioner's representative: William P. Quinn, 1800 Penn Mutual Tower, 510 Walnut Street, Philadelphia, PA 19106

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 275–7245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289–4357 (D.C. Metropolitan area) or call toll free (800) 424–5403.

Decided: December 15, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley. Commissioner Lamboley concurred in the result.

Noreta R. McGee,

Secretary

[FR Doc. 86–28813 Filed 12–23–86; 8:45 am]

BILLING CODE 7035-01-M

[Finance Docket No. 30946]

Robet D. Krebs; Exemption From 49 U.S.C. 11322

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts Robert D. Krebs from the prior approval requirements of 49 U.S.C. 11322 to permit him to hold both a position on the Board of Directors of Phelps Dodge Corporation and his current position as President and Chief Operating Officer and a director of Santa Fe Southern Pacific Corporation.

DATES: This exemption is effective on January 23, 1987. Petitions to stay must be filed by January 5, 1987, and petitions for reconsideration must be filed by January 13, 1987.

ADDRESSES: Send pleadings referring to Finance Docket No. 30946 to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423

(2) Milton E. Nelson, Jr., Robert R. Cowell, 224 South Michigan Avenue, Chicago, IL 60604

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289-4357 (DC Metropolian area) or toll free (800) 424-5403.

Decided: December 16, 1986.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

Noreta R. McGee,

Secretary.

[FR Doc. 86-28875 Filed 12-23-86; 8:45 am]

BILLING CODE 7035-01-M

[Docket No. AB-12 (Sub-No. 110X)]

Southern Pacific Transportation Co.; Exemption; Abandonment in Fort Bend County, TX

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Interstate Commerce Commission exempts from the prior approval requirements of 49 U.S.C. 10903 *et seq.*, the abandonment by Southern Pacific Transportation Company of approximately 15.77 miles of track in Fort Bend County, TX, subject to standard labor protection conditions.

DATES: This exemption will be effective on December 27, 1986. Petitions to reopen must be filed by January 13, 1987.

ADDRESSES: Send pleadings referred to Docket No. AB-12 (Sub-No. 110X) to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423

(2) Petitioner's representative: Gary A. Laasko, One Market Plaza, San Francisco, CA 94105

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 275-7245.

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision write to: T.S. InfoSystems, Inc., Room 2229, Interstate Commerce Commission Building, Washington, DC 20423, or call 289-4357 (DC Metropolitan area) or toll free (800) 424-5403.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Sterrett, Andre, and Lamboley.

Noreta R. McGee,

Secretary.

[FR Doc. 86-28876 Filed 12-23-86; 8:45 am]

BILLING CODE 7035-01-M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research Act of 1984; Cooperative Research and Development Agreement; Babcock and Wilcox

Notice is hereby given that, pursuant to Section 6(a) of the National Cooperative Research Act of 1984, Pub. L. 98-462 ("the Act"). The Babcock & Wilcox Company and Seitz-Filter-Werke, Theo & Geo Seitz GMBH und Co. have filed a written notification simultaneously with the Attorney General and with the Federal Trade Commission disclosing (1) the identities of the parties to a cooperative research and development agreement that became effective August 22, 1986 and (2) the nature and objectives of the venture. The notification was filed for the purpose of invoking the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Pursuant to section 6(b) of the Act, the identities of the parties to the venture and its general activities are given below.

The parties to the cooperative research and development agreement are:

The Babcock & Wilcox Company, 3315 Old Forest Road, Lynchburg Road, Lynchburg, VA 24506-0935

Seitz-Filter-Werke, Theo & Geo Seitz GMBH und Co., Planiger Strasse 137, Postfach 2363, D-6550 Bad Keuznach, Federal Republic of Germany

Under the agreement the parties will engage in cooperative research and development activities relating to the design and development of filtration processes, methods and devices for use in applications such as power plants and the licensing of technology developed by such cooperative research.

Joseph H. Widmar,

Director of Operations, Antitrust Division.

[FR Doc. 86-28942 Filed 12-23-86; 8:45 am]

BILLING CODE 4410-01-M

Drug Enforcement Administration

[Docket No. 86-03]

Irving M. Greenfarb, D.O.; Revocation of Registration

On December 5, 1985, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Irving M. Greenfarb, D.O. (Respondent), 160 Littleton Road, Morris Plains, New Jersey 07950 proposing to revoke his DEA Certificate of Registration AG4091714 and deny any pending applications for renewal of that registration. The statutory predicate for the Order to Show Cause was that Respondent's continued registration with the Drug Enforcement Administration would be inconsistent with the public interest as defined in 21 U.S.C. 823(f). The basis for this allegation was Respondent's prescribing of excessive quantities of the controlled substance methaqualone outside the scope of his professional practice and for no legitimate medical purpose, and the fact that on August 7, 1985, after a jury trial in the United States District Court for the Southern District of New York Respondent was found guilty of conspiracy to illegally distribute controlled substances, and illegal distribution of controlled substances.

In a letter dated December 31, 1985, Respondent, through counsel, requested a hearing on the issues raised in the Order to Show Cause. The matter was placed on the docket of Administrative Law Judge Francis L. Young. The hearing in this matter was originally set for June 17-20, 1986 in New York City. Due to Respondent's ill health, the hearing was cancelled and rescheduled for November 25, 1986 in Washington, DC. Respondent's counsel requested a stay of the administrative proceeding due to the pending appeal of Respondent's criminal conviction in the United States Court of Appeals for the Second Circuit. The request for a stay was denied by the Administrative Law Judge. In a letter dated November 24, 1986, Respondent's counsel advised the Administrative Law Judge that Respondent's criminal conviction had been affirmed by the United States Court of Appeals for the Second Circuit and that Respondent did not intend to participate in the hearing. The Administrative Law Judge found that the Respondent had waived his right to a hearing and terminated the proceedings on November 25, 1986.

The Administrator finds that Respondent has waived his right to a hearing in this matter and now enters his final order in this matter without a hearing and based upon the investigatetive file and the record as it appears. 21 CFR 1301.57.

The Administrator finds that Respondent worked at Jorum Associates, Inc., first in Staten Island and then at a clinic located at 201 E. 34th Street in New York City from March 1, 1981 until February, 1982. From February, 1982 through June 15, 1982, Respondent worked at a related clinic at 290 5th Avenue in New York City. Respondent worked one or two days a week at the clinics for a total of 74 days from March, 1981 through June, 1982. The clinics at which Respondent worked represented that they treated individuals with insomnia.

On May 12, 1982, a DEA Special Agent, acting in an undercover capacity, went to the clinic where Respondent worked at 290 5th Avenue in New York City. Upon entering the clinic the Agent was asked to complete a questionnaire. After completing the questionnaire, the Agent received a physical examination by a physician's assistant. He then went into Respondent's office with the physician's assistant and told the Respondent he was unemployed and had trouble sleeping. Respondent told the Agent not to drink fluids with caffeine and listen to the radio before sleeping. He also wrote the Agent a prescription for 50 Quaalude tablets. The Agent left Respondent's office after 5 minutes and paid the receptionist $200. The Agent was told not to return for 30 days. On May 19, 1982, the Special Agent, acting in an undercover capacity, returned to the clinic at 290 5th Avenue and provided another name to the receptionist. He received a physical examination by the physician's assistant, and went into Respondent's office with the physician's assistant. The Agent told Respondent that he was unemployed and had trouble sleeping. The Respondent again told the Agent not to drink fluids with caffeine before sleeping. As he was talking to the Agent, Respondent began to write a prescription for 52 tablets of Quaalude. The Agent paid the receptionist upon leaving the office the fee of $200.

On May 24, 1982, a search warrant was executed at the clinic at 290 5th Avenue, New York City. Respondent was present. Patient files and various other records were seized. An analysis of Respondent's patient files, and the prescriptions that he wrote for Quaalude during the period March, 1981 through June, 1982 showed that he wrote approximately 3,489 prescriptions for Quaalude totalling 190,160 tablets during the 74 days that he worked at the clinics. The Respondent wrote as many as 140 prescriptions for Quaalude in one day. Respondent prescribed Quaalude for over 96% of the individuals who he saw at the clinic.

On December 13, 1984, Respondent was indicted along with three other physicians and four individuals in the United States District Court for the Southern District of New York for conspiracy to illegally distribute Quaalude, and two counts of illegal distribution of Quaalude. On August 7, 1985, following a five week jury trial, Respondent was found guilty on all three counts. On July 22, 1986, during the pendency of these proceedings, Respondent was sentenced in the United States District Court for the Southern District of New York. Respondent was sentenced to 2½ years of imprisonment, 2 years special parole, and a $15,000 fine.

Several physicians testified at the trial and also provided letters to the Government which stated that upon review of selected patient files and the procedures at the clinics where Respondent worked that it was their professional opinion that the clinic was merely acting as a front for the distribution of Quaalude outside of medical practice. They further stated that the clinic was a sham operation, not intended to seriously treat patients.

The Administrator concludes that the continued registration of Respondent to prescribe, administer, dispense or otherwise handle controlled substances would be inconsistent with the public interest. This is exhibited by Respondent's controlled substance-related felony convictions in United States District Court for the Southern District of New York. These convictions alone provide the requisite statutory grounds for revocation of Respondent's DEA Certificate of Registration pursuant to 21 U.S.C. 824(a)(2).

Respondent's activities caused the diversion of thousands of Quaalude tablets, a much abused controlled substance which is now in Schedule I of the Controlled Substances Act. Respondent was clearly acting outside the scope of professional practice by participating in an operation devoted solely to the illegal distribution of Quaalude. Respondent has failed in his duty as a physician and a DEA registrant.

Accordingly, the Administrator of the Drug Enforcement Administration, pursuant to the authority vested in him by 21 U.S.C. 823 and 824 and 28 CFR 0.100(b), hereby orders that DEA Certificate of Registration AG4091714 previously issued to Irving Greenfarb, D.O., be and hereby is revoked effective January 23, 1987. Any outstanding applications for renewal of this registration are hereby denied.

Dated: December 18, 1986.

John C. Lawn,

Administrator.

[FR Doc. 86-28912 Filed 12-23-86; 8:45 am]

BILLING CODE 4410-09-M

NATIONAL SCIENCE FOUNDATION

Advisory Review Panel for Engineering Research Centers; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Review Panel for Engineering Research Centers.

Date and time: January 22, 23, and 24, 1987, 8:30 to 5:00 each day.

Place: Green Park Room, Park Hyatt Hotel, 24th at M Street NW., Washington, DC.

Type of meeting: Closed.

Contract person: Lewis G. Mayfield, Division Director, Cross-Disciplinary Research, Directorate for Engineering, National Science Foundation, 1800 G Street NW., Washington, DC 20550, 202-357-9707.

Purpose of meeting: To provide advice and recommendations concerning Engineering Research Center proposals.

Agenda: To review and evaluate Engineering Research Center proposals requesting NSF support to establish a center to develop fundamental knowledge in engineering fields that will enhance the international competitiveness of U.S. industry and prepare engineers to contribute through better engineering practice.

Reason for closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions 4 and 6 of the Government in the Sunshine Act.

M. Rebecca Winkler,

Committee Management Officer.

December 18, 1986.

[FR Doc. 86-28840 Filed 12-23-86; 8:45 am]

BILLING CODE 7555-01-M

Advisory Panel for Systematic Biology; Meeting

The National Science Foundation announces the following meeting:

Name: Advisory Panel for Systematic Biology.

Date and time: Janaury 12 & 13, 1987—8:30 a.m. to 5 p.m. each day.

Place: Room 1243, National Science Foundation, 1800 G Street NW., Washington, DC 20550.
Type of meeting: Closed.
Contract person: Dr. James E. Rodman, Acting Program Director, Systematic Biology, (202) 357-9588, Room 215, National Science Foundation, Washington, DC 20550.
Summary minutes: May be obtained from the Contact Person at the above address.

Purpose of meeting: To provide advice and recommendations concerning support for research in systematic biology.
Agenda: Review and evaluation of research proposals and projects as part of the selection process of awards.
Reason for closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries; and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), Government in the Sunshine Act.

M. Rebecca Winkler,
Committee Management Officer.
December 18, 1986.
[FR Doc. 86-28843 Filed 12-23-86; 8:45 am]
BILLING CODE 7555-01-M

COMMITTEE ON EQUAL OPPORTUNITIES IN SCIENCE AND ENGINEERING; MEETING

The National Science Foundation announces the following meeting:

Name: Committee on Equal Opportunities in Science and Engineering.
Dates: Wednesday, Thursday, and Friday, January 21, 22, and 23, 1987.
Time: Wednesday: 1:00 p.m.-5:00 p.m.; Thursday: 9:00 a.m.-5:00 p.m.; Friday: 9:00 a.m.-12:00 p.m.
Place: Room 540.
Type of meeting: Open.
Contact person: Dr. Elvira Doman, Executive Secretary, National Science Foundation, Room 321G0 1800 G Street NW., Washington, DC 20550 Telephone: 202/357-7975.

Purpose of committee: Responsible for all Committee matters relating to the participation in and opportunities for education, training, and research for minorities, women and disabled persons in science and engineering, and the impact of science and engineering on them.
Minutes: May be obtained from the contact person listed above.
Agenda: The Committee will consider mechanism to increase participation of minorities, women and disabled persons in Foundation programs, research projects, and all NSF advisory committees. It will also advise the Director on how to modify NSF policies and procedures relating to minority, women, and disabled persons as well as internal distribution of funds to implement this program.

December 18, 1986.
M. Rebecca Winkler,
Committee Management Officer.
[FR Doc. 86-28841 Filed 12-23-86; 8:45 am]
BILLING CODE 7555-01-M

Materials Research Advisory Committee; Meeting

The National Science Foundation announces the following meeting:

Name: Materials Research Advisory Committee.
Date and Time: Thursday & Friday, January 8 & 9, 1987, 8:30 a.m. to 5:00 p.m.
Place: Room 540, National Science Foundation, 1800 "G" Street, NW., Washington, DC 20550.
Type of Meeting: Part Open-OPEN: January 8, 8:30 a.m. to noon; CLOSED: January 8, Noon to 5 p.m.; January 9, 8:30 a.m. to 5 p.m.
Contact person: Dr. Lewis H. Nosanow, Director, Division of Materials Research, Room 408, National Science Foundation, Washington, DC 20550. Telephone: (202) 357-9794.
Minutes: May be obtained from the Contact Person, Dr. Lewis H. Nosanow, at the above stated address.

Purpose of meeting: To carry out oversight review of the Materials Research Laboratories Program, Materials Research Groups Program, Instrumentation for Materials Research Program, National Facilities Program and the Special Programs in Materials Research Section.
Agenda *Open: Thursday, January 8, 1987—8:30 a.m. to Noon:*
8:30 a.m.—Coffee and donuts
9:00 a.m.—Introduction and explanation of work plan for meeting.
9:30 a.m.—Staff Briefing on Programs
- Overview, Special Programs in Materials Research Section
- Materials Research Laboratories Program
- Materials Research Groups Program
- Instrumentation for Materials Research Program
- National Facilities Program

12:00 noon—Working Lunch; Organization of Subcommittee work
Closed: January 8, 1987, noon to 5 p.m.; January 9, 1987, 8:30 a.m. to 5:00 p.m.
Oversight review of the above programs. Review and comparison of declined proposals (and supporting documentation) with successful awards, including how merit review is applied to actions.

Reason for closing: The meeting will consist of a review of grant and declination jackets that contain the names of applicant institutions and principal investigators and privileged information contained in declined proposals. The meeting will also include a review of the merit review documentation pertaining to the applicants. These matters are within exemptions 4 and 6 of the Government in the Sunshine Act.

M. Rebecca Winkler,
Committee Management Officer.
December 18, 1986.
[FR Doc. 86-28842 Filed 12-23-86; 8:45 am]
BILLING CODE 7555-01-M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-255]

Consumers Power Co.; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating License No. DPR-20, issued to Consumers Power Company (the licensee), for operation of the Palisades Plant located in Covert Township in Van Buren County, Michigan.
The amendment request proposes the addition of operability requirements for the two diesel fire pumps to augment the service water under certain service water pump failure conditions. It also proposes a maximum service water inlet temperature as a limiting condition for operation with respect to post design basis accident cooling for various rooms and necessary components. The attendant surveillance requirement for monitoring service water inlet temperature is also proposed to be added. This amendment request also includes by reference a previous request dated November 24, 1980 regarding a minimum water level to be maintained in the containment spray piping and maximum containment pressure during reactor operation. However, insufficient information was provided to support these latter changes and the licensee provided no evaluation with regard to a no significant hazards finding for these proposals. Therefore, the proposed changes associated with the November 24, 1980 submittal are not being considered by the staff at this time as

part of this action but will be processed as part of a future proposed action when the licensee provides the required evaluations.

Before issuance of the proposed license amendment, the Commission will have made findings required by the Atomic Energy Act of 1954, as amended (the Act) and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility or a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety.

That part of the application being considered at this time, i.e., the operability requirements for fire pumps, the limit on maximum service water inlet temperature, and the addition of surveillance requirements for temperature, were evaluated by the licensee with regard to a finding of no significant hazards consideration as follows:

This change to the Technical Specifications imposes additional requirements for containment cooling by limiting service water inlet temperatures and requiring operable diesel fire pumps.

This change does not result in an increase in the probability or consequences of an accident or malfunction. The additional restrictions provided for service water temperature and diesel fire pumps will ensure that the probability or consequences will remain as previously analyzed.

These changes do not create the possibility of an accident or malfunction of a different type. The additional restrictions have been provided to ensure that the Service Water System heat removal will attain the minimum values needed for previously evaluated accidents.

The margin of safety provided by the Technical Specifications will not be reduced by these changes. The additional restrictions for service water inlet temperature and diesel fire pumps results in an enhancement to safety.

The staff concurs in these findings, noting that the use of the fire water pumps to backup service water has always been a design feature of the plant and was previously approved in the Systematic Evaluation Program for Palisades in 1983 for the case of inoperability of two service water pumps. The proposed service water inlet temperature limit, while maintaining the margin of safety on the limiting cooler, provides additional margin of safety with the increased cooling capability on other heat loads.

In addition, the Commission has provided guidance of examples that are considered not likely to involve significant hazards considerations (51 FR 7751, March 6, 1986). This amendment request matches example (ii) in that it involves a change that constitutes an additional limitation, restriction, or control not presently included in the Technical Specifications. Therefore, the staff proposes a preliminary determination that no significant hazards are involved in this amendment request.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing. Written comments may be submitted by mail to the Rules and Procedures Branch, Division of Rules and Records, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 4000, Maryland National Bank Building, 7735 Old Georgetown Road, Bethesda, Maryland from 8:15 am to 5:00 pm. Copies of written comments received may be examined at the NRC Public Document Room, 1717 H Street, NW., Washington, DC. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By January 23, 1987, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene. Request for a hearing and petitions for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR Part 2. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter, and the bases for each contention set forth with reasonable specificity. Contentions shall be limited to matters within the scope of the amendment under consideration. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Service Branch, or may be delivered to the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at (800) 325-6000 (in Missouri (800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Ashok C. Thadani: petitioner's name and telephone number; date petition was mailed; plant name; and publication date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel-Bethesda, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to Judd L. Bacon, Esq., Consumers Power Company, 212 West Michigan Avenue, Jackson, Michigan 49201, attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board designated to rule on the petition and/or request, that the petitioner has made a substantial showing of good cause for the granting of a late petition and/or request. That determination will be based upon a balancing of the factors specified in 10 CFR 2.714(a)(1) (i) through (v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated December 2, 1986, which is available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, and at the Van Zoeren Library, Hope College, Holland, Michigan.

Dated at Bethesda, Maryland, this 16th day of December 1986.

For the Nuclear Regulatory Commission.

Ashok C. Thadani,

Director, PWR Project Directorate #8, Division of PWR Licensing-B.

[FR Doc. 86-28923 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-329/330]

Consumers Power Co., Midland Plant, Units 1 and 2; Order Revoking Construction Permits

I

Construction Permit Nos. CPPR-81 and CPPR-82 authorized construction of the Midland Plant, Units 1 and 2, located just south of the City of Midland in Midland County, Michigan. The Construction Permits are held by Consumers Power Company (CPC). Both Construction Permits were issued on December 15, 1972. The latest construction completion dates in the Permits, as amended, were December 1, 1984 and July 1, 1984, respectively. CPC filed timely requests on May 24, 1984 and September 11, 1984, to extend the latest completion dates to December 1, 1989 and July 1, 1989, respectively.

II

On July 1, 1986, CPC informed the Commission that it planned to convert Unit 1 at Midland to a gas-fired unit and to abandon Unit 2 in-place. It also stated that it is withdrawing its request to extend the Construction Permits' latest completion dates. By motion dated July 11, 1986, CPC requested the Atomic Safety and Licensing Board (ASLB) to authorize withdrawal of its applications for licenses to operate Units 1 and 2 at Midland. The ASLB, in a Memorandum and Order dated September 26, 1986, ordered that the action on CPC's motion seeking authorization to withdraw the operating license applications be deferred pending preparation by the staff and consideration by the ASLB of an environmental assessment. The staff conducted an inspection of the Midland site on October 15 and 16, 1986, to determine, among other things, whether CPC's site stabilization plan, outlined in the October 2, 1986, CPC letter, had been completed satisfactorily and to determine whether the site stabilization plan considered all critical site areas. The NRC staff verified that CPC had satisfactorily restored the site to an environmentally stable condition and that Units 1 and 2 are not capable of being operated as utilization facilities. An Environmental Assessment and Finding of No Significant Impact was published in the **Federal Register** on November 20, 1986 (51 FR 42024).

On December 17, 1986, the ASLB issued a Memorandum and Order granting the July 11, 1986, CPC motion. Pursuant to 10 CFR 51.32 the Commission has determined that the revocation of these Construction Permits will have no significant impact on the environment.

III

A notice of withdrawal of the Midland Plant, Units 1 and 2, operating license applications is also being published in the **Federal Register.**

For the reasons set forth above, it is hereby ordered that Construction Permit Nos. CPPR-81 and CPPR-82 are revoked.

This Order is effective upon its date of issuance.

Dated at Bethesda, Maryland, this 18th day of December 1986.

For the Nuclear Regulatory Commission.

Frank J. Miraglia,

Director, Division of PWR Licensing-B, Office of Nuclear Reactor Regulation.

[FR Doc. 86-28918 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-329, 50-330]

Consumers Power Co., Midland Plant, Units 1 and 2; Withdrawal of Application for Operating License and Termination of Proceeding

On July 11, 1986, Consumers Power Company (CPC) filed a motion which requested authorization for withdrawal of its application for licenses to operate Units 1 and 2 at Midland and for dismissal of the operating license proceeding before the NRC Atomic Safety and Licensing Board (ASLB). On December 17, 1986, the ASLB issued a Memorandum and Order granting the motion and authorizing the staff to permit withdrawal of the operating license application subject to such conditions as the NRC staff finds to be warranted. The ASLB premised its authorization on certain commitments made by CPC.

The NRC staff finds that no conditions are warranted. However, it notes CPC's commitment to take the appropriate steps to assure that the structures, facilities and surrounding areas will be stable and suitable for their intended use in the contemplated plant in the event the site is used for a gas-fired cogeneration facility. the NRC staff also notes CPC's commitment to modify the Emergency Cooling Water Reservoir (ECWR) by backfilling and then trenching to the #003 outfall structure on the east side of the cooling pond, so that the entire ECWR can be gravity-drained in the event the site is completely abandoned. CPC has also committed to notify the NRC staff when conversion to a gas-fired facility begins or, alternatively, when the site is abandoned.

The site of the Midland Plant, Units 1 and 2, is located just south of the City of Midland in Midland County, Michigan. The Construction Permits, CPPR–81 and CPPT–82, were issued on December 15, 1972. On May 24, 1984 and September 11, 1984, CPC filed timely requests to extend the completion dates to December 1, 1989 and July 1, 1989, respectively. On July 1, 1986, CPC withdrew its request to extend the latest completion dates in its Construction Permits. An environmental Assessment and Finding of No Significant Impact was published in the **Federal Register** on November 20, 1986 (51 FR 42024).

Correspondence concerning this application will continue to be maintained at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC 20555 and at the Grace A. Dow Memorial Library, 1710 West St. Andrews Road, Midland, Michigan 48640 for at least one year.

Dated at Bethesda, Maryland, this 18th day of December 1986.

For the Nuclear Regulatory Commission.

Herbert N. Berkow,

Director, Standardization and Special Projects Directorate, Division of PWR Licensing-B, Office of Nuclear Reactor Regulations.

[FR Doc. 86–28917 Filed 12–23–86; 8:45 am]

BILLING CODE 7590–01–M

[Docket No. 50–278, License No. DPR–56, EA 86–59]

Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Unit 3); Order Imposing Civil Monetary Penalties

I

Philadelphia Electric Company, Philadelphia, Pennsylvania 19101 (licensee), is the holder of License No. DPR–56 issued by the Nuclear Regulatory Commission (Commission/NRC). This license authorizes the licensee to operate the Peach Bottom Atomic Power Station, Unit 3, Delta, Pennsylvania in accordance with the conditions specified therein.

II

During March 18–21, 1986, an NRC inspection was conducted at Peach Bottom to review the circumstances associated with an event that occurred at Unit 3 involving the withdrawal of a control rod during reactor startup in a sequence different from that specified in the control rod program. As a result of the inspection, it was found that the licensee has not conducted its activities in full compliance with NRC requirements. A written Notice of Violation and Proposed Imposition of Civil Penalties was served upon the licensee by letter dated June 9, 1986. The Notice states the nature of the violations, the provisions of the Commission's requirements that the licensee has violated, and the amount of civil penalties proposed for the violations.

An answer dated July 23, 1986 to the Notice of Violation and Proposed Imposition of Civil Penalties was received from the licensee.

III

After consideration of the statements of fact, explanation, and argument for mitigation of the proposed civil penalties contained in your response and as set forth in the Appendix to this Order, the Director, Office of Inspection and Enforcement, has determined that the penalties proposed for the violations designated in the Notice of Violation and Proposed Imposition of Civil Penalties should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2282, Pub. L., 96–295), and 10 CFR 2.205, it is hereby ordered that: The licensee pay civil penalties in the amount of Two Hundred Thousand Dollars ($200,000) within thirty days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

V

The licensee may, within thirty days of the date of this Order, request a hearing. A request for a hearing shall be addressed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555. A copy of the hearing request also shall be sent to the Assistant General Counsel for Enforcement, Office of General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555. If a hearing is requested, the Commission will issue an Order designating the time and place of hearing. If the licensee fails to request a hearing within thirty days of the date of this Order, the provisions of this Order shall be effective without further proceedings and, if payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the licensee violated NRC requirements as set forth in the Notice of Violation and Proposed Imposition of Civil Penalties and

(b) Whether, on the basis of such violations, this Order should be sustained.

Dated at Bethesda, Maryland, this 12h day of December 1986.

For the Nuclear Regulatory Commission.

James M. Taylor,

Director, Office of Inspection and Enforcement.

Appendix—Evaluation and Conclusion

In Philadelphia Electric Company's July 23, 1986 response to the Notice of Violation and Proposed Imposition of Civil Penalties (Notice) dated June 9, 1986, the licensee acknowledges the occurrence of the violations stated in the Notice but requests mitigation of the civil penalty amount from $200,000 to $100,000. Provided below are (1) a restatement of the violations, (2) a summary of the licensee's response including their reasons for requesting mitigation, and (3) the NRC evaluation of the licensee's response.

Restatement of Violations

I.A. Technical Specification 6.8.1 requires that written procedures shall be established, implemented, and maintained covering the activities of Appendix A of Regulatory Guide 1.33, November 1972. Appendix A of Regulatory Guide 1.33 states in part that the activity of "Hot Standby to Minimum Load (nuclear startup)" requires procedures.

Technical Specifications 6.8.1 is implemented by the Peach Bottom General Procedure GP–2, Appendix 1, Revision 3, "Startup Rod Withdrawal Sequence Instructions." Step 13 of GP–2 requires the reactor operator to withdraw control rod 02–23.

Contrary to the above, at 1:28 a.m. on March 18, 1986, while at step 13 of GP–2, Appendix 1, the reactor operator withdrew control rod 10–23 rather than rod 02–03 and incorrectly documented that rod 02–23 had been withdrawn.

B. Technical Specification Limiting Condition for Operation 3.3.B.3.b requires that whenever the reactor is in the startup or run mode below 25% rated power, the Rod Worth Minimizer shall be operable or a second licensed operator shall verify that the operator at the reactor console is following the control rod program.

Contrary to the above, at 1:28 a.m. on March 18, 1986, while the reactor was in the startup mode below 25% power and the Rod Worth Minimizer was inoperable, the second licensed operator did not verify adherence to the control rod program and identify that a wrong control rod (10–23) was withdrawn. The second licensed operator also incorrectly documented that rod 02–23 had been withdrawn.

This is a Severity Level III Problem (Supplement I). (Civil Penalty—$100,000 assessed equally among the violations.)

II.A. Technical Specification Limiting Condition for Operation 3.3.B.3.a and 3.3.A.2.d. require that whenever the reactor is in the startup or run mode below 21% rated power, the Rod Sequence Control System (RSCS) shall be operable, and no position switches shall be bypassed unless the control rods are moved in sequence to their correct position and the actual rod position is known.

Contrary to the above, between 2:30 and 2:55 a.m. on March 18, 1986, when a Group 3 rod withdrawal was attempted while the reactor was in the startup mode below 21% rated power, a rod block occurred. The RSCS position switch for rod 02–03 was bypassed to the full-out position by the Shift Supervisor and Shift Superintendent when in fact the rod was full-in.

B. Technical Specification Surveillance Requirement 4.3.A.2.d requires that a second licensed operator verify a control rod is in its correct position before the RSCS function is bypassed.

Contrary to the above, on March 18, 1986 when the RSCS function was bypassed for control rod 02-23, the second licensed operator failed to verify that control rod 02–23 was in the correct position.

This is a Severity Level III Problem (Supplement I). (Civil Penalty—$100,000 assessed equally among the violations.)

Summary of Licensee's Response

The licensee acknowledges the occurrence of the violations as stated in the Notice of Violation and Proposed Imposition of Civil Penalties, but requests that the proposed penalties in the cumulative amount of $200,000 be reduced to the base civil penalty amount of $100,000. The licensee states that the increase of the base civil penalty amount in this case is excessive, unwarranted, and does not properly consider the mitigation and escalation factors set forth in the "General Statement of Policy and Procedures for NRC Enforcement Actions," 10 CFR Part 2, Appendix C.

The licensee contends that the NRC basis for escalating the amount of the proposed civil penalties, namely, the licensee's history of personnel errors involving failures to adhere to procedures and not paying attention to detail, is insufficient. Also, the licensee argues that two of the civil penalties issued to Peach Bottom in the past three years were mitigated based on the licensee's corrective actions. Further, the licensee maintains that the NRC, in considering its request for mitigation, should consider the prompt managerial actions in identifying and reporting the event, as well as the comprehensive corrective actions taken subsequent to the event.

NRC Evaluation

The NRC staff carefully reconsidered the mitigation and escalation factors identified in the Enforcement Policy. In evaluating the licensee's request for mitigation of the civil penalties based on prompt identification and reporting, the NRC staff considered, among other things, the length of time the violations existed prior to discovery, the opportunity available to discover the violations, and the promptness and completeness of any required reports. In this case, numerous opportunities had existed for four licensed operators to identify and correct the problem had they been more attentive to the details of their duties, including adherence to safety procedures. Since these errors were not promptly identified by personnel who have a significant role in the safe operation of the plant, mitigation of the civil penalties based on this factor is not appropriate.

The NRC staff also recognizes the corrective actions taken by the licensee subsequent to the event, including disciplinary actions, restructuring and reassigning certain nuclear station management, and reviewing the incident with station operations personnel. While the NRC staff acknowledges the need for these actions, the NRC staff does not view them as sufficiently extensive to warrant mitigation, since the licensee focused narrowly on the failure of certain individuals through minor disciplinary actions of an administrative nature rather than on the broad management responsibility in overseeing personnel performance. The licensee has taken the position that no additional emphasis is needed to improve management oversight and contends that a pattern of inattention to detail or failure to adhere to procedural requirements does not exist at Peach Bottom. The NRC staff disagress with the licensee's assessment, particularly in light of the licensee's enforcement history. Improved management involvement and oversight is needed at the Peach Bottom facility to preclude the recurrence of significant personnel errors in the future. Since the licensee failed to undertake vigorous and extensive corrective actions in this regard, mitigation is inappropriate.

The licensee contends that its past performance did not warrant escalation of the civil penalty. To the contrary, the enforcement history in the area of personnel performance has been poor. Therefore, escalation of the civil penalties by 100 percent is appropriate and warranted in this case. As described in the NRC letter dated June 29, 1986 transmitting the Notice of Violation and Proposed Imposition of Civil Penalties, three previous civil penalties issued for violations of technical specifications involved violations that resulted from personnel errors. Although the licensee is correct in stating that one of these previous civil penalties, as well as a civil penalty issued on May 30, 1985 for violation of radiation protection requirements, were partially mitigated based on the licensee's corrective actions, the NRC staff considers it appropriate to escalate the current civil penalty because those previous corrective actions were not fully effective in precluding recurrence of such personnel errors. In addition, the NRC staff evaluated the licensee's claim that the enforcement conference conducted on June 29, 1986 involved an issue of "fitness for duty" rather than the inattentiveness of a licensed operator. The NRC staff believes this example also demonstrates an attitude of inattention to duties in the control room for which corrective actions were not effective and further reinforces the necessity for effective management involvement in the area of personnel performance of their duties.

NRC Conclusion

The violations occurred as originally stated. The NRC staff concludes that the licensee's corrective actions were not sufficiently extensive nor was the identification of the problem sufficiently prompt to warrant mitigation of the proposed penalties. Rather, the staff concludes that it is appropriate to escalate the base civil penalties based on the licensee's prior poor performance in the area of adherence to procedures. Given the number of licensed operators, including two supervisors involved, a significant civil penalty is warranted. Accordingly, the civil penalties in the amount of Two Hundred Thousand Dollars ($200,000) should be imposed.

[FR Doc. 86–28921 Filed 12–23–86; 8:45 am]
BILLING CODE 7590-01-M

[Docket No. 30–09664, License No. 35–15727–01, EA 86–134]

Star-Jet Services, Inc; Order Imposing Civil Monetary Penalties

I

Star-Jet Services, Inc. (licensee), 9208 West Reno, Olkahoma City, Oklahoma, is the holder of License No. 35–15727–01 issued by the Nuclear Reglatory Commission (NRC). License No. 35–15727–01 authorizes use of byproduct material for oil and gas well logging and tracer studies in oil and gas wells and is due to expire January 31, 1990.

II

In inspection of the licensee's activities under its license was conducted on April 21, 1986. The results of this inspection indicated that the licensee had not conducted its activities in full compliance with NRC requirements. These results were discussed with licensee representatives during an enforcement conference on July 18, 1986.

A written Notice of Violation and Proposed Imposition of Civil Penalties was served upon the licensee by letter dated September 4, 1986. This Notice stated the nature of the violations, the license conditions that were violated, and amount of civil penalties proposed. An answer dated September 30, 1986 to the Notice of Violation and Proposed Imposition of Civil Penalties was received from the licensee.

III

After consideration of the answer received, and the statements of fact, explanations, and arguments for remission of the proposed civil penalties contained therein, the Director, Office of Inspection and Enforcement, has determined, as set forth in the Appendix to this Order, that the penalties proposed for the violation designated in the Notice of Violation and Proposed Imposition of Civil Penalties should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2282, P.L. 96–295, and 10 CFR 2.205, it is hereby ordered that: The licensee pay civil penalties in the total amount of Five Hundred Dollars ($500) within 30 days of the date of this Order, by check, draft, or money order, payable to the Treasurer of the United States and mailed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

The licensee may, within 30 days of the date of this Order, request a hearing. A request for hearing shall be addressed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555. A copy of the hearing request shall be sent to the Assistant General Counsel for Enforcement, Office of the General Counsel, at the same address. If a hearing is requested, the Commission will issue an Order designating the time and place of hearing. If the licensee fails to request a hearing within 30 days of the date of this Order, the provisions of this Order shall be effective without further proceedings and, if payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the licensee violated NRC requirements set forth in the Notice of Violation and Proposed Imposition of Civil Penalties, and

(b) Whether, on the basis of such violations, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Bethesda, Maryland, the 12th day of December 1986.

James M. Taylor,

Director, Office of Inspection and Enforcement.

Appendix—Evaluation and Conclusion

The violations and associated civil penalties were identified in the Notice of Violation and Proposed Imposition of Civil Penalties dated September 4, 1986. The licensee responded by letter dated September 30, 1986. In its response, the licensee admitted the violations; however, it requested remission of the civil penalties. Provided below is (1) a restatement of each violation, (2) a summary of the licensee's request for remission, and (3) the NRC's evaluation of the licensee's response.

Restatement of Violations

1. 10 CFR 20.105(b) requires that radiation levels is unrestricted areas, be limited so that, if an individual was continuously present in the areas, the individual could not receive a dose in excess of two millirems in any one hour or a dose in excess of 100 millirems in any seven consecutive days.

Contrary to this requirement, on April 21, 1986, the NRC inspector measured radiation levels of 17 mR/hr at the point of contact with the licensee's building (an unrestricted area) and 4.5 mR/hr at three feet from outside of the building.

2. 10 CFR 20.201(b) requires that each licensee shall make or cause to be made surveys as may be necessary for it to comply with 10 CFR Part 20. 10 CFR 20.105 specifies the radiation levels permissible in an unrestricted area.

Contrary to these requirements, as of April 21, 1986, the NRC inspector found through interviews that the licensee had made no surveys of the area where radioactive sources were stored in order to determine if radiation levels exceeded allowable limits for unrestricted areas.

3. License Condition 18 requires that licensed activities shall be conducted in accordance with statements, representations, and procedures contained in the radioactive material license application dated January 31, 1984, and the licensee's letter dated November 29, 1984.

Figure 4(a) of the operating procedures included with the license application requires that licensed materials be stored in a designated radioactive materials and waste area located outside and behind the shop area.

Contrary to this requirement, on April 26, 1986, the NRC inspector found radioactive sources stored in the shop area instead of the designated radioactive materials and waste area.

4. 10 CFR 20.307(a) requires that licensed materials stored in an unrestricted area be secured against unauthorized removal from the place of storage.

Contrary to this requirement, the NRC inspector found on April 21, 1985, that radioactive sources were stored in the shop area (an unrestricted area) in ulocked containers and cabinets.

5. License Condition 9.D authorizes the use by the licensee of iridium-192 for tracer studies in oil and gas wells only.

Contrary to this condition, on April 21, 1986, the NRC inspector found that iridium was used and stored in a device for "scattered gamma ray logging."

Summary of Licensee's Request for Remission

The licensee's September 30, 1986 response addresses what the licensee has done to ensure that the violations do not recur. The licensee states, however, that it should not have a pay a fine in any amont. The licensee notes the severe economic downturn in the idustry and the considerable expense it has incurred by hiring a consultant to support the radiation safety program. The licensee argues that modifications to its radiation safety program will enhance licensee performance more than a fine.

NRC'S Response

The licensee's request for remission is based on the effectiveness of its corrective actions. The Enforcement Policy allows for corrective actions to be considered in assessing a civil penalty. Where corrective actions are deemed unusually prompt and extesive, a civil penalty may be reduced by as much as 50 percent. However, in this case the NRC has concluded that the licensee's corrective actions were neigher unusually prompt nor unusually extensive and, therefore do not warrant reduction of the proposed civil penalties.

Conclusions

The licensee did not deny the violations. Thus, based on this and its own findings, the NRC concludes that the violations occurred as stated in the Notice of Violation and Proposed Imposition of Civil Penalties and that no mitigation of the proposed civil penalties is warranted. Therefore, civil penalties in the amount of $500 should be imposed.

[FR Doc. 86–28915 Filed 12–23–86; 8:45 am]
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[Docket Nos. 50–445 and 50–446, Permit Nos. CPPR–126 and CPPR–127, EA 86–09]

Texas Utilities Electric Co. (Comanche Park Steam Electric Station Unit 1); Order Imposing Civil Monetary Penalties

I

Texas Utilities Electric Company (the licensee) is the holder of Construction Permit Nos. CPPR–126 and 127 (Construction Permits) issued by tghe Nuclear Regulatory Commission (the NRC or the Commission). The Construction Permits authorize contruction of the Comanche Peak Steam Electric Station, Units 1 and 2. The Construction Permits will expire on

August 1, 1988 and August 1, 1987, respectively.

II

Safety inspections of the licensee's activities were conducted during various times from July, 1984–December, 1985. A separate inspection to evaluate the CPSES Unit 1 as-built cable tray inspection program was conducted during the period November 18–December 18, 1985. The results of this inspection were discussed with licensee representatives during an enforcement conference on December 18, 1985.

A written Notice of Violation and Proposed Imposition of Civil Penalties (Notice) was subsequently served upon the licensee by letter dated May 2, 1986. This Notice stated the nature of the violations, the provisions of the NRC regulations that were violated, and proposed civil penalties in the amount of $50,000 for the violations set out in the Notice in Appendix B to the May 2, 1986 letter.

The licensee responded to the Notice of Violation and Proposed Imposition of Civil Penalties in a letter dated August 4, 1986 and requested mitigation of the civil penalty associated with the deficiencies identified in cable tray as-built inspection program described in Violation I.A.

III

Upon consideration of the licensee's response and the statements of fact, explanation, and arguments for mitigation of the proposed civil penalty contained therein, as set forth in the Appendix to this Order, the Director, Office of Inspection and Enforcement, has determined that the violation occurred as stated and the penalty proposed for the violation designated in the Notice of Violation and Proposed Imposition of Civil Penalties should be imposed.

IV

In view of the foregoing and pursuant to section 234 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2282, P.L. 96–295), and 10 CFR 2.205, it is hereby ordered that: The licensee pay the civil penalty in the amount of Fifty Thousand Dollars ($50,000) within thirty days of the date of this Order, by check, draft, or money order payable to the Treasurer of the United States and mailed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555.

V

The licensee may, within 30 days of the date of this Order, request a hearing. A request for hearing shall be addressed to the Director, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555. A copy of the hearing request also shall be sent to the Assistant General Counsel for Enforcement at the same address. If a hearing is requested, the Commission will issue an Order designating the time and place of hearing. Upon failure of the licensee to request a hearing within thirty days of the date of this Order, the provisions of this Order shall be effective without further proceedings. If payment has not been made by that time, the matter may be referred to the Attorney General for collection.

In the event the licensee requests a hearing as provided above, the issues to be considered at such hearing shall be:

(a) Whether the licenses violated NRC requirements set forth in the Notice of Violation and Proposed Imposition of Civil Penalties referred to herein, and

(b) Whether, on the basis of such violation, this Order should be sustained.

For the Nuclear Regulatory Commission.

Dated at Bethesda, Maryland, the 15th day of December, 1986.

James M. Taylor,

Director, Office of Inspection and Enforcement.

Appendix

On May 2, 1986, a Notice of Violation and Proposed Impositions of Civil Penalties (Notice) was issued for violations identified during inspections conducted at various times from July, 1984—December, 1985 proposing civil penalties in the amount of $50,000. Texas Utilities Electric Company (TUEC) did not pay the proposed $50,000 civil penalties for the violations in Appendix B. TUEC admitted Violation I.A of Appendix B, but requested mitigation of the civil penalty amount associated with Violation I.A. Since TUEC did not request mitiation for Violation I.B, only Violation I.A is discussed below. The proposed $50,000 civil penalties were assessed equally between the two violations.

Restatement of Violation I.B

10 CFR Part 50, Appendix B, Criterion X requires, in part, that a program for inspection of activities affecting quality be established and executed by or for the organization performing the activity to verity conformance with the documented instructions, procedures, and drawings for accomplishing the activity. In addition, Criterion XVIII requires, in part, that a comprehensive system of planned and periodic audits be carried out to verify compliance with all aspects of the quality assurance program and to determine the effectiveness of the program.

The Comanche Peak Steam Electric Station (CPSES) Final Safety Analysis Report (FSAR), section 17.1.10, states, in part, ". . . inspection planning is utilized to assure conformance to procedures, drawings specifications, codes, standards, and other documented instructions." The CPSES FSAR, section 17.1.18 states, in part, with respect to audits, "TUGCO requires that planned and periodic audits be performed to verify compliance with all aspects of the quality assurance program to determine effectiveness of the program. . . ."

Section 3.0 of Texas Utilities Generating Company (TUGCO) Engineering Procedure TNE–AB–CS–1, Revision 1, dated September 30, 1985, "As-Built Procedure, Cable Tray Hanger Design Adequacy Verification," states, in part, ". . . The 'as-designed' drawing will be marked up by the 'as-built' walkdown team in red . . . to denote actual dimenesion/configuration of the CTH attributes that are to be 'as-built.' The QC inspector will verity all dimension/configuration on the redlined drawing. . . ."

Contrary to the above, as of the inspection from November 18—December 18, 1985, attributes of a number of cable tray hangers located in the Reactor Building and Fuel Building related to tray size, tray span, tray clamps, member size, weld qualitative measurements, dimenional measurements, bolt size, and member orientation were not either correctly determined by walkdown engineers or correctly verified by quality control inspectors for 15 of 32 cable trays that had been walked down prior to the NRC inspection. In addition, the licensee failed to perform audits of these activities.

Summary of Licensee's Response

TUEC admits the violation occurred as stated. Although TUEC does not agree with some of the examples documented in Inspection Report 50–445/85–19, the number of examples with which it does agree indicated that the Unit 1 Cable Tray Hanger (CTH) as-built program was not properly implemented.

The licensee believes the primary reasons for the violation and its failure to identify that the Unit 1 CTH As-Built Program was not being properly implemented were: (1) Directives given by the Unit 1 CTH, Walkdown Manager were contrary to procedures (2) production quotas were set by the Unit 1 CTH Walkdown Manager which tended to encourage walkdown engineers to violate the engineering procedure, and (3) surveillance by Quality (QC) supervision was inadequate.

The licensee reqeusts mitigation of the civil penalty associated with this violation becaus of its extensive corrective actions. TUEC initiated a Corrective Action Request to address the problem, suspended the program in November, 1985 when the problem was identified, and did not resume the program until late January, 1986. The licensee contends that its reviews and investigation in response to the Unit 1 CTH as-built program resulted in a multitude of corrective actions by engineering and QC regarding the conduct of the program and the assocaited inspection activities, and lists fifteen of these significant actions in its response.

NRC Evaluation of Licensee's Response

After a thorough review of the licensee's response and its request for mitigation of the civil penalty, the NRC staff has concluded that the violation occurred as set forth in the

Notice and that no additional information was provided by the licensee which was not known to the staff at the time the Notice was issued. The staff has evaluated the licensee's request for mitigation, and after considering the factors allowed by the Enforcement Policy, determining that mitigation of Civil penalties would not be appropriate.

The NRC staff, when assessing civil penalties associated with this violation, recognized the licensee's extensive corrective actions taken after this violation was identified. The staff acknowledged in the May 2, 1986 letter that TUEC "took extensive actions to address the problems." However, when a breakdown in the quality verification program occurrsk, as was the case here, extensive corrective actions are necessary to reestablish confidence in the affected structures, systems, and components.

While the NRC staff acknowledges that TUEC has taken these extensive actions, these actions were necessary considering the lengthy duration of the violation and its pervasiveness. In fact, the NRC staff believed that escalation of the civil penalties could have been appropriate because of the duration of the violation, the many examples involved and the number of opportunities the licensee had to identify and to correct the problem. In view of the extent and significance of the problem, the corrective actions taken were not extra-ordinary and were required to verify the quality of the installation of the CTHs after construction was essentially completed. Therefore, on balance, the NRC staff was not believe mitigation of the civil penalty associated with Violation I.A. is warranted and is imposing the full amount of civil penalties associated with the violations in Appendix B to emphasize to the licensee the importance of promptly identifying and correcting significant problems while activities are in progress.

Conclusion

Mitigation of the proposed civil penalties is not warranted. Accordingly, civil penalties in the amount of Fifty Thousand Dollars ($50,000) are imposed.

[FR Doc. 86-28916 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-325 and 50-324]

Carolona Power and Light Co.; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of exemptions from the requirements of Appendix R to 10 CFR 50 to Carolina Power & Light Company (the licensee), for the Brunswick Steam Electric Plant, Units 1 and 2, located in Brunswick County, North Carolina.

Environmental Assessment

Identification of Proposed Action

The exemptions would modify Appendix R requirements as follows:

1. Approve alternate fire protection features in the Reactor Buildings for Units 1 and 2 for safe shutdown system separation (Fire Areas RB1-1 and RB2-2, licensee items 7.2.1 and 7.2.3.)
2. Approve alternate fire protection features in the ECCS room for Units 1 and 2 for safe shutdown separation features and for unrated penetrations (Fire Areas RB1-6 and RB2-6, licensee items 7.2.2 and 7.2.4).
3. Approve alternate fire protection features for safe shutdown system separation in the Diesel Generator Building Basement (Fire Area DB-1, licensee item 7.2.5).
4. Approve alternate fire protection features for safe shutdown system separation for the Service Water Building (Fire Area SW-1, licensee item 7.2.6).
5. Approve alternate fire protection features for full area supressions for the Diesel Generator Building (Fire Area DG-8, licensee item 7.2.7).
6. Approve alternate fire protection features for suppression in any "area, room or zone" where alternate shutdown capability is provided for rooms in the control and diesel generator buildings (licensee items 7.2.8 and 7.2.9).
7. Approve alternate fire protection features for fire suppression and detection, and emergency lighting for the east yard (licensee items 7.2.10 and 7.2.11).

The Need for the Proposed Action

The proposed exemptions are needed because the features described in the licensee's request regarding the existing fire protection at its plant for these items are the most practical method for meeting the intent of Appendix R and literal compliance would not significantly enhance the fire protection capability.

Environmental Impacts of the Proposed Action

The proposed exemptions will provide a degree of fire protection that is equivalent to that required by Appendix R for other areas of the plant such that there is no increase in the risk of fires at these facilities. Consequently, the probability of fires has not been increased and the post-fire radiological releases will not be greater than previously determined nor do the proposed exemptions otherwise affect radiological plant effluents. Therefore, the Commission concludes that there are no significant radiological environmental impacts associated with these proposed exemptions.

With regard to potential nonradiological impacts, the proposed exemptions involve features located entirely within the restricted areas as defined in 10 CFR Part 20. The exemptions do not affect nonradiological plant effluents and have no other environmental impact. Therefore, the Commission concludes that there are no significant nonradiological environmental impacts associated with the proposed exemptions.

Alternate Use of Resources

This action involves no use of resources not previously considered in the Final Environmental Statement (operating license) for the Brunswick Steam Electric Plant, Units 1 and 2.

Agencies and Persons Consulted

The NRC staff reviewed the licensee's request and did not consult other agencies or persons.

Finding of no Significant Impact

The Commission has determined to prepare an environmental impact statement for the proposed exemptions.

Based upon the foregoing environmental assessment, we conclude that the proposed action will not have a significant effect on the quality of the human environment.

For further details with respect to this action, see the application for the exemptions dated April 24, 1984, as supplemental December 21, 1984 and October 28, 1985, which are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC, and at the Southport-Brunswick County Library, 108 W. Moore St., Southport, North Carolina 20461.

Dated at Bethesda, Maryland, this 18th day of December, 1986.

For the Nuclear Regulatory Commission.

Daniel R. Muller,

Director, BWR Project Directorate #2, Division of BWE Licensing.

[FR Doc. 86-28919 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

[Docket Nos. 50-338 and 50-339]

Virginia Electric and Power Co. and Old Dominion Electric Cooperative, North Anna Power Station, Units No. 1 and 2; Issuance of Environmental Assessment and Finding no Significant Impact

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of an amendment to Facility Operating Licenses No. NPF-4 and No. NPF-7 issued to Virginia Electric and Power Company and Old Dominion Electric Cooperative (the licensees), for the operation of North Anna Power Station, Units No. 1 and 2, located in Louisa County, Virginia.

Identification of Proposed Action

The amendment would consist of changes to the operating license authorizing an extension in the expiration date for the Unit 1 Facility Operating License NPF-4 from February 18, 2011 to April 1, 2018 and for the Unit 2 Facility Operating License NPF-4 from February 19, 2011 to August 21, 2020.

The amendment to the licenses is responsive to the licensee's application dated August 22, 1986, as supplemented by letters dated December 5, and December 10, 1986. The NRC staff has prepared an Environmental Assessment of the Proposed Action, "Environmental Assessment by the Office of Nuclear Reactor Regulation Relating to the Change in Expiration Dates of Facility Operating License Nos. NPF-4 and NPF-7, Virginia Electric Power Company et al., North Anna Power Station, Units No. 1 and No. 2," dated December 18, 1986.

Summary of Environmental Assessment

The NRC staff has reviewed the potential environmental impacts of the proposed change in the expiration dates of the Operating Licenses for North Anna Power Station, Unit Nos. 1 and 2. This evaluation considered the previous environmental studies, including the "Final Environmental Statement Related to Operation of North Anna Power Station, Units 1, 2, 3 and 4", dated April 1973, and more recent NRC policy.

Radiological Impacts

Although the population in the vicinity of North Anna, Units 1 and 2 has increased slightly, the site requirements of 10 CFR Part 100 are still met with regard to Exclusion Area Boundary, Low Population Zone, and nearest population center distances. In addition, the proposed additional years of reactor operation do not increase the annual public risk from reactor operation.

With regard to normal plant operation, the licensee complies with NRC guidance and requirements for keeping radiation exposures "as low as is reasonably achievable" (ALARA) for occupational exposures and for radioactivity in effluents. The licensee would continue to comply with these requirements during any additional years of facility operation and also apply advanced technology where available and appropriate.

Non-Radiological Impacts

The NRC review identified no additional degradation of the habitat surrounding North Anna with regard to indigenous plant and animal species for the additional years of facility operation. In addition, the National Pollutant Discharge Elimination System permit provides additional environmental protection.

Finding of no Significant Impact

The staff has reviewed the proposed change to the expiration dates of the North Anna Power Station, Units 1 and 2 Facility Operating Licenses relative to the requirements set forth in 10 CFR Part 51. Based upon the environmental assessment, the staff concluded that there are no significant radiological or nonradiological impacts associated with the proposed action and that the proposed license amendments will not have a significant effect on the quality of the human environment. Therefore, the Commission has determined, pursuant to 10 CFR 51.31, not to prepare an environmental impact statement for the proposed amendments.

For further details with respect to this action, see (1) the request for amendments dated August 22, 1986 as supplemented by letters dated December 5, and December 10, 1986, (2) the Final Environmental Statement Related to the Operation of North Anna Power Station, Units 1, 2, 3 and 4, dated April 1973, and (3) the Environmental Assessment dated December 18, 1986. These documents are available for public inspection at the Commission's Public Document Room, 1717 H Street, NW., Washington, DC., and at the Board of Supervisors Office, Louisa County Courthouse, Louisa, Virginia 23093, and the Alderman Library, Manuscripts Department, University of Virginia, Charlottesville, Virginia 22901.

Dated at Bethesda, Maryland, this 18th day of December 1986.

For the Nuclear Regulation Commission.

Daniel G. McDonald,

Acting Director, PWR Project Directorate No. 2, Division of PWR Licensing-A, Office of Nuclear Reactor Regulation.

[FR Doc. 86-28922 Filed 12-23-86; 8:45 am]

BILLING CODE 7590-01-M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1-0170]

Issuer Delisting; Application To Withdraw From Listing and Registration; Amoco Corporation (Guarantees of Cyprus Mines Corporation's 8½% Sinking Fund Debentures due April 15, 2001 in the Original Principal Amount of $100,000,000)

December 15, 1986.

Amoco Corporation ("Company") has filed an application with the Securities and Exchange Commission pursuant to Section 12(d) of the Securities Exchange Act of 1934 ("Act") and Rule 12d2-2(d) promulgated thereunder, to withdraw the specified security from listing and registration on the New York Stock Exchange, Inc. ("NYSE").

The reasons alleged in the application for withdrawing this security from listing and registration includes the following:

Cyprus Mines Corporation ("Cyprus Mines") is a Delaware corporation and wholly-owned subsidiary of Cyprus Minerals Company ("Cyprus Minerals"), also a Delaware corporation. Cyprus Mines has outstanding $82 million in principal amount of its 8½% Sinking Fund Debentures (excluding $14 million in principal amount beneficially owned by Cyprus Minerals), which are listed on the NYSE, and are unconditionally guaranteed by the Company. Prior to July 1, 1985, the Cyprus entities were indirect, wholly-owned subsidiaries of the Company. On July 1, 1985, the stock of Cyprus Minerals was distributed to Amoco shareholders in a tax-free "spin-off".

On November 7, 1986, Cyprus Mines applied to the Commission for permission to withdraw the 8½% Sinking Fund Debentures from listing and registration on the NYSE.[1] In light of Cyprus Mines application, the Company sees no purpose in continuing the listing of the Guarantees since they relate only to the underlying Debentures as guaranteed and are not a separate security.

Any interested person may, on or before January 7, 1987, submit by letter to the Secretary of the Securities and Exchange Commission, Washington, DC 20549, facts bearing upon whether the application has been made in accordance with the rules of the

[1] The Commission published notice of the Cyprus Mines delisting application in Securities Exchange Act Release No. 23816, November 17, 1986, 51 FR 42154.

Exchange and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 86-28884 Filed 12-23-86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15485; File No. 812-6505]

Franklin AGE High Income Fund, Inc., et al.; Application

December 17, 1986.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of application under the Investment Company Act of 1940 ("1940 Act").

Applicants: AGE High Income Fund, Inc.; Birr, Wilson Money Fund; Franklin California Tax-Free Income Fund, Inc.; Franklin New York Tax-Free Income Fund, Inc.; Franklin California Tax-Free Trust; Franklin Tax-Free Trust; Franklin Corporate Cash Management Fund; Franklin Custodian Funds, Inc.; Franklin Equity Fund; Franklin Federal Money Fund; Franklin Federal Tax-Free Income Fund; Franklin Gold Fund; Franklin Money Fund; Franklin Option Fund; Franklin Tax-Exempt Money Fund; Franklin New York Tax-Exempt Money Fund; Franklin Pennsylvania Investors Fund; and Industrial Fiduciary Trust ("Funds") and Franklin Advisers, Inc.

Relevant 1940 Act Section and Rule: Exemption requested *under* section 17(d) and Rule 17d-1.

Summary of Application: Applicants seek an order permitting the Funds and all future investment companies for which subsidiaries or affiliates of Franklin Resources, Inc. serve as investment managers to deposit uninvested cash balances into a single joint account to be used to enter into one or more large repurchase agreements.

Filing Date: October 17, 1986. An amendment to the application was filed on November 24, 1986.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application, or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 p.m. on January 12, 1987. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for attorneys, by certificate. Request notification of the date of hearing by writing to the Secretary of the SEC.

ADDRESSES: Secretary, SEC, 450 Fifth Street NW., Washington, DC 20549. Applicants, c/o Murray L. Simpson, Esq., Gaston Snow & Ely Bartlett, 101 California Street, Suite 3000, San Francisco, CA 94111.

FOR FURTHER INFORMATION CONTACT: Philip J. Niehoff, Esq., (202) 272-2048, or H.R. Hallock, Jr., Esq., (202) 272-3030 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 253-4300).

Applicants' Representations:

1. The Funds all registered under the 1940 Act as open-end, diversified management investment companies. With the exception of Birr, Wilson Money Fund, which has entered into an investment management contract with BWC Management Company, each of the Funds has entered into a management contract with either Franklin Distributors, Inc. or Franklin Advisers, Inc., subsidiaries of Franklin Resources, Inc.

2. Each of the Funds (except for the U.S. Government Series of Franklin Custodian Funds, Inc.) is presently authorized to invest in repurchase agreements. Each of the Funds that currently possesses the authority to engage in repurchase agreements has established uniform systems and standards that comply with the requirements regarding repurchase agreements set forth by the SEC in its published releases, guidelines and interpretations.

3. In the normal case, at the end of each trading day each of the Funds has uninvested cash balances in its custodial bank. The uninvested cash of each Fund is normally invested in federal securities, overnight repurchase agreements with a bank or major brokerage house, or other short-term investments authorized by its investment policies in order to earn additional income for that Fund. Presently each Fund separately pursues, secures, and implements such investments, resulting in certain inefficiencies and increased costs, and limiting the return which some or all of the Funds could otherwise achieve. In addition, there can remain, in the respective account of each Fund, some amount which is received too late or is too small to be effectively invested in a separate transaction and/or at a rate reflecting the cost and investment risk of the transaction.

4. The Funds propose to establish a joint account for the purpose of engaging in repurchase agreements. At the conclusion of its daily trading activity, each Fund would automatically transfer its remaining uninvested cash into the joint account. The joint account would not be distinguishable from any other account maintained by a Fund with its custodian bank except that monies from each Fund could be deposited in the custodian bank on a commingled basis. The account would not have any separate existence which would have indicia of a separate legal entity. The sole function of this account would be to provide a convenient way of aggregating what otherwise would be the one or more individual daily transactions for each Fund necessary to manage their respective daily uninvested cash balances.

5. The joint account would operate as follows: (a) A separate cash account would be established at the custodian bank into which each Fund would deposit its daily uninvested net cash balances; (b) cash in the joint account would be invested in repurchase agreements collateralized by suitable U.S. Government obligations; (c) all investments held by the joint account would be valued on an amortized cost basis, (d) each Fund valuing its assets on the basis of amortized cost would use the average maturity of the joint account for the purpose of computing the Fund's average portfolio maturity with respect to the portion of its assets held in such account on that day; (e) in order to assure that there would be no opportunity for one Fund to use any part of a balance of the joint account credited to another Fund, no Fund would be allowed intentionally to create a negative balance in the joint account for any reason, although it would be permitted to draw down its entire balance at any time; (f) each Fund would participate in the income earned or accrued in the joint account and all instruments (*i.e.*, cash and U.S. Government securities) held in the joint account on the basis of the percentage of the total amount in the account on any day represented by its share of the

account; (g) Franklin Advisers, Inc. would administer the investment of the cash balances in and operation of the joint account and will not collect any separate fees for the management of the joint account; and (h) the administration of the joint account would be within the fidelity bond coverage required by section 17(g) of the 1940 Act and Rule 17g–1 thereunder.

6. Each of the Funds would participate in the proposed joint account on the same basis as every other Fund in conformity with its respective fundamental investment objectives, policies and restrictions. Franklin Advisers, Inc. would have no monetary participation in the joint account, but would be responsible for investing monies in the account, establishing accounting and control procedures, ensuring the equal treatment of each Fund, and ensuring that the assets of the Funds would continue to be held under proper bank custodial procedures.

7. The joint account would save the Funds substantial amounts in yearly transaction fees, allow the Funds to negotiate higher rate of return, reduce the possibility of errors by reducing the number of trade tickets and allow the Funds greater flexibility to cover excess cash near the end of each trading day. Applicants estimate that the Funds would have had an aggregate savings of approximately $426,400 in transaction fees alone for the 12 months ended August, 1986, if the joint account had been in place.

8. Any future Funds that participate in the joint account would be required to do so on the same terms and conditions as the existing Funds.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 86–28881 Filed 12–23–86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 35-24271]

Filings Under the Public Utility Holding Company Act of 1935 ("Act"); The Narragansett Electric Co. and Arkansas Power & Light Co.

December 18, 1986.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated thereunder. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) thereto is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by January 12, 1987, to the Secretary, Securities and Exchange Commission, Washington, DC 20549, and serve a copy on the relevant applicant(s) and/or declarant(s) at the addresses specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing shall identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After said date, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

The Narragansett Electric Company (70–7207)

The Narragansett Electric Company ("Narragansett"), 280 Melrose Street, Providence, Rhode Island 02901, a wholly owned, electric utility subsidiary of New England Electric System, a registered holding company, has filed a post-effective amendment to the applicant-declaration in this matter pursuant to sections 6(b), 9(a), 10, and 12(b) of the Act and Rules 42 and 50 promulgated thereunder.

By order in this matter dated May 29, 1986 (HCAR No. 24113), Narragansett was authorized to acquire through December 31, 1987, any or all of its outstanding First Mortgage Bonds, Series J, N, O, and P, aggregating $73.7 million. Narragansett was also authorized to issue and sell up to $75 million of new first mortgage bonds to finance the acquisitions. Narranganset had indicated that the Series P Bonds would be acquired through one or more tender offers to bondholders at a price not exceeding 116.25% of their principal amount, plus accrued interest, and that the new bonds isssued to cover the acquisition of its Series P Bonds would have an interest rate not exceeding 8½%.

Narragansett now states that the $40 million of Series P Bonds outstanding are proposed to be acquired through one or more tender offers and/or purchases on the open market at a price up to but not exceeding 120% of their principal amount, plus accrued interest, and that the new bonds issued to cover the acquisition of its Series P Bonds will have an interest rate up to but not in excess of 9¼%. In all other respects the proposed transactions remain unchanged.

Arkansas Power & Light Company (70–7315)

Arkansas Power & Light Company ("AP&L"), Capital Towers, P.O. Box 551, Little Rock, Arkansas 72203, an electric utility subsidiary of Middle South Utilities, Inc., a registered holding company, has filed a declaration pursuant to section 12(b) of the Act and Rule 45 thereunder.

AP&L's wholly owned subsidiary, Associated Natural Gas Company ("Associated "), is self-insured up to $125,000 per accident against any and all liabilities it may incur under the Workers' Compensation Law of Missouri. Missouri law requires the parent company of such a self-insured subsidiary to guarantee the payment of all such liabilities of the subsidiary. AP&L proposes to issue such a guaranty up to a maximum of $125,000 per accident. AP&L also requests authorization to enter into such further guarantees of Associated's workers' compensation liabilities as may be necessary and beneficial through December 31, 1990. During the past five years, the amount of Missouri workers' compensation claims actually paid by Associated was $2,077.04 in 1981, $5,954.75 in 1982, $688.86 in 1983, $3,529.98 in 1984 and $6,624.28 in 1985.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 86–28883 Filed 12–23–86; 8:45 am]

BILLING CODE 8010-01-M

[Release No. IC-15486; File No. 812-6514]

Nuveen Municipal Bond Fund, Inc., et al.; Application, December 17, 1986

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 ("1940 Act").

Applicants: Nuveen Municipal Bond Fund, Inc.; Nuveen Tax-Exempt Money Market Fund, Inc.; Nuveen Tax-Free Reserves, Inc.; Tax-Free Accounts, Inc.; Nuveen California Tax-Free Fund, Inc.; Nuveen Tax-Free Bond Fund, Inc.; Nuveen Insured Tax-Free Fund, Inc.; and Nuveen Tax-Free Money Market Fund, Inc.

Relevant 1940 Act Sections and Rule: Exemption requested under sections 6(c) and 17(d) and Rule 17d-1 from sections 13(a)(2), 17(d), 18(f)(1) and 22 (f) and (g) and the rules thereunder.

Summary of Application: Applicants seek an order to permit them to establish a deferred compensation plan for the non-interested directors of each of the above-mentioned funds and future funds advised by the same investment adviser as those funds.

Filing Date: The application was filed on October 27, 1986 and amended on November 12, 1986.

Hearing or Notification of Hearing: If no hearing is ordered, the application will be granted. Any interested person may request a hearing on this application or ask to be notified if a hearing is ordered. Any requests must be received by the SEC by 5:30 P.M. on January 12, 1986. Request a hearing in writing, giving the nature of your interest, the reason for the request, and the issues you contest. Serve the Applicants with the request, either personally or by mail, and also send it to the Secretary of the SEC, along with proof of service by affidavit, or, for attorneys, by certificate. Request notification of the date of the hearing by writing to the Secretary of the SEC.

ADDRESS: Secretary, SEC, 450 Fifth Street NW, Washington, DC 20549. Applicants, c/o Jane E. Edstrom, Esq., John Nuveen & Co., Incorporated, 333 West Wacker Drive, Chicago, IL 60606.

FOR FURTHER INFORMATION CONTACT: Philip J. Niehoff, Esq., (202) 272-2048, or H.R. Hallock, Jr., Esq., (202) 272-3030 (Division of Investment Management).

SUPPLEMENTARY INFORMATION: The following is a summary of the application; the complete application is available for a fee from either the SEC's Public Reference Branch in person, or the SEC's commercial copier (800) 231-3282 (in Maryland (301) 258-4300).

Applicants' Representations: 1. The Applicants are diversified, open-end management investment companies each having as one of its objectives the provision of tax-exempt income to its investors. Each fund is advised by Nuveen Advisory Corp., a wholly-owned subsidiary of John Nuveen & Co. Incorporated, the principal underwriter of the Applicants.

2. Each of the Applicants' Board of Directors consists of eight persons, five of whom are not "interested persons" as defined in section (2)(a)(19) of the 1940 Act. The membership of each Board of Directors is identical. Each director who is not an "interested person" of John Nuveen & Co. Incorporated or any of its affiliates receives a fee from each Applicant for serving as a director and is reimbursed for travel expenses incurred in attending Board of Directors meetings. The directors do not receive any other remuneration from the Applicants. The amounts received from the Applicants are, and are expected to continue to be, insignificant in comparison to the total assets of each Applicant.

3. Each Applicant proposes to adopt a deferred compensation plan ("Plan") to permit each non-interested director to elect to defer receipt of fees which would otherwise be payable to him for services performed after the date of the election. The election will continue in effect for each subsequent calendar year unless changed by the participating director prior to January 1 of the year in which the fee is accrued. The Plan will be administered by the Chairman of the Board, President, and Executive Vice President of the Applicants and such other persons as the Board of Directors of the Applicants designate (collectively "Administrators"). A participating director may not serve as an Administrator.

4. Amounts deferred under the Plan will be credited to a book account at the time that they would otherwise have been paid to the electing director. No shares in the Applicant will be purchased for the account with any amounts deferred under the Plan. All amounts in the accounts will be credited with earnings at a rate equal to the average net earnings rate on shares of the Applicant at the end of each calendar quarter. The Administrators will be empowered to change the earnings rate to the prevailing 90-day U.S. Treasury Bill rate at the beginning of each calendar quarter.

5. Amounts deferred under the Plan will become payable in cash at the time (end of a specified calendar year or termination of the directors service) and in the manner (lump sum or five annual installments) the director specifies.

Deferred amounts will continue to accrue earnings until paid. At the Administrators' discretion, a director may also receive deferred amounts plus accrued interest if the director becomes totally and permanently disabled or demonstrates severe financial hardship. The Administrators will also be empowered to accelerate payments under the Plan in the event of an Applicant's liquidation, dissolution, or the distribution of all or substantially all of an Applicant's assets and property to its shareholders or a change in the law that would have the effect of working a financial hardship on the participating directors if the accleration did not occur. In the event of the director's death, amounts payable to him will be payable to his designated beneficiary or his estate. In all other events the directors right to receive payments will be non-transferable.

6. Deferral of directors fees in accordance with the Plan will have a negligible effect on an Applicant's assets, liabilities, and net income per share. Title to, and beneficial ownership of, any assets that the Applicants may earmark to pay the amount deferred, will at all times remain in the Applicants and neither the participating directors nor any beneficiary of a director will have *any* property interest in any specific assets of the Applicants. Amounts credited to the deferred compensation accounts will not be construed to be held in trust or escrow or in any form of asset segregation. The participating directors only interest will be a contractual right to receive the payments credited to his deferred liability director's accounts. No participating director will have greater rights than the rights of an unsecured general creditor of the Applicants. Furthermore, the Plan will not obligate the Applicants to retain a director in such capacity.

7. The Plan possesses none of the characteristics of senior securities that lead to the adoption of restrictions pertaining to such securities, the restrictions on transferability or negotiability of the deferred fees will have no adverse affects on the Applicants' shareholders, and the deferral of fees under the Plan should be viewed as not being issued for services, but in return for the Applicants not being issued for services, but in return for the Applicants not being required to pay such fees on a current basis. Similarly, the Plan does not involve joint transactions between an Applicant and the participating directors within the meaning of section 17(d) of the 1940 Act and Rule 17d-1 thereunder. The agreement does not possess the profit-sharing characteristics required for a joint transaction as contemplated by the 1940 Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 86-28882 Filed 12-23-86; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

T.F. Green State Airport, Warwick, RI; Approval of Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: The Federal Aviation Administration (FAA) announces its findings on the noise compatibility program submitted by the Rhode Island Department of Transportation (RI DOT) under the provisions of Title I of the Aviation Safety and Noise Abatement Act (ASNA) of 1979 (Pub. L. 96–193) and 14 CFR Part 150. These findings are made in recognition of the description of Federal and non-federal responsibilities in Senate Report No. 96–52 (1980). On March 3, 1986, the FAA determined that the noise exposure maps, submitted by the RI DOT under Part 150, were in compliance with applicable requirements. On August 26, 1986, the Administrator approved the T.F. Green State Airport noise compatibility program. All of the recommendations of the program were approved.

EFFECTIVE DATE: The effective date of the FAA's approval of the T.F. Green State Airport noise compatibility program is August 26, 1986.

FOR FURTHER INFORMATION CONTACT: M. Ashraf Jan, Federal Aviation Administration, New England Region, Airports Division, ANE–610, 12 New England Executive Park, Burlington, Massachusetts 01803. Documents reflecting this FAA action may be obtained from the same individual

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for T.F. Green State Airport, effective August 26, 1986.

Under section 104(a) of the Aviation Safety and Noise Abatement Act (ASNA) of 1979, an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operator for the reduction of existing noncompatible land uses and prevention of additional noncompatible land uses within the area covered by the noise exposure maps. The Act requires such programs to be developed in consultation with interested and affected parties including local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatibility program developed in accordance with FAR Part 150 is a local program, not a Federal program. The FAA does not substitute its judgement for that of the airport proprietor with respect to which measures should be recommended for action. The FAA's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in Part 150 and the Aviation Safety and Noise Abatement Act of 1979, and is limited to the following determinations: The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150; program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses; program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types or classes or aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government; and program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the Navigable Airspace and Air Traffic Control Systems, or adversely affecting other powers and responsibilities of the Administrator as prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR Part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, State, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does not constitute a commitment by the FAA to financially assist in the implementation of the program nor a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA under the Airport and Airway Improvement Act of 1982. Where Federal funding is sought, requests for project grants must be submitted to the FAA Regional Office in Burlington, Massachusetts.

The RI DOT submitted to the FAA, on December 6, 1985, the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study conducted from September 1981 through September 1984. The T.F. Green State Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on March 3, 1986. Notice of this determination was published in the **Federal Register** on March 12, 1986.

The T.F. Green State Airport study contains a proposed noise compatibility program comprised of actions designed for phased implementation by airport management and adjacent jurisdictions from the date of study completion to beyond the year 1990. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in section 104(b) of the Act. The FAA began its review of the program on March 3, 1986, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control). Failure to approve or disapprove such program within the 180 day period shall be deemed to be an approval of such program.

The submitted program contained 20 proposed actions for noise mitigation on and off the airport. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective August 26, 1986. Outright approval was granted for 19 specific program elements. The 20th program element-Voluntary Nighttime Restrictions for Scheduled Air Carrier Operations (Noise Abatement Measure #7, Record of Approval)—was approved. But the approval is limited to the voluntary agreement itself. The legality or effect of the aircraft noise reduction legislation enacted and approved by the Sate of Rhode Island in 1985 or any implementing state policies has not been assessed and is not addressed in the FAA's Record of Approval. To the extent that any future state DOT policy formalizing the voluntary agreement was intended to be included within the Part 150 submittal, that item is disapproved pending submission of information needed to permit a full evaluation of its impacts. This disapproval is solely to prevent automatic approval of an unstudied proposal under section 104(b) of the ASNA Act and does not reflect an FAA judgement with respect to the merits of such policy.

The overall program has two components: a. Noise Abatement Measures, including airport physical changes, airport management changes, and airport and airspace procedural changes, and b. Land Use Planning Measures, including corrective policies, preventive policies, and compensatory policies. Noise Abatement Measures include: Construction of fillet at Runways 5R–23L and 10–28 intersection for an easier exit requiring less thrust; replacing the diagonal taxiway with a parallel taxiway serving Runway 5R; construction of a noise barrier parallel to Runway 5R extension; incorporating noise barrier considerations in the design of proposed air cargo buildings; displacing landing threshold on Runway 5L; physical isolation of maintenance runups; voluntary nighttime restrictions for scheduled air carrier operations; auxiliary power unit restrictions; restrictions on aircraft repositioning under power; pre-takeoff runup restrictions; informational program on reverse thrust; rotational runway use program; helicopter operating procedures; and restrictions on 180 degree turns on runway. The Land Use Planning Measures include: voluntary land acquisition within Ldn 75 contours; sound proofing Pilgrim High School; sound proofing of residential structures within Ldn 65 contours; rezoning selected residential properties between Ldn 70–75 contours; amending subdivision regulation; and amending the building code for sound proofing in the noise impact area.

These determinations are set forth in detail in a Record of Approval endorsed by the Administrator on August 26, 1986. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of the RI DOT.

Issued in Burlington, Massachusetts, on November 20, 1986.

William Williams, Jr.,

Acting Director, New England Region.

[FR Doc. 86–28856 Filed 12–23–86; 8:45 am]

BILLING CODE 4910–13–M

Tri-Cities Airport, Pasco, WA; Approval of Noise Compatibility Program

AGENCY: Federal Aviation Administration, DOT.

ACTION: The Federal Aviation Administration (FAA) announced its findings on the noise compatibility program submitted by the Port of Pasco under the provisions of Title I of the Aviation Safety and Noise Abatement Act (ASNA) of 1979 (Pub. L 96–193) and 14 CFR Part 150. These findings are made in recognition of the description of Federal and non-Federal responsibilities in Senate Report No. 96–52 (1980). On May 16, 1986, the FAA determined that the noise exposure maps submitted by the Port of Pasco under Part 150 were in compliance with applicable requirements. On October 16, 1986, the Administrator approved the Tri-Cities Airport noise compatibility program.

EFFECTIVE DATE: The effective date of the FAA's approval of the Tri-Cities Airport noise compatibility program is October 16, 1986.

FOR FURTHER INFORMATION CONTACT: Dennis G. Ossenkop; Federal Aviation Administration; Northwest Mountain Region; Airports Division, ANM–611; 17900 Pacific Highway South; C–68966; Seattle, Washington 98168. Documents reflecting this FAA action may be obtained from the same individual.

SUPPLEMENTARY INFORMATION: This notice announces that the FAA has given its overall approval to the noise compatibility program for Tri-Cities Airport, effective October 16, 1986.

Under section 104(a) of the Aviation Safety and Noise Abatement Act (ASNA) of 1979, an airport operator who has previously submitted a noise exposure map may submit to the FAA a noise compatibility program which sets forth the measures taken or proposed by the airport operators for the reduction of existing noncompatible land uses and prevention of additional noncompatible land uses within the area covered by the noise exposure maps. The Act requires such a program to be developed in consultation with interested and affected parties including the state, local communities, government agencies, airport users, and FAA personnel.

Each airport noise compatability program developed in accordance with FAR Part 150 is a local program, not a Federal program. The FAA does not substitute its judgement for that of the airport proprietor with respect to which measuers should be recommended for action. The FAA's approval or disapproval of FAR Part 150 program recommendations is measured according to the standards expressed in Part 150 and the Aviation Safety and Noise Abatement Act of 1979, and is limited to the following determinations:

The noise compatibility program was developed in accordance with the provisions and procedures of FAR Part 150;

Program measures are reasonably consistent with achieving the goals of reducing existing noncompatible land uses around the airport and preventing the introduction of additional noncompatible land uses;

Program measures would not create an undue burden on interstate or foreign commerce, unjustly discriminate against types of classes of aeronautical uses, violate the terms of airport grant agreements, or intrude into areas preempted by the Federal Government.

Program measures relating to the use of flight procedures can be implemented within the period covered by the program without derogating safety, adversely affecting the efficient use and management of the Navigable Airspace and Air Traffic Control Systems, or adversely affecting other powers and responsibilities of the Administrator prescribed by law.

Specific limitations with respect to FAA's approval of an airport noise compatibility program are delineated in FAR Part 150, section 150.5. Approval is not a determination concerning the acceptability of land uses under Federal, State, or local law. Approval does not by itself constitute an FAA implementing action. A request for Federal action or approval to implement specific noise compatibility measures may be required, and an FAA decision on the request may require an environmental assessment of the proposed action. Approval does nor constitute a commitment by the FAA to financially assist in the implementation of the program not a determination that all measures covered by the program are eligible for grant-in-aid funding from the FAA under the Airport and Airway Improvement Act of 1982. Where Federal funding is sought, requests for project grants must be submitted to the FAA Airports District Office in Seattle, Washington.

The Port of Pasco submitted to the FAA on February 27, 1986, the noise exposure maps, descriptions, and other documentation produced during the noise compatibility planning study conducted at Tri-Cities Airport. The Tri-Cities Airport noise exposure maps were determined by FAA to be in compliance with applicable requirements on May 16, 1986. Notice of this determination was published in the **Federal Register** on May 30, 1986.

The Tri-Cities Airport noise compatibility study contains a proposed noise compatibility program of actions designed for phased implementation by airport management and adjacent jurisdictions. It was requested that the FAA evaluate and approve this material as a noise compatibility program as described in section 104(b) of the Act. The FAA began its review of the program on May 16, 1986, and was required by a provision of the Act to approve or disapprove the program within 180 days (other than the use of new flight procedures for noise control).

Failure to approve or disapprove such program within the 180-day period shall be deemed to be an approval of such program.

The submitted program contained 7 proposed actions for noise mitigation on and off the airport and for review and monitoring of the program. The FAA completed its review and determined that the procedural and substantive requirements of the Act and FAR Part 150 have been satisfied. The overall program, therefore, was approved by the Administrator effective October 16, 1986.

Approval was granted for all 7 program elements. On-airport actions include installation of a noise monitoring system and preferential runway use. Off-airport elements include zoning, avigation easements, and preventive land use planning and policies.

These determinations are set forth in detail in a Record of Approval endorsed by the Administrator on October 16, 1986. The Record of Approval, as well as other evaluation materials and the documents comprising the submittal, are available for review at the FAA office listed above and at the administrative offices of the Tri-Cities Airport.

Issued in Seattle, Washington on November 19, 1986.

Frederick M. Isaac,

Acting Director, Northwest Mountain Region.

[FR Doc. 86-28857 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-13-M

Federal Highway Administration

Environmental Impact Statement: City of Richmond, VA

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway project in the City of Richmond, Virginia.

FOR FURTHER INFORMATION CONTACT: Robert B. Welton, District Engineer, Federal Highway Administration, P.O. Box 10045, Richmond, Virginia 23240-0045, telephone (804) 771-2682.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Virginia Department of Highways and Transportation (VDH&T), will prepare an environmental impact statement (EIS) on a proposal to provide a fourlane facility on Warwick Road from Route 60 (Midlothian Turnpike) to Bells Road.

The proposed highway project involves three alternative roadway alignments. One alternative involves upgrading the existing two-lane facility, while the other two alternatives would be on new location.

The proposed project will provide improved traffic flow from Route 60 to Bells Road.

There are also three alternatives to the proposed project under consideration:

(1) Null or No-Build Condition—which includes all elements of the Regional Transportation Plan with the exception of the proposed project.

(2) Mass Transit—evaluate the ability of mass transit to accommodate the transportation demands in the study area.

(3) Traffic System Maintenace—to evaluate the ability of non-major construction activities on the existing roadway network to accommodate the transportation demands in the study area.

Letters describing the proposed action and soliciting comments will be sent to appropriate Federal, State, and local agencies and to private organizations and citizens who have previously expressed interest in this proposal. No formal scoping meeting is planned at this time. The Draft EIS will be available for public and agency review and comment. Following publication of the DEIS, a public hearing will be held. Public notice will be given of the time and place of the hearing.

To ensure that the full range of issues related to this proposed action are addressed and all significant issues identified, comments and suggestions are invited from all interested parties. Comments or questions concerning this proposed action and the DEIS should be directed to the FHWA at the address provided above.

Catalog of Federal Domestic Assistance Program number 20.205, Highway Research, Planning and Construction. The provisions of OMB Circular No. A-95 regarding State and local clearinghouse review of Federal and Federally assisted programs and projects apply to this program.

Issued on: December 16, 1986.

Robert B. Welton,

District Engineer, Richmond, Virginia.

[FR Doc. 85-28859 Filed 12-23-85; 8:45 am]

BILLING CODE 4910-22-M

Environmental Impact Statement: Vernon County, WI

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of intent.

SUMMARY: The FHWA is issuing this notice to advise the public that an environmental impact statement will be prepared for a proposed highway improvement project in Vernon County, Wisconsin.

FOR FURTHER INFORMATION CONTACT: Mr. Michael M. Moravec, Environmental Coordinator, Federal Highway Administration, 4502 Vernon Boulevard, Madison, Wisconsin 53705-4905; telephone (608) 264-5947.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with the Wisconsin Department of Transportation, is currently preparing an Environmental Impact Statement for relocation of State Trunk Highways 33 (5 miles) and 131 (2.5 miles) between Rockton and Ontario in Vernon County, Wisconsin. Both highway segments were constructed in 1927 with 20- to 22-foot-wide driving surfaces, 1- to 2-foot shoulders, and vertical and horizontal alignments that are considerably below current design standards. The subject highway segments include several substandard bridges, two of which are posted for one-way traffic, one of which has a clear roadway width of 13 feet. Portions of the roads lie within the Kickapoo River floodplain, resulting in their being closed to traffic several times per year.

Planning, environmental, and engineering studies are underway to develop transportation improvement alternatives. The EIS will assess the need, location, and environmental impacts of alternatives including: (1) *The No-Build Alternative*—Assumes the continued use of the existing facilities with the maintenance necessary to insure their use; (2) *Existing Alignment*—Rebuild to current standards; (3) *Previously Approved New Alignment*—Would relocate the roads out of the Kickapoo River floodplain; (4) *A Modification of the Previously Approved New Alignment to Avoid 4(f)/6(f) Lands in Wildcat Mountain State Park;* and (5) *A Modification of the Previously Approved New Alignment to Reduce its Visibility from Wildcat Mountain State Park.*

Coordination and scoping process: Coordination activities will begin soon and will involve agencies that are identified as having an interest in or jurisdiction by law regarding the proposed action. A January 15, 1987 date has been established for the formal scoping meeting. Agencies will be notified by mail of this date. In addition, coordination will continue with local units of government, private interest groups, and local citizens, including public meetings.

Comments and suggestions are invited from all interested parties to insure that the full range of issues related to the proposed action are addressed and all significant issues identified. Comments or questions concerning this proposed action and the EIS should be directed to FHWA at the address provided.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Research, Planning, and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: December 18, 1986.

Frank M. Mayer,

Division Administrator, Madison, Wisconsin.

[FR Doc. 86-28838 Filed 12-23-86; 8:45 am]

BILLING CODE 4910-22-M

DEPARTMENT OF THE TREASURY

[DEPT. Circ. 570, 1986 Rev., Supp. No. 7]

Surety Companies Acceptable on Federal Bonds; Statewide Insurance Co.

A Certificate of Authority as an acceptable surety on Federal bonds is hereby issued to the following company under sections 9304 to 9308, Title 31, of the United States Code. Federal bond approving officers should annotate their reference copies of the Treasury Circular 570, 1986 Revision, on page 23951 to reflect this addition:

Statewide Insurance Company. Business Address: P.O. Box 799, Waukegan, Illinois 60079.

Undewriting Limitation:[b] *$189,000.* Surety Licenses:[c] IL, AZ. Incorporated in: Illinois.

Federal Process Agents.[d]

Certificates of Authority expire on June 30 each year, unless revoked prior to that date. The certificates are subject to subsequent annual renewal so long as the companies remain qualified (31 CFR Part 223). A list of qualified companies is published annually as of July 1 in Department Circular 570, with details as to Underwriting Limitations, areas in which licensed to transact surety business and other information.

Copies of the Circular may be obtained from the Department of the Treasury, Financial Management Service, Finance Division, Surety Bond Branch, Washington, DC 20226, telephone (202) 634-2119.

Dated: December 9, 1986.

Mitchell A. Levine,

Assistant Commissioner, Comptroller, Financial Management Service.

[FR Doc. 86-28910 Filed 12-23-86; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF DEFENSE

Department of the Army

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the committee: Army Science Board (ASB).

Dates of meeting: 7-8 January 1987.

Times of meeting: 0830-1700 hours.

Place: Pentagon, Washington, DC.

Agenda: The Army Science Board's Ad Hoc Subgroup for the Army Biological Defense Program will meet to review the TOR and to set up guidelines for conducting the study. This meeting will be closed to the public in accordance with section 552b(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 1, subsection 10(d). The classified and nonclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039 or 695-7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 86-29133 Filed 12-23-86; 12:17 pm]

BILLING CODE 3710-08-M

Army Science Board; Closed Meeting

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), announcement is made of the following Committee Meeting:

Name of the committee: Army Science Board (ASB).

Dates of meeting: 8-9 January 1987.

Times Of meeting: 1200-1700 hours, 8 January, 0800-1700 hours, 9 January.

Place: Pentagon, Washington, DC.

Agenda: The Army Science Board's Ad Hoc Subgroup for the Army Information Management Area Concepts and Architecture will meet to hear briefings on evolution of the Army's Information Mission Area and current Information Management architectural initiatives. This meeting will be closed to the public in accordance with section 552(c) of Title 5, U.S.C., specifically subparagraph (1) thereof, and Title 5, U.S.C., Appendix 1, subsection 10(d). The classified and nonclassified matters to be discussed are so inextricably intertwined so as to preclude opening any portion of the meeting. The ASB Administrative Officer, Sally Warner, may be contacted for further information at (202) 695-3039 or 695-7046.

Sally A. Warner,

Administrative Officer, Army Science Board.

[FR Doc. 86-29134 Filed 12-23-86; 12:17 pm]

BILLING CODE 3710-08-M

Sunshine Act Meetings

Federal Register
Vol. 51, No. 247
Wednesday, December 24, 1986

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

INTERNATIONAL TRADE COMMISSION

TIME AND DATE: Tuesday, January 6, 1987 at 10:00 a.m.

PLACE: Room 117, 701 E Street, NW., Washington, DC 20436.

STATUS: Open to the public.

MATTERS TO BE CONSIDERED:

1. Agenda
2. Minutes
3. Ratifications
4. Petitions and Complaints:
5. Inv. 701-TA-267 and 268 (F) and 731-TA-304 and 305 (F) (Top-of-the-stove stainless steel cooking ware from Korea and Taiwan)—briefing and vote.
6. Inv. 731-TA-321/325 (F) (Certain unfinished mirrors from the Federal Republic of Germany, Italy, Japan, Portugal, and the United Kingdom)—briefing and vote.
7. Inv. 731-TA-367/370 (P) (Color picture tubes from Canada, Japan, Republic of Korea, and Singapore)—briefing and vote.
8. Any items left over from previous agenda: none.

CONTACT PERSON FOR MORE INFORMATION: Kenneth R. Mason, Secretary, (202) 523-0161.

Kenneth R. Mason,
Secretary.
December 18, 1986.

[FR Doc. 86-28976 Filed 12-22-86; 10:40 am]
BILLING CODE 7020-02-M

LEGAL SERVICES CORPORATION

TIME AND DATE: The meeting will commence at 9:00 p.m., Friday, January 2, 1987 and will reconvene at 10:00 a.m. on Saturuday, January 3, 1987, and continue until all official business is completed.

PLACE: Capitol Holiday Inn, Mars Room, 550 C Street, SW., Washington, DC 20024.

STATUS OF MEETING: Closed. The meeting is to be closed to discuss personnel and personal matters under The Government in the Sunshine Act [5 U.S.C. 552b (c) (2), (6), and (9)(B)] and 45 CFR 1622.5 (a), (e), and (g).

MATTERS TO BE CONSIDERED:

1. Personal and Personnel Matters

CONTACT PERSON FOR MORE INFORMATION: Timothy H. Baker, Executive Office, (202) 863-1839.

Date issued: December 19, 1986

Timonthy H. Baker,
Secretary.

[FR Doc. 86-28943 Filed 12-22-86; 9:45 am]
BILLING CODE 6820-35-M

Corrections

Federal Register

Vol. 51, No. 247

Wednesday, December 24, 1986

This section of the FEDERAL REGISTER contains editorial corrections of previously published Rule, Proposed Rule, and Notice documents and volumes of the Code of Federal Regulations. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 1106

[Docket Nos. A0-231-A54 et al.]

Milk in the Texas and Certain Other Marketing Areas; Order Amending Orders

Correction

In the issue of Friday, December 19, 1986, on page 45575 in the first column a correction to FR Doc. 86-27870 appeared. In the third item, the reference to the section being corrected should have read "§ 1106.52 (a)(8)(i)".

BILLING CODE 1505-01-D

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[OR-943-07-4220-10; 032; OR-37548]

Oregon; Proposed Withdrawal and Opportunity for Public Meeting

Correction

In notice document 86-27106 appearing on page 43675 in the issue of Wednesday, December 3, 1986, make the following corrections in the land description for "T. 20 S., R. 5 W.,":

1. On page 43675, in "Sec. 9", the fifth and sixth lines should read"E½SE¼ NW¼SW¼SW¼E½SW¼SW¼SW¼, NE¼NE¼SE¼, W½NE¼SE¼, W½SE¼NE¼SE¼,".

2. On the same page, in"Sec. 21", the first line should read "Sec. 21, W½E½N E¼NE¼, W½NE¼NE¼,".

BILLING CODE 1505-01-D

DEPARTMENT OF LABOR

Employment and Training Administration

20 CFR Part 617

Trade Adjustment Assistance for Workers

Correction

In rule document 86-28397 beginning on page 45867 in the issue of Monday, December 22, 1986, make the following correction:

On page 45868, in the first column, the **EFFECTIVE DATE** should have read "January 22, 1987".

BILLING CODE 1505-02-M

Wednesday
December 24, 1986

Part II

Department of Energy

Federal Energy Regulatory Commission

18 CFR Parts 270 and 284

Ceiling Prices; Old Gas Pricing Structure; Order Granting Rehearing in Part, Denying Rehearing in Part, and Clarifying Final Rule

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 270 and 284

Ceiling Prices; Old Gas Pricing Structure

[Docket Nos. RM86-3-003 Through -068]

Issued December 15, 1986.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order granting rehearing in part, denying rehearing in part, and clarifying final rule.

SUMMARY: The Federal Energy Regulatory Commission is granting in part and denying in part rehearing of, and clarifying, its final rule establishing new ceiling prices under sections 104(b)(2) and 106(c) of the Natural Gas Policy Act of 1978. The final rule also established a "good faith negotiation rule" with which producers must comply before collecting a higher price under an existing contract, absent voluntary renegotiation of the contract. In addition, the final rule provided blanket transportation certificates to interstate pipelines which formerly purchased gas released under the good faith negotiation rule in order to facilitate marketing of that gas to a new purchaser. On rehearing, the Commission modifies the regulations governing the rates charged by releasing pipelines for transportation of the gas in order to assure that those rates are the same as those for comparable transportation under Order No. 436. The Commission also authorizes upstream interstate pipelines that provided transportation of gas immediately before its release to continue transporting that gas on behalf of any shipper. Finally the Commission on rehearing clarifies the operation of the good faith negotiation rule in various respects and makes several minor modifications in the regulations implementing that rule.

EFFECTIVE DATE: January 23, 1987.

FOR FURTHER INFORMATION CONTACT:

Christopher J. Warner, (202) 357-8473
Howard B. Schneider, (202) 357-8511
Richard Howe, Jr., (202) 357-8308
Peter J. Roidakis, (202) 357-8224
Darrell Blakeway, (202) 357-8213

Office of the General Counsel, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426

SUPPLEMENTARY INFORMATION:

[Docket Nos. RM86-3-003 through -068; Order No. 451-A]

Ceiling Prices; Old Gas Pricing Structure; Order Granting Rehearing in Part, Denying Rehearing in Part, and Clarifying Final Rule

Issued: December 15, 1986.

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

I. Introduction

On June 6, 1986, the Commission issued Order No. 451 modifying the price structure of old natural gas pursuant to its authority under sections 104(b)(2) and 106(c) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301-3432 (1982), and adopting regulations governing implementation of the revised price structure. 51 FR 22168 (June 18, 1986). The order became effective on July 18, 1986.[1] Numerous requests for rehearing have been filed challenging virtually all aspects of Order No. 451. This Order No. 451-A denies rehearing of Order No. 451 for the most part. However, certain modifications to the implementing procedures are adopted and various provisions of the rule are clarified.

II. Background

In November 1985, the Secretary of Energy, acting pursuant to section 403 of the Department of Energy Organization Act,[2] issued and transmitted to this Commission for its consideration and action a proposed rule to reform the pricing structure for certain categories of natural gas subject to ceiling prices under sections 104 and 106 of the NGPA. According to the Department of Energy (DOE), the separately vintaged pricing system for old natural gas established by the NGPA distorted price signals in the natural gas market, raised consumer prices above market-clearing levels, inhibited efficient production of least-cost supplies, and would, unless modified, result in the loss of some 11 trillion cubic feet of old gas reserves. DOE argued that overall prices for gas had not fallen to market-clearing levels, despite the current surplus of available supplies, due to the cushion provided by old gas ceiling prices and that as a result consumers had not realized the full benefit of market competition. DOE also argued that the NGPA's old gas pricing system failed to assign a reasonable share of the replacement cost of new gas supplies to purchasers of old gas and concluded that the old gas ceiling prices should be corrected to take into account current competition in natural gas markets. DOE therefore proposed that

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[1] On July 18, 1986, the Commission stayed the effectiveness of Order No. 451 until July 30, 1986, at the request of the United States Court of Appeals for the Eighth Circuit. 35 FERC ¶ 61,067. The stay was granted in order to allow additional time for the court to consider a petition filed on July 1, 1986, by KN Energy, Inc. requesting issuance of a writ of prohibition or, alternatively, a writ of mandamus directing the Commission to vacate Order No. 451. On August 19, 1986, the Court denied KN's petition. *In re KN Energy, Inc.*, No. 86-1806 (8th Cir. Aug. 19, 1986).

[2] 42 U.S.C. 7173 (1982).

the Commission exercise its authority under sections 104(b)(2) and 106(c) of the NGPA to eliminate vintage-based pricing of old gas by establishing a uniform ceiling price equal to the highest current ceiling price for old gas, that being the post-1974 vintage, with a price of $2.57 per MMBtu as of June 1986.[3]

DOE also proposed a "good faith negotiation rule" under which "first sellers" [4] would be given a one-time right to request their purchasers to nominate a price the purchaser was willing to pay, up to the new ceiling. If the purchaser nominated the ceiling price, the sale would continue at the new ceiling price. If the purchaser nominated a lower price, the seller could accept the price and continue sales at that price. Alternatively, the seller could reject the nominated price, in which case sales would continue at the existing price, but the seller would have the right at any time to sell the gas to another purchaser at a higher price provided the sale was for a term of at least two years. In that event, the seller would be released from any further obligation in law or contract to the existing purchaser upon 30-days notice. DOE also proposed that the Commission exercise its authority under NGPA section 107(b) by establishing higher incentive prices for production enhancement gas and creating certain new categories of gas eligible for the higher incentive prices.

Notice of the proposed rule was issued in the **Federal Register** on November 25, 1985 (50 FR 48540). On December 20, 1985, the Commission issued a notice establishing a schedule for public comments on the proposed rule.[5] The Commission requested comments by interested parties concerning the scope of Commission authority to implement the proposal, including the elements of the just and reasonable rate standard applicable to old gas prices, the operation of indefinite price escalation clauses in old gas contracts, the relationship of the proposed rule to the Commission's block billing proposal in Docket No. RM85-1-000 and the likely response of the market in developing old gas supplies. On February 26, 1986, the Commission issued a notice providing for the filing of reply comments and scheduling a two-day public conference for discussion of issues involved in the proposed rule.[6] Initial comments were filed by February 25, 1986, and reply comments were filed by March 27, 1986. Over 160 initial comments and over 40 reply comments were received from numerous producers, pipelines, and gas distribution companies, as well as DOE, the United States Department of Justice, consumer representatives, members of Congress, States, State regulatory agencies, Cities, trade and business associations, and individuals.

In Order No. 451, the Commission adopted DOE's old gas price proposal, establishing a new, alternative ceiling price of $2.57 per MMBtu for old gas subject to Commission jurisdiction under NBPA sections 104 and 106. The Commission jurisdiction under NGPA 104 and 106. The Commission also adopted a modified version of the good faith negotiation rule. The good faith negotiation rule proposed by DOE was modified by allowing purchasers, in response to price renegotiation requests of a first seller, to request price renegotiation of any gas sold under the contract placed on the bargaining table by the producer as well as all gas sold under other contracts with the same first seller which include any old gas. Each party is allowed 60 days to respond to price nomination requests of the other party, and each party is given 30 days to respond to the other party's price nomination. If no agreement on repricing is reached, the producer may abandon sales to the purchaser and the purchaser may terminate its purchases. The effectiveness of the good faith negotiation rule was deferred until November 1, 1986, in order to enable both purchasers and first sellers to become familiar with its terms and to encourage contracting parties to enter into voluntary contract renegotiations in lieu of mandatory renegotiation under the good faith negotiation procedures.[7] Adandoning producers were granted blanket certificates of public convenience and necessity authorizing the sale of gas abandoned or released under the rule, and rate filing requirements were waived for such sales. DOE's proposals to require that any sale of abandoned gas be for a term of at least two years and at a price higher than that offered by the existing purchaser were not adopted. The Commission instead provided firm sales customers of interstate pipelines with a right of first refusal enabling them to purchase abandoned or released gas by agreeing to meet the terms offered by any potential third-party purchaser. Interstate pipelines which are not open-access transporters under Order No. 436 [8] were granted blanket transportation authorization and are deemed to have agreed to transport abandoned or released gas to their existing customers or to interconnected pipelines. Action on DOE's incentive price proposal was deferred pending further Commission review.

III. *Requests for Rehearing*

The Commission received 62 requests for rehearing challenging virtually every aspect of Order No. 451. (*See* Appendix A.) Applicants seeking rehearing argue variously that in adopting the rule the Commission exceeded the scope of its authority, that even assuming sufficient authority, the rationales for the rule are inadequate or invalid, that various provisions of the rule are unlawful, that the rule is unbalanced in favor of particular categories of affected parties, and that various terms and provisions of the rule require clarification. The Commission has reviewed the arguments set forth in the rehearing requests and concludes they do not justify making any significant changes in the basic terms of the rule. However, the Commission agrees that certain modifications should be made, mostly involving the procedures of the good faith negotiation rule and transportation rates. The Commission also grants numerous requests for clarification of various terms and provisions of the rule.

IV. Discussion of Rehearing Issues

A. Commission Authority

In Order No. 451 the Commission acted to reform the price structure of old gas under the authority of sections 104(b)(2) and 106(c) of the NGPA and rejected arguments of various commenters that Congress' incorporation in the NGPA of the prices and price structure for old gas in effect

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[3] Under DOE's proposal the new ceiling price would continue to be adjusted for inflation each month. First sellers would be entitled to claim the new ceiling price only if authorized by contract. However, since approximately 90 percent of old gas is sold under contracts containing sufficient authorization in the form of indefinite price escalation clauses, most old gas producers would be entitled to claim the new ceiling price.

[4] *See* NGPA section 2(21), 15 U.S.C. 3302(21) (1982).

[5] 50 FR 52935 (Dec. 27, 1985).

[6] 50 FR 7583 (Mar. 5, 1986).

[7] On July 17, 1986, the Commission issued an Interim Order on Rehearing to confirm that contract amendments may be made outside the good faith negotiation procedures. 36 FERC ¶ 61,058. The Commission has also delayed the date on which good faith negotiation may be initiated until December 18, 1986. 37 FERC ¶ 61,077.

[8] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Docket No. RM85-1-000, Order No. 436, 50 FR 42408, 42,372 (Oct. 18, 1985), corrected at 50 FR 45907 (Nov. 5, 1985); Order No. 436-A, 50 FR 52,217 (Dec. 23, 1985); Order No. 436-B, 51 FR 6398 (Feb. 24, 1986); Order No. 436-C, 51 FR. 11566 (April 4, 1986); Order No. 436-D, 51 FR 11569 (April 4, 1986); Order No. 436-E, 51 FR 11566 (April 4, 1986); appeals docketed *sub nom.* Associated Gas Distributors *et al.* v. FERC, Nos. 85-1811 *et al.* (D.C. Cir.).

prior to enactment of the NGPA deprived the Commission of authority to alter that structure under the authority of the Natural Gas Act (NGA). The Commission concluded that the terms of sections 104(b)(2) and 106(c) are unambiguous and specifically authorize the Commission to modify the prices and price structure of old gas, subject only to the just and reasonable standard of the NGA.

Requests for rehearing. Numerous rehearing applicants reiterate the arguments made in their comments that sections 104(b)(2) and 106(c) do not provide authority for the Commission's promulgation of a single maximum lawful price for all old gas, and the consequent elimination of the system of tiered prices based on the date the wells were drilled.[9] Applicants argue that Congress intended to leave old gas under the largely original-cost-based price ceilings in effect at the time of enactment of the NGPA in order to protect consumers from the effects of deregulation of new gas prices and prevent a financial windfall to producers of old gas, while at the same time stimulating addition of new reserves, and that the Commission's action in Order No. 451 is thus at odds with the basic purpose and design of the NGPA.

Applicants argue that the Commission's authority to increase old gas prices under sections 104(b)(2) and 106(c) is limited to applying the rate-making principles embodied in the last producer rate orders issued by the Federal Power Commission before enactment of the NGPA, Opinion Nos. 770 and 770–A.[10] These orders modified a decision in the previous national rate order, Opinion No. 699–H,[11] to gradually eliminate vintaging, and re-established a vintaged-based price structure for old gas. Applicants argue, therefore, that the Commission now lacks authority to eliminate the system of vintage pricing adopted in Opinion No. 770 or to base old gas ceiling prices on cost methods different from those from which the old gas prices adopted in that proceeding were derived. UDC argues that the Commission had never adopted a purely replacement-cost-based rate for old flowing gas prior to enactment of the NGPA and that Congress, therefore, could not have intended to allow the use of this methodology to raise ceiling prices for old gas under the authority of section 104(b)(2) of the NGPA.[12]

Several applicants argue that the United States Supreme Court's discussion of the NGPA in *Public Service Commission of New York* v. *Mid-Louisiana Gas Co.*[13] *supports the conclusion that the Commission is precluded from eliminating vintaging, and that the Commission may increase old gas prices under the authority of sections 104(b)(2) and 106(c) only when traditional NGA principles would dictate a higher price, such as when costs have increased at a rate in excess of the statutory inflation adjustment.*[14] *UDC cites Mid-Louisiana* for the proposition that the vintaged price structure for old gas became unalterable upon passage of the NGPA:

> The statute evinces careful thought about the extent to which producers of 'old gas'—the gas already dedicated to interstate commerce before passage of the NGPA—would be able to enjoy incentive pricing. Section 104 of the statute directly incorporates part of the 'vintaging' pattern that previously existed under the NGA.[15]

Several applicants argue that the Commission's authority under sections 104(b)(2) and 106(c) is limited to granting "special relief" on a case-by-case basis, where the otherwise applicable ceiling prices are insufficient to allow producers to recover their production costs.[16] These applicants cite a Commission order terminating a proposed rulemaking on special relief regulations where sections 104(b)(2) and 106(c) were described as providing authority under the NGPA to continue granting special relief in accordance with procedures and standards developed under the NGA.[17] The PUC of California also cites *Interstate Natural Gas Association of America* v. *FERC* [18] for the proposition that Congress did not intend to permit the Commission to raise old gas prices across the board, but only on a case-by-case basis.[19]

Other applicants argue that because the new ceiling price is well above current market prices for natural gas, Order No. 451 constitutes *de facto* deregulation of old gas, in contravention of Congress' intent under the NGPA to leave old gas "forever regulated." [20] These applicants note that the Commission repeatedly asserted its goal of providing for "market-responsive prices" for old gas by means of the regulations promulgated in Order No. 451. They argue, however, that the Supreme Court has construed the NGA as prohibiting the Commission's reliance on prevailing prices in the marketplace to determine just and reasonable rates, citing *FPC* v. *Texaco, Inc.*[21]

Commission Response. The Commission recognizes that section 104(b)(1) of the NGPA was intended to directly incorporate the just and reasonable rates, and thus the cost-based prices according to vintage, in effect at the time of the NGPA's enactment. Further, the Commission agrees that Congress considered this provision for old gas prices to be a significant feature of the NGPA's design, intended to mitigate the effects on consumers of allowing higher prices for new gas. The Commission expressed the same rationale for its decision to retain vintage-based rates in Opinion No. 770. However, the applicants have not cited, nor has the Commission found, any legislative history whatsoever on section 104(b)(2),[22] or the virtually identical sections 106(c) and 109(b)(2), that raises any doubt about its plain meaning. If Congress had intended old gas prices to be forever subject to the ceilings in effect when the NGPA was enacted, subject only to the statutory inflation adjustment, sections 104(b)(2) and 106(c) would not have been included in the NGPA. The authority granted to the Commission under these provisions to increase old gas prices above the otherwise applicable maximum lawful prices is too clear to admit any doubt. By inclusion of these provisions, Congress authorized the Commission to review and revise old gas prices in light of current conditions. The *only* limitations imposed by section 104(b)(2) on the Commission's authority to restructure old gas prices is that such

[9] United Distribution Companies (UDC) at 15–37; American Public Gas Association (APGA) at 12–20; Maryland Peoples Counsel/National Association of State Utility Consumer Advocates (MPC NASUCA) at 6–13; KN Energy, Inc. (KN) at 13–17; Northern Natural Gas Company (Northern Natural) at 5–10; Florida Cities at 5–6; Public Service Commission of New York (N.Y. PSC) at 2–8; Public Service Commission of the District of Columbia (D.C. PSC) at 8–13; Interstate Natural Gas Association of America (INGAA) at 6–7; Michigan and the Michigan Public Service Commission (Michigan) at 2–5; Laclede Gas Company (Laclede) at 2–6.

[10] 56 FPC 509 (1976) and 56 FPC 2698 (1976).

[11] 56 FPC 604 (1974).

[12] UDC at 17–20.

[13] 463 U.S. 319, 333–35 (1983).

[14] UDC at 31–33; MPC NASUCA at 11–12.

[15] 463 U.S. at 334.

[16] D.C. PSC at 8–9; California Public Utilities Commission (Cal. PUC) at 15–17; Southern California Gas Company (SoCal) at 10–12.

[17] FERC Statutes and Regulations, Regulations Preambles (1982–1985), ¶ 30,565 at 30,928.

[18] 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, Exxon Corp. v. Interstate Natural Gas Assoc., 465 U.S. 1108 (1984).

[19] PUC of California at 16.

[20] Northern Natural at 11–13; Minnesota Department of Public Safety (Minnesota DPS) at 2–3; INGAA at 8–9; APGA at 16–17; Kansas Power & Light Company (KP&L) at 14–16; N.Y. PSC at 13–15.

[21] 417 U.S. 380 at 397–99 (1978).

[22] 15 U.S.C. 3314(b)(2) (1982).

prices must be just and reasonable within the meaning of the Natural Gas Act and may not be lower than the ceiling prices established under section 104(b)(1).

Nothing in section 104(b)(2) or the NGPA's legislative history supports the applicants' argument that Congress intended to limit the scope of the Commission's discretion under the NGA to utilize whatever methodology it chooses to establish rates for old gas, so long as the end result is just and reasonable. The record of the debates on the NGPA demonstrates that Congress was clearly aware of the broad scope of that discretion. Senator Abourezk, for example, stated during the Senate's debate on the NGPA on September 19, 1978:

> In addition, it is critical to point out that the law [NGA] does not require that the price set by the FERC be cost-based, except that, in the absence of full cost justification, the FERC must show the tangible benefits to consumers. This is the "end result test" established in FPC against Hope Natural Gas Co. . . .
>
> Nothing prevents FERC setting the rate at whatever level is necessary actually to elicit new supply. . . .[23]

Senator Kennedy also stated, later the same day:

> I want to remind Senators that the means of increasing production is already available in the form of the Federal Energy Regulatory Commission Authority. Sufficient authority already exists to establish prices which will bring forth gas at a "just and reasonable" price and to vary that price according to conditions.[24]

However, except for the proscription against reducing old gas prices from the ceilings otherwise applicable under sections 104(b)(1) and 106(b), Congress did not limit the Commission's authority to establish old gas prices under the just and reasonable standard of the NGA.[25]

The statements by the Supreme Court in *Public Service Commission of New York* v. *Mid-Louisiana Gas Co., supra,* do not support the applicants' assertions that the Commission lacks authority under section 104(b)(2) to eliminate vintage pricing for old gas. In *Mid-Louisiana* the Court held that interstate pipelines that owned gas wells were entitled to have their intracorporate transfers of gas treated as "first sales" and thus be subject to the pricing provisions of the NGPA. The statement from *Mid-Louisiana,* quoted above, is part of a general description of the NGPA's pricing provisions and not a holding on the scope of the Commission's authority. The Court accurately described section 104(b)(1) as directly incorporating the existing pattern of vintaged prices. However, the Court also referred to section 104(b)(2): "[T]he statute recognizes that the ceiling [under section 104(b)(1)] may be too *low* and authorizes the Commission to raise it whenever traditional NGA principles would dictate a higher price." [26] As discussed more fully in succeeding sections, the Commission in this proceeding has revised the old gas price structure on the basis of reasonable and previously approved principles of regulation fully consistent with the just and reasonable standard of the NGA and the Court's comments in *Mid-Louisiana.*

While the Commission recognizes the benefits of market-responsive prices in a competitive environment, it does not in this proceeding rely exclusively on market forces to establish just and reasonable prices. Thus, the price of old gas has not been deregulated *de facto* or otherwise. Order No. 451 allows for sales of old gas *to be* negotiated in light of current market conditions, but with a protective ceiling price based on long-term replacement costs. Because current market prices for natural gas are *generally* below the alternative ceiling price established for old gas by Order No. 451, the good faith negotiation procedures are expected to result in prices for old gas that are market-responsive. However, old gas prices can respond to market forces only within the just and reasonable ceiling price, and thus remain regulated.

The Supreme Court's decisions in the *Mobile* and *Sierra* cases [27] established the doctrine, preserved in this proceeding, that the agreement of the parties sets the lawful rate for a utility service under the NGA, so long as the contract rate does not exceed the rate found just and reasonable by the Commission. Thus, market forces will operate within the regulated ceiling price for old gas under Order No. 451 as under any other rate ceiling established by the Commission under the NGA, or under NGPA ceiling prices for other categories of gas.

B. Old Gas Price Structure

In the final rule the Commission determined that the record in this proceeding demonstrated that the old gas price structure was a principal source of market distortion, that it caused producers to abandon prematurely easily accessible supplies, and caused consumers to react to misleading market signals. The Commission concluded that the old gas price structure was a central factor contributing to current market anomalies, characterized by falling wellhead prices, unresponsive citygate prices, fuel switching, loss of loads, and excess production and transmission capacity. The Commission therefore determined that the old gas price structure was unjust and unreasonable and should be abolished.

In adopting the final rule, the Commission confirmed the view that the then-existing old gas price structure was outmoded, and characterized by distortions, inequities, inefficiencies and disincentives, that demanded reform.[28] Prior to issuance of Order No. 451, it had been nine years since the last national ratemaking was completed. Thus, the economic data and information concerning replacement costs, commodity values, and other factors which were considered by the Commission in formulating the old gas prices had been overtaken by events, which include the current market realities of excess deliverability and declining investment in exploration and development and the imperative need for national energy self-sufficiency. The former system of vintaged rates for old gas failed to accurately reflect the cost and market value of certain categories of old gas; thus, it discouraged production of old gas reserves, reflected an unwarranted disparity between old and new gas prices, was unnecessarily

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[23] 124 Cong. Rec. 30,018 (September 19, 1979).

[24] 124 Cong. Rec. 30,023 (September 19, 1979).

[25] While the Commission has asserted that sections 104(b)(2), 106(c), and 109(b)(2) provide authority to grant special relief in the form of higher prices for old gas from certain wells or leases, it has never suggested that the authority granted by these provisions is limited to granting relief on a case-by-case basis. FERC Statutes and Regulations, Regulations Preambles (1982-1985) ¶ 30,565. Nor is this authority so limited by the decision of the United States Court of Appeals for the D.C. Circuit in Interstate Natural Gas Association of America v. FERC, *supra,* that the Commission lacked authority under the NGPA to allow higher prices for natural gas by altering the standard for measuring its Btu content. Section 104(b)(2) specifies circumstances where the Commission is authorized to increase gas prices, without limiting the exercise of that authority to individual cases.

[26] 319 U.S. at 333 (emphasis in original).

[27] United Gas Pipe Line Co. v. Mobile Gas Corp., 350 U.S. 332 (1956); FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956).

[28] The former price structure for old gas consisted of 15 separate categories based for the most part on the vintage-based price categories and related prices established by the Commission in national rate proceedings in Opinion Nos. 749 (pre-1973 gas) (54 FPC 3090 (1975)) and 770-A (post-1972 gas) (56 FPC 2698 (1976)) and which were in effect as of April 1977. These rates were incorporated in the NGPA, subject to increase by the Commission to a new maximum lawful price, if just and reasonable within the Natural Gas Act.

complex, and caused distortion in the market because of the unequal access of pipelines and distributors to various categories of old gas supplies.

The Commission found most persuasive studies showing that if current old gas prices were held at their present levels, approximately 11 Tcf of old gas reserves would not be produced. The 11 Tcf of old gas reserves not produced as a result of vintaging would have been replaced by higher-priced energy supplies. In part these incremental supply requirements would be met by foreign imports of both oil and gas and the nation's energy security would thereby be compromised and its trade balance weakened. Regardless of the source of the incremental supplies, however, the nation's energy users would be required to pay more for these incremental supplies than would be necessary.

The Commission utilized as one basis for judging the justness and reasonableness of the NGPA old gas prices, the four criteria employed by the Commission in its notice requesting supplemental comments in Docket No. RM85-1-000 (Part D), issued on October 9, 1985.[29] Under these standards, a just and reasonable rate must (1) permit efficiency in the production and consumption of natural gas, (2) permit fair competition, (3) prevent wasteful depletion, and (4) respond to changing conditions in the industry. The former vintaged old gas prices failed to meet these standards and were therefore found no longer just and reasonable.

Requests for rehearing. A number of rehearing applicants challenge the Commission's findings concerning the price structure of old gas.[30] A large number of these parties continue to argue that the major cause of distortion in the natural gas market is the rigidity of existing contract relationships, not vintaging. They also argue that the Commission appears at one time to have shared this view—notably in Order No. 436—and that the Commission's "change" of position is inconsistent.[31] In this vein, Northwest Central asserts that the Commission acted arbitrarily "in failing to resolve issues involving new gas with above-market prices and high take-or-pay contracts." [32] Putting it another way, KP&L asserts that the Commission's finding that the vintaging pricing structure is responsible for current market disorders was arbitrary.[33] NI-Gas appears to acknowledge as beneficial the fact that Order No. 451 addresses the causes of distortion (vintage rates), but argues that the rule provides "no symptomatic relief" [34] from contracts.

MPC/NASUCA renew assertions that the competitive advantages associated with disproportionate access to the old gas vintages no longer exist. MPC/NASUCA confirm that what they refer to are the bidding wars of the 1978–1981 period of relative supply scarcity. During that period, pipelines with relatively larger cushions of old gas vintages were able to outbid their competitors, not on the basis of efficiency of operation and management, but solely based on the amount of "old" gas they could roll-in without adversely affecting their weighted average cost of gas (WACOG) vis-a-vis other pipelines.[35] Since all WACOG's are now above market-clearing levels, MPC/NASUCA insist that the distorting effects of what they admit are "artificially low prices" [36] have been expended.

KN asserts that because Congress incorporated "part of the vintaging pattern" into the NGPA, the Commission no longer has the discretion to eliminate vintaging, even if it did have that discretion under the NGA. KN claims that the Commission's staff "acknowledged the fact that the Commission has no clear legal authority to eliminate vintaging," [37] in the staff analysis attached to the 1982 Notice of Inquiry in Docket No. RM82-26-000.

Finally, a number of applicants take issue with the Commission's perception that the old gas "cushions" enjoyed by some pipelines are the result of historical accident. Northern Natural, for example, asserts that the cushions "in most cases" reflect years of prudent and effective management.[38]

Commission response. Applicants have generally raised arguments previously made in comments and reply comments to the final rule. The Commission has already considered and disposed of these arguments. The Commission finds nothing new that would impel it to change its determination that the old gas vintage price structure had become unjust and unreasonable and should therefore be replaced.

The Commission reaffirms that the former ceiling price structure for old gas is the *primary* cause of continuing price distortions to consumers in natural gas markets. This is not to say it is the *only* cause.

The former old gas prices distorted consuming patterns in two ways. First, consumers supplied by pipelines with access to large quantities of the below market-priced vintages are misled into the false belief that they can continue to buy incremental units of gas for less than the true market price. These pipelines are then required to meet their customers' demands by bidding up the price of new gas. Second, consumers supplied by pipelines with limited access to low-priced categories of gas are required to pay higher than necessary prices because these pipelines have to purchase incremental supplies whose price has been distorted by pipelines who had large quantities of below market-priced gas and who have bid up the price of new gas to meet their own customers' demands. Consequently, customers of high cost pipelines have attempted to switch to either less expensive gas supplies or alternative fuels when able, thus causing their original pipeline supplier to lose load and attempt to shift costs to those customers without the ability to switch supplies or fuels. Likewise, customers supplied by pipelines with access to large quantities of the below market-priced vintages will not consider the use of alternative supplies even though those supplies may be cheaper when the incremental supplies' marginal cost is compared with the marginal cost being paid by their pipeline supplier.

These same price signal distortions also distort producers' exploration, development and production decisions. Specifically, producers selling new supplies find that pipelines endowed with a below-market cushion of old gas are willing to pay otherwise above-market prices in order to secure new supplies to meet their growing demand. This in turn encourages the development of more new high-cost marginal supplies at costs which exceed that which an undistorted market would be willing to pay, while producers of below-market-priced old gas vintages are discouraged from making investments needed to maximize production of easily available

[29] 50 FR 42372 (Oct. 18, 1985).

[30] Associated Gas Distributors (AGD) at 8; The Kansas Power and Light Company, Kansas Public Service Company, and Missouri Public Service Company (KP&L; *et al.*) at 26–27; (MPC NASUCA at 24–26; Northern Natural at 9; D.C. PSC at 4; Northern Illinois Gas Company (NI-Gas) at 9; Interstate Power Company at 4; KN at 15–17; Northwest Central Pipeline Corporation (Northwest Central) at 23–24; Midwest Energy Inc. (Midwest) at 4–5.

[31] AGD at 8; KP&L *et al.* at 26–27.

[32] Northwest Central at 29.

[33] KP&L *et al.* at 27.

[34] NI-Gas at 9.

[35] *See* Order No. 451, 51 FR at 22181 and n.110.

[36] MPC/NASUCA at 25.

[37] KN at 13–17 *citing* Staff Analysis, Impact of the NGPA on Current and Projected Natural Gas Markets (Notice of Inquiry), IV FERC Stats. & Regs. ¶ 35,512 at 35,573–74 (1982). KN's assertions related to the Commission's authority to eliminate vintaging has already been addressed in Part IV.A., *supra*.

[38] Northern Natural at 9. *See also* Interstate Power Company at 4; Midwest at 4–5.

production from existing fields. Correcting these distortions which arise primarily from the old gas price structure was the central purpose of the notice of inquiry in Docket No. RM82-26-000,[39] was integral to the proposal in Docket No. RM85-1-000,[40] and was finally accomplished in Order No. 451.[41] Notwithstanding the assertions of certain applicants to the contrary, the Commission has neither changed positions nor been inconsistent. The elimination of vintaging, coupled with the good faith negotiation process, will help bring economic rationality and more competition to the natural gas markets and will provide a framework for overhauling rigid contract structures. In the more economically rational market-responsive environment created by Order No. 451, lower cost gas will be produced first, and higher cost gas produced only later, as needed.

Applicant NI-Gas is correct, in at least acknowledging that Order No. 451 addresses the root causes of market distortion by collapsing the vintage rates, than are those applicants such as AGD who insist that the contractual "symptoms" of vintaging are the root problem. Treating the cause of an ailment will provide relief from the symptoms in due course. The Commission cannot concur that Order No. 451, by treating vintaging as a root cause, provides no symptomatic relief whatsoever for these contract problems. Under the good faith negotiation process established by the rule,[42] pipelines as well as producers may effect the renegotiation of many "problem" contracts entered into in the context of the old vintage structure. Moreover, Order No. 451 provides room for and encourages negotiations outside of the good faith negotiation process.[43] Thus Order No. 451 addresses both the primary cause and the symptoms of the existing market distortions. AGD, KP&L, and Northwest Central's assertions of inconsistency with, or departure from, Order No. 436 and the Notice of Inquiry are therefore without merit.

The Commission must similarly reject again the contentions of those petitioners such as MPC/NASUCA, who assert that the distortions engendered by the vintage structure no longer exist. MPC/NASUCA admit the old vintages were "artificially low" and had a distorting effect in the past.[44] MPC/NASUCA confirm the Commission's assumption in Order No. 451 that the distortion they refer to is a narrower concept than the Commission's, because it is limited to the immediate effects of the bidding wars of the 1978-1981 period of relative supply scarcity. During that period, pipelines were able to bid-up new supplies to distorted, above-market levels by "rolling-in" the old gas with the new. In response to applicant MPC/NASUCA's insistence that the distorting effect of the "artificially low" vintages has dissipated, the record in this proceeding demonstrates the continuing correlation between various pipelines' access to cushion gas and the pipelines' WACOGs. Unless the vintage structure is corrected now, during a transient period of opportunity when bidding-up of new gas and ability to roll-in high price new supplies with old gas has temporarily subsided, the cycle could repeat itself. Pipelines with low WACOGs have an inherently distorting impact on the market, because they need not contract for new gas supplies based on any fair measure of competitive equality. Far from being dissipated, the distortions inherent in having the old vintages priced "artificially low" thus persist today, and would be renewed to full vigor as the gas bubble dissipates and supplies tighten in the years ahead. The current decline in rig counts [45] testifies to the danger of the full-blown reappearance of these now quiescent distortions.

Current market realities make it plain that there will not likely be extensive new investment in order to add additional high cost supplies at this time. The most efficient way of adding incremental supplies is to stimulate production of low-cost gas, which represents an assured and reliable supply available at the lowest reasonable cost. Therefore the Commission took action to provide the incentive to produce these reliable low cost supplies by establishing the new just and reasonable rate for such gas in the final rule.

In addition, gas from wells with low price ceilings may be prematurely abandoned and resources lost absent the elimination of below-market price ceilings. The sooner these distortions are eliminated, and a more market-responsive environment allowed to develop under the negotiation initiatives encouraged by Order No. 451, the better. Otherwise, some resources will remain underproduced, or even permanently lost, while other, marginal resources are developed at higher cost and before they are needed. Consumers on deep cushion pipelines will continue to be misled as to the true cost of replacing the gas they consume, while consumers on pipelines less well-endowed will continue to pay higher prices for their supplies.

KN's assertion that the staff analysis attached to the 1982 Notice of Inquiry in Docket No. RM 82-26-000 "acknowledged the fact that the Commission has no clear legal authority to eliminate vintaging" is puzzling, when actually the staff concluded that "the Commission probably has the legal authority to eliminate vintaging, if such elimination is found to be just and reasonable, by setting a single just and reasonable rate for all gas currently vintaged." [46] The analysis goes on to note the alternative adoption and elimination of vintaging in the past, the courts' approval of the Commission's discretion in this regard, and the policy imperatives that would support elimination of the NGPA vintages as follows: [47]

> The Commission alternatively embraced and backed away from vintaging throughout the 1960's and 1970's. The elimination of vintaging has, therefore, been considered by the Commission and reviewed by the courts on several occassions.
>
> * * * * *
>
> On judicial review of Opinion No. 699-H, the Court recognized that the Commission was not bound by its previous vintaging policies, but that the Commission should "be permitted latitude to evaluate old experiments and modify or abandon them when [its] best judgment require[s] such course of action." [*Shell Oil Co. v. FPC*, 520 F.2d 1061, 1077-78 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976).]
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> * * * * *
>
> [T]he principal difference between eliminating vintaging and not eliminating vintaging would not be the average price paid

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[39] *See* Order No. 451, 51 FR at 22181 n.105 (June 18, 1986).

[40] *Id.* at 22182 ("[V]intaging is the major cause of the market distortions identified by the Commission in Docket No. RM85-1-000. . . .").

[41] AGD argues that in Order No. 436, the Commission attributed market disorders to rigid contracts, but in Order No. 451 attributed them to the vintage pricing system. Since Order No. 436's, "principal mission" was market analysis, the Order No. 436 approach should have been adopted according to AGD. Yet the approach of Part D of Order No. 436 dealt by indirection with the problem the Commission addressed directly in Order No. 451. Thus there was no divergence from the "mission" of Order No. 436 as alleged by petitioner AGD. *See* AGD at 8. Both orders have a role to play in developing a more market-responsive industry framework. *See also* Part V. B., *infra*.

[42] Order No. 451, 51 FR 22204-09 (June 18, 1986).

[43] *See also* Interim Order On Rehearing, issued July 17, 1986, Docket No. RM86-3-002, 36 FERC ¶61,058, designed to encourage voluntary renegotiation by clearly permitting contract amendments, if the parties desire, without loss of rights under the good faith negotiation rule.

[44] MPC/NASUCA at 25.

[45] Hughes Rig Count as of Nov. 11, 1985 was 1,895; as of Nov. 10, 1986 it declined to 874. *See* Oil & Gas Journal, week of Nov. 17, 1986, at 76.

[46] Appendix A.—Staff Analysis, Impact of the NGPA on Current and Projected Natural Gas Markets (Notice of Inquiry), IV FERC Stats. & Regs. ¶ 35,512 at 35,573 (1982).

[47] *Id.* at 35,573-74.

by consumers, but the distribution of wealth among producers and the ability of interstate and intrastate pipelines to compete with and among one another for new supplies. [footnote omitted.]

* * * * *

Finally, vintaging may discriminate unreasonably against customers of pipelines that have a much smaller price cushion. If pipelines with low weighted average costs are in a better position to obtain new supplies, their customers are more certain of delivery of their supplies and lower prices. This advantage is the result of a pipeline's historical, fortuitous opportunities to contract for large volumes of low-priced vintaged gas and bears no rational relationship to its customers' demands or priority uses.

If anything, this analysis supports the final rule as issued and the rationales therein. Far from being an abrupt departure in policy, Order No. 451 should be understood as the culmination of a long study of the market-ordering problem, begun in the 1982 Notice of Inquiry.

Finally, the Commission disagees with the assertions of Northern Natural and others that the disparity among pipelines' old gas cushions in most cases reflects more prudent and effective management by those pipelines endowed with the larger cushions.[48] While some pipeline managements may have geen more effective in negotiating for lower price supplies than others, a far more important factor was the fortuitous geographic location of certain pipelines near plentiful low-cost supplies subject to lower vintage prices. Moreover, the Commission anticipates that after Order No. 451 is fully implemented, and "the dust has settled" somewhat, those pipelines will continue to benefit from proximity to such fields and this advantage will be reflected in relatively lower WACOG's for such pipeline systems vis-a-vis competing pipelines. While the final rule will not result in absolutely level WACOGs, it should reduce the current spread in gas prices that comprise these WACOGs, by providing a framework for moderate increases in some old gas prices and commensurate reductions in some new gas prices. The final rule, by contributing to a more economically efficient market will benefit those managements that are most genuinely competitive and skillful by increasing their access to gas that may now be shut-in, and will enable them to bring that gas to market.

C. Ceiling Price

In Order No. 451 the Commission adopted DOE's proposal to establish the old gas ceiling price at a level equal to the existing ceiling price for post-1974 gas. That price was $2.57 per MMBtu as of June 1986, and is currently $2.61 MMBtu. In selecting the post-1974, vintage rate as the ceiling price for old gas, the Commission relied on the theory of replacement cost pricing. The Commission found that prices based on replacement/cost were necessary to assure an adequate long-term supply of natural gas, to eliminate distortion and excessive disparity in prices as between new and old gas prices, and to make the price structure of natural gas more economically efficient. (51 FR at 22186–87). The Commission relied on the fact that the FPC had approved eventual pricing of all natural gas, including old flowing gas, at replacement cost levels, and the resulting elimination of vintaging, in the first national producer rate proceeding, Opinion No. 699–H,[49] was affirmed by the courts.[50]

In determining whether DOE's proposed ceiling price was representative of current replacement costs, the Commission reviewed the discounted cash flow (DCF) methodology used by the FPC in Opinion No. 770 to establish the post-1974 vintage rate. The Commission also considered an updated Opinion No. 770 DCF cost study submitted by Indicated Producers. The Commission concluded that the long-term replacement cost of gas was within a range between the post-1974 vintage rate of $2.57 per MMBtu (as of June 1986) and the Indicated Producers' updated replacement cost estimate of $2.77 per MMBtu. The Commission selected the post-1974 vintage ceiling price as the ceiling price for old gas. The Commission stated that while the $2.57 per MMBtu rate might not reflect post-1976 DCF inputs as accurately as the Producers' study, the lower estimate was more reasonable under the circumstances because it recognizes that any prediction or replacement cost is subject to constant change in input variables and that adopting the lower estimate would protect consumers.

The Commission emphasized that the post-1974 rate adopted would operate only as a ceiling price, and that prices actually paid for old gas in the market pursuant to the good faith negotiation rule are likely to be substantially below the ceiling price as long as the current deliverability surplus continues. At such time as the market clears and supply and demand come into balance, the market price for old gas will increase. When this happens, the ceiling price will prevent market forces from driving the price of old gas above the level of replacement costs and will thus assure that old gas prices remain just and reasonable.

Requests for rehearing. Numerous parties seek rehearing of the Commission's decision in Order No. 451 to adopt a ceiling price for flowing gas based on replacement costs.[51] These parties argue that old gas prices must be based, either wholly or at least inpart, on historical or original costs. Many rehearing applicants cite *City of Detroit* v. *FPC*, 230 F.2d 819 (D.C Cir. 1956), and *Farmers Union Central Exchange, Inc.* v. *FERC*, 734 F.2d 1486 (D.C. Cir. 1984), in support of the claimed need to rely on historical costs. They further argue that the Commission in Order No. 451 erroneously relied on certain FPC and judicial decisions, notably FPC Opinion Nos. 699–H and 749 and their respective affirming court decisions, *Shell Oil Co.* v. *FPC*, 520 F.2d 1061 (5th Cir. 1975), and *Tenneco Oil Co.* v. *FERC*, 571 F.2d 834 (5th Cir. 1978), as supporting reliance on replacement costs in establishing old gas ceiling prices.

Rehearing applicants also argue that even if replacement cost pricing of old gas could be justified in theory, the record in this case does not support such a policy. They argue that the FPC's decision in Opinion No. 699–H to grant higher prices for old gas and phase out vintaging were based on a finding made by the Commission and accepted by the reviewing court that in light of the natural gas shortage which then existed, a massive infusion of funds was required to help finance the search for new supplies. These parties argue that since gas deliverability now exceeds demand, there is no reason to believe that producers need additional revenues from sales of old gas to finance increased levels of exploration. It is alleged that under these circumstances, raising the ceiling price for old gas

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[48] Midwest Energy Inc. (Midwest) is wrong in assuming that the Commission intended to suggest that KN and other pipelines with low WACOGs "secured their present low cost status by sharp or improper practices." Midwest at 4. Rather, the Commission views artifically low WACOGs on some systems as primarily adventitious, with management decisions having some effect on what is essentially a fortuitous phenomenon.

[49] 52 FPC 1604 (1974). See also Opinion No. 639, 48 FPC 1299 (1972).

[50] Shell Oil Co. v. FPC, 520 F.2d 1061 (5th Cir. 1985), *cert. denied* 426 U.S. 941 (1976).

[51] American Gas Association (AGA) at 5–7; INCAA at 4–7; UDC at 15–31; ACD at 2–3; Northern Distributor Group (NDG) at 3–5; Cal. PUC at 17–20; N.Y. PSC at 2–10; Texas Eastern Transmission Corporation (Texas Eastern) at 25–31; Florida Cities at 6–18; Southern Natural Gas Company (Southern Natural) at 6–11; Southern California Gas Company (SoCal) at 12–15; KP&L *et al.* at 6–9; Laclede at 6–13; Peoples Gas Light and Coke and North Shore Gas Company (Peoples Gas *et al.*) at 4–10.

results in windfall profits for producers of old gas.[52]

A number of rehearing applicants also argue that the ceiling price adopted by the Commission has not been shown to accurately represent current replacement costs and that the Commission's finding in Order No. 451 that the post-1974 rate is representative of current replacement costs is not supported by substantial evidence.[53] They argue, for example, that the Commission failed to consider evidence that gas production costs, inflation rates and fuel prices have changed significantly since the Opinion No. 770 replacement cost formula was adopted and that, in particular, the cost of drilling for gas had declined in real terms since Opinion No. 770 was issued in 1976.[54] They argue that rather than relying on the Opinion No. 770 cost analysis adjusted for inflation or the updated study submitted by Indicated Producers, the Commission should have prepared an independent calculation of current replacement costs.[55] Several parties also allege procedural errors in the Commission's consideration and determination of the ceiling price issue.

Commission response. In the Commission's judgement, the arguments presented on the replacement cost issue are without merit and do not justify modifying the old gas ceiling price adopted in Order No. 451. The Commission has previously considered and rejected assertions by the rehearing applicants that the Commission's authority to approve rates as just and reasonable under the NGA has been circumscribed as the result of enactment of the NGPA and that as a consequence the Commission may not adopt rate methodologies different from those used to determine the rates in effect at the time the NGPA was enacted. The Commission has likewise rejected contentions that adopting the post-1974 rate for flowing gas amounts to *de facto* deregulation of old gas. The Commission's reasoning on these issues is set forth in the discussion in section IV. A. *supra* and need not be repeated here. The principal issues raised by the rehearing applicants with respect to the level of the new ceiling price for old gas are (1) whether the Commission may properly base its determination of the just and reasonable rate for old gas on replacement cost, (2) whether the Commission's decision to do so is supported by the record, and (3) whether the post-1974 rate is representative of current replacement costs.

In Order No. 451, the Commission reviewed applicable Commission orders and court decisions pertinent to the establishment of just and reasonable producer rates under the NGA. (51 FR 22185–86). The Commission noted that a vintaged rate structure was adopted with approval of the Supreme Court in the original *Permian Basin Area Rate Proceeding*, Opinion No. 468, 34 FPC 159 (1965), that the Commission moved toward the establishment of uniform producer rates based on replacement costs in the first nationwide rate proceeding, Opinion No. 699-H, also with judicial approval, *Shell Oil, supra*, and that the Commission subsequently reinstated vintaging with court approval in the second national rate proceeding, Opinion No. 770, 56 FPC 509 (1976). The Commission concluded that the issues of replacement costs versus historical costs as well as vintage-based rates versus uniform rates are matters within the Commission's reasonably exercised discretion. 51 FR 22. The Commission has carefully considered the arguments presented by the rehearing applicants and concludes that they do not provide any basis for modifying the conclusions reached by the Commission in Order No. 451 concerning the Commission's authority to eliminate vintaging through the establishment of a uniform ceiling price for old gas based on replacement costs.

The reliance by numerous parties on the *City of Detroit* case in support of the proposition that gas producer rates must be based either in whole or in part on historical or original costs is misplaced. *City of Detroit* involved a pipeline rate proceeding in which the FPC authorized the pipeline to charge the so-called "field price" or "commodity value" for its own gas production. In setting aside this part of the FPC's order, the Court stated as follows (230 F.2d at 818–19) (emphasis added):

> When we refer to an 'increase' we mean an increase in the rates above those which would result from use of the *conventional rate base method*. For, though we hold that method not to be the only one available under the statute, it is essential in such a case as this that it be used as a basis of comparison. It has been repeatedly used by the Commission and repeatedly approved by the courts, as a means of arriving at lawful just and reasonable rates under the Act. Unless it is continued to be used at least as a point of departure, the whole experience under the Act is discarded and no anchor, as it were, is available by which to hold the terms 'just and reasonable' to some recognized meaning.

It has long been recognized that the rate standards set forth in the *City of Detroit* are not directly or specifically applicable to the establishment of gas producer rates. In reviewing the FPC's Opinion No. 586 establishing the producer rates for the Hugoton-Anadarko area, the United States Court of Appeals for the Ninth Circuit stated, with reference to *City of Detroit*, that "that case involved a single pipeline company cost-of-service problem. The application of that decision to a review, as in the case before us, of a producer-area rate opinion and order is questionable to say the least." [56] The Commission likewise rejects the assertions of the rehearing applicants that the old gas ceiling price adopted in Order No. 451 violates standards for just and reasonable rates set forth in *Farmers Union*. In Opinion No. 154 (the *Williams* proceeding), which was the subject of the *Farmers Union* decision, the Commission proposed to adopt certain unconventional ratemaking methods for the purpose of determining rates for oil pipelines. These methods were adopted for a number of reasons including the Commission's interpretation of the legislative history of the Lodge Amendment to the Hepburn Act adopted by Congress in 1906.[57] The Commission acknowledged that the methods adopted in Opinion No. 154 result in rates substantially in excess not only of those derived through application of traditional cost-of-service methodologies but also of those estimated by the Commission to be normally obtainable through the operation of market forces. The court in *Farmers Union* rejected the cost methodologies proposed by the Commission, finding that the Commission's rejection of original cost ratemaking lacked both evidentiary support and "economic common sense," 734 F.2d at 1515. The court held that oil pipeline rates must be set within the zone of reasonableness and that "presumed market forces may not

[52] UDC at 31; Cal. PUC at 14; Florida Cities at 11; Southern Natural at 11; SoCal at 14; Peoples Gas *et al.* at 19; KP&L *et al.* at 16.

[53] AGA at 8–10; AGD at 3–4; Minnesota DPS at 4–5; SoCal at 15–16; Peoples Gas *et al.* at 21–22.

[54] AGA at 8; INGAA at 8; KP&L *et al.* at 24; SoCal at 16.

[55] Natural Gas Pipeline Company of America and United Gas Pipe Line Company (Natural and United) at 79; Peoples Gas *et al.* at 23; Southern Natural at 8; Minnesota DPS at 5.

[56] In re Hugoton-Anadarko Area Rate Case, 466 F.2d 974, 989 (9th Cir. 1972). The court went on to cite the Supreme Court's decision in Wisconsin v. FPC, 373 U.S. 294 (1963), concerning the view expressed in *City of Detroit* that cost of service must be used "at least as a point of departure." The Supreme Court there stated that "whatever the court may have meant in that context, it is clear that it did not have before it any question relating to the area rate method." 373 U.S. at 310, n.16.

[57] *See* Williams Pipe Line Company, 21 FERC ¶ 61,260 at 61,582, n.78 and n.124 (1982).

comprise the principal regulatory constraint," *id.* at 1530.

We believe that due to the substantial differences in regulatory context, *Farmers Union* is no more applicable to gas producer regulation than *City of Detroit.* More importantly, there is no parallel between the methods adopted in *Williams* and those adopted in Order No. 451. The rate adopted in Order No. 451 is in no way designed merely to restrain "gross overreaching" or solely as a protection against "egregious exploitation and gross abuse," *id.* at 1502. Order No. 451 establishes a cost-based rate within the zone of reasonableness established by reference to prior FPC and court-approved ratemaking principles and is supported by sound economic and regulatory policy.

The Commission also rejects the arguments of the rehearing applicants that Order No. 451 violates *City of Detroit* and *Farmers Union* not only for failure to adopt an original-cost ratemaking methodology but also for its alleged reliance on market forces to establish the rates actually charged. The establishment of a ceiling price based on replacement costs which, under existing market conditions, is in excess of prevailing market prices does not constitute an abdication of the Commission's regulatory responsibility in favor of market pricing. Any such argument ignores the very real limitation represented by the ceiling price. The rate actually charged, while possibly below replacement cost, cannot exceed that level. Contracting parties have always been and continue to be free to negotiate prices up to but not in excess of applicable ceiling prices. Under the *Mobile-Sierra* doctrine, negotiated, below-ceiling prices are the lawful just and reasonable rates. There is no reason to assume that sales should uniformly be made at the ceiling price. The fact that particular sales can and undoubtedly will be made at prices lower than the ceiling price in no way supports the suggestion that the ceiling price is without regulatory force or effect.

In Order No. 451, the Commission relied on the FPC's first national rate proceeding, Opinion No. 699–H, as support for the pricing of old gas based on replacement cost. The Commission also relied on FPC Opinion No. 749 as supporting the Commission's discretion to consider replacement costs in setting just and reasonable rates for old flowing gas. Several applicants argue that these interpretations are erroneous, that the FPC never totally eliminated vintaging or established a single price for all NGA regulated gas, and that there is thus no valid precedent for the Commission's adoption of the post-1974 rate for all flowing gas.[58]

It will be helpful in considering the arguments of the rehearing applicants briefly to review the FPC's decisions in the national producer rate proceedings conducted prior to enactment of the NGPA. In Opinion No. 699–H, the FPC established a just and reasonable rate of 50 cents per Mcf for 1973–74 biennium gas, with annual escalations of one cent per Mcf. The Commission also ruled that the 1973–74 biennium gas would be entitled to be priced at the rate established for each succeeding period. 52 FPC at 1636. The FPC in Opinion No. 699–H also extended its policy originally adopted in Opinion No. 639 of eliminating vintaging through the vehicle of allowing replacement contracts (contracts which replace expired or expiring contracts) to receive the new gas price. 52 FPC at 1631–32. The agreement of the purchaser to pay the higher rate was required, *id.* The FPC acknowledged that its decisions in Opinion No. 699–H would lead over an extended period of time to a uniform rate for all gas sold in interstate commerce. In support of its policy, the FPC stated as follows (52 FPC at 1637):

> This uniform price will constitute a recognition of the fact that gas is a consumable, irreplaceable commodity and not a service which can be renewed by man. Thus, there is no rational basis for setting differing price levels based upon date of discovery, lease acquisition, contract, or well commencement or completion over an extended period of time.

In opinion No. 749, the FPC established the national rate for gas flowing in interstate commerce prior to January 1, 1973. The FPC adopted a uniform old gas rate of 29.5 cents per Mcf based on a 1972 test year, thereby eliminating the vintage categories of old gas adopted in various prior area rate proceedings.[59] In the second national rate proceeding for new gas, the FPC adopted a full DCF cost methodology resulting in a 1975–76 biennium rate of $1.42 per Mcf. In light of the magnitude of this increase over the pre-existing new gas rate of 50 cents per Mcf, the FPC reimposed vintaging. It did provide, however, that upon contract expiration, old gas would still be entitled to the 1973–74 biennium rate of 50 cents adopted in Opinion No. 699–H.

Rehearing applicants argue that Commission reliance on Opinion No. 699–H is misplaced because (1) it did not eliminate vintaging immediately but rather over time as old gas contracts expired; (2) it was based on a shortage situation and the need for infusion of capital to producers; and (3) the devintaging policy was reversed in Opinion No. 770. The Commission recognizes the difference between Opinion No. 699–H and Order No. 451 in the manner in which devintaging would be accomplished; the Commission also recognizes that the FPC's devintaging plan was discontinued in Opinion No. 770. These facts, however, do not invalidate Opinion No. 699–H as a precedcent for the elimination of vintaging through establishment of a replacement-cost-based ceiling price.

First, Order No. 451, like Order No. 699–H, does not authorize producers to immediately or automatically collect the post-1974 rate. Whereas Opinion No. 699–H required producers to execute replacement contracts and thus obtain their purchasers' approval in order to obtain the new gas ceiling price, Order No. 451 requires producers to negotiate their old gas contracts with their purchasers pursuant to the good faith negotiation rule and does not require any purchaser to pay the new ceiling price without its consent. Producers may abandon sales of old gas if no price agreement is reached, but purchasers may also release higher-priced gas subject to renegotiation if no price agreement is reached. Thus, while there are differences between Opinion No. 699–H and Order No. 451, there are also fundamental similarities. In the Commission's judgment, the ratemaking policy incorporated in Order No. 451 is significantly similar, even analogous to that in Opinion No. 699–H, and the Commission therefore believes that Opinion No. 699–H may properly and reasonably be relied upon as precedent supporting the findings and conclusions adopted in Order No. 451.

The Commission also believes that the efficacy of Opinion No. 699–H as a precedent is not diminished by the later issuance by the FPC of Opinion No. 770. A review of the pertinent cases decided by the FPC prior to enactment of the NGPA reveals clearly that the FPC was given reasonable discretion to determine whether to require or discontinue vintaging and whether to rely on historical or replacement costs, so long as its decisions were within the zone of reasonableness and supported by the record. The fact that the Commission

[58] INGAA at 6–7; UDC at 23–27; Florida Cities at 13–16; Laclede at 9–12.

[59] Producers were permitted to continue to collect certain special rates and area rates which were higher than the Opinion No. 749 ceiling price. 54 FPC at 3093.

initially instituted vintaging, later moved to abandon it, and subsequently reinstated it, all with judicial approval, supports this view.

The Commission also rejects arguments that Order No. 451 misinterprets or misapplies the decision in *Tenneco, supra*. In Order No. 451, the Commission relied on *Tenneco* for the proposition that the Commission has discretion to select between historical or replacement cost in establishing just and reasonable rates for old gas. The Commission relied on the court's statement that "Insofar as theories of regulation are concerned, the choice between actual and replacement cost is for the Commission to make, subject to the sole requirement that the end result be within the 'zone of reasonableness.'" 571 F.2d at 840. Parties objecting to the Commission's reliance on *Tenneco* point out that the court also noted in its opinion that under the Constitution as well as the NGA, producers are only entitled to a fair return on their "actual costs" [60] and that the FPC's Opinion No. 749, which was the subject of the *Tenneco* decision, did not actually adopt replacement cost pricing for old gas.

The Commission believes that *Tenneco*, in affirming the FPC's old gas pricing policy adopted in Order No. 749, is relevant to the issue of replacement cost pricing. Although the FPC did not in Opinion No. 749 adopt a flowing gas ceiling price based solely on replacement costs, it did eliminate vintaging of old gas through the adoption of a uniform ceiling price based on then-current (1972) exploration and development costs rather than purely historical costs. 54 FPC at 3105. As the court in *Tenneco* observed (571 F.2d at 837–38):

> In calculating costs, the Commission made a number of judgments challenged here. It chose to measure exploration and development costs by using a 1972 test year, even though many of the wells from which the gas comes were developed at a lower cost years earlier.

The Commission does not concede that its findings in Order No. 451 are in any way based on a misinterpretation or distortion of the holding in *Tenneco*. Although Opinion No. 749 and the related decision in *Tenneco* are not as directly relevant to the replacement cost issue as Opinion No. 699–H, we believe they support the Commission's discretion to eliminate vintaging of old gas and to choose between replacement and historical cost in setting just and reasonable rates for old gas. Clearly *Tenneco* does not support the claim by rehearing applicants that old gas ceiling prices must remain vintaged as well as based on historical costs. For the reasons discussed above, the Commission reaffirms its determination in Order No. 451 that it is permissable for the Commission to establish a uniform ceiling price for old gas based on replacement costs.

The next principal issue to be considered is whether the record in this proceeding supports the Commission's decision in Order No. 451 to base the ceiling price for old gas on replacement costs. A number of parties argue that the FPC's decision in Opinion No. 699–H was justified on the basis of the then-existing natural gas shortage in the interstate market and the need for "vastly expanded exploration and development programs to meet future demand. . . ." 52 FPC at 1613.[61] It is argued that the NGPA, which eliminated the interstate-intrastate regulatory dichotomy and incorporated incentive prices for new gas and special rates to support continuing or incremental production from old wells, has resulted in a gas surplus and that there is therefore no emergency need to increase old gas prices as a means of financing exploration for increased supplies. New York Public Service Commission, for example, argues that the use of replacement cost as a basis for old gas ceiling prices would be lawful only if the Commission could find that the resulting additional producer revenues are necessary to provide investment funds needed for adequate exploration and development of new supplies and that such additional revenues will actually be used for that purpose. According to New York, "the Commission has not made any such finding and none would be possible on the basis of the record before it." [62]

The Commission agrees that the FPC's decision in Opinion No. 699–H was based on the gas shortage which then existed and the need to finance a greatly increased program of exploration and development of additional supplies; the Commission likewise agrees that the present market is characterized by oversupply in relation to demand. It follows that the rationale relied upon by the Commission in Opinion No. 699–H is not applicable in light of present industry conditions. However, the Commission disagrees with the suggestion that replacement cost pricing of old gas can be justified solely and exclusively on the grounds specified in Opinion No. 699–H. We believe that replacement cost pricing is supported by the record in this proceeding, albeit for reasons different from those set forth in Opinion No. 699–H.

In Order No. 451, the Commission reviewed the record and concluded that the pre-existing old gas price structure was unjust and unreasonable (51 FR 22179–83). The Commission determined that the old gas price structure was the principal cause of distortion in the natural gas market, prevented fair competition, failed to accurately reflect the cost and market value of the many categories of old gas, and resulted in inefficient production and the potential loss of trillions of cubic feet of old gas reserves. The Commission also noted that the elimination of vintaging had been contemplated since the inception of formal producer price regulation commencing with the FPC's original Statement of General Policy No. 61–1 in 1960 (51 FR 22182). The Commission further noted (51 FR 22182–83) that the courts reviewing its orders had observed that the vintage-based pricing system was anomalous, *Placid Oil Co. v. FPC*, 483 F.2d 880 (5th Cir. 1973), and resulted in a "gargantuan inequity." *Tenneco, supra*. (51 FR at 22185). The Commission further found that under the partially decontrolled pricing system adopted by the NGPA, it was inevitable that where old gas prices were frozen at levels equal to only a fraction of replacement cost, prices of unregulated supplies would become disproportionately high to enable producers to realize overall prices over the long term at least equal to replacement cost (51 FR 22186). The Commission found that this is what occurred following enactment of the NGPA, that the resulting price distortions between new and old gas are a prime cause of dysfunction in today's natural gas market, and that further exacerbation of the distortion in natural gas prices is likely to occur at such time as the current surplus is eliminated and supply and demand come into balance. (51 FR 22187).

The Commission has reviewed the arguments of the rehearing applicants and finds they provide no basis for

[60] The pertinent portion of the Court's decision reads as follows (571 F.2d at 840):

The "zone of reasonableness" is wide. The producers, under the Constitution as well as the [NGA], are at bottom, only entitled to a fair return on their actual costs, i.e., a rate which, if anticipated at the time their wells were dug would be sufficient to "maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they assumed." *Permian*, 390 U.S. at 792, 88 S.Ct. at 1373. Subsequent increases in operating costs would be taken into consideration, but replacement value would not.

[61] The FPC in Opinion No. 699–H stated that "the magnitude of the drilling effort that will be required to elicit the supply of gas necessary to fulfill reasonable future demands calls for massive capital commitments." 52 FPC at 1638 (footnote omitted). This finding was accepted by the reviewing court in Shell Oil Co. v. FPC, 520 F.2d at 1077 (5th Cir. 1975).

[62] N.Y. PSC at 8.

modifying the conclusions reached in Order No. 451. The Commission has reviewed and reaffirms its findings in Order No. 451 that the existing old gas price structure is unjust and unreasonable and should be replaced by a uniform old gas ceiling price based on replacement cost. The Commission believes the issues related to both the old and new price structure for old gas were fully considered in Order No. 451 and that the determinations made were fully justified for the reasons stated.

The Commission is convinced that it is essential in selecting a proper cost basis for old gas ceiling prices to recognize the fundamental differences between the exploration for, and production and sale of natural gas and the providing of traditional utility services. As the Commission has previously observed, natural gas is a "consumable, irreplaceable commodity and not a service which can be renewed by man." Opinion No. 699–H, 52 FPC at 1637. An electric generating plant can be constructed which may last for decades and produce electricity virtually on demand and in the amounts desired. Similarly, a pipeline can be constructed for use over an extended period through which gas can be transported on demand and in the quantities desired. The same is true for other utility services such as transportation or telephone service. By contrast, natural gas is a non-renewable energy resource. The total supply of gas, while not precisely known, is finite, and the ultimate stock provided by nature cannot be replenished. The compelling need to replace natural gas consumed is the driving force behind the entire natural gas industry. It is reasonable that consumers of gas should pay prices up to but not in excess of the cost of replacing the volumes which they consume. Gas prices that are equal to only a fraction of replacement cost encourage the rapid, inefficient consumption of this non-renewable resource.

The Commission firmly believes that it is inconsistent with logic, common sense and economic reality to have multiple, binding ceiling prices for a fungible commodity, whether it be bushels of wheat, bars of gold, bales of cotton, barrels of oil or Btus of natural gas. *Placid Oil, supra.* Of course, uniform pricing of natural gas is not possible absent total deregulation. However, the adoption of a uniform ceiling price reflecting replacement costs constitutes a significant step in the right direction and the most the Commission can do within the limits of its statutory authority. In Opinion No. 770, the FPC held that reimposition of vintaging was necessary to "preclude the exaction of excessive and unjustifiable economic rent from flowing gas." 56 FPC at 521 (1976). The Commission rejects this finding in Opinion No. 770 to the extent it implies that in workably competitive wellhead markets any economic rent realized by producers for the sale of flowing gas could be judged to be "excessive and unjustifiable." The Commission is finding in this rulemaking that pricing old gas at its replacement cost over the long-term will assure that economic rents exacted by all producers for all gas will be most responsive to competitive conditions in wellhead markets as mandated by the NGPA. If competitive conditions in energy markets permit producers a higher return in exploration and development than in other endeavors, then such investments will be made. If energy markets do not permit the producer a higher return on exploration and development than on other investments, then the economic rents may not be reinvested in additional drilling. In both cases, the economic rents are allocated in a market-responsive manner consistent with the competitive conditions mandated by the NGPA. For this reason, the Commission finds that this rule will not result in the "exaction of excessive and unjustifiable economic rent from flowing gas." Furthermore, in Order No. 451 the Commission determined that some old gas prices would increase while other old gas prices would decrease under the good faith negotiation provisions. The Commission also found that the increased ceiling price for pre-1974 gas would allow some old gas wells to operate to a lower pressure and level of production, thereby permitting the wells to produce a greater percentage of resources-in-place. Without this price incentive the Commission estimated that a significant amount of old gas would not be produced. For these reasons, the Commission concludes that the record as well as economic common sense and sound regulatory policy dictate that the ceiling price of old gas be based on replacement rather than historical costs.

In considering the means by which to implement replacement cost pricing, the Commission reaffirms its support for the analysis submitted by DOJ. DOJ argues persuasively that in a competitive industry, market forces drive prices toward the producer's marginal cost. 51 FR at 22186. In the terminology of producer regulation, this means replacement cost. Thus, in a competitive industry, market prices will reflect replacement cost and regulation is theoretically unnecessary.

There can be no reasonable doubt that the natural gas producing industry is workably competitive. The Commission so found in Order No. 451, citing Congress' implicit finding of competitiveness in enacting the NGPA, judicial acknowledgments of such congressional intent, and the declining trend in gas prices since 1984 resulting from conditions of oversupply. (51 FR at 22195–96.) Other available evidence supports the finding of a competitive natural gas market among sellers. EIA, for example, prepared a comprehensive study of the concentration of interstate sellers in some nine regional producing areas and 26 production sub-areas.[63] The results of this study indicate a low level of seller concentration in every market except Alaska and similarly low levels of seller concentration in 23 of 26 producing areas.[64] These findings are consistent with and support conclusions reached in earlier studies.[65]

Despite the Commission's finding of competition among sellers of natural gas and the resulting absence of any real need for wellhead price controls, the Commission nevertheless, out of necessity as well as an abundance of caution, adopts the post-1974 ceiling price recommended by DOE. The basis for Commission approval of this ceiling price is replacement cost. The Commission recognizes that there is no perfect formula for calculating replacement cost. Because of the characteristics of the natural gas producing industry, including high risk, price variability, joint products, and fluctuating costs, there can be no one price which is precisely representative of replacement cost. The Commission believes, however, that the DCF model adopted by the FPC in Opinion No. 770 is the most reasonable method available for purposes of estimating current replacement costs.

As outlined in detail in Order No. 451 (51 FR 22185–88) the post-1974 rate had

[63] Richard P. O'Neill, James B. Tobin, and Henry Clarius, "Pipeline Mergers and Their Potential Impact on Natural Gas Markets," *Natural Gas Monthly*, Energy Information Administration, February 1986.

[64] *Ibid.* at Tables F3 and F4. Data for the remaining 3 areas was inadequate or incomplete. Most sales in these areas were in intrastate commerce or in certain instances only a few sales occurred. These areas together accounted for less than 1 percent of total interstate sales in 1984.

[65] Joseph P. Mulholland, *The Economic Structure and Behavior in the Natural Gas Production Industry*, Federal Trade Commission, February 1979. Ronald R. Braeutigam, "The Deregulation of Natural Gas," in *Case Studies in Regulation: Revolution and Reform*, ed. by Leonard W. Weiss and Michael W. Klass, Little, Brown and Co. (Boston: 1981).

its origin in Opinion No. 770, in which the FPC adopted a rate for post-1974 gas of $1.42 per Mcf. The rate was increased by one cent per quarter until enactment of the NGPA and thereafter adjusted according to the NGPA's monthly inflation adjustment. The Commission concluded that the DCF cost methodology adopted in Order No. 770 remained a reasonable method of calculating the replacement cost of gas. The Commission also held that in light of the adjustment-for-inflation feature of the NGPA, it was reasonable to assume the current post-1974 ceiling price remained representative of replacement costs absent a showing that the inflation adjustment had either overstated or understated changes in the cost of finding and producing gas since enactment of the NGPA. The Commission also considered and found reasonable the replacement cost study submitted by Indicated Producers demonstrating a 1985 replacement cost of $2.77 per MMBtu. The Producers' study represent an updated application of the Opinion No. 770 methodology incorporating recent data concerning productivity, reserve additions, income tax liability, drilling costs, and industry capital structure.[66]

Certain rehearing applicants argue that the Commission has failed adequately to demonstrate that the post-1974 rate is representative of current replacement costs. Several applicants argue that the Commission's assumption, based on the NGPA monthly adjustment factor, that the post-1974 rate remains representative is without adequate support, and that such an assumption is belied by the fact that drilling costs have actually declined. Several applicants also question the Commission's reliance on the Indicated Producers' replacement cost study.

The Commission agrees that the NGPA's inflation adjustment factor, in and of itself, does not assure that the original Opinion No. 770 rate will remain representative of replacement cost. The Commission agrees therefore that it would be improper to rely solely on the inflation factor to justify the reasonableness of the current post-1974 rate. However, the Commission has not relied solely on the NGPA's adjustment factor; the Commission also carefully reviewed the updated Opinion No. 770 study submitted by Indicated Producers and found that it to be reasonable and to confirm the reasonableness of the post-1974 rate proposed by DOE. Rehearing applicants' objections to the Commission's reliance on the Producers' study are without merit. The Producers' study was submitted as part of the initial comments of Indicated Producers. All parties had an opportunity to respond to all of the issues raised in the initial comments including the Producers' replacement cost study. No party has presented any facts, evidence, or information whatsoever, either in their reply comments or on rehearing, challenging the validity of the Producers' study as representing a valid estimate of current replacement costs based on the Opinion No. 770 DCF model.

The Commission has again reviewed the study and finds that it represents an accurate and reasonable application of the Opinion No. 770 methodology. The Commission therefore properly adopts this study as representing a reasonable measure of the current replacement cost of natural gas, and finds its underlying assumptions to be reasonable. The Commission specifically approves as reasonable the Producers' productivity factor of 145 Mcf per successful gas well foot drilled. The Commission likewise adopts as reasonable the Producers' drilling costs of $70.10 per foot for successful wells and $59.67 per foot for dry holes. In estimating 1985 drilling costs, Producers' trended actual 1984 costs downward based on data reported by EIA and API.[67] Successful well costs were adjusted downward 21 percent from $88.73 per foot (actual) in 1984 to $70.10 (estimated) in 1985; dry hole costs were adjusted downward 10 percent from $66.52 (actual) in 1984 to $59.67 (estimated) in 1985.[68] However, if the index-based adjustment procedure actually utilized by the FPC in Opinion No. 770 (56 FPC at 543) were applied to actual 1984 drilling costs the result would be estimated 1985 drilling costs of $83.94 per foot for successful wells and $62.93 per foot for dry holes.[69] Producers' 1985 drilling cost estimates may thus fairly be characterized as conservative.

Several applicants allege procedural flaws in the Commission's consideration of replacement costs.[70] They argue that there was insufficient notice of the Commission's intent to rely on the Opinion No. 770 DCF cost analysis in establishing the ceiling price for old gas and that the Commission should reopen the record and prepare its own cost study which would then be subject to further comment by all interested persons.[71]

The issue of replacement cost pricing has been raised throughout these proceedings. DOE's proposal was based in part on the fact that the old gas price structure failed to assign a reasonable share of replacement costs to purchasers of old gas. 50 FR at 48541 (November 29, 1985). DOE and Indicated Producers among others, specifically relied in their initial comments on the concept of replacement cost to support DOE's old gas pricing proposal,[72] and the issue was fully discussed in the parties' reply comments. In fact, the Commission requested reply comments for the very purpose of providing an opportunity to respond to each issue. It is noteworthy that the ceiling price proposed by DOE and adopted in Order No. 451 is a replacement cost price; the source of the post-1974 rate in Opinion No. 770 is a matter of common knowledge. The argument that interested persons did not have full opportunity in this proceeding to submit their views on the issue of replacement cost pricing is thus simply not credible.

The Commission also rejects the suggestion that the record in this proceeding is incomplete or inadequate without a separate 1985 replacement cost study prepared by the Commission or its staff. It is true that the Commission staff developed proposed cost models in the prior national rate proceedings. However, those proceedings involved issues concerning cost methodology as well as cost level and various parties submitted cost studies incorporating a variety of suggested methodologies.[73] Here, however, no question of methodology is involved. The Commission has found the Opinion No. 770 DCF method to be reasonable, and the only thing necessary to do is apply the Opinion No. 770 methodology. Indicated Producers

[66] The Commission also notes a recent study of oil and gas replacement costs presented to the Cost Study Committee of the Independent Petroleum Association of America, finding a current replacement cost of $4.00 per Mcf for gas. *See* "Analyst Suggests True Oil Replacement Costs Cause Heavy Financial Pressure," *The Oil Daily* (November 20, 1986), p. 2.

[67] Indicated Producers' initial comments, Appendix A, Exhibit B, Schedule 3. Actual 1985 drilling costs have not yet been reported by the Joint Association Survey.

[68] *Ibid.*

[69] The current value for the adjustment index used in Opinion No. 770 is obtained from IPAA Report of the Cost Study Committee, Midyear Meeting, Nashville, Tennessee, May 1, 1986, Table I. That index is 94.6, representing a decline of 5.4 percent from 1984. Applying this adjustment factor to actual 1984 drilling costs results in $83.94 per foot for successful wells and $62.93 per foot for dry holes.

[70] NDG at 13; APGA at 78–80.

[71] NDG at 13; APGA at 78–80.

[72] DOE at 19–22, 36–37; Indicated Producers at 31–34, 41–46, Appendices A and C.

[73] *See, e.g.*, Opinion No. 770, 56 FPC at 519.

did this in the DCF study included in their initial comments. The Commission has critically reviewed the study and reaffirms its prior conclusion that the Indicated Producers' study is reasonable and properly reflects application of the Opinion No. 770 principles. The Commission notes that the Tax Reform Act of 1986 was enacted subsequent to the issuance of Order No. 451. The Tax Reform Act modified certain of the assumptions used in the Producers' DCF study, notably the federal corporate income tax rate and allowance for investment tax credits (ITC). The Tax Reform Act provides for a corporate tax rate of 34 percent (effective July 1, 1987) are compared to the 46 percent used by Producers and for elimination of ITC in contrast to the eight percent rate used by Producers. Substituting these changes in tax provisions in place of those utilized by Producers' results in a slight overall reduction in the 1985 replacement cost estimate from $2.77 to $2.71 per MMBtu.

As a further check on the reasonableness of the 1985 estimated replacement cost, the Commission has calculated replacement costs for each year 1979 through 1984 using the Opinion No. 770 DCF methodology and the Producers' application of that methodology. Actual drilling costs and actual productivity values for each year were utilized. The resulting replacement costs, which vary from $3.05 per MMBtu in 1979 to over $6.00 per MMBtu in 1982 are shown in the following table. The average replacement cost for the entire 1979–1984 period is $3.98 per MMBtu.

Year	Successful well cost $/foot [74]	Dry holes $/foot [74]	Productivity Mcf/foot [75]	Replacement cost with 4% escalator
1979	80.54	63.21	148	$3.05
1980	94.87	72.08	130	4.07
1981	121.70	88.63	202	3.32
1982	145.96	102.62	130	6.13
1983	108.37	77.75	155	3.86
1984	88.73	66.52	143	3.44

[74] Based on actual costs and footage published in the Joint Association Survey 1979–1984.

[75] For 1979, Reserves of Crude Oil, Natural Gas Liquids, and Natural Gas in the U.S. and Canada and U.S. Productive Capacity, AGA-API-CPA. For 1980–1984, U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Reserves, Annual Reports, DOE-EIA.

These results demonstrate the variability of replacement cost estimates from year to year. It may be seen, however, that the Producers' estimate of $2.77 ($2.71 adjusted for tax changes) is conservative when measured in relation to the total range of annual replacement cost values resulting from application of the Opinion No. 770 model. For the foregoing reasons, the Commission denies the requests for rehearing on the ceiling price issue and reaffirms its conclusion that the old gas ceiling price adopted in Order No. 451 is just and reasonable within the meaning of the NGA.

D. Supply Response

In Order No. 451, the Commission found that eliminating vintaging will substantially increase recoverable old gas reserves through delayed abandonment of wells. The Commission reasoned that the increased ceiling prices for pre-1974 gas will allow wells to operate to a lower pressure and level of production before the net present value of future costs outstrip the net present value of future revenues, thereby permitting the wells to produce a greater percentage of reserves. The Commission reached this conclusion after a careful review of various studies in the record, including those by DOE, Indicated Producers and AGA, concerning the effect of eliminating vintaging on recoverable reserves.

Those studies generally followed a methodology first developed in an April 1983 study by the Shell Oil Company estimating the increased production from total decontrol of natural gas prices. Under that methodology, the increase in recoverable reserves in the fourteen largest gas fields in the United States is first estimated. This is done by estimating (1) the pressure at which each field would be abandoned under current prices, (2) the lower abandonment pressure of the fields under the new ceiling prices, and (3), based on these estimates and reserve data for the fields, the resulting increase in recoverable reserves. The fourteen field data is then extrapolated to a nationwide basis to estimate the total increase in production. This is done in such a way as to account for the fact that some old gas may qualify for NGPA incentive or deregulated prices in any event and other old gas, including that subject to fixed rate clauses, may not receive an increased rate. (The fourteen field data does not take those factors into account.) The Indicated Producers' study predicted an increase in recoverable reserves from eliminating vintaging of 16 Tcf. DOE estimated an increase of 9 to 12 Tcf, with its best estimate 11 Tcf. AGA predicted an increase of approximately a third that predicted by DOE. The Commission found the DOE estimate to be the most reliable of the three. The Commission's analysis of the AGA study revealed a number of errors not made by DOE, which caused AGA to underestimate the probable supply response. Similarly, the Shell study contained errors causing an overestimate of the probable supply response.[76] The Commission, however, emphasized the uncertainty of any prediction of the exact amount of the increase, since many of the relevant variables, including future market prices, are uncertain.

Rehearing requests. On rehearing, a number of applicants attack the Commission's finding of a substantial increase in recoverable reserves through delayed abandonment. Only AGA, however, makes a detailed critique of the Commission's reliance on the DOE study.[77] AGA contends that, in estimating the supply response from the fourteen fields, the DOE study improperly assumed prics would rise to the new ceiling price,[78] used outdated data from different time periods for reserves and abandonment pressures, and failed to account for the fact that under current law producers may in many cases collect compression costs in addition to the ceiling price. AGA also contends that the DOE study made errors in extrapolating the fourteen field data to a national level. Allegedly, the DOE study improperly included some intrastate gas in its predicted increase. It also failed to account for the fact that most of the predicted increase would occur in any event under the NGPA section 108 incentive prices for stripper wells.[79] Finally, it used 1981 national reserve figures in making the extrapolation, thus failing to account for the fact that the reserves produced since 1981 are no longer available for increased production.

Other applicants for rehearing, while not addressing the specifics of the DOE and other studies, question the general conclusion that eliminating vintaging will substantially increase recoverable reserves. Several applicants state that the increased production cannot occur during a time, such as now, when there is a natural gas surplus. Others contend that, even assuming increased production of old gas and a concomitant lowering of overall prices as predicted by the Commission, the result will be a sharp decrease in new drilling and stripper well activity, causing a decrease in new production. This allegedly will offset the increased production of old gas, causing a gas shortage and higher prices. Furthermore, some applicants contend, the incremental cost of the increased

[76] The errors in the AGA and Shell studies are fully discussed in Part IV. D of Order No. 451, 51 FR at 22191–22193.

[77] AGA at 10–17.

[78] *See also* Northern Natural at 29.

[79] APGA at 34 contends that the increased supply response could also occur pursuant to special relief.

production of the old gas (the increased cost of all old gas divided by the increase in recoverable reserves) will be exorbitant

Commission response. The Commission continues to believe that eliminating vintage will cause a substantial increase in recoverable reserves of old gas. Furthermore, nothing raised on rehearing causes the Commission to modify its belief that DOE's study predicting an approximate 11 Tcf increase is the most convincing analysis in the record of that increase.

In its rehearing request, AGA again contends that DOE made a number of errors in estimating the increase in recoverable reserves in the fourteen field study. Several of AGA's allegations of error are incorrect, and AGA has not shown that the other allleged errors affect the validity of DOE's prediction of a substantial increase in reserves in the fourteen fields. First, AGA contends that DOE incorrectly assumed that old gas prices would rise to the new alternative ceiling price (now $2.61) rather than to the current market price alleged to be approximately $1.90.[80] AGA alleges that if DOE had used $1.90, its prediction of increased production would have been cut by one-third. The Commission rejects this contention.

For purposes of predicting the increase in recoverable old gas reserves, estimated average prices over the next twenty to forty years should be used, since old gas is not expected to be exhausted before then. While future gas prices cannot be projected with certainty, it is unlikely that current depressed prices will continue indefinitely. The current low price of gas has resulted in a dramatic drop in drilling activity.[81] Therefore, it appears inevitable that the current surplus deliverability will disappear and that as a result prices will increase in order to maintain an equilibrium between supply and demand. For these reasons, the Commission believes that DOE's projection that gas prices will reach the new ceiling price by 1990 is reasonable. This price thus seems a reasonable basis for projecting the supply response from eliminating vintaging, since the majority of abandonment decisions will be made after 1990. In addition, even pre-1990 abandonment decisions will take into account expected higher future prices since producers abandon wells only when the net present value of total predicted future costs exceed the net present value of total predicted future revenues.[82]

Second, AGA contends that much of the increased production claimed from the fourteen fields as a result of Order No. 451 would occur in any event because of the availabiity of the compression allowance under NGPA section 110.[83] Section 271.1104(d)(iv) of the Commission's regulations allows a producer to collect such allowances[84] in addition to the maximum lawful price, if the producer's contract expressly authorizes collection of compression costs and if the compression facility was installed after enactment of the NGPA.[85] AGA argues, in effect, that when DOE determined the pressure at which each of the fourteen fields would be abandoned at current prices, it assumed that current prices equal the existing ceiling prices, failing to take into account producers' ability to collect more than the current ceiling prices through a compression allowance. In view of the authorization for producers to collect those allowances, this assumption allegedly was improper and may have resulted in a substantial overestimate of the overall supply response. AGA contends that EIA's May 1986 *Analysis of DOE's Notice of Proposed Rulemaking, Ceiling Prices: Old Gas Pricing Structure* (EIA Study) (at 22–25) demonstrates that where pipelines pay compression costs, producers are able to produce 46 percent of the gas which DOE claims will be produced as a result of the new ceiling price.

It is unclear whether the DOE study accurately accounts for compression allowances in calculating current abandonment pressures for the fourteeen fields. However, even if it does not, the Commission does not believe that such an omission would significantly affect the reliablity of the DOE Study. The Commission's regulations authorize producers to collect compression costs only when expressly authorized to do so by contract. The EIA study relied on by AGA indicates that producers actually collect compression costs with respect to only 28 percent of sections 104 and 106 gas subject to compression. Thus, even assuming that pipelines' payment of compression costs does bring about 46 percent of the production increase claimed by DOE, that 46 percent increase would occur in ony 28 percent of the cases under present contractual arrangements. The alleged error in the DOE study, therefore, could at most cause an overestimate of increased production by 12.4 percent (28 percent of 46 percent equals 12.4 percent) assuming pipelines do not agree to bear a significantly greater percentage of compression costs than they now do.

Furthermore, the Commission does not believe that, even in those cases where pipelines assume compression costs, the supply response from the rule would be reduced by 46 percent. While the producer could charge the compression allowance in addition to the existing ceiling price, it could also charge the compression allowance in addition to the new ceiling price.[86] Thus, to the extent DOE ignored compression allowances, it not only failed to take into account any additional production that the allowance permits under existing law, it also failed to take into account the additional production that the allowance would permit under the new price ceiling. The two factors would largely offset one another.[87]

Finally, the Commission observes that while the EIA study predicts a supply response of 8.4 Tcf assuming all compression costs are borne by pipelines but 15.9 Tcf if they are borne by producers, EIA's overall predicted production increase is 11.7 Tcf, based on the fact pipelines assume compression costs only 28 percent of the time. That figure agrees very well with the DOE study's predicted 11 Tcf increase.

The third error alleged by AGA in DOE's calculation of increased production from the fourteen fields is DOE's use of unreliable reserve and

[80] *See also* Northern Natural at 29 and Florida Cities at 21.

[81] Northern Natural at 29–30.

[82] If, despite the facts stated above, prices fail to rise to the new ceiling price (perhaps because of competition from alternative fuels) then it is likely that recoverable reserves will not increase as much as projected by DOE. However, any market force sufficiently strong to keep old gas prices significantly below the new ceiling price indefinitely into the future in the face of the current collapse in drilling activity is likely to be strong enough to keep overall prices from rising. In addition, the increased production of old gas (although less than projected by DOE) would be all the more important, since at such low prices very litte new gas could be expected to be found and produced.

[83] *See also* KP&L *et al.* at 25–26

[84] The allowance is]¢ per stage of compression not to exceed 18¢, plus compensation for the cost of fuel or power to drive the compressor.

[85] *But see* Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985, *cert. denied*, 106 S. Ct. 1967 (1986) (Permits recovery of fuel and power costs to operate compressors constructed prior to the NGPA).

[86] Based on the discussion in IV. D., Commission response, above, the Commission believes that the market will generally permit such collection over the 20 to 40 year period of the predicted supply response.

[87] It should also be noted that the compression allowance is relatively small compared with price increases permitted by this rule. The allowance is only 6¢ per compression stage up to a maximum of 18¢ plus fuel costs. This compares to an increase in the ceiling price for pre-1973 gas, for example, from 52¢ to $2.57.

pressure data. AGA asserts that DOE improperly used reserve data for each of the fields published in 1970; that data allegedly is so outdated, having been collected for example at a time when the average wellhead price was only 17¢, as no longer to be reliable. AGA also reiterates its earlier criticism of DOE for estimating pressures in each of the fourteen fields based on field depth and other factors rather than relying on actual measurements of field pressure. AGA's assertion that DOE used 1970 reserve figures is inaccurate. It is apparent from DOE's reply comments that, unlike the 1983 Shell study and the Indicated Producers' study, DOE used figures for reserves from a 1980 AGA study presented to Congress' Office of Technology Assessment (OTA) for its consideration in preparing a February 1984 report entitled *Effects of Decontrol on Old Gas Recovery*.[88]

More importantly, AGA has not shown that any inaccuracies in DOE's reserve and pressure data are significant enough to affect the essential conclusion that the increased production from the fourteen fields will be substantial. In its comments, AGA submitted a study using updated reserve data, actual field pressures, and an assumed $1.90 market price for old gas to estimate the increased production from the fourteen fields. That study shows increased production of 2.3 Tcf, nearly half DOE's prediction of 5.7 Tcf. Such an increase, as the Commission observed in Order No. 451, would still be significant. Furthermore, the AGA study contains errors leading it to *underestimate* the probable increased production in the fourteen fields. As already discussed above, the AGA study improperly assumed a market price for old gas of $1.90 rather than the new ceiling price. In addition, as fully discussed in Order No. 451, the AGA study used reserve and pressure data from different years causing a further underestimate of increased production in the fourteen fields.[89] In its rehearing request, AGA does not contest Order No. 451's criticism of its study on this basis.

The Commission has now considered all contentions raised on rehearing concerning increased production from the fourteen fields. None alter the Commission's belief that elimination of vintaging will cause a substantial increase in recoverable reserves in the fourteen fields.

Once increased production in the fourteen fields has been estimated there remains the task of extrapolating the fourteen field results to a national level and accounting for production that would occur in any event under existing incentives. DOE accomplished this task by a three step procedure. First, it extrapolated the fourteen field results to a national level by multiplying those results by the ratio of ultimate national reserves to ultimate reserves in the fourteen fields.[90] Next, DOE reduced its estimate of national increased production by four percent, in order to account for production which would have occurred in any event under existing section 108 incentive prices for stripper wells. Finally, in order to adjust for the 1983 Shell study's failure to account for other gas that would receive adequate prices to stimulate full economic production under current regulations, DOE scaled down its estimate of increased production by the ratio of DOE's estimate of the total reserves responsive to eliminating vintaging (66 Tcf) to Shell's (115 Tcf) or about 57 percent. Neither AGA nor other rehearing applicants attack the adjustment made in the first step of DOE's extrapolation procedure. However, they do attack the adjustments made in the second and third steps.

First, AGA claims that the stripper well adjustment is too small. It notes that 40 percent of all producing wells are stripper wells and that to date over 100,000 wells have qualified as stripper wells. AGA contends that these facts suggest that most section 104 and 106 wells will eventually qualify as stripper wells, thus providing the production response anticipated under Order No. 451 without collapsing old gas vintages.

AGA's contentions on this point are not persuasive. While the Commission can confirm that as of March 1986, over 100,000 wells have qualified for stripper well pricing under NGPA section 108 nationwide, over 50 percent of all such wells are located in a limited geographic area, in the Appalachian region of the country.[91] Moreover, the average daily production from these wells is extremely low, conservatively estimated in most cases at fifteen Mcf per day or less.[92]

Thus, stripper wells are not for the most part located in areas where substantial reserves of old gas are located. The OTA study confirms that an unknown percentage of stripper applications are new, low production wells, and are not examples of how the stripper incentive has prolonged well lives.[93] In West Virginia, which accounts for almost one-quarter of all stripper wells, for example, producer filings since 1984 are generally made for NGPA section 103, with a later filing for a section 108 determination for the same well approximately three months later.[94] Thus, these wells are not old gas wells whose life has been prolonged by obtaining stripper well status, but instead are new, low-production wells. Even though we do not know precisely how many stripper wells are new wells nationwide, under current market conditions this is more likely to be the case than not.

AGA's contention might have had more relevance prior to 1984 when market prices were not as depressed as they are currently. In the past, a producer might actually obtain the stripper well ceiling price of approximately $4.00 per MMBtu.[95] Thus it would be worth the administrative effort and expense to qualify an old well as a stripper well in order to obtain that price. Under current conditions, however, the purchaser is not likely to pay the full stripper well ceiling price, even if the old well obtains a stripper well determination.[96] In the past, when

[88] DOE reply comments at 4.

[89] *See* 51 FR at 22192.

[90] *See* 51 FR at 22193 for a discussion of why use of the ratio of ultimate national reserves to ultimate reserves in the fourteen fields is appropriate for this purpose.

[91] Data on the number and location of NGPA section 108 stripper wells is derived from Forms 121 filed with the Commission. Of the over 100,000 stripper wells nationwide, about 11,000 are located in Ohio, 1,700 in New York, 26,000 in West Virginia, 13,000 in Pennsylvania, and 3,500 in Kentucky, for a total of 56,000 in the Appalachian region, or over 50 percent of all stripper wells.

[92] In 1983, the average daily per well production from a gas well in the States of Ohio, New York, West Virginia, Pennsylvania, and Kentucky was 15 Mcf, 19 Mcf, 14 Mcf, 13 Mcf, and 15 Mcf, respectively. Since stripper wells comprise approximately 62 percent of the total number of producing gas wells in these states, and the average per day per well production figures include other wells, the per day production from stripper wells is probably even lower. *See* Interstate Oil Compact Commission, The Oil and Gas Compact Bulletin, Vol. XLIII, No. 2 (Dec. 1984) at S-2 (United States 1983 Production of Oil and Gas by States).

[93] Office of Technology Assessment Staff Memorandum on the Effects of Decontrol on Old Gas Recovery, prepared by the Energy and Materials Program (Feb. 1984) at 50.

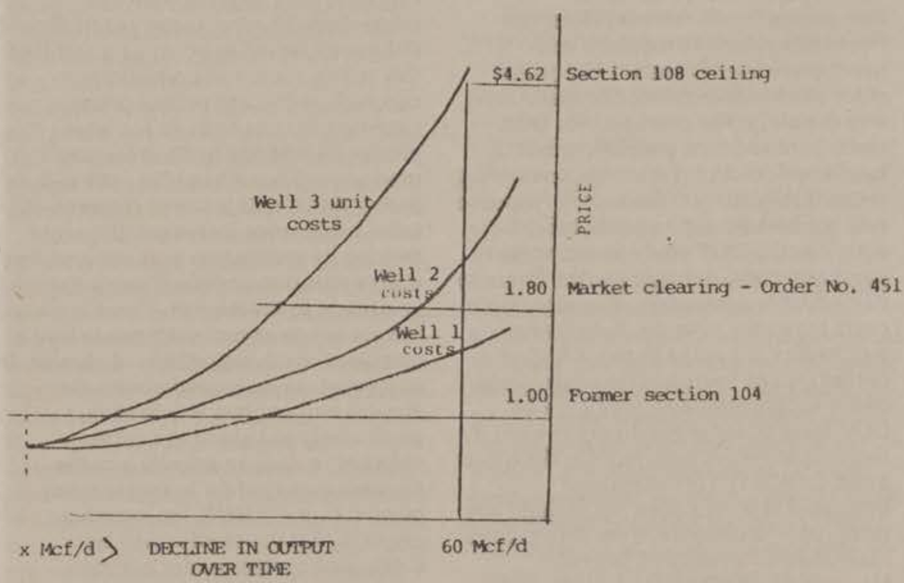
[94] Prior to 1984, before gas prices became extremely depressed, producers would more commonly file for NGPA sections 102 and 107 determinations, as well as section 103, and then later file for a section 108 determination for the same well after completing a 90-day production period in order to prove that the well did not exceed an average of 60 Mcf per production day, so as to meet the definition of stripper well natural gas under NGPA section 108(b). *See* Interstate Oil Compact Commission, The Oil and Gas Compact Bulletin, Vol. XLIV, No. 1 (June, 1985) at 51.

[95] $4.018 per MMBtu in August 1984.

[96] The stripper well ceiling prices as of July, 1986 was $4.615 per MMBtu. Under current conditions it is unlikely a producer will receive anywhere near that price, however.

the cost of operating an old gas well exceeded the revenues generated at the old vintage price the operator may have continued production until the well could qualify as a stripper well because the operator knew it could obtain the section 108 ceiling price once the well qualified. In today's market this is not a certainty and the well will more likely be abandoned and production is lost. (The diagram at the margin graphically illustrates this syndrome.) Plainly, the market, including consumers, producers, pipelines, distribution companies, and industrial end-users are better off with less new gas and more old gas that is now being abandoned if this additional old gas can be acquired at a price below that of new gas. This is what the final rule will accomplish, which the mere availability of the section 108 price does not.

In this diagram, the section 108 price provides an adequate incentive for Well 1, may provide less than adequate incentive for Well 2 (the production costs exceed the NGPA section 104 price for an extended period before the section 108 price is obtained, and the producer may rightfully question whether the stripper price will clear the market), and provides a definitely inadequate incentive for Well 3.



(Diagram represents locus of supply costs for three old gas wells over time and several price/output relations; these are but three of the multitude of possible cost/output relationships. As pressure drops and production decreases over time, a higher price is needed to prevent abandonment. The NGPA section 108 price may not be the best economic incentive, since to qualify for this stripper well price, output must be no more than 60 Mcf/day (unless special ruling is obtained).)

"x" indicates production *greater than* 60 Mcf per day, declining, as time passes, until it reaches 60. The curved lines indicate the increase in per unit costs.

AGA also claims that DOE overestimated total national responsive reserves when it scaled down the predicted increase in nationwide recoverable reserves by the ratio of its estimate of responsive reserves to Shell's. Allegedly, this meant DOE failed to account sufficiently for Shell's overestimate of responsive reserves. As explained in Order No. 451, DOE calculated its 66 Tcf estimate of responsive reserves by (1) determining the percentage of each category of gas likely to respond to higher prices allowed by eliminating vintaging, (2) multiplying the amounts of gas in each category on December 31, 1980, by those percentages, and (3) totalling the results. In doing this, DOE relied on data in a study prepared for AGA.[97] AGA alleges DOE made two errors in performing this calculation.

First, AGA contends that DOE erred in including 10 percent of section 105 intrastate gas, or 3.9 Tcf, in responsive reserves. AGA argues that intrastate gas will generally be unaffected by Order No. 451 because most is deregulated and the remainder is either section 105 gas (intrastate gas sold under contracts existing on the date of enactment of the NGPA) not subject to Order No. 451 or is eligible for the higher NGPA section 102 price.[98] The Commission believes that some intrastate gas is properly included in the estimate of gas affected by Order No. 451, and that DOE's estimate of that amount is reasonable for the following reasons. Although Order No. 451 does not permit higher prices for section 105 gas, Order No. 451 does permit section 106(b) gas (intrastate gas sold under rollover contracts) to qualify for higher prices. All section 105 and 106(b) gas sold under contracts which provided for prices of $1.00 or less on December 31, 1984, remains subject to ceiling prices well below the alternative ceiling price provided by Order No. 451.[99] Thus, all gas presently subject to section 106(b) which was sold under such low-priced contracts is properly included in responsive reserves. So also is section 105 gas sold under such contracts if those contracts will expire in time to permit the gas to qualify for the alternative ceiling price before abandonment.

DOE's estimate of responsive intrastate gas does not include any present section 106(b) gas and to that extent may actually underestimate responsive intrastate gas. DOE does include section 105 gas sold under low-priced contracts which will expire by 1995 permitting the gas to qualify for the section 106(b) ceiling price. DOE appears to have reasonably estimated the amount of that gas. Based on EIA data, which AGA does not contest, DOE states that about 35 percent of intrastate old gas is sold under contracts which provided for prices of $1.00 or less on December 31, 1984. About 28 percent of these contracts will expire by 1995. Since 28 percent of 35 percent is about 10 percent, DOE concluded that 10 percent of intrastate gas (or 3.9 Tcf) May reasonably be considered responsive to the higher prices provided by Order No. 451.[100] The Commission finds the DOE calculation reasonable and rejects AGA's contention that intrastate gas should be excluded altogether from the responsive reserve base. In any event, the Commission observes that intrastate gas accounts for only 5.9 percent of the

[97] *See* DOE reply comments at 14.

[98] AGA at 16.

[99] *SE* NGPA Section 121(a)(3), 15 U.S.C. 3331(a)(3) (1982).

[100] *See* DOE reply comment at 15.

total 66 Tcf responsive reserve base found by DOE. Thus, even if DOE has overestimated the intrastate gas responsive to elimination of vintaging, the resulting error in the overall 11 Tcf estimate of increased production under Order No. 451 would be minimal.

AGA's second criticism of DOE's calculation of responsive reserves is that DOE failed to exclude all gas produced through 1985. Instead, DOE's calculation was based on December 31, 1980 reserves. AGA contends that gas produced or abandoned since 1980 should have been excluded since such gas is no longer available to be produced as a result of the elimination of vintaging. The Commission finds this criticism of DOE's calculation of responsive reserves without merit. In the first place, the increased production as a result of eliminating vintaging is, by definition, production which, because uneconomic, cannot occur under present ceiling prices. Thus, production of gas which is economic under present ceiling prices should not affect the increased production to be obtained through eliminating vintaging unless as a result the gas field is entirely abandoned. It follows that AGA is incorrect in suggesting that production since 1981 under existing ceiling prices reduced the increase in production from eliminating vintaging. Secondly, as explained in more detail in Order No. 451,[101] DOE properly used December 31, 1980 reserves in order to use consistent data in adjusting for the Shell study's overestimate of responsive reserves. The original Shell study had extrapolated the fourteen field results to a national level by multiplying those results by the ratio of January 1981 national reserves responsive to decontrol to January 1981 reserves in the fourteen fields. Shell had estimated January 1981 responsive reserves to be 115 Tcf. Since DOE scaled down its prediction of increased production by the ratio of its estimate of responsive reserves to Shell's 115 Tcf estimate and Shell's estimate was for January 1, 1981, consistency required that DOE use an estimate for the same period. If, as AGA suggests, DOE's estimate of responsive reserves should be reduced to account for production since 1980, then the Shell estimate should also be similarly adjusted so that consistent figures may be used in determining the ratio. If this were done, the adjustment to the two figures would probably approximately cancel one another out, leaving the ratio used to account for Shell's overestimate of responsive reserves approximately the same.

The Commission has now considered all contentions raised on rehearing alleging specific errors in the DOE study. While the Commission has rejected these contentions and continues to believe that the DOE study is the most reliable olf the studies concerning supply response in the present record, the Commission wishes to emphasize that no estimate of the increasae in recoverable reserves from this rule can be exact. As the Commission stated in Order No. 451, "Overall the only certainty about future natural gas supplies is their extreme uncertainty."[102] Any estimate of increased production under this rule must be based on predictions concerning future market prices and future behavior of producers and purchasers over the next twenty and more years which cannot be made with any certainty. For example, the DOE study is based on a prediction that market prices will rise to the new ceiling price. If they do not, the supply response will not be as great as predicted. In addition, the DOE study assumes that purchasers will not agree in the future to pay a higher percentage of compression costs than they now do. If, however, purchasers did agree to pay a higher percentage of compression costs, some of the supply response predicted by DOE from this rule would occur even if this rule were not adopted. On the other hand, DOE's 11 Tcf estimate of increased reserves does not include any increase in production from water-drive reservoirs as a result of this rule. However, some increased production from partial water drive reservoirs may occur. Some of those reservoirs may be susceptible to permanent loss of recoverable reserves when subjected to sharply curtailed takes of gas. It may well be that more favorable take provisions will be negotiated as a result of this rule that will permit an increase in the amount of in-place gas resources that will ultimately be recovered. Such higher rates of take and greater recovery of in-place reserves could moderate producer demands for a higher contract price because of the enhanced cash flow resulting from such increased takes.

Nevertheless, regardless of the uncertainties of predicting the precise amount by which recoverable resources will be increased by this rule, the Commission believes it clear that there will be a significant increase. There is a direct relationship between price levels and the length of time operation of a well remains economic. Since pre-1975 gas will receive a substantial price increase as a result of this rule, recoverable resources must also increase. This finding is supported by the fact that all the studies, including AGA's agree that there will be a significant increase in recoverable resources.

Some rehearing applicants question the general conclusion that eliminating vintaging will substantially increase recoverable reserves. First, several petitioners[103] observe that there is currently a surplus of deliverable gas estimated as high as 2.49 Tcf for 1986. The petitioners claim that it makes little sense to expect additional production to occur during a time of surplus. The Commission disagrees with this contention. The increased production of old gas expected to occur as a result of this rule is from wells which are currently subject to ceiling prices ranging from 52¢ to $1.66 for large producers and 62¢ to $2.18 for small producers. Thus, Order No., 451 will permit much of this gas to receive substantial price increases, thereby making its production economic, and yet still permit it to undersell much gas that is already in the market. There is no reason not to expect such gas to find a market, even during a time of surplus. In any event, as discussed above, the surplus will not last indefinitely, particularly in light of the current collapse in drilling activity and the Commission's action to create more competition.[104] DOE, for example, predicts that the surplus will be dissipated by 1988 under current regulation and 1987 if vintaging is eliminated.[105] Most of the increased production from eliminating vintaging will thus occur after dissipation of the surplus.

Some petitioners for rehearing contend that, even if the increased production of old gas occurs and causes overall prices to decline, this will discourage new drilling and result in the

[101] 51 FR at 22193.

[102] 51 FR at 22194.

[103] Ohio Consumers Counsel at 7; Florida Cities at 20; Northwest Central at 41.

[104] The Commission notes that after the Commission issued Order No. 451, the Energy Information Administration (EIA) released the advance summary of its year-end report on the U.S natural gas reserves. EIA's data indicates overall, natural gas reserve additions in the lower-48 states declined to 77.9% of production in 1985, and U.S. proved gas reserves declined for the fourth year in a row. *See* U.S. Department of Energy, Energy Information Administration, Advance Summary of U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Reserves, 1985 Annual Report (Washington D.C., September 1986).

[105] The overall lower prices brought about by the rule will cause the surplus to dissipate faster than it otherwise would.

abandonment of many existing stripper wells.[106] They argue that over the longer term, the loss of stripper and some new gas production will offset, and thereby cancel out the benefits of, the increased old gas production. The Commission understands that under Order No. 451 some high-cost gas may not be produced immediately in the same time frame as under current regulations because of lower prices in the near term for such gas although the Commission would expect that renegotiation to lower prices will cause some portion of higher priced gas to be produced and sold at lower prices as has occurred in the current market. Exploration for and development of other higher-cost new gas will be delayed. However, these are precisely the intended effects of Order No. 451 which will cause overall prices to be less than they otherwise would be. The increased supply of lower-cost old gas will replace some higher cost gas immediately and delays the need to engage in expensive exploration and development of high-cost new gas.

Finally, some rehearing requests reiterate the contention that, even assuming increased production of old gas occurs, it will be beneficial since its incremental cost will be exorbitant.[107] In response, the Commission reiterates its rationale for rejecting this contention in Order No. 451. The high incremental cost estimates are obtained by determining the purchasers' increased cost of purchasing all old gas as a result of Order No. 451 and dividing the result by DOE's estimate of increases in recoverable reserves. This calculation fails to take into account the reduction in price of high-cost gas which will occur as a result of this rule. The petitioners' contentions that higher cost gas will not come down in price as predicted by the Commission are considered in the next section.[108]

E. Price Response

In Order No. 451, the Commission considered the comments and data in the record regarding the likely impact of the DOE proposal on consumer gas prices and pipelines' weighted average costs of gas (WACOGs). The Commission concluded that the most likely impact would be further downward pressure on consumer prices and WACOGs. It found that the higher ceiling price for old gas would eliminate the price distortions of the gas cushion. It also found that the higher ceiling price would lead to a reduction in wellhead prices for high-cost gas to market-clearing levels responsive to competition mandated by the NGPA.[109]

The Commission also concluded that, over the long-run, pricing old gas at its replacement cost would call forth additional supplies of gas not likely to be available under vintage pricing, and that these additional supplies would put downward pressure on future wellhead prices.[110] In analyzing the numerous studies and statistics in the record and in the public domain [111] concerning the likely price impact of the DOE proposal, the Commission stated that the real issue was not *whether* overall gas prices would come down in response to higher old gas prices, it was *how fast* such prices would come down. Based on the record as well as on the behavior of pipeline purchased gas costs (PGAs) before and after the partial deregulation of wellhead prices on January 1, 1985, the Commission concluded that any renegotiation of old gas prices to replacement cost levels under the DOE proposal would be more than offset by reductions in high-cost gas prices.[112]

However, the Commission also found that, despite the likely reduction in overall gas prices, it was impossible to predict with certainty whether some consumers or some pipeline systems would face short term transitional increases in their gas costs before the lower overall prices and enhanced supplies are made available to all pipelines under the rule. For this reason, the Commission modified the good faith negotiation procedure in the final rule in order to give the purchaser the right to renegotiate the prices of all gas, including new gas, in contracts which contain some old gas where the producer requests any old gas price renegotiation. Under this modification, the American Gas Association (AGA) estimated that at least one-third of all new gas potentially would be subject to price renegotiation by purchasers, because it is contained in "multi-vintage" contracts which cover some old gas eligible for renegotiation to the new ceiling price established by the final rule.[113] To the extent large quantities of this new gas, as well as high-cost categories of old gas, are already priced above spot market prices or individual pipeline WACOGs, Order No. 451 concluded that the modifications to the good faith negotiation procedure would give pipeline purchasers substantial added leverage to bargain both old and new gas prices to market-responsive levels.

Finally, the Commission included two additional protections in Order No. 451.

First, the Commission provided to firm sales customers of a pipeline a right of first refusal to any old gas released by the pipeline to the open market as a result of unsuccessful price renegotiation. This right of first refusal would assure that those customers with least access to alternative gas supplies—especially sole-supplied, full-requirements customers of pipelines that have not chosen to provide open access transportation under Order No. 436—would have the ability to keep inexpensive old gas supplies on-system by matching any bids for the gas released to the open market.[114] In addition, the final rule provides such customers (and others) with transportation authority in order to receive the gas.

Second, the Commission stated its intention to assure that the PGAs reflect prudent renegotiating practices by pipelines under the rule, instead of projecting purchased gas costs based on the worst possible outcome of such

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[106] Elizabethtown Gas Company (Elizabethtown) at 5; KP&L *et al.* at 25; Florida Cities at 31; AGA at 13; and APGA at 44.

[107] Peoples Gas *et al.* at 13; Cal. PUC at 8; NI-Gas at 13; Florida Cities at 25; AGD at 4; UDC at 42; and Northwest Central at 25, 40.

[108] The Citizen/Labor Energy Coalition (C/LEC) at 4–6 contends that Order No. 451 improperly relied on the May 1986 EIA Study in its findings concerning the supply response. This applicant states that the EIA Study's supply response estimate relied heavily on full implementation of Order No. 436. Without the transportation rights provided by full implementation, the supply response allegedly would decline significantly. It is, of course, true that producers must be able to obtain transportation of their gas in order to obtain the full benefit of the market-responsive pricing permitted by this rule. However, even if Order No. 436 is not adopted by every pipeline, the transportation provisions of Order No. 451 should enable producers to obtain the necessary transportation. Second, the applicant states that the Commission's failure to adopt DOE's proposal for incentive prices would reduce the supply response projected by EIA. However, that failure can have no effect on the EIA Study's prediction of an 11.7 Tcf supply response through delayed abandonment. Finally, the Commission notes that in any event it does not rely on the EIA Study in its holdings concerning the supply response except to the extent applicants themselves have relied on the EIA Study to challenge the Commission's holdings.

[109] *See, generally,* Order No. 451, 51 FR 22195–204 (June 18, 1986).

[110] *Id.* at 22197–98.

[111] *See* Foster and Reddick, "Analysis of High Cost Gas Purchases by Contract Termination Date," *Gas Energy Review* (Vol. 13, No. 12, American Gas Association, December 1985); AGA Initial Comments, "1986 Base Case, U.S. Energy Information Administration, Analysis of Natural Gas Contracts, Volume I: Old Interstate Gas," *Service Report,* Table 3 (February 1986) (RNGD–86–01).

[112] Order No. 451, 51 FR 22198–203 (June 18, 1986).

[113] AGA at 4.

[114] Order No. 451, 51 FR 22207 (June 18, 1986).

renegotiation.[115] This scrutiny would assure that pipelines cannot choose to pass through to their customers any higher old gas prices requested by producers without exercising their bargaining rights under the good faith negotiation procedure.[116]

For these reasons, the Commission concluded that Order No. 451 would not unreasonably increase consumer gas prices over the short-term, and over the long-term would reduce city-gate gas prices in response to more competitive wellhead markets and enhanced supplies.[117]

Requests for rehearing. On rehearing, a number of pipelines, distribution companies, and their trade associations argue that the Commission lacked substantial evidence in the record to determine the impact of the final rule on pipeline WACOGs and consumer prices.[118] These applicants state that the final rule is based on economic theory, not credible evidence, and that there will be substantial pressure on pipelines to bid the highest price for old gas under the rule, because wellhead markets are not workably competitive.[119]

INGAA, AGA, and most pipelines acknowledge that, by including multi-vintage contracts in the renegotiation process, Order No. 451 gives partial recognition to the problem of high-cost new gas contracts. However, they criticize the final rule as being inadequate to remedy the whole problem, because it does not give purchasers the right to bring all gas contracts to the bargaining table.[120]

Texas Eastern, Transco, and others argue the final rule will increase old gas prices without forcing high-cost gas prices down, unless purchasers are given the right to initiate renegotiation of high-cost gas contracts which do not cover some old gas.[121]

Several applicants argue that the final rule will not only force pipelines to reduce takes of high-cost gas, thus increasing the take-or-pay costs associated with such contracts. The problem, these applicants say, is not low old gas prices, it is take-or-pay costs.[122] Other applicants allege that the recent decreases in pipeline WACOGs cited in the final rule are largely due to pipelines exercising market-outs and maximizing old gas takes, and that the only high-cost gas contracts remaining are those with rigid, non-market-responsive terms not susceptible to market pressures if old gas prices increase.[123]

A number of applicants argue that the inclusion of multi-vintage contracts in the good faith negotiation procedure will not help "deep cushion" pipelines—those pipelines with large quantities of cheap old gas and very little high-cost gas under the same or other contracts. Nothwithstanding any overall reduction in gas prices nationwide, applicants say, these pipelines face inevitable price increases under Order No. 451, because they lack enough high-cost gas to offset against old gas price increases sought by their suppliers.[124]

Some applicants argue that producers will never initiate price renegotiation of their old gas unless they believe that higher prices are available in the marketplace for all their gas subject to renegotiation, regardless of whether or not their pipeline purchaser exercises its renegotiation rights. Thus, these applicants say, the final rule guarantees higher prices unless purchasers are permitted to initiate price renegotiation on their own.[125] Similarly, some applicants argue the Commission cannot have it both ways: increased gas supplies cannot result without higher prices to consumers, and lower consumer prices cannot occur without reducing supplies.[126]

On the other hand, some pipelines, distribution companies, trade associations, and state commissions agree with the Commission's conclusion that wellhead markets are workably competitive, or otherwise laud the Commission's goal of raising the ceiling price for old gas to market-clearing levels.[127]

Producer applicants generally agree that under current competitive conditions in wellhead markets, the higher old gas ceiling price will bring gas prices down to market-clearing levels.[128] But producers argue that the inclusion of multi-vintage contracts is unnecessary to achieve this goal. In support of these conclusions, these applicants cite the experience of wellhead markets under partial deregulation and argue that market forces are forcing renegotiation of high-cost, take-or-pay contracts without the need for regulatory intervention in such contracts through the good faith negotiation procedure. Producers also point out that including new gas in the good faith negotiation procedure is unwarranted because issues relating to take-or-pay and new gas prices would be brought to the bargaining table voluntarily anyway.[129] Finally, producers generally agree that Order No. 451 will go far in removing a primary source of current price disorders in natural gas markets—the "price cushion" created by existing old gas vintage price ceilings.[130]

Maryland People's Counsel and the National Association of State Utility Consumer Advocates (MPC/NASUCA) allege that Order No. 451 will not reduce gas prices because the natural gas industry—including the pipeline segment—is not workably competitive in the absence of meaningful access to transportation. The fact that the wellhead market may be competitive does not mean that the entire industry is competitive, MPC/NASUCA say. Therefore, without transportation access, local distribution companies and consumers will have no alternative to increased old gas costs passed along by

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[115] In a recent PGA filing by Colorado Interstate Gas Company, for example, the Commission rejected CIG's estimate of the net effect of impending negotiations under Order No. 451 and disallowed recovery of projected gas cost increases for lack of adequate supporting data. 36 FERC ¶ 61,406 (1986). The Commission took similar action with respect to a PGA filing by KN Energy, Inc. which also included an estimate of the net effect of Order No. 451. 37 FERC ¶ 61,198 (1986).

[116] *Id.* at 22,203.

[117] *Id.* at 22,204.

[118] *See, e.g.,* INGAA at 9–11; UDC at 37; Panhandle Eastern Pipe Line Company, Trunkline Gas Company, and Trunkline LNG Company (Panhandle and Trunkline) at 4–5; Florida Cities at 23–24; Northern Natural at 26–32; Southern Natural at 5.

[119] *See, e.g.,* Northwest Central at 2–4; AGD at 10; APGA at 35–45; Northern Natural at 32.

[120] *See, e.g.,* INGAA at 10–11; AGA at 28–29; Northwest Pipeline Corporation at 4; ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG) at 9; Natural and United at 2, 7; Transwestern Pipeline Company (Transwestern) at 4; Arkla Inc. (Arkla) at 10–11; Northern Natural at 37; Transcontinental Gas Pipe Line Corporation (Transco) at 4–6; Florida Gas Transmission Company (Florida Gas) at 4, 18–19; Texas Gas Transmission Corporation (Texas Gas) at 5; Texas Eastern at 4–5.

[121] *See, e.g.,* Transco at 6–7; Texas Eastern at 17–19.

[122] *See, e.g.,* AGD at 8–9; Peoples Gas *et al.* at 8–9; UDC at 52; INGAA at 12–15; APGA at 37–40.

[123] *See, e.g.,* INGAA at 11, AGD at 8–9, MPC NASUCA at 28–30; NI-Gas at 8–12; N.Y. PSC at 15–16; Tennessee Gas Pipeline Company (Tennessee) at 10–13.

[124] *See, e.g.,* Northern Natural at 34–36; Interstate Power Company at 4; Midwest at 1–3; Northwest Central at 45; KP&L *et al.* at 20; Kentucky Public Service Commission (Kentucky PSC) at 2.

[125] *See, e.g.,* INGAA at 11; Transco at 4; Pacific Gas and Electric Company (PG&E) at 2, 4; Arkla at 5, 8–10.

[126] *See e.g.,* Florida Cities at 23–24; Ohio Consumers Counsel at 6–8.

[127] *See. e.g.,* Transco at 4; Cal. PUC at 23–27; El Paso Natural Gas Company (El Paso) at 1–2; Baltimore Gas and Electric Company (BC&E) at 1; Process Gas Consumers Group, American Iron and Steel Institute, and Georgia Industrial Group (PGC) at 2.

[128] *See,* e.g., Indicated Producers at 2.

[129] *See,* e.g., Indicated Producers at 4–8.

[130] *See,* e.g., Independent Petroleum Association of America (IPAA) at 1; Indicated Producers at 2–7

pipelines under Order No. 451. MPC/NASUCA also allege, as discussed *supra* in IV. B., that the previous price distortions of the old gas "cushion" have been largely eliminated, and that the current WACOGs of pipelines that enjoyed a cushion are no longer below market-clearing levels and that such pipelines no longer retain artificial advantages over other pipelines in bidding for new gas.[131]

A group of industrial end-users commends the Commission for expanding the scope of the rule to cover multi-vintage contracts, but argues that any old gas price increases should be tied to reductions in high-priced new gas over the same period of time, in order to avoid any short-term increases in the price of gas on certain pipeline systems.[132]

Florida Cities argue that if the Commission is correct in its finding that wellhead gas markets are competitive, then any increase in old gas prices under Order No. 451 will be matched by a decrease in new gas prices, and the consumer will get no price benefits under the rule.[133] In support of this view, Florida Cities cite the Commission staff's findings in the 1982 Notice of Inquiry on wellhead price issues, as well as a study commissioned by the Natural Gas Supply Association (NGSA).[134] Similarly, AGD argues that contract rigidities, not low old-gas prices, are the real source of gas market distortions, citing the Commission's own conclusions in Order No. 436.[135] Finally, INGAA and others allege that Order No. 451 will increase cash flow to producers, and therefore reduce, not increase, their incentive to renegotiate high-cost problem contracts.[136]

Commission response. Many of the applications for rehearing on the price response issue appear to misunderstand the Commission's fundamental purpose in promulgating the final rule. As the Commission stated:

> It is clear that consumers have suffered shortages and higher prices under the current price system for old gas, and these distortions can only cause more damage to consumers in the future, if existing reserves continue to be sold on a basis less than replacement cost. Keeping old gas rates below replacement cost can only revive shortages and high prices for future generations of consumers.
>
> The final rule is not intended to balance the interests of present consumers and present producers, it is intended to balance the needs of future consumers for long-term reliable gas service, with the protection of present consumers from exploitation by producers.[137]

For this reason, Order No 451 does not guarantee a particular wellhead price for old gas to either producers or pipelines. Instead, it leaves to both parties the opportunity to renegotiate old gas prices subject to the full competitive conditions in wellhead markets mandated by the NGPA *and* to the protection of a just and reasonable price ceiling. In this way, in times of surplus, such as now, old gas prices are likely to fluctuate below the price ceiling and possibly below long-term replacement costs. In times of adjustment as supply and demand move into equilibrium, old gas prices may move higher, but never in excess of the new ceiling price. Under the rule's renegotiation requirement, the Commission has assured that short-term price impacts, if any, are subject to the consent of individual pipeline systems, rather than be incurred suddenly by virtue of the automatic operation of indefinite price escalators in existing contracts.

To the extent old gas prices will be gradually renegotiated under Order No. 451 to market-responsive levels, the Commission and most applicants agree the prices will more closely approximate the replacement cost of all gas. However, to the extent the previous old gas vintage pricing system has permitted a small minority of interstate pipeline systems to artificially maintain their overall gas prices below even today's depressed spot market prices, Order No. 451 is in no way intended to exempt such pipelines—or their customers—from the pressures in the marketplace to renegotiate their prices upward to competitive levels.

On the contrary, Order No. 451 is expressly intended to remove the artificial price advantages these pipelines and their producer suppliers have enjoyed in the past and to instead require them to gradually renegotiate their prices under open market conditions, even if those market conditions may place upward pressure on their WACOGs. The Commission recognized in Order No. 451 that a small number of these pipelines could face gas price increases during a transition period, but that these price increases would not be unreasonable in light of the overall benefits of the rule. For this reason, the Commission rejects those applications which request the rule be modified to guarantee somehow that *no* pipeline will face *any* increased wellhead gas prices under Order No. 451. To guarantee no wellhead price increases whatsoever would undermine the fundamental purpose of the rule, which is to assure that old gas prices will more accurately reflect market clearing prices and thus reduce the previously distorting effect of the old gas vintaging system.

The crux of the price response issue on rehearing, then, is not whether any pipelines and their customers will face higher gas costs, but whether or not any such increases will be unreasonable.

Applicants generally concede that the inclusion of multi-vintage contracts in the "good faith negotiation" procedure will limit substantially the number of pipelines who will be exposed to increased old gas prices without any corresponding "right" to reduce other gas prices. However, applicants variously argue that (1) some pipelines do not possess enough high-cost gas under multi-vintage contracts to offset old gas price increases; (2) some "deep cushion" pipelines do not possess enough high-cost gas to offset against old gas price increases, regardless of multi-vintage contracts; or (3) even if pipelines possess enough high-cost gas, their producers will not initiate old-gas price renegotiation unless they are sure they can obtain higher prices for all their gas, including take-or-pay payments for high-cost gas which the pipeline can terminate purchasing under the rule. Therefore, applicants conclude, pipelines and customers inevitably will face unreasonable price increases or lost supplies or both.

In response to these alleged problems, the Commission has reviewed the American Gas Association's (AGA) rehearing application, which included as Appendix A a study entitled "Economic Impacts of Order No. 451."[138] Appendix

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[131] MPC/NASUCA at 17–26.

[132] *See, e.g.*, PGC at 12–14.

[133] Florida Cities at 2–3.

[134] *Id.* at 23–24.

[135] AGD at 8.

[136] INGAA at 10; Kentucky PSC at 2; N.Y. PSC at 16.

[13] Order No. 451, 51 FR 22203 (June 18, 1986).

[138] Rehearing Petition of American Gas Association, Appendix A, attaching "Economic Impacts of Order No. 451" Docket No. RM86-3-000 (July 3, 1986), (Issue Brief 1986-24); also see "AGA Forecasts Lower Gas Prices for this Winter," *Washington Letter* (American Gas Association, October 31, 1986) ("The nationwide average price of natural gas to residential customers this winter is forecast to be 6 percent lower than the price last winter, $5.28 per MMBtu versus $5.60 per MMBtu, according to an AGA analysis . . . The projection is based on an analysis of PGA filings made with FERC by 25 interstate pipeline companies representing about 95 percent of interstate gas purchases. According to AGA, the PGAs show that, on a nationwide average basis, the price pipelines will pay to buy gas this winter will be 32 cents per MMBtu lower than last winter. Analysis of pipeline tariff data indicates that this saving will be passed on to the distribution companies. The average field purchase price projected by the pipelines for this winter is $2.14 per MMBtu, compared with $2.46 per

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A analyzed data available to the public on gas contracts between major pipelines and major producers compiled by the Energy Information Administration from FERC Purchased Gas Adjustment Filings covering the first half of 1986. The data indicate for each pipeline the total amount and average contract price of old gas from each producer and the total amount and average contract price of any new gas covered by the same old gas contract. EIA also reports the total volumes and average price for both old and new gas covered by these contracts as well as the total volumes and average price for all contracts with each producer.

Appendix A then assumed a market price of $1.80 per MMBtu, which AGA said is in line with a benchmark refiner acquisition cost of crude oil of $17.50 per barrel and with trends in the spot gas market where prices are generally below $1.50/MMBtu—in some cases below $1.25/MMBtu. The assumed price was also in line with recent market-out prices by interstate pipelines, according to AGA.

For Order No. 451 as formulated, Appendix A also assumed that producers would nominate contracts to only those pipelines where the price of gas flowing under *all* old gas and multi-vintage contracts is less than the assumed $1.80/MMBtu market price. Given that the producer can nominate at any time, AGA said, it is unreasonable to assume that a producer would nominate to any pipeline where, in the aggregate, its average price for all contracts with old gas is above current market prices.

Appendix A also apparently assumed that once a producer nominated its contracts to a pipeline, the pipeline would agree to pay a price for the gas equivalent to the assumed market price, regardless of whether the gas is surplus to the pipeline's system supply needs. Another apparent assumption is that the price of new gas not covered by multi-vintage contracts nominated by a producer will not come down in response to the upward pressure on old gas prices. However, AGA does note recent trends in pipeline purchases indicating that anticipated WACOGs have been reduced from a $2.52/MMBtu average in early 1986 to $2.30/MMBtu at mid-year, due to reductions in takes of new, high-cost gas. In addition, AGA notes that if the market price of gas is in fact lower than the assumed $1.80/MMBtu, the impacts of Order No. 451 would be less than those calculated in Appendix A because fewer volumes of gas would be nominated for renegotiation by producers.

Based on all these assumptions, Appendix A concludes that average pipeline gas costs would be at least $0.08/MMBtu (3%) higher in 1986 than they would otherwise be—a WACOG of $2.60/MMBtu compared to $2.52/MMBtu. According to AGA, this increase would vary significantly among pipeline systems, depending primarily on the amount and price of old gas under contract to each system. Some pipeplines would be minimally affected, because their contracts with producers have average prices higher than the current market level. Other pipelines with proportionally more low-cost old gas under contract, could expect their WACOGs to rise as much as $0.53/MMBtu (over 30%), according to AGA.

The Commission has also reviewed the PGA data for the first half of 1986 which underlies AGA's Appendix A. These data, excerpts of which are attached as Appendix B [138a] to this order, indicate that 16 of 20 major interstate pipelines have weighted average costs of Order No. 451-eligible, unaffiliated old gas and multi-vintage gas above $1.80/MMBtu. Of the remaining 4 pipelines with WACOGs of unaffiliated old and multi-vintage gas below $1.80/MMBtu, two (Northern Natural at $1.63/MMBtu and Transwestern at $1.72/MMBtu) serve end-use markets which are subject to either intense interfuel competition (Transwestern) [139] or surplus system supplies (Northern). Both pipelines have settlements pending before the Commission under which their customers and shippers would be provided open access to alternative suppliers consistent with Order No. 436.

One pipeline (KN Energy at a WACOG of $1.11/MMBtu for eligible old and multi-vintage gas) has as its largest old gas supplier a former affiliate which was spun off recently to KN's common shareholders (Plains Petroleum Corporation). On October 1, 1986, KN filed its regularly scheduled annual PGA which proposed an increase of only 11.83¢/MMBtu in its average purchased gas cost over the next twelve months relating to the new effects of Order No. 451, market-outs, and a decrease in purchases associated with Cities Service. Because KN did not provide adequate support for the projection, the Commission accepted and suspended the PGA increase contingent on KN eliminating the Order No. 451 adjustment without prejudice to KN filing an out-of-cycle PGA with detailed support. 37 FERC ¶ 61,198 (1986).

The final pipeline (Northwest Central with an old and multi-vintage gas WACOG of $1.19/MMBtu) could offset over two-thirds of any old gas price increase to $1.80/MMBtu, by reducing its new gas WACOG from a current $3.63/MMBtu to $1.68/MMBtu, its current all-gas WACOG. This is also a large percentage reduction, but the Commission considers it unlikely that Northwest Central's old gas suppliers will be able to sustain price increases in excess of their pipeline purchaser's all-gas WACOG of $1.68/MMBtu. In addition, Northwest Central and its customers apparently recognize the substantial bargaining leverage contained in a right of first refusal such as that given a non-Order No. 436 pipeline's customers under Order No. 451.[140]

The Commission considers it reasonable to conclude that a pipeline experiencing a substantial contraction of its sales demand, as most have since 1982, will have additional bargaining leverage with its old gas producers, especially where its firm sales customers rely on the pipeline's system supply, and interconnecting pipelines

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MMBtu last winter, according to the analysis. While average costs vary from one pipeline to another, most systems expect price declines this winter, says AGA").

[138a] Appendix B may be obtained from the Commission.

[139] The Commission rejects the contention of the California PUC that Order No. 451 will cause substantial increases in the WACOGs of Transwestern and El Paso, the two interstate pipelines serving California. El Paso's WACOG is even less likely to increase significantly than Transwestern's since the average price of its unaffiliated old gas is $2.12, substantially above AGA's assumed market price of $1.80. The seven California PUC estimates of potential increased annual costs to California consumers under Order No. 451, which range from 79 to 501 million dollars based on varying assumptions concerning the prices of old and multi-vintage gas, all underestimate the ability of purchasers to reduce the price of net, multi-vintage gas under Order No. 451. The estimates assume that the price of new gas in multi-vintage contracts will either (1) not be renegotiated at all, (2) be renegotiated only down to $3.00, or (3) be renegotiated down to $2.58, the new ceiling price, while all old gas is renegotiated up to that ceiling price. However, the purchaser has the right, once the producer seeks a higher price for any old gas, to request that the producer nominate a new price for new gas in multi-vintage contracts or above-market old gas. The purchaser may abandon purchases of such gas if dissatisfied with the price nominated. Given these rights, it seems totally unrealistic to assume that pipelines will continue to pay prices substantially above the current market price of approximately $1.80 for new gas in multi-vintage contracts (or old gas) when the producer seeks a higher price for below-market old gas.

[140] *See* Northwest Central's Order No. 436 settlement proposal, Docket Nos. RP86-32-000, RP86-68-000, where Northwest sought to reserve the right to defer implementation of the settlement if Order No. 451 is not modified to give a right of first refusal to Order No. 436 pipelines.

have experienced a similar reduction in their sales demand.[141]

The Commission therefore rejects the assertion of the rehearing applicants that pipelines and their customers do not possess enough high-cost gas on their system, whether under multi-vintage contracts or not, to offset old gas price increases. The Commission believes that producers will nominate their old gas contracts cautiously and gradually, consistent with the risks they face in exposing their current old and multi-vintage contracts to the uncertainty of spot wellhead markets in the midst of surplus deliverability and post-NGPA gas-on-gas competition in end-use and city-gate markets. Because of these competitive market conditions, the Commission also concludes that it is likely that old gas price renegotiation on individual pipeline systems will follow the pace of changes in the pipeline's overall WACOG, neither faster nor slower.

The Commission also rejects the allegation by applicants that producers will not initiate old gas price renegotiation unless they are sure they can obtain higher prices for all their gas. This is a circular argument that old gas prices will not be market-responsive because producers will not seek higher prices unless they perceive that the market is willing to pay those prices. In any case, this argument does not alter the requirements of Order No. 451 that old gas prices be the price negotiated in light of market conditions or the ceiling price, *whichever is lower*.

The objection that Order No. 451's price response consideration is based on economic theory, not substantial evidence, must likewise be dismissed. Applicants' own numerous references to PGA data themselves confirm the downward flexibility of WACOGs since January 1, 1985, and belie the assertion that WACOGs will not be similarly flexible under Order No. 451. The Commission also notes that this WACOG flexibility will only increase as most pipelines elect to offer open access transportation under Order No. 436. The transitional transportation provisions in Order No. 451 assure the availibility of this increased flexibility to all pipeline customers, regardless of their status under Order No. 436.

However, the Commission reiterates that it intends to strictly scrutinize pipeline PGAs filed to reflect Order No. 451 price negotiations, in order to monitor closely pipelines who bid the highest price for old gas without exercising their renegotiation rights under the rule. The Commission retains the ability, on a case-by-case basis, to determine the prudence of pipelines' purchasing practices under the rule.

MPC/NASUCA's assertion that Order No. 451 will increase gas prices unless transportation access is available, must be dismissed.[142] Order No. 451 contains a transitional transportation provision and a right of first refusal which together provide access to transportation even where a pipeline is not an Order No. 436 transporter.[143] In addition, Order No. 451 expressly finds that any unduly discriminatory refusal by a pipeline to provide transportation for old gas released under the rule would constitute a violation of section 5(a) of the Natural Gas Act.[144]

In response to Florida Cities' allegation that Order No. 451 will only transfer income from one group of producers to another without increasing supplies, the Commission reiterates its finding that, over the long-term, the higher ceiling price for old gas will call forth additional old gas supplies as supply and demand move into equilibrium in gas markets. But for the new ceiling price, natural gas markets could face more cycles of boom and bust in the drilling industry such as those that have led to low reserve replacement ratios and shortages to consumers in the past.

In response to INGAA, AGD, and others alleging that by failing to deal with take-or-pay, Order No. 451 addresses the wrong problem, and contradicts the Commission findings in Order No. 436, the Commission refers applicants to numerous notices of inquiry, proposed and final rules and other orders. Substantial evidence has been presented in all these other dockets as well as in this rulemaking regarding the continuing market distortions caused by below-market vintage price ceilings for old gas.[145] The Commission therefore must reject the argument that Order No. 451 does not address a real problem in gas markets. Furthermore, the Commission believes that, as a general matter, purchasers can, and are, successfully renegotiating high-cost gas contracts with inflexible take-or-pay clauses. Adoption of Order No. 451 should accelerate that process. As the Commission observed in Order No. 451, an NGSA survey of producers shows that they have settled over two-thirds of their outstanding take-or-pay liabilities and that most of the remaining liability is of recent origin. Also an NGSA survey of interstate pipeline financial statements filed with the Securities and Exchange Commission shows pipelines repeatedly stating that they expect to renegotiate take-or-pay contracts. Furthermore, an AGA study, submitted with its initial comments and later updated, projects that natural gas markets will force high-cost "market unresponsive" gas prices down 11% a year between 1984 and 1988.[146]

The elimination of vintaging can only accelerate this process. Pipelines will be able for the first time to offer higher prices for old gas in return for voluntary renegotiation of take-or-pay contracts. Furthermore, since the old gas cushion currently protecting high-priced contracts through rolled-in pricing will be eliminated, both pipelines and producers will find it mutually advantageous to renegotiate such contracts in order to retain a market for their supplies in the face of competition from cheaper gas and alternate fuels. Presumably, a producer would rather sell gas than have its wells shut in, because the pipeline cannot market the gas under the terms of their original contract, or go through the difficulty of a lawsuit to enforce an uneconomic contract.[147] It appears, therefore, that purchasers have sufficient bargaining power to bring down the price of high-cost gas sold under take-or-pay contracts. Order No. 451 further reinforces that power with respect to such gas sold under multi-vintage contracts containing old gas by permitting the purchaser to request that

[141] In order to assist pipelines in renegotiating their contracts in such situations, the Commission has at certain pipelines' request, authorized blanket limited-term abandonment by the pipeline's suppliers. *See* Southern Natural Gas Co., 36 FERC ¶ 61,401 (1986), and Transcontinental Gas Pipe Line Corp., 36 FERC ¶ 61,403 (1986). Such authority provides pipelines additional flexibility to voluntarily renegotiate high-cost as well as low-cost jurisdictional gas as an alternative to renegotiation under the good faith negotiation rule.

[142] MPC/NASUCA at 17–26.

[143] Order No. 451, 51 FR 2211–13 (June 18, 1986).

[144] *Id.* at 22112–13.

[145] *See, e.g.*, Order No. 451, 51 FR at 22175 nn. 60, 61, and 63. *See also* DOE Proposal, 50 FR 48540 (Nov. 25, 1985), Interstate Transportation of Gas for Others, 50 FR 114 (Jan. 2, 1985) Notice of Inquiry (NOI); Natural Gas Pipeline Ratemaking, Risk, and Financial Implications After Partial Wellhead Decontrol, 50 FR 3801 (Jan. 28, 1985) (NOI, Phase II): Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 FR 24130 (June 7, 1985).

[146] 51 FR at 22197 and 22202.

[147] There are often considerable pressures on the producer to produce and sell its gas. In addition to the obvious needs to cover costs, debts, and royalty payments, there is often the risk that a failure to produce will cause the producer to lose the ability to recover the gas or make future recovery more expensive. Water can seep into nonproducing wells, and if the well is in a jointly-owned field an individual producer's show can "drain away" toward other producing wells.

the producer nominate a new price for any gas in such contracts and permitting the purchaser to discontinue purchases if dissatisfied with the purchasers' nominated price. Furthermore, it is conceivable that successful price renegotiation pursuant to or as a result of Order No. 451 of the higher price gas will make the prices more competitive for resale, thus increasing the volume sold and reducing the pipeline purchaser's exposure to potential take-or-pay liability under such contracts. At the same time, however, the Commission does recognize that Order No. 451's substantial downward pressure on high-cost gas prices may expose certain pipelines to some additional liability for take-or-pay prepayments for gas not taken under certain specific contracts. The Commission also expressly reaffirms its policy to expeditiously review take-or-pay "buyouts," including such "buyouts" under contracts subject to Order No. 451, in order that the parties may adjust to these new competitive pressures as smoothly as possible.

In Order No. 436, we reaffirmed our earlier policy statement on "Regulatory Treatment of Payments Made in Lieu of Take-or-Pay Obligations," and indicated that pipelines may seek to recover take-or-pay buyouts in rate filings under section 4 of the NGA on a case-by-case basis. [147a]

For all these reasons, the Commission denies rehearing on the price response issue, and reaffirms its conclusion that Order No. 451 is unlikely to cause any unreasonable increase in gas prices to consumers or pipelines.

F. *Good faith negotiation rule.* In Order No. 451, the Commission adopted a "good faith negotiation rule" primarily in order to assure that old gas is priced at the lower of the new ceiling price or the market price. While producers must have contractual authority to collect the ceiling price, existing contracts may provide that authority, for example by an indefinite price escalation clause. In order to prevent indefinite price escalation clauses from automatically raising prices to the new ceiling price regardless of the market price, the Commission required that parties to existing contracts, who do not voluntarily negotiate a new or amended contract price, comply with the good faith negotiation rule before collecting higher prices. That rule gives both parties an opportunity to assess the value of the gas in light of competition and other market forces. A second purpose of the good faith negotiation rule is to assure fairness in the renegotiation of multi-vintage contracts and give purchasers an opportunity to reduce substantially their cost of new gas contained in multi-vintage contracts. The rule does this by providing for the renegotiation of new gas in multi-vintage contracts containing some old gas. Finally, the Commission sought to encourage voluntary renegotiation as an alternative to the formal procedures of the good faith negotiation rule.

The good faith negotiation rule operates generally as follows. The rule establishes a three step procedure by which contracts are placed on the bargaining table. In step 1, the producer may request the purchaser to nominate a new price for any old gas sold under contracts or service obligations in effect on July 18, 1986, and which authorize a higher price. In step 2, the purchaser may, within 30 days of the producer's request in step 1, request that the producer nominate a new price for any old or other gas sold under the contracts covered by the producer's request. In addition, the purchaser may request the producer to nominate a new price for any gas sold under any other contract between the parties which contains some old gas. In step 3, the producer may, within 30 days of the purchaser's request in step 2, request the purchaser to nominate a new price for any old gas in the contracts brought to the negotiating table by the purchaser in step 2.

Once a nomination request is made by either party, the other party has 60 days in which to nominate a price. The party requesting the nomination then has 30 days in which to decide whether to accept the nominated price. However, if the purchaser nominates the highest price permitted by the contract, the producer must accept the nomination. If a nominated price is accepted, sales continue under the existing contract at the nominated price. If a party rejects a nominated price, it may, upon 30-days notice, cease sales or purchases from the wells subject to the nomination request, and abandonment is deemed granted. However, a producer may not give the 30-days notice until it has entered into a contract to sell the gas to a new purchaser. In the interim between rejection of a nominated price and abandonment, sales continue at the existing price. Whenever any gas previously sold to a non-Order No. 436 pipeline is eligible for release under the good faith negotiation rule, the producer must give the pipeline's firm sales customers a right of first refusal before selling released jurisdictional gas to a third party. [148]

No contract may be renegotiated more than once under the good faith negotiation rule. Parties may renegotiate a contract at any time without using the good faith negotiation rule. However, voluntary renegotiation after July 18, 1986, prevents any subsequent renegotiation of the contract under the good faith negotiation rule, unless the parties mutually agree in writing to retain their rights under the rule. [149] In order to give the parties time to familiarize themselves with the operation of the rule and to voluntarily renegotiate their contracts, the Commission provided that producers may not proceed under the good faith negotiation rule before November 1, 1986. [150] The Commission has since postponed the start of good faith negotiation to December 18, 1986.

Rehearing requests. Pipelines, distributors, and state utility commissions contend that the good faith negotiation rule is illegal and unfairly weighted in favor of producers. They contend that the provision of the rule permitting producers who have rejected the purchaser's price nomination to abandon sales upon thirty-days notice grants blanket abandonment in violation of section 7(b) of the NGA. [151] That section provides that producers may not terminate sales until the Commission has found, after a hearing, that the present or future public convenience or necessity warrants the abandonment. These parties contend that the Commission improperly held that it could provide the required hearing and make the necessary findings on a generic basis in the present rulemaking proceeding. The applicants contend that, in deciding whether abandonment is in

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[147a] FERC Stats. & Regs. ¶ 30,665 at 31,564. *See also,* FERC Stats. & Regs. ¶ 30,637 (1985). *See also,* orders setting Tennessee Gas Pipeline Co. (RP86-119-003) 36 FERC ¶ 61,032 (1986), Transwestern Pipeline Co. (RP86-126-000) 36 FERC ¶ 61,048 (1986), Mountain Fuel Resources, Inc. (RP86-87-000) 36 FERC ¶ 61,150 (1986), and ANR Pipeline Co. (RP86-169-000) 37 FERC ¶ 61,080 (1986), for hearing, where the Commission has set for hearing rate proposals addressing costs related to payments for past and future take-or-pay buyouts.

[148] Issues raised on rehearing concerning the right of first refusal shall be considered in the succeeding section of this order.

[149] The parties' right to mutually agree to retain their rights under the good faith negotiation rule was not in the rule as originally adopted by Order No. 451 but was added by the Interim Order on Rehearing issued July 18, 1986.

[150] A chart illustrating the operation of the good faith negotiation rule, as modified on rehearing, is attached to this order as Appendix C.

[151] Pacific Gas & Electric Co. (PG&E) at 17; Cal PUC at 31; Elizabethtown at 7; Missouri PSC at 5; Northern Natural at 13; KN at 26; KP&L *et al.* at 16; ANR and CIG at 4; Southern Natural at 16; Union Gas System, Inc. (Union) at 6; AGD at 9, 11; UDC at 12, 45, 48; Northwest Central at 9, 10, 14; APGA at 46-51; Peoples Gas *et al.* at 10.

the public interest, the Commission must consider a number of factors which require analysis of facts concerning specific persons and transactions such as the relative needs for the gas of the existing and prospective purchasers and the markets they serve. Allegedly, the Commission can consider such factors only on a case-by-case basis. The applicants also observe that the Supreme Court has held that putting the abandonment decision solely in the hands of the producer would violate section 7(b).[152] The applicants contend the good faith negotiation rule does exactly that.

Pipelines, distributors, and consumer representatives also contend that the Commission erroneously held that the good faith negotiation rule does not violate the *Mobile-Sierra* doctrine.[153] In *United Gas Pipe Line Co. v. Mobile Gas Corp.* 350 U.S. 332 (1956), the Supreme Court held that a natural gas company may not unilaterally change its contract, but that the Commission may modify contracts when necessary in the public interest. These petitioners contend that, since the producer initiates renegotiation and decides whether to accept the nominated price or reject it and abandon sales, the rule allows the producer to abrogate the contract unilaterally. The petitioners also contend that the Commission neither made, nor could make, a finding that permitting contract abrogation is in the public interest. They assert that permitting such abrogation under the good faith negotiation rule undermines the stable supply arrangements which the Supreme Court found in *Mobile* were essential to the health of the natural gas industry.

Pipelines, distributors, and consumer representatives also contend that the good faith negotiation rule is unfairly weighted in favor of producers, thereby preventing the achievement of the Commission's goal of creating more market-responsive pricing and the benefits that flow therefrom. The primary objections are (1) that only producers can initiate the process,[154] and (2) that purchasers cannot obtain the renegotiation of contracts containing only new gas.[155] These features allegedly permit a producer to limit renegotiation to situations where its increased revenues from old gas are likely to outweigh its increased revenues from new gas, and give the purchaser no recourse. In addition, new gas sold separately from old gas is not subject to the good faith negotiation procedures. As a result, petitioners claim, a large proportion of new gas subject to non-market-responsive contracts will never come down in price. In addition, some old gas sold under multi-vintage contracts will not rise in price and therefore will be prematurely abandoned, contrary to the Commission's goal of maximizing production of old gas.

Beyond the alleged discrimination against pipelines generally, petitioners claim that the good faith negotiation rule also discriminates among pipelines in that pipelines purchasing both old and new gas under separate contracts will experience greater increases in their gas purchase costs than those who generally purchase gas under multi-vintage contracts. These petitioners seek modification of the rule to eliminate the alleged discriminatory features; they also seek numerous other changes, including, for example, clarification of the effect of abandonment on a purchaser's take-or-pay obligations.

Most producers do not question the legality of the good faith negotiation rule. However, some contend that permitting purchasers to seek renegotiation of non-jurisdictional gas in multi-vintage contracts containing some old gas is beyond the Commission's authority.[156] These petitioners contend that section 601 of the NGPA expressly prohibits the Commission from regulating the sale of gas removed from its NGA jurisdiction. Therefore, the Commission allegedly erred in holding that it could subject non-jurisdictional gas to renegotiation as a condition of a producer's eligibility for a higher ceiling price for jurisdictional old gas. Other producers, while not contesting the Commission's authority to include non-jurisdictional gas in the good faith negotiation rule, contend that such inclusion is unwise as a matter of policy.[157] They argue that Order No. 451 amply demonstrates that competition will bring down the price of new gas in any event, and that the inclusion of new gas serves only to render the good faith negotiation rule overly complex and thus discourages negotiations under the rule.

Producers contend that the good faith negotiation rule is unfairly weighted against them in a number of other respects which will be addressed in the succeeding discussion. Producers, like pipelines, distributors, and consumer representatives, request numerous clarifications and minor alterations in the rule.

Commission response. The Commission will first consider the rehearing applicants' major challenges to the legality of the good faith negotiation rule. It will then address the applicants' various other requests for clarification or modification of the rule.

1. Legality of the Good Faith Negotiation Rule

a. *Abandonment under the good faith negotiation rule does not violate NGA section 7(b).* The Commission firmly believes that Order No. 451's grant of abandonment if the purchaser fails to nominate an acceptable price comports with the requirements of NGA section 7(b). The Commission properly found in Order No. 451, after due hearing, that the present and future public convenience or necessity permit abandonment when the conditions set forth in the good faith negotiation rule are met. The ultimate criterion in determining whether abandonment should be granted under section 7(b) is the public interest.[158] As the Commission stated in Order No. 451, abandonment under the good faith negotiation rule is in the public interest, since it is necessary to ensure that the goals of Order No. 451 of increased production of old gas and overall lower prices described in sections IV. D. and E. *supra* are achieved. Those goals cannot be achieved unless producers can obtain the market-responsive prices permitted by the rule. Without the possibility of abandonment, purchasers under existing contracts could prevent producers from obtaining those prices by insisting on continuation of the present price. In addition, requiring individual producers to file abandonment applications and considering those applications on a

[152] United Gas Pipe Line Co. v. McCombs 442 U.S. 529, 539 (1979).

[153] Missouri PSC at 3; Northern Natural at 22; ANR and CIG at 5; UDC at 50; Northwest Central at 31; APGA at 52.

[154] PG&E at 4; NI-Gas at 17; Panhandle and Trunkline at 16; Transwestern at 9; INGAA at 14; Texas Gas at 7; Natural and United at 9; Texas Eastern at 17; Transco at 7; ANR and CIG at 11; Arkla at 8; Florida Gas at 15; Tennessee at 16; AGD at 15; and AGA at 19.

[155] AGA at 28; AGD at 9; Tennessee at 16; MPC/NASUCA at 33; PG&E at 6; Peoples Gas *et al.* at 25; Cal. PUC at 27; Kentucky PSC at 3; NI-Gas at 15; SoCal at 5; Williston Basin Interstate Pipeline Company (Williston) at 12; El Paso at 4; Northwest Pipeline Corporation at 9; Transwestern at 13; INGAA at 14; Texas Gas at 7; Missouri PSC at 7; BG&E at 1; Texas Eastern at 8; Transco at 6; ANR and CIG at 8; Florida Gas at 18; Arkla at 10; D.C. PSC at 4; Northwest Central at 51.

[156] Atlantic Richfield *et al.* at 3, 7.

[157] Indicated Producers at 4.

[158] Transcontinental Gas Pipe Line Corp. v. FPC (*Transco*), 488 F.2d 1325, 1328 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

case-by-case basis is an inadequate solution. That would cause lengthy delays before abandonments could be granted, given the vast number of producers in the nation and the Commission's limited resources. Achievement of the goals of increased production and lower overall prices would thereby be substantially delayed. Thus, granting abandonment in the present proceeding, if the conditions set forth in the good faith negotiation rule are met, is in the interest of the natural gas market as a whole and is necessary to bring about market-responsive prices for old gas and overall lower prices.

It is true, as a number of petitioners note, that before granting abandonment the Commission must consider all factors relevant to the public interest and that historically, under standards developed in cases such as *Michigan Consolidated Gas Co.* v. *FPC* [159] and *Transco, supra,* these factors have included (1) a comparison of the needs of the existing purchaser and the prospective purchaser of the gas and of the markets which each serve, (2) a presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate supplies, (3) the contractual arrangements between the parties, and (4) the environmental impact of the abandonment decision. However, in the recent case of *Felmont Oil Corporation and Essex Offshore, Inc.,* [160] the Commission rejected the notion that the public interest cannot evolve as conditions change or that the Commission cannot revisit and revise the abandonment policy of the *Transco* and *Michigan Consolidated* cases in light of changed industry conditions, regulatory context and valid policy objectives. The Commission stated that enactment of the NGPA has virtually eliminated the concerns which formed the basis of the Commission's traditional abandonment policy. Instead, experience under the NGPA demonstrates that reliance on market forces to allocate supplies of gas works to the benefit of the public by preventing shortages. Thus, in *Felmont,* the Commission held that these facts permit the Commission, when considering abandonment applications, to shift its focus, from the interests of specific customers and their access to particular sources of supply, to the interests of the market as a whole. Pursuant to this shift in the identification of the public interest, the Commission in *Felmont* permitted abandonment of certain low-cost old gas supplies which the pipeline had shut in in order to take higher-cost new gas subject to take-or-pay obligations. The Commission stated that such abandonment served the interest of the market as a whole since it would permit the low-cost gas to enter the marketplace, displace higher-cost gas, and help to reduce the overall cost of gas. So also, by the abandonment granted here through the good faith negotiation rule, the Commission seeks to permit old gas to enter the marketplace, placing downward pressure on overall prices.

Of course, as petitioners for rehearing point out, the Commission in *Felmont* stated that it would continue to weigh the factors which it previously considered, including the parties' comparative needs, their contract arrangements, and the environmental and economic consequences of the abandonment. And the petitioners observe that the Commission did carefully consider those factors in *Felmont,* considering evidence concerning the specific parties there involved. The petitioners contend that the Commission has not, and cannot, consider those factors in the present rulemaking proceeding, since such consideration requires case-by-case analysis.

In this proceeding, the Commission could and did consider all relevant factors involved in determining the overall public interest. The Commission believes that generally a purchaser's loss of gas under abandonment provisions of the good faith negotiation rule should not cause it, or the market it serves, to experience a shortage of supply. The move to market-responsive prices for new gas over the last eight years under the NGPA has already eliminated shortages of gas. Allowing old gas prices also to rise to market-responsive levels up to replacement cost will ensure that present adequate supplies of gas continue into the forseeable future.[161] Therefore, there is no reason to believe that purchasers losing supplies under this rule should have difficulty replacing those supplies. In addition, the lower overall prices brought about by this rule should allow the purchaser to replace lost supplies at reasonable prices.[162] Furthermore, this rule protects the interests of the firm sales customers of non-Order No. 436 pipelines by granting them a right of first refusal. Of course, initially at least, some persons, particularly those who benefited from the distortions inherent in the old vintage-based ceiling price structure, may experience price increases. However, such isolated instances are outweighed by the benefits to the market as a whole described above. Since abandonment occurs under the good faith negotiation rule only if the purchaser has chosen not to pay the price provided for under the contract, in effect terminating the contract, there is nothing in the parties' contractual arrangements militating against abandonment. The presumption in favor of continued service under these circumstances is outweighed by the need to obtain the overall benefits for the public described above.[163] As the Commission discusses in section V. C. of this order, the Commission does not believe that this rule will have any significant adverse environmental consequences. The Commission concludes that it properly found in Order No. 451 that granting abandonments under the good faith negotiation rule is required by the public interest. Since the public interest is "the ultimate criterion under section 7(b)," [164] the standards for granting

[159] 283 F.2d 204 (1960), *cert. denied,* 364 U.S. 913 (1960).

[160] Opinion No. 245, Docket No. CI84-10-000, 33 FERC ¶ 61,333 (1985); appeal docketed *sub nom.* Consolidated Edison of N.Y. v. FERC (D.C. No. 86-1168).

[161] *See* the discussion in Part IV. D. above.

[162] In short, the Commission relies on market forces to assure that purchasers have adequate supplies at reasonable cost. Such reliance on market forces in the context of NGA section 7(b) is supported by the Supreme Court's decision in *FCC* v. *WNCN Listeners Guild,* 450 U.S. 582 (1981). That case involved a similar requirement that the FCC determine whether the "public interest, convenience, and necessity" permit radio station license renewals or transfers. Among the factors to be considered in making the necessary determination is whether granting the renewal or transfer will promote diversity in entertainment programming. The FCC issued a policy statement that it would not consider this factor in individual cases since it could rely on market forces to promote diversity. The Supreme Court upheld the policy statement, holding that the FCC had provided a rational explanation of its reliance on the market. In the present order and in Order No. 451, the Commission has provided a detailed explanation why under this rule market forces should assure adequate supplies at reasonable costs. *See* Order No. 451, 51 FR at 22194-22204. *See* sections IV. D. and E. of this order.

[163] The relative diligence of purchasers in providing for adequate natural gas supplies has less relevance in determining the public interest in a time of surplus rather than shortage. That factor is primarily of use in determining relative equities when allocating shortages among two pipelines that both lack adequate supplies. When all purchasers have adequate supplies, it is difficult to find that any have lacked diligence in obtaining such supplies. The effect of this rule is to provide an adequate economic incentive to ensure producton of available lower-cost reserves that otherwise probably would not be available to those purchasers.

[164] *Transco,* 488 F.2d at 1328.

abandonment under section 7(b) have been met.[165]

The Commission also rejects rehearing applicants' contention that granting abandonment under the good faith negotiation rule is contrary to *United Gas Pipe Line Co.* v. *McCombs*, 442 U.S. 529 (1979). In that case, the Supreme Court reversed a lower court holding that, upon depletion of reserves, a producer may abandon sales without obtaining any prior Commission approval. The Court reasoned that permitting abandonment without prior commission approval would leave the abandonment determination "as a practical matter, in the producer's control, a result clearly at odds with Congress' purpose to regulate the supply and price of natural gas." [166] The present case is distinguishable from *McCombs* since no abandonment without prior Commission approval is here involved. The Commission has in Order No. 451 granted prior approval of abandonments under the good faith negotiation rule as being in the public interest.

One applicant [167] asserts that section 1(a) of the Interstate Commerce Act (ICA) has been interpreted as requiring the Interstate Commerce Commission (ICC) to consider requests for abandonment of service by railroads on a case-by-case basis. The applicant notes that section 1(a) of the ICA is virtually identical to section 7(b) of the NGA, requiring a finding that the "present or future public convenience and necessity" permits abandonment of service. Accordingly, the applicant argues that section 7(b) should also be interpreted as requiring case-by-case consideration of abandonment requests.

The Commission's review of precedent concerning the ICC's authority under section 1(a) and other relevant provisions of the ICA indicates that, far from supporting the proposition that section 7(b) of the NGA requires case-by-case determinations, that precedent supports the Commission's grant of abandonment in Order No. 451. Both sections 14 and 210 [168] of the ICA, requiring that the ICC find that grants of a license to engage in particular activities are in the "public interest," have been interpreted as permitting the ICC to make generic findings applicable to all license applications that the public interest standard is met. [169] This is so even though the ICC previously granted such licenses on a case-by-case basis. Since the ultimate criterion under section 7(b) of the NGA is also in the public interest, these cases support the Commission's action here. Of the two cases cited by the applicant, one [170] merely states generally that the ICC must balance the interests of presently served customers with those of the carrier and the transportation system. It does not state that the balancing must be done on a case-by-case basis. The other [171] does contain dicta that certain legislative history relied on by the appellant for one point does not address that point, but indicates "that 'public convenience and necessity' must be determined in each case on the basis of the factors that are presented in that instance. *See* H.R. Rep. No. 456, 66th Cong. 1st Sess. 146–52 (1919)." The Commission's review of the document cited reveals no indication that findings of public convenience and necessity must be made on a case-by-case basis. Rather, the essential issue raised in the course of legislative consideration of the section appears to have been whether the states or the Federal government should have jurisdiction to make the determinations.

Finally, the Commission has provided the hearing required by section 7(b) in the present proceeding. The Commission has provided all segments of the natural gas industry an opportunity to file initial and reply comments. Two days of public hearings were held. All interested persons have had the opportunity to present further arguments on rehearing. The only argument as to why this opportunity for hearing is inadequate is that the Commission allegedly cannot consider all relevant factors, including the effects of individual abandonments on affected parties, other than on a case-by-case basis. That argument has been answered above. [172]

b. *The good faith negotiation rule does not violate the Mobile-Sierra doctrine.* The Commission also rejects contentions by various rehearing petitioners from all segments of the natural gas industry that the good faith negotiation rule violates the *Mobile-Sierra* doctrine. Pennzoil Company and Pennzoil Producing Company contend that the good faith negotiation rule unlawfully abrogates indefinite price escalation clauses in existing contracts. Those clauses allegedly authorize collection of the just and reasonable rate established by this rule. Yet the good faith negotiation rule does not permit a producer to collect that price until it has given the purchaser an opportunity to renegotiate the contract in question and certain other contracts. Pennzoil argues that, since the Commission has found the new ceiling price to be just and reasonable, the Commission cannot make the requisite finding that abrogation of the indefinite price escalation clause is in the public interest.

The Commission first observes that it has not found that automatic collection of the new ceiling price is necessarily appropriate, even though the new ceiling price is within the zone of reasonableness for replacement costs, and therefore just and reasonable. The Commission recognizes that the new ceiling price may be above prevailing market prices. Accordingly, the Commission adopted the good faith

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[165] Some applicants also rely on various statements in Order No. 436–A (50 FR at 52259) concerning the expedited abandonment policy established in Order No. 436 (*see* 18 CFR 2.77) to contend that the Commission must consider abandonments on a case-by-case basis. It is true that in Order No. 436–A the Commission emphasized that abandonment applications based on the Commission's policy statement at § 2.77 would be granted only on a case-by-case basis. However, nothing in that order was intended as a statement that the Commission could not in appropriate circumstances grant abandonment in a rulemaking proceeding such as the present. For the reasons stated above, the Commission believes that it is appropriate to grant abandonment in the final rule when the conditions set forth in the good faith negotiation rule are met. Furthermore, the Commission observes that, at the request of certain pipelines, it has granted limited-term abandonment authority to numerous suppliers of the pipeline rather than as in *Felmont*, considering only the abandonment of a specific contract between one producer and the pipeline. *See, e.g.*, Southern Natural Gas Co., 36 FERC ¶ 61,401 (1986) and Transcontinental Gas Pipe Line Corp., 36 FERC ¶ 61,403 (1986).

[166] 442 U.S. at 539.

[167] Northwest Central at 13–14.

[168] 49 U.S.C. 10924 and 10930. (Former sections 14 and 210 have recently been revised and recodified as 10924 and 10930).

[169] American Trucking Associations, Inc. v. United States, 602 F.2d 444 (D.C. Cir. 1979). National Tour Brokers Ass'n v. ICC, 671 F.2d 528 (D.C. Cir. 1982).

[170] Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 321 (1981).

[171] Farmland Industries Inc. v. U.S., 642 F.2d 208, 211 n. 5 (7th Cir. 1981).

[172] Some applicants claim that in Order No. 451 the Commission improperly relied on Phillips Petroleum Co. v. FPC, 475 F.2d 842, 848–52 (10th Cir. 1973) and American Public Gas Ass'n v. FPC, 567 F. 2d 1016, 1064–67 (D.C. Cir. 1977), in holding that the hearing provided in the present proceeding satisfies the section 7(b) hearing requirement. The Commission disagrees. While those cases involved the issue whether the Commission may establish area and national rates in rulemaking proceedings without violating the hearing requirements of NGA sections 4 and 5, those sections require similar findings concerning the public interest as does section 7(b). Applicants also attack the Commission's reliance on Texaco v. FPC, 377 U.S. 33, 44 (1964), and FPC v. Moss, 424 U.S. 494, 500–01 (1976). The Commission recognizes that those cases are not precisely on point. Nevertheless, *Texaco* supports the proposition that the Commission has discretion to establish expeditious administrative methods in order to achieve its regulatory purposes and *Moss* supports the proposition that the Commission may pre-grant abandonment even though years may elapse before the abandonment actually occurs.

negotiation rule, as an integral part of obtaining the new ceiling price, in order to assure that producers do not collect above-market prices for gas under existing contracts with indefinite price escalation clauses. Without that rule the price of the 90 percent of old gas sold under such contracts would automatically escalate to the ceiling price regardless of the market price. This would not be a just and reasonable result in the sense of providing for the lowest reasonable rate under NGA section 5(a). Thus, the requirement that producers comply with the good faith negotiation rule clearly is in the public interest, and provides for a transitional graduation toward the ultimate just and reasonable ceiling available under the rule.

Furthermore, the Commission believes that that rule does not abrogage indefinite price escalation clauses for the same reasons the court in *Pennzoil Co.* v. *FERC (Pennzoil II)*[173] held that the Commission's requirement of specific contractual authority for collection of the section 107(c)(5) ceiling price also does not abrogate indefinite price escalation clauses in violation of the *Mobile-Sierra* doctrine. As the Commission made clear in Order No. 451, indefinite price escalation clauses may provide the necessary *contractual* authority to collect the alternative ceiling price; however, in order to assure that the rate actually *collected* is just and reasonable, the Commission requires compliance with the good faith negotiation rule unless the parties voluntarily renegotiate. In other words, while the indefinite price escalation clause continues to provide contractual authority to collect the highest just and reasonable price allowed by law, the alternative ceiling price is allowed by law only if parties specifically agree to it under the good faith negotiation rule or otherwise. Since the ceiling price adopted under section 104 and 106 is just and reasonable and since the purpose of the good faith negotiation rule is to assume that the price collected thereunder is the lowest just and reasonable price within that ceiling, the rule clearly furthers the Commission's legitimate regulatory policies.[174]

Pipelines, distributors, and consumer representatives also claim that the good faith negotiation rule violates the *Mobile-Sierra* doctrine, although for different reasons. They claim the rule permits producers to terminate contracts unilaterally and that the Commission cannot make the necessary finding that such termination is in the public interest since it adversely affects pre-existing supply arrangements. The Commission fully discussed this issue in Order No. 451. While permitting producers and purchasers to terminate their contracts, the good faith negotiation rule requires that as a condition for seeking the alternative ceiling price otherwise provided for by the contract's indefinite price escalation clause, producers must give the purchaser an opportunity to seek a lower price under that contract and certain other contracts. Any termination of the contract results from the purchaser's decision to offer a price lower than that provided by the contract. Since any contract termination occurs only through the parties' mutual exercise of their rights under the good faith negotiation rule, there is no unilateral contract termination in violation of the *Mobile-Sierra* doctrine. Nor is there any need for the Commission to make a finding that permitting unilateral abrogation of the contracts is in the public interest, since none is permitted. In any event, in the discussion above finding that abandonment under the good faith negotiation rule is permitted by the public convenience or necessity, the Commission has shown that any mututal contract termination and abandonment which occurs under the good faith negotiation rule is in the public interest in spite of its effect on the parties' past supply arrangements.

c. *The Commission has authority to permit purchasers to seek lower prices for non-jurisdictional gas under the good faith negotiation rule.* Several producers [175] contend that the Commission exceeded its authority by permitting purchasers, in step 2, to seek a lower price for any new gas, including non-jurisdictional gas, in any contract between the parties which includes old gas. These applicants point out that NGPA section 601 removes certain new gas from the Commission's NGA jurisdiction. They assert that conditioning a producer's right to obtain the new just and reasonable rate for old gas on renegotiating non-jurisdictional gas amounts to backdoor regulation of that gas in violation of NGPA section 601. They find support for this view in *Pennzoil Co.* v. *FERC* (*Pennzoil I*) 645 F. 2d 360 (5th Cir. 1981), holding that the Commission lacks authority to regulate non-jurisdictional gas sales in the guise of contract interpretation.

The Commission has not exceeded its authority. It does not seek to reregulate sales on non-jurisdictional gas through the good faith negotiation rule. Rather, as described above, it seeks to establish a condition of eligibility to ensure that the price collected for old jurisdictional gas is just and reasonable. As described in Order No. 451, purchasers may have agreed to a higher price for new gas, including non-jurisdictional gas, in a multi-vintage contract in reliance on the fact that the lower cost of the old gas reduced the average price under the contract. The Commisison believes that in such circumstances it would be unjust and unreasonable for the producer to collect, pursuant to the new price ceiling, a higher price for the old gas, whether from the existing purchaser or from a new purchaser after abandonment, without giving the existing purchaser under the contract an opportunity to renegotiate the price of the new gas. The Commission also believes it would be unjust and unreasonable to permit a producer to renegotiate only those multi-vintage contracts where it will gain a net increase in price because the contracts contain primarily old gas. The provision of the good faith negotiation rule permitting purchasers to seek a lower price in step 2 for any gas in contracts containing some old gas follows from this reasoning. Accordingly, the Commission believes that, pursuant to its authority recognized in *Pennzoil II* to define criteria for eligibility for a ceiling price in order to further its legitimate regulatory policies, it may include this provision in the good faith negotiation rule. [176]

The producers seek to distinguish *Pennzoil II* primarily on two grounds. First, they contend that the rationale of that case applies only to "special rates," such as the NGPA section 107(c)(5) ceiling price, which Congress authorized the Commission to establish "to the extent necessary" to achieve a stated goal. Eligibility criteria allegedly are permissible as a means of limiting the

[173] 671 F.2d 119, 124–25 and nn.13 and 14 (5th Cir. 1982).

[174] This discussion should alleviate the concern of one applicant (El Paso at 16–18) that, because the Commission allegedly has found the new ceiling price to be just and reasonable, an indefinite price escalation clause might be interpreted as agreement to pay the new ceiling price. Under this interpretation, a purchaser's failure to nominate the new ceiling price would constitute a breach of the indefinite price escalation clause. As stated above, the Commission has not found automatic collection of the new ceiling price necessarily just and reasonable. It is only just and reasonable to the extent agreed to under the good faith negotiation rule or as a result of voluntary renegotiation. Thus, no purchaser is in any way obligated to pay the new just and reasonable ceiling price. Rather, the producer, as a condition of eligibility for making a transition toward the higher rate, is required to give the purchaser an opportunity to negotiate for a lower price.

[175] Atlantic Richfield et al.

[176] *See also Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (5th Cir. 1986).

special rate to that gas which requires the special rate to achieve the stated goal. Producers claim that rates established under sections 104 and 106 are not such special rates. However, the Commission sees no significant distinction between the rate involved in *Pennzoil II* and that involved here. The Commission may establish higher ceiling prices under sections 104 and 106 only to the extent such prices are just and reasonable under the NGA. As described above, that is the purpose of this condition in the good faith negotiation rule.

Second, producers contend that the Commission cannot find, as required by *Pennzoil II*, that the condition here involved is reasonably calculated to further its legitimate regulatory policies.

The producers claim that the regulatory policy here involved is the prevention of premature abandonment of low-cost old gas, that requiring producers to submit non-jurisdictional gas to renegotiation does not serve this purpose, and that to do so is contrary to the stated goal, since some producers may thereby be discouraged from seeking the price increases for old gas necessary to keep that gas in production. Producers also state that, since the Commission expects new gas prices to be renegotiated downward in any event, there is no need to require producers to submit new gas sold under multi-vintage contracts to renegotiation in step 2.

The Commission believes that the condition here involved is reasonably calculated to further its regulatory policies. When the Commission establishes a just and reasonable rate, it must balance a number of factors, some of which conflict with one another. In the present case, the Commission must balance the need for higher prices for old gas to avoid premature abandonment with fairness to purchasers. The Commission recognizes that conditioning higher prices for old gas on renegotiation of the price of any other gas may discourage some producers from seeking higher prices and thus reduce to some extent the increased production sought in this rule. On the other hand, purchasers may have relied on low prices for old gas in agreeing to pay higher prices for new gas, whether that new gas is in multi-vintage contracts or not. Thus, failure to condition higher prices for old gas on renegotiation of other gas prices may involve unfairness to purchasers. The Commission has balanced these two concerns by conditioning higher prices for old gas on renegotiation only of the price of new gas sold under multi-vintage contracts between the producer and purchaser including some old gas. Requiring the renegotiation of all new gas prices, including that sold under separate contracts, could make the rule so costly to producers that few would seek higher old gas prices, thereby preventing achievement of the rule's goal of increased old gas production. Also, the relationship between old and new gas prices is less clear when the two are sold under separate contracts. However, as discussed above, where the two are sold under the same contract, the contractual relationship is so intertwined that it would be unfair to allow renegotiation of one of the strands of consideration to permit higher old gas prices with no provisions for renegotiation of other threads of the contractual balance related to new gas prices.

It is true that the Commission expects new gas prices to be renegotiated downward as a result of the market forces released under this rule. However, there could, over the short term, be a lag between a producer obtaining a higher price for old gas under the good faith negotiation rule and market forces having their full effect on the new gas price. The purchaser's rights in step 2 assure that that lag does not occur with respect to new gas sold in multi-vintage contracts. The fact that market forces will bring down new gas prices does, however, reduce the Commission's concern about the fairness of excluding from step 2 of the good faith negotiation rule new gas sold separately. Finally, since about two thirds of new gas is sold under separate contracts,[177] limiting the new gas the producers must submit to renegotiation to new gas sold with old gas means that the costs of seeking higher prices for old gas should not be so high as to discourage producers from seeking higher prices for a sufficient amount of old gas to permit significant increased production. The Commission concludes that permitting purchasers to seek renegotiation of the price of all new gas, including non-jurisdictional gas sold in contracts with old gas, furthers the Commission's legitimate regulatory policies and is permitted by the authority to establish eligibility requirements for NGPA prices confirmed in Pennzoil II. The Commission has not reregulated new gas. Rather, it has simply sought to assure that the price obtained for jurisdictional sections 104 and 106 gas is just and reasonable.

[177] AGA at 4.

d. *The good faith negotiation rule is not unfairly weighted in favor of producers.* The Commission now turns to contentions of many pipelines, distributors, and consumer representatives that the good faith negotiation rule is unfairly weighted in favor of producers, since only producers can initiate the process and purchasers cannot obtain renegotiation of new gas not sold in multi-vintage contracts with old gas. These provisions of the rule allegedly have three major discriminatory effects preventing achievement of the Commission's goal of market-responsive pricing for all gas. First, they allow most high-cost, non-market-responsive new gas to escape downward renegotiation under the good faith negotiation rule. As previously noted, approximately two thirds of new gas is sold in separate contracts containing no old gas which cannot be renegotiated under the good faith negotiation rule.[178] Also, not all of the remaining high-cost gas will be renegotiated under the good faith negotiation rule. The fact that only producers can initiate good faith negotiation allows producers to limit renegotiation under the rule to situations where the potential for increased revenues from higher old-gas prices outweighs the risk of decreased revenues from lower prices for new gas sold with old gas. The failure of the good faith negotiation rule to reach non-market-responsive, new-gas contracts allegedly means that overall gas prices will increase as a result of higher old-gas prices, since applicants believe that the Commission's contention that competition will lower the price of high-cost gas apart from the good faith negotiation rule is unsupported by substantial evidence.

The second discriminatory effect alleged by applicants is that some purchasers will be more adversely affected than others. Some purchasers buy a higher percentage of their new gas under multi-vintage contracts than do others. Those purchasing more of their

[178] A number of applicants claim that the exclusion of new gas sold under separate contracts from the good faith negotiation process is particularly arbitrary in light of two additional factors. First, the rationale for inclusion of new gas in multi-vintage contracts allegedly applies equally when old and new gas is sold to a purchaser under separate contracts. In both cases, the purchaser relied on its ability to roll in the low-cost old gas with high-cost new gas in agreeing to pay higher prices for the old gas. Second, the decision whether to include old and new gas in one contract or separate contracts was largely an arbitrary drafting decision. Indeed, the Commission allegedly encouraged separate contracts under § 272.102(c) of its regulations as in effect before 1980 (AGA at 30–31).

new gas under separate contracts will have less ability to renegotiate downward the price of that gas than those purchasing more of their new gas under contracts containing old gas. Similarly, producers selling most of their new and old gas under separate contracts will obtain a higher net price increase than those selling more gas in multi-vintage contracts.

Finally, applicants contend that, to the extent producers refrain from seeking higher prices for their old gas under the good faith negotiation rule in order to avoid renegotiation of the price of new gas sold under multi-vintage contracts, the beneficial effects claimed by the Commission from higher old-gas prices will not occur. The old gas will be prematurely abandoned. This will impede achievement of the Commission's goal of lowering overall prices.

Applicants contend that for these reasons the good faith negotiation rule is arbitrary and capricious, grants undue preferences to particular producers and pipelines and provides for unjust and unreasonable rates in violation of NGA section 5. Applicants propose two main changes in the rule to avoid these problems and provide market-responsive pricing for all gas. First, they propose that purchasers be permitted to initiate good faith negotiations, at least with respect to any contract containing any old gas. Applicants contend that, having found the present vintage-based pricing system unjust and unreasonable, the Commission has the legal authority under NGA section 5 to allow purchasers to initiate good faith negotiations as the necessary remedy to eliminate the present unjust and unreasonable rates. Second, they propose that, once the producer seeks a higher price for any old gas, the purchaser should be able to seek lower prices for new gas covered by any contract between the parties, regardless of whether that contract contains old gas. The applicants argue that, if the Commission has legal authority to condition eligibility for higher old gas prices on renegotiating all gas in multi-vintage contracts, that same authority permits it to condition higher old-gas prices on renegotiation of gas in all contracts with the purchaser. Another proposal is to allow any purchaser from a particular producer to exercise its rights under step 2 of the good faith negotiation rule once that producer has requested one of its purchasers to nominate a price in step 1.[179]

[179] AGA at 27; PG&E at 5; NI-Gas at 17; Williston at 12.

Tennessee [180] proposes a more radical solution of replacing the entire good faith negotiation rule with a requirement that bilateral market-out clauses be included in all contracts. Process Gas Consumers Group (PGC) [181] proposes that the Commission require that a producer be required to file an affidavit agreeing to renegotiate fully all its contracts with any interstate pipeline that accepts Order No. 436 before seeking a higher price under any contract. PGC contends this would give pipelines a greater incentive to accept Order No. 436 and also make a producer more willing to risk potential renegotiation of all its higher-priced supplies since the pipeline's acceptance of Order No. 436 would give the producer needed non-discriminatory access to wider markets for all its gas, not just released supplies.

The Commission does not believe that the good faith negotiation rule as adopted is discriminatory or that it must be altered to permit purchasers to initiate the process and to renegotiate all new gas prices. Applicants' contentions proceed from a false predicate; they assume that non-market-responsive, high-cost new gas prices will not come down unless purchasers are given a means to bring them down under the good faith negotiation rule. This is not true. As explained in detail in Section IV. E. of Order No. 451,[182] the Commission believes that competitive forces in the natural gas market, including competition from alternative fuels, increased production of old gas, and more accurate price signals, will force down the price of non-market-responsive gas, wholly apart from the good faith negotiation rule. Therefore, it is unnecessary to modify the rule in any of the ways suggested in order for the increased production of old gas encouraged by this rule to bring overall prices down. The two-thirds of new gas which cannot be renegotiated under the good faith negotiation rule will nevertheless respond to competitive forces in the natural gas market which will be strengthened by increased production resulting from this rule. The record amply demonstates that higher gas prices have, in fact, fallen as a result of competitive forces.[183] Also,

[180] At 4-9.

[181] At 12-14.

[182] 51 FR at 22194-22, 197.

[183] See also "First to Pay, Last to Gain," a report by the Citizen/Labor Energy Coalition issued October 1986, showing that from the first half of 1984 to the first half of 1986 the wellhead price of gas dropped 65 cents per Mcf or 24 percent.

producers not immediately initiating good faith negotiation, because they believe any increased revenues from old gas will be more than offset by lost revenues from new gas sold with old gas, will find the price of their high-cost gas nevertheless coming under heavy competitive pressure as other producers take advantage of the rule. Purchasers may reduce takes of the high-cost gas. Thus, it may well become worthwhile for them to seek the higher prices permitted by the market for their old gas in order to offset the inevitable decline in the price of their high-price gas.

The fact that high-cost gas will respond to competitive market forces even though not subject to renegotiation under the good faith negotiation rule should also prevent the various other discriminatory effects alleged by applicants. Because prices of all new gas will come down, purchasers buying their new and old gas under separate contracts should not experience higher gas costs over the long term any more than those purchasing such gas under multi-vintage contracts. Producers selling most new and old gas under separate contracts should not obtain higher prices than those selling primarily under multi-vintage contracts. Also, since most producers are likely to seek eventually over an extended period of time higher prices for old gas, little old gas will remain at present low regulated prices and thus be prematurely abandoned, contrary to some applicants' contentions.

For these reasons alone there is no need to amend the good faith negotiation rule to avoid discrimination. In addition, there are other grounds for rejecting the proposed amendments to the good faith negotiation rule. First, the Commission doubts its authority to permit purchasers to initiate the process, since that might result in purchasers' unilaterally terminating high-cost contracts in violation of the *Mobile-Sierra* doctrine as embodied in NGPA section 101(b)(9).[184] Under the good faith negotiation rule as adopted, if the producer does not want to risk the pipeline terminating purchases of high-cost gas, it need not invoke the good faith negotiation procedures. The purchaser too has an opportunity to prevent the contract from terminating, by paying the contract price or voluntarily renegotiating. Thus, termination of purchases results only from mutual decisions by the producer and purchaser. The situation would be very different if the purchaser could

[184] See *Pennzoil Co. v. FERC*, 671 F.2d 119, 125 (5th Cir. 1982).

invoke the good faith negotiation procedures; then the purchaser's right to terminate would arise not because the producer chose to grant the purchaser such a right as a condition of obtaining the benefit it sought. Rather, the purchaser's right to terminate would arise from its unilateral action in initiating good faith negotiation.

Nor is the Commission convinced by the applicants' contention that it has authority to grant purchasers the right to initiate good faith negotiation under section 5 of the NGA. Applicants contend that that authority arises because the Commission has found in Order No. 451 that the present pricing structure is unjust and unreasonable. However, the Commission only found that the present rigid, vintage-based old gas price structure is unjust and unreasonable. The Commission has not found that gas prices for new gas are unjust and unreasonable. In fact, the current much lower prices for large amounts of new gas renegotiated or subject to market outs could not be found unjust or unreasonable. In any event, the Commission lacks authority to find new gas prices unjust and unreasonable. Some new gas prices are set pursuant to NGPA price ceilings and the remainder are set in the open market pursuant to deregulation. All such rates are deemed to be just and reasonable under section 601(b) of the NGPA. However, based on the Commission's finding that the old gas prices have become unjust and unreasonable, the Commission reformed the old gas pricing structure to set new just and reasonable ceiling prices pursuant to NGPA sections 104 and 106. Accordingly, it provided for renegotiation of new gas prices only where the old and new gas volumes were so inextricably intertwined, because covered by the same contract, that such renegotiation may be conceived of as part of the adjustment of the old gas price under the contract. All terms of such a multi-vintage contract are so interrelated that it would not be equitable to adjust the old gas prices under the contract without allowing the new gas price aspects of the contract to be open to adjustment in turn.

While rehearing applicants have argued for the Commission's authority to permit purchasers to seek renegotiation of all new gas prices, including that not sold with old gas, after producers have initiated the process, the Commission believes there are strong policy reasons not to do so, apart from the fact competition will force down new-gas prices in any event. If a producer's request for the purchaser to nominate a new price for old gas in step 1 instantly gave the purchaser the right to renegotiate all other contracts with the producer including those not containing old gas, the potential cost to a producer of initiating good faith negotiation would in many instances undoubtedly be greater, perhaps far greater, than under the current procedure so that fewer producers would initiate the process. This would seriously impede achievement of the Commission's goal of market responsive prices for old gas so as to avoid premature abandonment of that gas. Without higher prices for old gas and the resulting increased production of old gas, the competitive pressures forcing down high-cost prices would be lessened.

The Commission rejects the contention that it arbitrarily distinguished new gas sold in multi-vintage contracts containing some old gas from new gas sold separately. It is, of course, true that purchasers may have relied on their ability to roll in high-cost new gas with low-cost old gas in agreeing to pay a higher price for the new gas, regardless of whether the new gas was purchased in a multi-vintage contract with old gas or separately. In striking the balance previously described between the need for higher prices for old gas and fairness to purchasers, the Commission determined that fairness to purchasers required giving them a right to renegotiate under the good faith negotiation rule all new gas sold under the same contract with old gas. This assures that there is no significant lag between the producer's obtaining a higher price for old gas sold under such contracts and the purchaser's obtaining a lower price for the new gas. Again, all terms of multi-vintage contract relations are interrelated and it would not be fair to disrupt the mutuality of consideration between the parties. Accordingly, the rule applies to such contracts. However, in order not to render negotiations under the good faith negotiation rule so costly to producers so that in the short run few would initiate such negotiations, the Commission believes it appropriate to exclude new gas sold under separate contracts from negotiations under the good faith negotiation rule. While this may result in some lag between the producer's obtaining a higher price for the old gas and the purchaser's obtaining a lower price for the new gas, the market forces released by this rule, including more accurate price signals and increased production of old gas, should bring down the price of the new gas sold under separate contracts. Therefore, the Commission concludes that exclusion of that gas from the good faith negotiation process is not unfair to purchasers.

The Commission also rejects the separate proposals of Tennessee and PGC. The Commission believes these proposals to be unnecessary since, as stated above, new-gas prices are expected to come down in any event. In addition, since as explained above, the Commission has not found new-gas prices to be unjust and unreasonable, the Commission doubts its authority to require market-out clauses to be included in all contracts. In any event, while the Commission recognizes the value of market-out clauses in encouraging market-responsive pricing, such clauses should be adopted through negotiation between the parties, not Commission fiat. The Commission is handicapped in analyzing PGC's proposal by the fact that the details of that proposal are unclear. For example, PGC does not state what rights Order No. 436 pipelines would have if they failed to reach agreement with the producer on a lower price for new gas. If the existing contract price would continue in effect, the proposal appears to grant pipelines no additional rights over what they now have. Presumably, however, PGC intends the pipeline to have rights similar to those granted under the good faith negotiation rule. Granting Order No. 436 pipelines greater bargaining rights than non-Order No. 436 pipelines and other purchasers who are not pipelines at all appears unfair and possibly in violation of the prohibition against undue preference. Furthermore, allowing all Order No. 436 pipelines the right to demand lower prices for new gas or terminate purchases if the producer seeks a higher price for any old gas with any purchaser appears to suffer from the infirmity that it would discourage producers from seeking higher prices for old gas, thus impeding achievement of the goals of this rulemaking.

For all of the above reasons, the Commission rejects the contention that the good faith negotiation rule is unfairly weighted in favor of producers because it does not permit purchasers to intiate the process and does not provide for renegotiation of new gas sold under separate contracts. The Commission accordingly declines to adopt any of the various suggestions to alter these features of the rule.

2. Response to Other Suggested Clarifications and Modifications of the Good Faith Negotiation Rule

The Commission has now considered all of the major challenges to tne legality of the good faith negotiation rule made by rehearing applicants. Applicants from all segments of the natural gas industry have, however, also requested numerous clarifications and alterations of specific aspects of the good faith negotiation rule. Most applicants seek to increase the bargaining rights of their segment of the industry. Since the Commission believes that bargaining rights under the rule as adopted are balanced, it generally rejects the suggested modifications. However, the Commission does make several minor changes in the rule.

The Commission will first consider (a) issues involving generally the three-step nomination procedure by which contracts are placed on the bargaining table for negotiation under the good faith negotiation rule. It will then discuss, in order, (b) issues specifically concerning the producer's right in step 1 to request that the purchaser nominate a new price for old gas, (c) issues concerning the purchaser's right in step 2 to request that the producer nominate a new price for any gas in the contract placed on the bargaining table in step 1 or any other contract including old gas, (d) issues concerning the producer's right to request that the purchaser nominate a new price for old gas in contracts brought to the bargaining table in step 2, (e) issues concerning the rule that no contract may be renegotiated more than once under the good faith negotiation rule, (f) issues concerning the parties' rights to abandon sales or terminate purchasers of gas, and (g) issues concerning the operation of the good faith negotiation rule in certain specific situations.

a. *General issues concerning the three-step nomination procedure.* First, several applicants [185] request that the Commission postpone the start of negotiations under the good faith negotiation rule from November 1, 1986 to at least January 1, 1987. These applicants contend that otherwise old gas price increases and abandonment may occur during the winter heating season. Also, one contends that a delay will provide more time for resolution of Order No. 436 settlements, thus enabling both pipelines and their customers to make their pricing decisions based on more accurate knowledge of the market structure under which they will be operating. Finally, they express concern that good faith negotiation might start before the Commission acts on their rehearing requests.

The Commission has previously postponed the date on which a producer is permitted to make a nomination request until December 18, 1986 in order to assure that no party is required to renegotiate a contract under the good faith negotiation rule until the Commission has resolved the issues raised on rehearing.[186] In this order, the Commission further postpones the initiation of good faith negotiation until January 23, 1987. The amendments to the good faith negotiation rule adopted in this order do not become effective until that date. This further postponement of the initiation of good faith negotiation will therefore avoid any confusion which might otherwise arise if the rule were changed after negotiation had already begun under it. The postponement of the initiation of good faith negotiation ensures that no abandonments or price increases not agreed to by the purchaser will occur during the winter heating season. The purchaser may prevent any abandonment from occurring until at least 90 days after the January 23, 1987, start of good faith negotiation, or April 23, 1987, and probably longer. A purchaser has up to 60 days to respond to a producer's nomination requests. If the producer rejects the price nomination, it must negotiate a contract with a new purchaser, and then give the purchaser 30-day notice before abandoning the sales to the purchaser. Furthermore, if the pipeline is a non-Order No. 436 pipeline and the new purchaser is not a firm sales customer of that pipeline, the producer must also give the firm sales customers a right of first refusal, a process taking an additional 30 days, before giving the 30-days notice of abandonment. The only price increases occurring under the good faith negotiation procedures significantly before April 23, 1987, would be those resulting from a producer's acceptance of the purchaser's price nomination.[187] Since such price increases are voluntarily agreed to by the purchaser, the Commission sees no reason to postpone their effect through further delaying initiation of the good faith negotiation rule. The Commission also does not believe that any further delay in the effectiveness of the good faith negotiation rule would significantly affect the number of pipelines whose Order No. 436 status has been clarified.

A large number of applicants, primarily pipelines and distributors,[188] request that the Commission require that all producer requests for price nominations under the good faith negotiation rule be made within a specified period after the date when producers may initiate good faith negotiation. Many suggest one year as an appropriate period. The applicants contend that without this requirement producers might postpone exercising their rights under the good faith negotiation rule indefinitely, waiting for market conditions to improve so that they can obtain a greater increase in old gas prices while incurring a smaller decrease in new gas prices. This allegedly would permit the indefinite continuation of the present vintage-based rates found unjust and unreasonable in Order No. 451 in violation of NGA section 5, and postpone achievement of the Commission's goals of increased production of old gas and resulting lower overall prices. Also, purchasers' uncertainty over their supply arrangements allegedly would be indefinitely prolonged. Finally, when price increases did occur, they could be unreasonably large because obtained during a time of shortage.

The Commission has determined not to place a time limit on initiation of good faith negotiation. The purpose of this rulemaking is to create market-responsive pricing for old gas up to replacement costs. A limitation on when the producer can invoke good faith negotiation would be contrary to this goal. It is difficult to see any significant harm to an individual purchaser from a producer's delay in seeking renegotiation, since the purchaser is entitled to continue to buy the gas at the existing low price until renegotiation is sought. If the purchaser is concerned about security of supply, it can seek to enter long-term contracts with other sellers or offer voluntary renegotiation to the existing seller. Furthermore, the Commission anticipates that the effect of good faith negotiation nationwide will probably be a gradual phase-in of the higher old gas prices in an evolutionary fashion reflecting individual producer decisions on initiation and continued voluntary negotiation. An arbitrary time limit could force either premature initiation with a rush of good faith negotiation nationwide or in the alternative the loss of good faith negotiation rights by many producers unwilling to initiate the process before

[185] *See* Minnesota DPS at 8 and NI-Gas at 22–23.

[186] 37 FERC ¶ 61,077 (1986).

[187] These could occur by about 60 days after initiation of good faith negotiations, or March 24, 1987.

[188] Tennessee at 24; PG&E at 5; Peoples Gas *et al.* at 24; Cal PUC at 28; SoCal at 2; Panhandle and Trunkline at 15; El Paso at 15; Northwest Central at 54; Transwestern at 16; AGA at 25; INGAA at 16; Texas Eastern at 19; Transco at 8; ANR and CIG at 23; D.C. PSC at 5; Arkla at 14; Florida Cities at 8; Arkla at 14; and Florida Gas at 22.

the deadline. The Commission wants to ensure that it provides fully for the evolutionary phase-in of higher old gas prices over time to maximize the price and supply responses. Finally, the Commission rejects the contention that NGA section 5 requires limiting the time in which the producers can initiate good faith negotiation in order to force elimination of current unreasonable rates. The Commission has found that the existing rigid vintage-based old gas pricing structure is unjust and unreasonable. By establishing the alternative ceiling price and permitting producers to seek higher prices under the good faith negotiation rule, the Commission has eliminated the existing rigid old gas pricing structure by permitting market-responsive pricing up to replacement cost. Having done that, the Commission should now let the market work and not interfere in it by specifying the time in which producers must exercise their rights.

Third, several applicants [189] request that the Commission clarify that a party requested to nominate a new price may also seek changes in the non-price terms of the contract. The Commission agrees that when a party is requested to nominate a new price, in may include in its nomination changes in any term of the contract. It would be inconsistent with the Commission's goal of encouraging market-responsive pricing to limit the contract terms subject to renegotiation. Terms other than price can have a significant effect on the economic value of a bargain to either party.[190] Parties should not be restricted in the types of contract changes they can make in order to reach agreement on a new contractual relationship satisfactory to both. Accordingly paragraph (a)(7) has been included in § 270.201, as revised.

However, the requirement that the producer accept the purchaser's nomination of the highest price permitted under the contract will not apply if the purchaser nominates the highest price permitted by the contract but includes in its nomination a change in another contract term. The reasons for requiring the producer to accept a nomination of the highest permitted price is that the purchaser has agreed to abide by the existing contract, which provides for payment of that price. If the purchaser seeks to change terms in the contract, then it has not agreed to abide by the existing contract. Furthermore, it would be improper to allow a purchaser to impose on the producer a change in any contract term by the simple expedient of including such change in a nomination of the simple expedient of including such change in a nomination of the highest permitted price. No change in the contract should occur other than through the mutual agreement of the parties.[191] Section 270.201(d) and (e) have been amended accordingly.

One applicant [192] request that the Commission clarify the mechanics of requesting and making price nominations under the good faith negotiation rule. First, it suggests that both parties be required to send their requests for price nominations by U.S. mail, return receipt requested. Since the 60 days for responding to the nomination request run from the day of receipt, this requirement would enable the person making the request to know when the 60-day period begins to run. The Commission adopts this suggestion. Not only will this provision enable the sender to know the date of receipt, but also it is consistent with the requirements in § 270.201(g) (2) and (3) that the tender of the right of first refusal and its acceptance be made by U.S. mail, return receipt requested. For the same reasons, the Commission similarly requires that responses to nomination requests and acceptance or rejection thereof, as well as notices of abandonment or termination of purchases, be made by U.S. mail, return receipt requested.[193]

Second, the applicant seeks clarification of when nominations should be considered as having been made. Consistent with the usual rule that service of a document is accomplished on the date it is deposited in the mail,[194] a party's price nomination will be considered made on that date. Finally, the applicant asks to whom nomination requests and price nominations should be addressed and whether the contract's notice provision governs. The notice provision does govern. In the absence of such a provision, the parties should work out this matter among themselves.[195]

One applicant [196] states that the purchaser's price nomination in response to the producer's step 1 nomination request should be due on the same day as the producer's price nomination in response to the purchaser's step 2 nomination request. The rule, as adopted, provides for the purchaser's price nomination to be made 30 days before the producer's. The applicant argues that this is unfair since it allows the producer to see the purchaser's nominated price before it nominates a price for the gas covered by purchaser's nomination request. The Commission rejects this proposal. While the producer can see the price nominated by the purchaser before nominating a price in response to the purchaser's step 2 nomination request, the purchaser can see the producer's nominated price before responding to the producer's step 3 nomination request. These sequential price nominations are inherent in the structure of the good faith negotiation rule, and the Commission does not believe that any imbalance in the parties' negotiating rights results.

b. *The producer's rights in step 1.* A producer cannot request the purchaser to nominate a higher price under the good faith negotiation rule unless its contract provides authority for collection of the higher price. [197] In Order No. 451 the Commission stated that if a contract contained an indefinite price escalation clause but the parties had executed an amendment providing for a fixed price lower than the applicable maximum lawful price for a set period less than the term of the contract, the producer could make a nomination request at any time but any new price agreed to would not take effect until expiration of the fixed price. An applicant [198] states that such

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[189] AGA at 35 n.44; INGAA at 17; Panhandle and Trunkline at 17; and ANR and CIG at 21.

[190] This does not, however, make non-price terms part of the price paid under the contract. *See* Declaratory Order, Transporation of Liquid and Liquefiable Hydrocarbons by Natural Gas Pipelines, 22 FERC ¶ 60,013 (1983), *reh'g denied*, 24 FERC ¶ 61,004 (1983), *aff'd*, Texas Eastern Transmission Corporation v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1967 (1986).

[191] Tennessee contends (at 20–22) that the producer should at least be required to accept the purchaser's nomination where it nominates the highest permitted price but seeks insertion of a market-out clause. Tennessee argues that this would provide for more market-responsive pricing of gas in the future. For the reasons stated above, the Commission rejects this proposal. While the Commission recognizes the value of market-out clauses in encouraging market-responsive pricing, the Commission believes that insertion of such clauses into contracts should not occur through Commission fiat or the unilateral action of one party, but through mutual agreement of both parties in light of current market conditions. A party desiring a long-term agreement without a market-out clause should have the ability to negotiate for such agreement through offering appropriate inducements to the other party.

[192] Tennessee at 33–34.

[193] Accordingly, paragraph (a)(5) has been included in § 270.201, as revised.

[194] *See* 18 CFR 385.2010(g)(1) (1986).

[195] As the Commission stated in Order No. 451, parties may extend any deadlines for action under the good faith negotiation rule by mutual agreement. In response to an applicant's request (Indicated Producers at 22), the Commission has codified this right in § 270.201(a)(6) of its regulations.

[196] Northwest Central at 57.

[197] Section 270.201 (a) (2) (ii) (A).

[198] ANR and CIG at 29.

amendments may be for indefinite periods, for example until further notice or until some benchmark price is reached. It requests that the Commission clarify the producer's rights under the good faith negotiation rule in such circumstances. The Commission believes that the same rule should apply regardless of whether the amendment is for a definite or indefinite period, but it has determined to modify the rule stated in Order No. 451 so that the producer may not request that the purchaser nominate a price until the fixed price amendment has expired pursuant to its terms. Thus, in the situation hypothesized by the applicant, no nomination request may be made until the necessary notice is given or the benchmark price is reached. [199] This rule is necessary to prevent the producer from obtaining a right to abandon sales through rejection of the purchaser's nomination price before it has contractual authority to increase prices. It is also consistent with the general principle that producers must have contractual authority for higher prices in order to initiate good faith negotiation. [200]

A contract must have been in effect on July 18, 1986, in order to be renegotiated under the good faith negotiation rule. One producer applicant, [201] however, contends that where a producer signed a rollover contract before issuance of Order No. 451 but the contract had not been signed by the purchaser by July 18, 1986, signature by the purchaser after July 18, 1986, should not preclude the contract from renegotiation under the good faith negotiation procedures even though the contract was not in effect on July 18. Without this change, the applicant claims, the purchaser could deny the producer its right to renegotiation under the good faith negotiation rule by purposefully delaying signing the rollover contract. The Commission sees no reason to change the rule as suggested by this applicant. Once the Commission had issued Order No. 451 on June 6, the producer should have been as aware of its rights under Order No. 451 as the purchaser. If the producer wanted to reconsider its offer to the purchaser in light of Order No. 451 it should have withdrawn that offer. If it failed to do so, the purchaser would be entirely within its rights to sign the contract and a binding agreement would result not subject to renegotiation under the good faith negotiation rule.

One producer applicant [202] requests that the Commission modify the provision that the producer must accept the purchaser's nomination of the highest price permitted by the contract to make that provision inapplicable where that contract contains a market-out clause. The applicant contends that otherwise the provision would permit a purchaser to deprive the producer of its right to abandon sales or obtain transportation to an alternative purchaser by nominating the highest price and then, a month later, exercising the market-out clause to reduce the price of the gas. The Commission will not modify the good faith negotiation rule as suggested. The producer, having originally agreed to the market-out clause, should abide by the consequences of its agreement. Since market-out clauses encourage market-responsive pricing, the Commission sees no reason why it should interfere with their operation in a rulemaking designed to encourage market-responsive pricing. In any event, if the situation postulated by the applicant were to occur, the applicant would not be entirely without remedy. It could apply to the Commission for an individual abandonment pursuant to NGA section 7(b).

Finally, another producer applicant [203] requests that the Commission permit a producer, when it makes a nomination request in step 1, to stipulate that neither it nor the purchaser can make any nomination requests with respect to casinghead gas sold under contracts otherwise subject to the negotiations. Casinghead gas is a by-product of oil production. The applicant's primary reason for desiring the right to exclude casinghead gas is apparently that a purchaser's termination of purchases of such gas under the good faith negotiation rule might adversely affect the producer's oil production. Conceivably, if the producer could not find an alternative purchaser for the casinghead gas, the producer could be required to shut in the oil production.

The Commission refuses to adopt the applicant's suggested modification of the good faith negotiation rule. It would be contrary to the Commission's goal of market-responsive pricing to allow the producer to insulate certain gas from renegotiation. The producer should take into account any concern about the effect of abandonment on its oil production in deciding whether to initiate good faith negotiations and whether to accept the purchaser's nominated price. In addition, as will be described later, the Commission is lengthening the notice the purchaser must give the producer before terminating purchases. This should give the producer a greater opportunity to find another purchaser for the casinghead gas and avoid any loss of oil production. The Commission concludes that the suggested modification would add unnecessary complexity to the good faith negotiation rule.

c. *The purchaser's rights in step 2.* A number of applicants request clarifications concerning precisely what contracts containing some old gas the purchaser may bring to the bargaining table in step 2. First, clarification is sought concerning precisely what gas is considered old gas for purposes of permitting the purchaser to put a contract on the bargaining table. For example, if a contract contains gas committed or dedicated to interstate commerce on the date of enactment of the NGPA which now receives the section 108 stripper price, could the purchaser bring that contract to the bargaining table in step 2? [204] The old gas must be actually priced under NGPA sections 104 and 106. Thus, a contract containing all new gas on July 18 except for some old gas priced under section 108 could not be brought to the bargaining table by the purchaser. The Commission's rationale for including contracts containing some old gas in step 2 would not apply in such circumstances since the purchaser could not be relying on low-priced section 104 or 106 gas to bring down the average price paid under the contract to reasonable levels. [205]

Second, one applicant [206] ask *when* the contract must contain old gas. It observes that a contract may have originally covered old gas but later all the old gas wells may either have qualified for NGPA incentive prices or been abandoned. It sugguests that the

[199] Of course, if the contract also covered some gas with a price ceiling lower than the price set in the fixed price amendment, the producer could, before the amendment expired, request that the purchaser nominate a higher price for that gas up to the price set by the amendment. However, such request would prevent the producer from making any subsequent nomination request under the good faith negotiation rule after the fixed-price amendment expired. *See* § 270.201 (a) (4) (ii).

[200] This rule would not apply where the purchaser had imposed a unilateral price increase moratorium. In that case, since the producer had not agreed to the moratorium, the producer would retain contractual authority to collect a higher price and could initiate good faith negotiation any time after January 23, 1987.

[201] Amoco Production Company (Amoco) at 8.

[202] Plains Petroleum Company (Plains) at 2–4.

[203] Indicated Producers at 16.

[204] *See* ANR and CIG at 26 and IPAA at 3.

[205] Paragraph (a)(2)(i) has been included in § 270.201, as revised, to clarify the definition of "old gas."

[206] IPAA at 2.

Commission require that the contract cover old gas on the date the first seller makes his nomination request in step 1. The Commission agrees that to avoid ambiguity there must be a reference date for purposes of determining whether a contract covers old gas. However, the Commission believes that that date should be the effective date of this rule, July 18, 1986. This date will enable all parties to determine with certainty what contracts are potentially subject to good faith negotiation. It will also prevent a producer from insulating a contract from renegotiation by delaying initiation of the good faith negotiation procedures until all that contract's old gas wells are abandoned or qualify for NGPA incentive prices. A contract will be considered to cover old gas if on July 18, 1986 it covered any wells subject to the section 104 or 106 price ceilings for which the Commission has not authorized permanent abandonment. Thus, the mere fact no old gas was sold on that date does not necessarily mean that the contract does not cover old gas.[207] The requirement that abandonment have been granted should avoid disputes whether a well was only temporarily shut in or depleted.[208]

Third, one applicant [209] requests clarification whether, when a purchaser has contracts naming different divisions of a single corporation as the seller, and the producer makes a nomination request with respect to one division's contract, the purchaser may bring to the bargaining table the other division's contract in step 2. Another applicant [210] requests clarification that, where a producer has contracts with two affiliated corporations and requests one to nominate a price, the other may not seek renegotiation in step 2, of its contracts. The Commission believes that, for purposes of determining whether a "purchaser" has contracts with a "seller" containing some old gas subject to renegotiation in step 2, individual corporations should be considered single, but separate, sellers and purchasers. Thus, two divisions of one corporation are nevertheless the same seller, and the purchaser may bring to the bargaining table all contracts with both divisions. However, affiliated corporations with separate corporate identities are separate purchasers (or sellers), and contracts with one affiliate cannot be brought to the bargaining table in step 2 if only a contract with the other was brought to the bargaining table in step 1.

Fourth, one applicant [211] requests clarification whether an umbrella settlement covering many separate contracts, some containing old gas and some only new gas, is an existing contract subject to renegotiation in step 2. If such an umbrella settlement is an existing contract, the purchaser could seek to renegotiate the new gas contracts solely because the producer previously agreed to provide price or take-or-pay relief in the umbrella settlement. The Commission agrees that a producer should not be penalized for entering into such umbrella settlements. It intends that the phrase "existing contract . . . that includes the sale of any old gas" [212] should refer to base contracts, not umbrella settlements.

Fifth, two applicants request clarification whether a producer's request, after expiration of an existing contract, to collect the new ceiling price under a rollover or replacement contract trigger the purchaser's right under step 2 of the good faith negotiation rule. Amoco [213] states that a producer's request for a rollover contract at the new ceiling price should not constitute a nomination request under the good faith negotiation procedures permitting the purchaser to obtain renegotiation of other contracts containing old gas in step 2. ANR and CIG,[214] however, take the opposite position, stating that the occurrence of a contractual rollover should constitute a request for a price nomination under the good faith negotiation rule to the extent the underlying contract contains an indefinite price escalation clause.

The Commission generally agrees with Amoco, not ANR and CIG. The good faith negotiation rule applies only to contracts (or the underlying service obligation) in effect on July 18, 1986. When a producer seeks to negotiate a rollover contract after July 18, 1986 to replace an expired contract, it is negotiating a contract not in effect on July 18, and the good faith negotiation rule is inapplicable. Negotiation of the rollover contract is entirely voluntary, and neither party thereafter has any rights under the good faith negotiation rule. If a producer and pipeline voluntarily enter a rollover contract, the execution of the rollover terminates any further rights under the good faith negotiation rule.

Of course, old gas sales may be continuing under the expired contract pursuant to the service obligation of a certificate of public convenience or necessity. If the service obligation was in effect on July 18, 1986,[215] the producer may pursuant to the good faith negotiation procedures seek a higher price for old gas sold under an expired contract pursuant to the service obligation. However, if the producer does so, the purchaser may in step 2 seek renegotiation of all other contracts with the producer containing old gas. In the absence of the purchaser's agreement to a higher price either voluntarily or under the good faith negotiation procedures, the producer may not collect from that purchaser the new ceiling price for gas sold pursuant to a service obligation. If the producer could collect up to the new ceiling price without the purchaser's agreement, there would be no assurance that the producer was obtaining mutually agreeable prices. This would violate the Commission's objective of permitting collection only of mutually agreed-upon prices or the ceiling price, whichever is lower.

Sixth, two applicants [216] express concern that some producers may seek to avoid renegotiation of their new gas in step 2 by transferring or assigning either their old gas or their new gas to an affiliated entity so that all new and old gas is in separate contracts. The Commission does not believe that this is a significant danger under the rule as adopted. Mere assignment to another corporate entity of old or new gas covered by a multivintage contract without amendment of the sales contract itself could not insulate the new gas from renegotiation in step 2. This is because the original owner of the gas would still appear on the contract with the purchaser as the seller of that gas. The purchaser is entitled to obtain renegotiation in step 2 of all gas sold under the contract as it was on July 18,

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[207] Paragraph (a)(2)(ii)(B) is included in § 270.201, as revised, to resolve this ambiguity.

[208] For the same reasons, the expired contracts subject to renegotiation under the good faith negotiation rule will be considered to include all expired contracts as to which the Commission has not authorized abandonment as of July 18, 1986. Gas sold under the expired contract need not have actually been flowing on July 18, 1986. This rule provides certainty as to which expired contracts are subject to the good faith negotiation rule. The Commission recognizes that in some instances abandonment may not have been granted even though all gas wells subject to the expired contract are depleted. However, in many such circumstances, neither party is likely to have an interest in renegotiating the contract in any event, and the rule should cause no hardship.

[209] El Paso at 20.

[210] Samson Resources Company (Samson) at 3–4.

[211] Indicated Producers at 29

[212] Section 270.201(b)(2).

[213] at 8.

[214] at 28–29.

[215] Even if the contract expired after July 18, 1986, the service obligation is considered to have been in effect on that date so long as the contract was in effect on that date.

[216] ANR and CIG at 22 and Arkla 12.

1986, by the seller regardless of whether the seller claims someone else owns the gas. Furthermore, if the contract were amended after July 18, 1986, to reflect the assignment, the amendment would deprive the producer of any rights under the good faith negotiation rule in any event, unless both the producer and the purchaser mutually agreed in writing to preserve their rights under the good faith negotiation rule.[217]

Finally, the provision for purchasers to make a nomination request in step 2 with respect to the same gas subject to the seller's step 1 nomination request [218] has caused confusion among some rehearing applicants. Some applicants appear to believe that a purchaser's request that a producer nominate a price for old gas covered by the producer's nomination request relieves the purchaser of its obligation to nominate a price in response to the producer's nomination request, thus depriving the producer of the opportunity to accept or reject a price nomination by the purchaser.[219] One applicant requests that the Commission amend the rule to eliminate any right by the purchaser in step 2 to request the producer to nominate a price for gas covered by the producer's step 1 request.

The Commission permitted purchasers to make nomination requests with respect to gas covered by the producer's request so that purchasers and producers would have identical bargaining rights with respect to old gas. Without this provision, the producer could foreclose the purchaser from obtaining a lower price for, or terminating purchases of, any old gas by including all such gas in its nomination request in step 1. Even if the purchaser nominated a price lower than the existing contract price in response to the producer's nomination request, the producer could simply reject the purchaser's nomination and continue sales at the existing contract price. Accordingly, the Commission believes that this provision should be retained. However, the Commission does clarify that a purchaser's request in step 2 that the producer nominate a price for old gas covered by the producer's request in step 1 does not relieve the purchaser of its obligation to nominate a price in response to the producer's request. Rather, in such circumstances negotiations must continue under the good faith negotiation rule until either (1) one party has accepted the other's price nomination resulting in a binding contract at the accepted price or (2) both parties have rejected the other's price nomination resulting in each having the right to terminate sales or purchases.

d. *The producer's rights in step 3.* One applicant [220] requests that the Commission permit a producer in step 3 to request that the purchaser nominate a price for any gas, including new gas, which the purchaser introduced in step 2. Under the rule as adopted, the producer may only request that the purchaser nominate a price for any *old* gas covered by the contracts the purchaser brought to the bargaining table while the purchaser can make nomination requests with respect to both old and new gas. The applicant alleges that the suggested change would make the parties' bargaining rights more balanced, since the fact that only the purchaser can renegotiate both old and new gas means only it can threaten to terminate the contract with respect to both old and new gas if dissatisfied with the producer's nominated price. The Commission does not adopt the suggested modification. Since new gas is mostly high priced, it would appear that the producer would gain little additional bargaining power by threatening to discontinue sales of that gas. Any benefits to be gained by giving the producer this right would be outweighed by the increased cumbersomeness of the rule. In any event, the Commission believes that the bargaining rights of the parties under the good faith negotiation rule, as adopted, are appropriately balanced.

e. *The rule that no contract may be renegotiated more than once under the good faith negotiation rule.* Numerous applicants request various clarifications and modifications to the provision of the good faith negotiation rule as adopted by Order No. 451 that an existing contract may not be renegotiated under the good faith negotiation rule if the parties "have renegotiated the price or any other terms for the sale of any old gas under the contract after July 18, 1986, with or without using the good faith negotiation procedures of this section." [221] First, a number of applicants [222] state that the blanket nature of this provision could cause the unnecessary deferral of routine contract amendments necessary for operational reasons, such as changes in delivery points, quality specifications, and billing procedures. It could also discourage other beneficial amendments such as take-or-pay settlements. This is because a producer would be reluctant to enter into any contract modifications, no matter how minor, until it had reviewed its contracts with the purchaser to determine the consequences of the loss of its rights under the good faith negotiation rule.

In response to Indicated Producer's emergency motion to clarify § 270.201(a)(3)(i) in order to resolve this problem, the Commission issued an interim order on rehearing on July 17, 1986. In that order, the Commission amended § 270.201(a)(3)(i), subject to further consideration in the rehearing order, to permit parties amending their contracts after July 18, 1986, mutually to consent to preserve their rights under the good faith negotiation rule. The Commission continues to believe that this is the correct solution to the problem raised by the applicants and reaffirms the amendment made in the interim order on rehearing. [223]

The purpose of § 270.201(a)(3)(i) as adopted in Order No. 451 was to encourage voluntary renegotiation of contracts in light of the new ceiling price as a substitute for negotiation under the good faith negotiation rule. Without some such provision, purchasers who voluntarily renegotiated contracts with their producers would be subject to requests for further renegotiation under the good faith negotiation rule. In such circumstances, purchasers might well be reluctant to renegotiate their contracts voluntarily. The amendment adopted in the interim rehearing order avoids deterring such voluntary negotiation, since the producer would retain its rights under the good faith negotiation rule only if the purchaser so agreed. At the same time, it accomplishes the goal of permitting parties, if they desire, to make routine or, for that matter, substantial amendments without loss of their rights under the good faith negotiation rule. [224]

[217] The Commission disagrees with Arkla's concern about possible circumvention between the June 6, 1986 issuance of Order No. 451 and July 18, 1986, since, as noted above, purchasers had the ability to protect themselves during that period by refusing to agree to contract amendments. Purchasers should have been as aware of their step 2 rights during that period as sellers. In addition, there is no evidence that sellers sought to separate a significant amount of new gas from old gas during that period.

[218] 51 FR at 22208, note 261.

[219] *See* Indicated Producers at 31–32 and Amoco at 8–9.

[220] Indicated Producers at 15–16.

[221] § 270.201(a)(3)(i), as adopted by Order No. 451.

[222] Indicated Producers at 24; Panhandle and Trunkline at 17; Transwestern at 22; INGAA at 17; Florida Gas at 26; and AGA at 34.

[223] This provision now appears in paragraph (a)(4)(i) of § 270.201, as revised.

[224] One party (IPAA), in a motion for reconsideration filed August 13, 1986, requests that the Commission modify the amendment adopted in the interim rehearing order to provide that parties

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The other solutions to the problem suggested by applicants are not adopted since each would either deter voluntary renegotiation or fail to solve the problem. These suggestions are as follows:

1. Delete § 270.201(a)(3)(i), thereby allowing producers to invoke their rights under the good faith negotiation procedures, regardless of whether they have previously renegotiated existing contracts for the sale of old gas informally. This suggestion would deter voluntary negotiations because it would enable producers potentially to secure economic concessions for the sale of old gas one time through informal, voluntary negotiations and a second time under the formalities of the good faith negotiation rule.

2. Delete the phrase "or any other terms" from the clause in question, so that only informal renegotiations of the *price* of old gas after July 18, 1986, would bar subsequent resort to the good faith negotiation procedures. This suggestion deters voluntary renegotiation because it would permit producers to exact economic concessions under existing contracts without technically increasing the price of old gas, and later seek price increases under the good faith negotiation procedures.

3. Establish the date when producers may initiate good faith negotiations,[225] rather than July 18, as the date after which informal amendments to existing contracts would preclude subsequent resort to the good faith negotiation procedures. This proposal, however, would continue to stifle minor contract changes after January 22, 1987, since no change could be made after that date without loss of rights under the good faith negotiation rule.

Two applicants [226] request clarification that § 270.201(a)(4)(i) [227] does not operate to deprive producers of their rights under the good faith negotiation rule when there is a price change as a result of a preexisting contract cause. Examples of such contract clauses are price redetermination clauses which call for establishment of a new price at periodic intervals, either by some previously stipulated formula or by negotiation, and inflation adjustment clauses providing for monthly or quarterly automatic price escalations. The Commission believes that when a contract provides for an automatic price change pursuant to a stipulated formula so that no additional negotiations between the parties are required to determine the price, then § 270.201(a)(4)(i) does not operate to deprive the producer of its rights under the good faith negotiation rule. No voluntary renegotiation has occurred. However, if the contract clause requires negotiations to establish a new price, when voluntary renegotiation has occurred and § 270.201(a)(4)(i) does apply. The parties could, of course, mutually agree in writing to preserve their rights under the good faith negotiation rule.

Finally, one applicant [228] contends that § 270.201(a)(3)(i), while prohibiting producers from making nomination requests under the good faith negotiation rule with respect to a contract voluntarily amended after July 18, 1986, unfairly permits purchasers to make nomination requests with respect to such contracts. Although the rule as adopted technically permits the applicant's interpretation, the Commission did not intend to permit purchasers to make nomination requests in such circumstances. Accordingly, the Commission further amends § 270.201(a)(3)(i), now paragraph (a)(4)(i), in order to clarify its intent in this regard.

f. *Abandonment under the good faith negotiation rule.* Numerous applicants seek clarification and modification of the provisions of the good faith negotiation rule concerning abandonment. The most significant issue concerning abandonment is the effect of abandonment on a purchaser's take-or-pay obligations under the existing contract. In particular, numerous pipelines, distributor, and consumer representative applicants [229] observe that a pruchaser at the time of abandonment may, pursuant to its take-or-pay obligation, have paid for gas but not taken it. However, the contract may provide the purchaser a chance to make up that gas over a particular period which has not yet expired. Most applicants request that the Commission require that in such circumstances the producer repay the take-or-pay payment if abandonment occurs under the good faith negotiation rule. Barring that requirement, the applicants desire that the Commission at least require that the purchaser's make-up rights under the contract survive the abandonment. The applicants also state that at the time of abandonment the purchaser may be subject to an accrued obligation to make a take-or-pay payment, but it may not yet have made the payment. Most applicants request that the Commission state that the purchaser is relieved of any accrued obligations to make take-or-pay payments upon abandonment. Applicants contend that the requested clarifications would avoid any inequity resulting from allowing producers to be paid twice for the same gas, first when they collect take-or-pay payments and second when they sell the gas to a new purchaser after release.

The Commission does not believe it appropriate to establish procedures as to how the parties' take-or-pay obligations are affected when a contract is terminated under the good faith negotation rule. The Commission believes that resolution of such obligations is part of the renegotiation process and disputes should be settled in accordance with the respective state laws governing the administration of contracts.

Pipeline, distributor, and consumer representative applicants suggest a number of other changes to the abandonment provisions of the good faith negotiation rule to prevent unfairness to them. Several applicants [230] request that the Commission limit the time within which either party may exercise its right to abandon sales or terminate purchases. For example, some applicants propose that a party be required to exercise its

voluntarily amending a contract *retain* their rights under the good faith negotiation rule unless they mutually agree in writing to waive those rights. IPAA claims that the amendment as adopted may permit a purchaser to trick an unsophisticated producer into loss of its rights under the good faith negotiation rule by proposing a minor contract amendment and not informing the producer of the necessity to expressly preserve or lose its rights under the good faith negotiation rule. IPAA also notes that some contract amendments are so minor that parties may not recognize them as renegotiations involving potential loss of rights under the good faith negotiation rule. The Commission declines to adopt IPAA's proposed change in the amendment adopted in the interim order on rehearing. The Commission believes that participants in a regulated industry such as the natural gas industry will become sufficiently familiar with the relevant regulations, and will be able to protect their interests. All persons have constructive, if not actual, notice of all duly published regulations, and as business participants in the natural gas arena, should be aware of possible loss of their rights under the good faith negotiation rule if they amend their contracts. Thus, producers can protect their own interests. However, the Commission is concerned about possible sharp practices by pipelines with respect to small producers hypothesized by IPAA. If such a case presents itself, the Commission may address the matter in the context of that concrete circumstance.

[225] Formerly November 1, 1986, now January 23, 1987.

[226] Indicated Producers at 27; IPAA at 4.

[227] This provision was in paragraph (a)(3)(i) of § 270.201 in Order No. 451, but now appears in paragraph (a)(4)(i) in § 270.201, as revised.

[228] Indicated Producers at 28–29.

[229] PG&E at 7; NI-Gas at 19; SoCal at 8; El Paso at 14, 18; Panhandle and Trunkline at 14; Transwestern at 21; INGAA at 16; Natural and United at 12; Texas Eastern at 24; Transco at 8; ANR and CIG at 24; Florida Gas at 24; Tennessee at 18; UDC at 49; Northwest Central at 55; and AGA at 32.

[230] *See* El Paso at 15–16, and Arkla at 14–16.

right of abandonment within one year of the accrual of that right through its rejection of the other party's price nomination. Essentially, the applicants argue that allowing a party to reserve its abandonment right indefinitely would create unnecessary uncertainty for the other party and make future planning by that party difficult. The Commission believes that such a limitation on the parties' abandonment rights would be an unnecessary interference in the marketplace and refuses to adopt it. The primary concern of the applicants is with a pipeline waiting for its producer to abandon sales to the pipeline. While a producer's failure to exercise its abandonment rights for an indefinite time might cause the pipeline some uncertainty, it would also benefit the pipeline since sales would continue at the existing low price until abandonment occurred. Futhermore, given this fact, the Commission believes most producers have a strong incentive to exercise their abandonment rights expeditiously. Therefore, in most cases the problem of the pipeline being placed in indefinite uncertainty should be avoided.

Order No. 451 requires that, before the producer can abandon sales, it must enter into a contract to sell to a third party. In the notice of proposed rulemaking, DOE proposed that the Commission require that the new contract be for a higher price than that nominated by the existing purchaser and be for a term of at least two years. The Commission did not adopt these requirements. Several applicants [231] contend that the Commission should reinstitute these requirements. They contend that the Commission erred in finding these provisions unnecessary since producers are unlikely to sell to another purchaser unless they can obtain a better bargain. They argue that a producer may sell gas to a third party in a short-term agreement at a price less than that nominated by the existing purchaser solely for the purpose of freeing itself from its existing service obligation. Then, when market prices rise, it would be in a position to collect the higher prices. In the interim between expiration of the short-term agreement and higher market prices it might even shut in the gas. Two applicants [232] observe that a sale at a lower price might be more valuable to the producer in any event if the new purchaser agreed to take more volumes and that the new purchaser might well be able to take more than the existing pipeline purchaser.

The Commission continues to believe that the two-year and higher price requirements are unnecessary and unwise. As stated in Order No. 451, those requirements are inconsistent with the Commission's objective of encouraging market–responsive natural gas contracts. The two–year requirement would effectively prohibit market-out clauses for that period. Such clauses have been instrumental in permitting pipelines to reduce their purchased gas costs in recent years. Furthermore, if the Commission required that new contracts be for a higher price, it would also have to prohibit the existing purchaser from nominating any change in the contract other than price. Otherwise, it would be difficult to determine whether the new purchaser's offer was, in fact, worth more to the existing producer, since non-price terms may have a significant effect on the economic value of a bargain. Numerous applicants have stressed the importance of permitting existing purchasers to nominate changes in contract terms other than price as enabling them to renegotiate unfavorable non-price terms in existing contracts.

Even if there is danger that some producers may enter short-term contracts at lower prices to eliminate their service obligations, the Commission believes that that danger is outweighed by the interest in permitting parties to negotiate new contracts freely, without restriction as to the terms they can negotiate. In any event, the Commission continues to believe that producers are unlikely to sell to a third party at terms less favorable than those offered by the existing purchaser. Furthermore, the Commission notes that the increased bargaining power Order No. 451 grants purchasers with respect to higher-priced new gas should enable purchasers to negotiate more effectively to keep the lower-priced old gas. Finally, the producer cannot sell to non-firm sales customers of a non-Order No. 436 pipeline without giving the firm sales customers a right of first refusal. If a producer were to arrange a sale to a third party at an artificially low price solely to eliminate its service obligation, the firm sales customers could benefit from the lower price through exercise of the right of first refusal.

Two pipeline applicants [233] request that the Commission limit the term of any abandonment authorized under the good faith negotiation rule to two years, but provide that the abandonment will become permanent at the end of that period if the parties do not then reach agreement for continued sales. The applicants state that this would give producers an opportunity to sell to another purchaser in the spot market over the next several years, during which the natural gas surplus deliverability is expected to continue, but will give pipelines an opportunity to protect their historic access to these valuable supplies at the end of that period when the surplus is likely to be largely dissipated. The Commission refuses to adopt this proposal. The good faith negotiation rule, as adopted, gives the purchaser ample opportunity to negotiate to keep the gas when responding to the producer's nomination request. Giving the pipeline an automatic right under the good faith negotiation rule to regain the gas two years after abandonment would create unnecessary uncertainty.[234] It would also prevent the producer from negotiating a long-term contract with another purchaser in violation of the Commission's goal of maximizing the parties' rights to freely negotiate concerning old gas.

Finally, the same two pipeline applicants [235] request that the Commission state that a pipeline will not be deemed negligent for the loss of gas pursuant to the abandonment provisions of the good faith negotiation rule, even though the pipeline later has to curtail sales because of a shortage of supplies. The applicants state that, because of current market conditions, pipelines may not be able to nominate a high enough price to keep all their old gas. However, in the future, market conditions may change and shortages occur. It would be unfair in such circumstances, the applicants claim, to hold the pipeline negligent for any resulting curtailments. The Commission can make no blanket statement concerning a pipeline's liability for future claims of negligence based on events which have not yet occurred. The Commission assumes that parties will negotiate in good faith based on current and forseeable market and supply conditions. To the extent a pipeline acts prudently and in good faith to do what is in the best interests of its customers, the Commission would not intervene at a later date to hold that pipeline negligent for unforseeable events. The

[231] Northern Distributor Group (NDG) at 14; Northern Natural at 34; ANR and CIG at 16; Northwest Central at 53.

[232] ANR and CIG at 17.

[233] ANR and CIG at 18–20.

[234] Of course, the pipeline could seek a limited-term abandonment of the type granted in *Southern Natural Gas Co.*, 36 FERC ¶ 61,401 and *Transcontinental Gas Pipe Line Corp.*, 36 FERC ¶ 61,403 if its producers voluntarily agree.

[235] ANR and CIG at 20.

Commission cannot, of course, speculate on how a court would decide any negligence suit brought to it.[236]

Producer applicants also claim that various provisions of the good faith negotiation rule must be modified to prevent unfairness to them. One producer applicant [237] contends that the 30-days notice purchasers must give producers before terminating purchases is too short. The applicant states that because of various factors, including the difficulty of finding purchasers for the relatively small packages of gas which may be released and of arranging transportation to the new purchaser, thirty days is generally too short a time in which to arrange new sales. As a result, the gas is likely to be shut in before a new purchaser is found. Such shut-ins allegedly cause serious operational difficulties for producers. Neighboring wells belonging to other producers may drain the shut-in well. The well might not produce when reopened. The leases may be terminated for cessation of commercial production. The applicant notes that these problems do not arise when the producer abandons sales to the purchaser, since the producer cannot abandon sales until it has arranged for a new sale. The applicant requests that the Commission require that the purchaser give the producer at least 120 days before terminating purchases.

The 30-days notice that Order No. 451 requires purchasers to give producers before terminating purchases is the same notice that the producer must give the purchaser before abandoning sales. Thus, the purchaser has the same time in which to arrange to purchase replacement supplies as the producer has to arrange to sell to an alternative purchaser. The purchaser, too, may have difficulties in arranging to purchase from another producer. Thus, the Commission is reluctant to lengthen the notice the purchaser must give the producer before terminating purchases. However, the Commission does recognize that the producer has one difficulty that the purchaser does not face. The producer must give a pipeline's firm sales customers a right of first refusal before selling to any other purchaser. This process takes up to thirty days itself after an agreement has been entered into with the alternative purchaser. Therefore, if the producer seeks to sell to a purchaser other than a firm sales customer of the pipeline, it would be virtually impossible for it to arrange the sale within the 30-days notice given by the original purchaser of the termination of purchases. A pipeline receiving notice of abandonment of sales by the producer does not face this problem in arranging to purchase gas from another producer. There is generally no right of first refusal with which it must comply. In light of these facts, the Commission has determined to lengthen the notice the purchaser must give the producer before terminating purchases to 60 days to give more time for the producer to arrange another sale. Sections 270.201 (c)(2) and (f)(3) are amended accordingly. The notice the producer must give the purchaser will remain at 30 days.

The same applicant [238] also requests that the Commission eliminate the requirement that the producer enter into a contract to sell the gas to a third party before abandoning sales to the original purchaser. The applicant states that this requirement is unfair since there is no comparable requirement applicable to purchasers when they terminate purchases. In addition, the applicant suggests that the producer's ability to abandon sales without having arranged for a new purchaser would give it additional bargaining power to obtain agreement from the purchaser that neither will terminate sales or purchases until both have made alternate arrangements. The Commission rejects this proposal. The purpose of the requirement that the producer contract to sell the gas to another party is to assure that the old gas with its relatively lower price continues to flow to the market-place. There is no similar policy reason for imposing a comparable requirement on purchasers that they arrange to purchase gas from another producer before terminating purchases from the first producer.

Finally, a number of applicants from all segments of the natural gas industry request that the Commission expend the abandonment permitted under the good faith negotiation rule in various ways. First, two pipeline applicants [239] request that the Commission provide for abandonment, at the request of the purchaser, of gas under any contract which has expired and cannot be renegotiated. The applicants state that there are many expired jurisdictional contracts with terms favorable to the producer for which purchasers have been seeking to renegotiate rollover contracts. However, the producers have no incentive to renegotiate such rollover contracts since in the absence of abandoment the purchaser allegedly must continue purchasing gas under the unfavorable terms of the expired contract. The Commission sees no need to modify the good faith negotiation rule to deal with this situation. If the producer requests that the purchaser nominate a price with respect to any contract with a purchaser, the purchaser could seek renegotiation of the expired contract in question.[240] If dissatisfied with the producer's nomination, it could terminate purchases under the contract. If the producer does not make a nomination request with respect to any contract, the only way to deal with the problem raised by the applicants through the good faith negotiation rule would be to permit the purchaser to initiate negotiations under the rule. The Commission refuses to do that for the reasons discussed in IV, F, I, d above.

Second, four pipeline and distributor applicants [241] request that the Commission provide for abandonment when the parties voluntarily agree to it as part of a voluntary renegotiation outside the scope of the good faith negotiation rule.[242] These applicants contend that such abandonment would be consistent with the Commission's desire to encourage renegotiation. Without providing for such abandonment, if the parties entered into a voluntary agreement involving abandonment, parties would either have to file an individual application or proceed through the good faith negotiation procedures. The Commission refuses to provide the additional abandonment authority to cover this situation. Such abandonment would provide a means for the parties to avoid granting the pipeline's firm sales customers a right of first refusal, unless the Commission also required that the producer grant the firm sales customers a right of first refusal in such circumstances. In any event, there is no significant hardship in requiring the parties either to apply for an individual abandonment or a blanket limited term abandonment of the type granted in *Southern Natural Gas Co.*, 36 FERC ¶ 61,401, or go through the good faith negotiation procedures. The abandonments would likely be granted since unopposed and no fee would be required.

Third, one producer applicant [243] proposes that the Commission provide

[236] *See* Opinion No. 248, 35 FERC ¶ 61,043, *reh'g denied*, 35 FERC ¶ 61,340 (1986).

[237] Indicated Producers at 9–15.

[238] Indicated Producers at 14.

[239] El Paso at 15–16 and Florida Gas at 20–22.

[240] Since the contract is subject to the Commission's NGA jurisdiction it likely contains some gas priced under section 104 or 106(a).

[241] El Paso at 19, Natural at 11; Arkla at 6; AGA at 40.

[242] AGA would limit such abandonment to gas previously priced higher than the pipeline's WACOG.

[243] Amoco at 7.

pre-granted abandonment and transportation rights similar to those provided under the good faith negotiation rule where the parties agree under the good faith negotiation procedures to include a bilateral market-out clause in their contract and one of the parties later terminates purchases pursuant to such a clause. The applicant contends that, without such rights, producers might be reluctant to accept a purchaser's price nomination with a market-out clause, since the purchaser could later exercise that right, and the producer would have lost its rights under the good faith negotiation rule to abandon sales and market the gas elsewhere. The Commission rejects this proposal as unwise in policy and adding unnecessary complexity to the good faith negotiation rule. The Commission believes that the parties themselves should negotiate any changes in their contractual relationship. These changes include insertion of market-out clauses and the conditions which must be met for such clauses to be exercised. Therefore, the Commission will not require, for example, that pipelines exercising a market-out clause must transport the released gas. A producer with the concerns outlined above should seek the pipeline's agreement not to oppose abandonment and to transport the released gas if the pipeline exercises the market-out clause. Absent such agreement, the producer could refuse the pipeline's price nomination if it includes a market-out clause. In addition, the Commission observes that if the purchaser terminates purchases pursuant to a market-out clause agreed to under good faith negotiation procedures, the producer can seek abandonment from the Commission.

Fourth, one applicant [244] requests that the Commission permit the purchaser to terminate its contract with the producer within 180 days after the producer's rejection of the purchaser's nomination. The applicant expresses concern that, if the purchaser does not have this right, a producer could reject the purchaser's nomination and continue sales indefinitely at the existing price while waiting for gas prices to firm up. The purchaser would be unable to purchase alternative supplies because of its contractual obligation to the producer, but nevertheless could lose the gas sold it by the producer at any time. There is no need to amend Order No. 451 as suggested by the applicant, since purchasers already have the ability to prevent occurrence of the situation described by the applicant. If a purchaser did not desire to continue its existing contractual relationship with the producer in the event the producer rejects its price nomination, it may in step 2 request that the producer nominate a price for the gas covered by the producer's step 1 request.[245] It can then either accept the producer's nomination or reject the nomination and terminate purchases.

Finally, another applicant [246] expresses concern that the good faith negotiation rule may permit a purchaser, after rejecting the producer's price nomination requested in step 2, to terminate purchases of all relatively high-cost post-1974 and new gas, without foregoing its contractual right to purchase that gas, while simultaneously continuing to purchase the cheaper pre-1975 old gas. The applicant suggests that the Commission prevent such a situation from arising by providing that the contract is automatically terminated whenever the purchaser discontinues any purchases. The Commission believes that the applicant's concern is unjustified. If the purchaser terminates purchases of any gas, the terms of the existing contract no longer apply to that gas and the producer may sell that gas to another party.[247] It is true that the purchaser's termination of purchases of some gas does not affect the producer's obligation to sell to the purchaser all other gas covered by the contract. However, the producer has the right under the good faith negotiation rule to request the purchaser to nominate a price with respect to any old gas. If dissatisfied with the price nominated, it may abandon sales of that gas. Accordingly, there is no reason to believe that a pipeline would be able to selectively terminate purchases of high-cost gas but require the producer to continue sales of cheap old gas.

g. *Operation of the good faith negotiation rule with respect to multiple working interest owners, natural gas processing plants, and advance payment contracts.* Four applicants request that the Commission clarify the operation of the good faith negotiation rule when a number of persons own undivided interests in a lease, yet all the gas is sold under single a contract to the purchaser. Before discussing this issue, the Commission observes that multiple working interest owners generally enter into an operating agreement governing the operation of their lease. The operating agreement names one of their number or a third party as the operator of the lease. In the operating agreement, some working interest owners may authorize the operator to enter into sales contracts on their behalf. These owners thus do not sign the sales contract [248] and are referred to as non-signatory co-owners of the lease. Other working interest owners, however, do not authorize the operator to contract on their behalf, but join in and sign the same contract signed by the operator. These owners are referred to as signatory co-owners of the lease.

One producer applicant [249] requests that the Commission clarify that the operator's nomination request in step 1 affects only its working interest and not those of the non-signatory parties represented by it. This applicant is concerned that an operator's step 1 nomination request might permit the purchaser in step 2 to bring to the bargaining table all its contracts with a non-signatory co-owner, even though that owner did not desire to initiate good faith negotiation with respect to the first contract or any other contract. Another producer applicant [250] requests that the Commission clarify that each signatory co-owner may proceed separately under the good faith negotiation rule. In addition, it states that, where only one signatory co-owner initiates good faith negotiation the purchaser should not be able in step 2 to bring to the bargaining table the gas of any other co-owner even though that gas is sold under the same contract as the first co-owner's. Two pipeline applicants, however,[251] ask that the Commission state that where there are multiple working interest owners, all must initiate good faith negotiation together or not at all. Otherwise, they claim, pipelines will be faced with difficult operational problems if one co-owner obtains abandonment under the good faith negotiation rule and sells to a third party but other co-owners continue to sell to the pipeline. Another pipeline applicant [252] simply requests clarification of how the good faith negotiation rule works when there are multiple working interest owners without taking a position as to how it should work.

The Commission recognizes that the good faith negotiation rule, as adopted in Order No. 451, is ambiguous concerning the rights of multiple working interest owners. Accordingly it

[244] NI-Gas at 18.

[245] *See* discussion *supra* in the last two paragraphs of IV. F. 2. c above.

[246] Amoco at 8.

[247] *See* §§ 270.201(f) (4) and (5).

[248] The sales contract may indicate that the operator is acting on their behalf and name them.

[249] Indicated Producers at 27.

[250] Samson at 5–6.

[251] Panhandle and Trunkline at 16.

[252] Tennessee at 34.

has amended the rule to clarify these rights as explained below.[253] Generally any co-owner of a lease with a direct contractual relationship with the purchaser and may initiate good faith negotiations separately without implicating the gas of other co-owners. A co-owner who has authorized another to contract on his behalf has no direct contractual relationship with the purchaser and may not initiate the good faith negotiation procedures. Its gas becomes subject to good faith negotiation only through the good faith negotiations of the person contracting on its behalf. In other words, its gas is treated as if owned by that person.

Therefore, since each signatory co-owner has a direct contractual relationship with the purchaser, each may initiate good faith negotiations separately. If one signatory co-owner does so, then in step 2 the purchaser may bring to the bargaining table only that co-owner's gas, sold under the contract covered by the initial request or under other contracts containing old gas to which that co-owner is also signatory. Following completion of the three-step nomination procedure, neither the co-owner nor the purchaser may make further nomination requests under the good faith negotiation rule with respect to that co-owner's gas sold under any contract which either brought to the bargaining table. However, the other signatory co-owners may at any time make nomination requests with respect to their gas, and the purchaser will have the same rights with respect to their gas as it did with respect to the first co-owner's.

Non-signatory owners are treated differently since they do not have a direct contractual relationship with the purchaser. Because they have authorized the operations to contract on their behalf, they cannot make nomination requests under the good faith negotiation rule. However, any nomination by the operator must cover the gas of the non-signatory co-owners represented by it, as well as its own gas. When the operator makes a nomination request, the purchaser may in step 2 request that the operator nominate a new price both for its gas and that of any non-signatory co-owners sold under the contract brought to the bargaining table by the operator. The purchaser also may request that the operator nominate a price both for its gas and that of non-signatory co-owners sold under any other contract with the operator containing old gas. This includes the gas of non-signatory co-owners not included in the first contract. However, the purchaser cannot request that the operator nominate a new price for any other gas of the non-signatory co-owners not covered by a contract with the operator.

Following completion of the three-step nomination procedure, neither the operator nor the purchaser may make subsequent nomination requests under the good faith negotiation rule with respect to the gas of the operator and non-signatory co-owners sold under contracts which either the operator or purchaser brought to the bargaining table. However, other signatory co-owners may at any time make nomination requests with respect to their gas and the purchaser will then have the same rights with respect to their gas which it previously had with respect to that of the operator and the non-signatory co-owners. In short, the operator is treated like any other signatory co-owner except that the gas of the non-signatory co-owners on whose behalf it contracted is treated as if owned by the operator.

The operation of these procedures may be illustrated by the following example. Both old and new gas from three leases is sold to a single purchaser under three separate contracts. The operators and other working interest owners of the leases are as shown on the diagram in the margin.[254] Either A, B, or C may initiate good faith negotiation with respect to Lease 1. D and E, however, as non-signatory co-owners, may not make nomination requests with respect to that lease.[255] If B, as a signatory co-owner of Lease 1, requests that the purchaser nominate a new price for its old gas sold under the Lease 1 contract, the purchaser may request that B nominate a new price for any of B's gas sold under the Lease 1 and 3 contracts. It may not make a nomination request with respect to any other gas sold under these contracts. Nor may it make a nomination request with respect to B's gas sold under the Lease 2 contract, since B is only a non-signatory co-owner of that lease.

Any price agreed upon between the purchaser and B will apply only to B's gas. The existing price will continue to apply with respect to the other working interest owners' gas. Similarly, if B and the purchaser fail to reach agreement and one abandons sales or purchases, the abandonment will apply only to B's gas.[256] Neither B nor the purchaser may subsequently renegotiate the price of B's gas in Leases 1 and 3 under the good faith negotiation rule. However, all other gas remains subject to renegotiation under the good faith negotiation rule, including B's gas in Lease 2.

If A, as the operator of Lease 1, makes a nomination request with respect to old gas sold from that lease, it must make the request both with respect to its gas and to that of the non-signatory co-owners D and E. The purchaser may then request A to nominate a new price for A, D, and E's gas sold under the Lease 1 contract. It also may request A to nominate a new price for A, B, D, and F's gas sold under the Lease 2 contract since A is the operator of that lease. The purchaser may not make nomination requests with respect to any other gas sold under the Lease 1 and 2 contracts, since the remaining gas is owned by signatory co-owners not covered by A's original nomination request.[257] Finally, even though A and E are non-signatory co-owners of Lease 3, the purchaser may not request that A nominate a new price for any gas sold under the Lease 3 contract since A is neither the operator nor a signatory co-owner of that lease.[258] Likewise, the purchaser may not request that D nominate a new price for any gas sold under the Lease 3 contract since D was a non-signatory party to the Lease 1 contract nominated by A.

One applicant [259] requests that the Commission describe the operation of the good faith negotiation rule with respect to natural gas processing plants. It states that typically a number of producers sell gas to a processor under percentage of proceeds contracts and the processor then sells the gas to a pipeline under a separate contract. The

[253] Paragraph (a)(2)(iii) has been included in § 270.201, as revised, and the language now appearing in paragraph (a)(4) has been revised.

[254] The diagram is not printed in the Federal Register. A copy may be obtained from the Commission.

[255] Of course, E as a signatory co-owner of Lease 2 could request the purchaser to nominate a price for its gas sold under the Lease 2 contract. If it did that, the purchaser could not make a nomination request with respect to its gas sold under the Lease 1 and 3 contracts, since E is a non-signatory co-owner of those leases.

[256] While abandonment with respect to one working interest owner's gas may cause some operational difficulties, the Commission does not believe these difficulties to be insuperable. Split-stream sales are common. Thus, it should be possible for a working interest owner to sell its gas to a different purchaser than the other working interest owners sell to. In addition, producers can adjust production from wells. Therefore, if a working interest owner fails to find a new purchaser for gas released under the good faith negotiation rule, it should be possible to make the necessary adjustments in production to account for this.

[257] This is true even though the signatory co-owner of Lease 2 is E, one of non-signatory co-owners in Lease 1.

[258] If A were a signatory co-owner of Lease 3, the purchaser could request that A nominate a price for its gas covered by the Lease 3 contract.

[259] Samson at 8–7.

applicant asks specifically (1) whether the processor is a first seller that can initiate good faith negotiation and (2) whether the processor's nomination request would trigger a right by the pipeline in step 2 to bring to the bargaining table all its contracts with the behind-the-plant producers which contain some old gas.

A natural gas processor selling gas under the circumstances described is a first seller of natural gas.[260] Accordingly, it is entitled to request under the good faith negotiation rule that the pipeline nominate a new price for any old gas sold under its contract with the pipeline. The purchaser may in step 2 request that the processor nominate a new price for any gas sold under the contract covered by the processor's request and any other contract with the processor containing old gas. This includes new gas which the processor may buy from a behind-the-plant producer in a percentage of proceeds contract covering only new gas, so long as there is old gas in the processor's contract with the pipeline. However, the pipeline may not make a nomination request with respect to any gas sold by the behind-the-plant producers directly to the pipeline under separate contracts. The pipeline may only reach gas sold under contracts with the person who makes the step 1 request.

The behind-the-plant producers selling to the processor under percentage of proceeds contracts are in a position somewhat analogous to that of non-signatory working interest owners. They may not make a nomination request directly to the pipeline since they have no contract with the pipeline. In addition, they cannot initiate good faith negotiations with the processor, since they lack contractual authority to obtain a higher price from the processor. Their contracts permit them to collect only a particular percentage of what the processor collects from the pipeline. Thus, only the processor can initiate good faith negotiation with respect to the behind-the-plant producers' gas sold to the processor in a percentage of proceeds contract. The behind-the-plant producers will receive from the processor the agreed-upon percentage of whatever price the processor obtains from the pipeline for the relevant gas under the good faith negotiation rule or through voluntary negotiations.

A producer who sells directly to the pipeline but nevertheless has its gas processed in the natural gas processing plant would, of course, be in an entirely different position. Its rights would be more analogous to those of a signatory working interest owner. It could initiate good faith negotiations with the pipeline, and its rights would be unaffected by any good faith negotiation conducted by the processor with respect to its contract with the pipeline.

Finally, two applicants [261] ask that the Commission clarify the operation of the good faith negotiation rule with respect to advance prepayment contracts. Pursuant to the advance payment program, which was terminated in 1975, [262] the Commission permitted pipelines to enter into advance payment agreements with producers. Under such agreements the pipeline would make an advance payment to the producer for use in exploring for gas on specified acreage. The agreement generally dedicated to the pipeline all gas produced from the acreage and provided for repayment of the advance payment. Once gas was discovered, separate sales contracts were entered into between the producer and purchaser. The applicants request that the Commission clarify that where there are outstanding advance payments when gas is released under the good faith negotiation rule, the producer must repay those amounts. The applicant also states that some gas dedicated to a purchaser under an advance payments contract may have subsequently qualified for NGPA incentive prices and thereby become "new" gas. The applicant requests that the Commission nevertheless treat that gas as old gas for purposes of the good faith negotiation rule, apparently to ensure that purchasers may seek the renegotiation of that gas if the producer initiates good faith negotiation with the purchaser.

The Commission first observes that virtually all advance payments have already been repaid due to the deadlines for repayment the Commission established when it prohibited parties from entering into further advance payment agreements after December 31, 1975. This fact is reflected in current rate filings which show little or no advance payments in rate base. In any event, nothing in Order No. 451 negates or supersedes the requirements in the Commission's various orders concerning the advance payment program that these payments be repaid.[263] Such requirements remain applicable regardless of whether gas is released under the good faith negotiation rule.

Finally, the Commission sees no reason to treat gas dedicated to a purchaser under an advance payment agreement differently from any other gas. To the extent such gas has qualified for NGPA incentive or deregulated prices, it is subject to renegotiation under the good faith negotiation rule to the same extent as any other similar gas.

G. *Right of first refusal.* In Order No. 451, the Commission provided that, whenever any gas previously sold to a pipeline which has not accepted Order No. 436 is abandoned under this rule, the producer must give that pipeline's firm sales customers a right of first refusal before selling released jurisdictional gas to anyone else. If the producer packages the jurisdictional gas with other gas, the producer must give the firm sales customers a right of first refusal with respect to the entire package. The procedures established by Order No. 451 governing the right of first refusal generally track those governing the right of first refusal which NGPA section 315(b) requires sellers to give to existing purchasers of certain gas removed from the Commission's NGA jurisdiction.

In granting a non-Order No. 436 pipeline's firm sales customers a right of first refusal, the Commission observed that those customers may have relied on the pipeline's continued access to low-cost old gas pursuant to the producer's NGA service obligation. The Commission stated that the right of first refusal should enable the firm sales customers to purchase gas released under Order No. 451 at a price approximately equal to or less than the pipeline's WACOG. Thus, the firm sales customers' access to an adequate supply of gas at reasonable cost is protected.

Rehearing requests. Producers and some large end-users request that the Commission eliminate the right of first refusal given firm sales customers of non-Order No. 436 pipelines. The producer applicants' [264] primary contention is that the right makes difficult the marketing of their gas, since third parties are reluctant to bid for gas when the firm sales customers can take away any favorable deal they obtain. Producers and large end-users [265] also claim that the right unfairly discriminates against new customers and interruptible customers of the pipeline by giving the firm sales customers a preferential right to the gas.

[260] NGPA section 2(21), 15 U.S.C. 3301(21) (1982). *See also* 18 CFR 270.202(h) (1986).

[261] ANR and CIG at 10–11.

[262] 54 FPC 3046 (1975).

[263] FPC Order Nos. 410, 499, and Order Terminating Advance Payment Program, 54 FPC 3046 (1975).

[264] Indicated Producers at 17.

[265] PGC at 4.

Pipelines, distributors and consumer representatives generally seek expansion of the right of first refusal. Pipelines and some public service commissions from consuming States [266] request that the Commission grant pipelines a right of first refusal superior to their customers'. These applicants state that such a right would recognize the existing contractual commitment of the gas to the pipeline and the pipeline's reliance on that commitment to provide it adequate supplies to serve its customers. At the same time, however, producers could still obtain a market price for the gas. A right of first refusal for pipelines would also better protect the rights of all their customers, since all of them benefit from the pipeline's exercise of its right, whereas only particular firm sales customers benefit from the exercise of the right of first refusal as provided by Order No. 451. Also, a pipeline's right of first refusal allegedly would discourage producers from rejecting the pipeline's price nomination, and then arranging a short-term sale of the gas to a third party at a price lower than that offered by the pipeline, solely for the purpose of permitting it to abandon its service obligation to the pipeline. Some applicants, believing that the existing purchaser can only nominate a price change and not a change in other terms of the contract, state that a right of first refusal for pipelines would also give them an opportunity to obtain gas under the more favorable non-price terms generally offered today than when the pipelines originally purchased the gas. These include market-out rights.

Pipelines, distributors, and consumer representatives also request that the Commission extend the right of first refusal to the firm sales customers of Order No. 436, as well as non-Order No. 436, pipelines.[267] They state that the Commission's rationale for according that right to the customers of non-Order No. 436 pipelines applies equally to the customers of Order No. 436 pipelines. Both sets of customers relied on their pipeline's continued access to the old gas dedicated to it as assuring access to an adequate supply of gas at reasonable prices. The applicants disagree with the Commission's contention that the customers of an Order No. 436 pipeline have less need for the right of first refusal since they "could purchase gas from any producer connected to that pipeline and have the gas transported to them." [268] The applicants state that, unlike the Order No. 451 right of first refusal, Order No. 436 does not give firm sales customers any right to purchase gas from producers connected to the pipeline, but only transportation authority for the pipeline. In fact, one applicant contends that the customers of the Order No. 436 pipeline may have a greater need for the right of first refusal since the pipeline may have less ability to nominate a high enough price because its system supply sales will be under such intense competitive pressure from off-system spot gas. Finally, the applicants state that a right of first refusal is a valuable right, since it allows the customer to avoid the time and expense of finding a seller and negotiating from scratch an agreement with it. Rather, the purchaser can exercise the right of first refusal and be relatively confident that it is purchasing the gas at the best available market price. Applicants state that it is unfair to grant such a valuable commercial right to some firm sales customers and not others solely on the basis of whether their pipeline has accepted Order No. 436.

Order No. 451 provides that if several firm sales customers accept a third party offer, the producer has discretion to determine to which it will sell. Some pipelines, distributors, and consumer representatives [269] contend that this right improperly allows the producer to discriminate among the customers. They state a producer will likely choose to sell to large firm customers instead of smaller customers. The larger customers with greater need for gas are a more desirable market. In addition, if the producer is a pipeline affiliate, it may sell to fuel-switchable customers, rather than the pipelines' firm sales customers who must buy the affiliated pipeline's system supply in any event. One applicant [270] proposes that the Commission provide that full requirements firm sales customers shall have priority over all other firm sales customers in the exercise of the right of first refusal.

Commission response. The Commission rejects proposals by producers and large end-users to eliminate the right of first refusal. The Commission continues to believe that giving firm sales customers of non-Order No. 436 pipelines that right is desirable in order to protect their continued access to adequate supplies at reasonable costs since they relied on the pipeline's continued access to such gas under its service obligation. Thus, the right of first refusal supports the Commission's decision to grant abandonment to producers under section 7(b) of the NGA, if the producer and pipeline fail to reach agreement under the good faith negotiation procedures.

The Commission does not believe that the obligation to give firm sales customers this right unduly burdens producers. NGPA section 315(b) already requires that producers grant a similar right to the existing purchaser for certain gas removed from the Commission's NGA jurisdiction. The producer's obligations under section 315(b) have not had a significant adverse effect on producers' ability to market their gas by discouraging third parties from bidding for the gas. There appears no reason why the right of first refusal obligation imposed by Order No. 451 should have a more significant adverse effect. It is of course true, as pointed out by Indicated Producers,[271] that many pipelines have large numbers of firm sales customers and therefore a producer may, after arranging a sale to a third party, have to give the right of first refusal to many persons. The Commission recognizes that this may place some administrative burdens on the producer. However, the Commission believes that these burdens are mitigated by the requirement that pipelines provide producers with the names and addresses of their firm sales customers. The Commission believes that any burdens on producers from granting the right of first refusal are outweighed by the need to provide firm sales customers the protection afforded by that right.[272] Finally, the Commission rejects the contention that granting the right to firm sales customers unfairly discriminates against new and interruptible customers. As explained

[266] ANR and CIG at 14; Arkla at 16; Florida Gas at 23; Tennessee at 22; Northwest Central at 47; California PUC at 29; N.Y. PSC at 16; Kentucky PSC at 3.

[267] Missouri PSC at 9; PG&E at 6; Minnesota DPS at 8; NDG at 15; Cal. PUC at 29; NI-Gas at 21; SoCal at 7; El Paso at 11; INGAA at 17; Missouri PSC at 8; KP&L *et al.* at 29; ANR and CIG at 16; Arkla at 17; ACD at 16; Northwest Central at 52; AGA at 38; APGA at 61.

[268] 51 FR at 22207.

[269] APGA at 61–62; ACD at 11–12; Missouri PSC at 9; MPC/NASUCA at 23; Arkla at 19–21.

[270] Arkla at 20.

[271] At 18.

[272] Indicated Producers (at 18) also contends that the right of first refusal granted by Order No. 451 may act as a disincentive for pipelines to accept Order No. 436. It states that the present good faith negotiation procedures may "allow non-Order No. 436 transporters and their customers to lock-up old gas while selectively discontinuing the purchase of high-cost supplies." The Commission rejects this argument. Obviously, there are a vast number of factors a pipeline must consider in determining whether it is advantageous for it to become an Order No. 436 pipeline. This one-sentence assertion, unsupported by any analysis, does not convince the Commission that the right of first refusal under Order No. 451 provides an advantage to pipelines rendering them less likely to accept Order No. 436.

above, the firm sales customers may have relied on the pipeline's continued access to old gas pursuant to the producer's NGA service obligation as insuring their access to an adequate supply of gas at reasonable prices. An interruptible customer could not similarly rely on access to the pipeline's old gas since, as an interruptible customer, it was subject to loss of that gas in any event. A new customer obviously never relied on the pipeline's access to the old gas.[273]

The Commission now turns to the contentions of various applicants that the right of first refusal should be modified. First, the Commission rejects the proposal that pipelines be granted a right of first refusal. Pipelines already have an adequate opportunity to negotiate for continued purchases of the old gas under the good faith negotiation rule, a right that their firm sales customers lack. Furthermore, granting a pipeline a right of first refusal would remove any incentive it has to negotiate in good faith under the good faith negotiation rule. Since that rule requires that in the absence of agreement producers continue sales to the existing purchaser at the existing price until the producer finds another purchaser, a pipeline with a right of first refusal would have every incentive to nominate an unreasonably low price, comfortable in the fact that if the price was rejected and the producer found another purchaser willing to pay a higher market price the pipeline could then exercise its right of first refusal. Thus, as a practical matter, granting pipelines a right of first refusal could largely sabotage the proper operation of the good faith negotiation rule. Furthermore, it is not necessary, as argued by some applicants, to grant this right to pipelines in order to give them an opportunity to obtain relief from unfavorable non-price terms in the existing contracts. As stated in the previous section, the pipeline may in its price nomination propose changes in any other term of the contract.

The Commission also rejects the proposal that the right of first refusal be extended to the firm sales customers of an Order No. 436 pipeline. Those customers do not have the same need for the right as the customers of a non-Order No. 436 pipeline. Order No. 451 provides the customers of a non-Order No. 436 pipeline only limited transportation rights over that pipeline. They can obtain transportation only of gas formerly sold to the pipeline and released under the good faith negotiation rule. The customers of an Order No. 436 pipeline, by contrast, have much broader transportation rights. They can obtain transportation of any gas whether or not formerly sold to the pipeline or released under the good faith negotiation rule. Thus, there is less need to protect their access to the released old gas formerly sold to the pipeline.

Even assuming applicants are correct that the cost of an Order No. 436 pipeline's system supply may be more likely to increase than that of a non-Order No. 436 pipeline, the customers of the Order No. 436 pipeline are adequately protected by their ability to purchase non-system supply gas and obtain transportation. Finally, while, as some applicants point out, the right of first refusal may be a valuable commercial right, the Commission believes it should grant that right only to those with a need for it. As already discussed, the firm sales customers of an Order No. 436 pipeline do not need that right.

The Commission also refuses to alter the provision that, when more than one firm sales customer exercises its right of first refusal, the producer may in its discretion determine to which it will sell. The Commission is not convinced that the discrimination alleged by various applicants will occur. Any attempt to establish a priority system governing the producer's selection of the firm sales customers to which it will sell would complicate the rule and place additional administrative burdens on the parties. Therefore, the Commission is reluctant to establish such a system.

One applicant [274] requests that the Commission clarify that gas not released under the good faith negotiation rule, and thus not subject to the right of first refusal, may not be included in the agreement with a third party offered to the firm sales customers for their right of first refusal. The applicant is concerned that otherwise a producer and third party might include a large amount of unreleased gas in the third party agreement in order to preclude acceptance by most firm sales customers who have no need for so much gas. The Commission agrees that the offer to the third party must include only gas released under the good faith negotiation rule in order to avoid circumvention in the manner suggested by the applicant. In Order No. 451, the Commission did provide that where the offer to the third party encompasses "non-jurisdictional, as well as jurisdictional gas, the right of first refusal will apply to the entire offer." The non-jurisdictional gas referred to was intended to include only non-jurisdictional gas released under the good faith negotiation rule.

The same applicant also requests that the Commission clarify that where a pipeline and a local distribution company are divisions of the same corporation and no sales contract exists between the two, the local distribution company should nevertheless be considered a firm sales customer of the pipeline division for purposes of the right of first refusal. The Commission agrees. If the two were separate but affiliated corporations, the local distribution company would fall within the definition of firm sales customer. There appears no reason to distinguish between the two situations.

Another applicant [275] requests that the Commission clarify whether a firm transportation customer of the pipeline has a right of first refusal. It does not. That right is limited to firm *sales* customers, those being the customers who relied on the pipeline's access to old gas as ensuring their access to adequate supplies at reasonable cost.

One other applicant [276] requests that the Commission lengthen the 20-day deadline for firm sales customers to accept or reject the third party offer. The applicant contends that the 20-day period provides no opportunity to bargain with the producer. There is no need to provide such opportunity since under the regulations governing the right of first refusal the customer must either accept or reject the offer. Any counteroffer constitutes a rejection. The 20-day response period is the same period provided under the regulations governing the section 315(b) right of first refusal. The Commission is not aware that 20 days has proven too short under section 315(b).

Finally, the Commission addresses the relationship between the existing purchaser's section 315(b) bona fide offer and right of first refusal rights and their customers' Order No. 451 right of first refusal. Section 315(b) requires that when a contract for the sale of NGPA section 102(c), 103(c), or 107(c)(1)–(4) gas

[273] The Commission also rejects PGC's alternative proposal for protecting firm sales customers' access to low-cost old gas without giving them a right of first refusal (at 4–7). That proposal is to give the firm sales customers exclusive rights to purchase the gas for thirty days after its release. However, thereafter the producer would be free to sell to anyone else unencumbered by any right of first refusal. The Commission does not believe this proposal gives adequate protection to the firm sales customers. A producer could simply refuse to negotiate with them and then sell to another purchaser after 30 days.

[274] Arkla at 22–23.

[275] ANR and CIG at 28.

[276] APGA at 63.

which was subject to the Commission's NGA jurisdiction on the day before enactment of the NGPA expires or is terminated, the seller must give the existing purchaser a bona fide offer and right of first refusal before selling to a third party. One applicant [277] claims that the Commission has not made any provision in the good faith negotiation rule for the original purchaser's section 315(b) rights.

It is true that on occasion the existing purchaser may have rights under section 315(b) after release of gas under the good faith negotiation rule. Such rights would, of course, arise only with respect to non-jurisdictional sections 102(c), 103(c), and 107(c)(1)-(4) gas released by the pipeline since that is the only gas to which section 315(b) applies.[278] Where such rights do arise in the context of the good faith negotiation rule, the Commission believes that the producer's nomination of a price for the relevant gas in response to the purchaser's step 2 request constitutes the bona fide offer required by section 315(b), and no additional bona fide offer need be given. However, the producer must still give the existing purchaser its right of first refusal with respect to released sections 102(c), 103(c), and 107(c)(1)-(4) gas dedicated to interstate commerce on the day before enactment of the NGPA pursuant to the procedures set forth at § 277.206 of the Commission's regulations. There is, however, no overlap between the section 315(b) and Order No. 451 rights of first refusal. According to the usual practice, the producer must offer only the gas covered by section 315(b) to a third party and present any offer substantially accepted in principle to the original purchaser. In order to comply with § 277.206 the producer must either (1) sell the gas to the third party under the terms of an offer rejected by the original purchaser or (2) sell the gas to the original purchaser.[279] Thus, the gas covered by section 315(b) will never be available for packaging with released jurisdictional gas in a third party offer covered by the Order No. 451 right of first refusal.

H. Blanket Sales Certificates

In Order No. 451, the Commission promulgated a new regulation, 18 CFR 157.301, granting producers blanket authorization to sell gas abandoned under the good faith negotiation rule for resale in interstate commerce. Section 157.301 also provides pre-granted abandonment authorization to discontinue sales of gas upon termination of a contract of sale, requires annual reports of sales initiated under the blanket certificate during the preceeding calendar year, and waives rate filing requirements for sales under the blanket certificate.

In their request for rehearing ANR Pipeline Company (ANR) and Colorado Interstate Gas Company (CIG) state that the order appears to require that the abandoned gas *must* be sold for resale in interstate commerce.[280] ANR and CIG assert that such a limitation on the sale of abandoned gas is desirable to assure continued gas supply to the interstate market, and request a clarification from the Commission that the sales of the abandoned gas are so limited. Florida Gas Transmission Company and Transwestern Pipeline Company, on the other hand, argue that the Commission lacks jurisdiction over sales of abandoned gas, except for certain gas from the Outer Continental Shelf (OCS), and seek a Commission declaration that the blanket sales authority granted under the new § 157.301 is only required for such sales, and that abandoned gas can otherwise be sold free from Commission regulation.[281]

None of these applicants correctly stated the effect of abandonment under the good faith negotiation rule. When a producer abandons sales of gas under the rule, the producer is free to sell the abandoned gas to whomever it chooses—whether to an end-user, an interstate pipeline, an intrastate pipeline, or a marketer. A limitation on the sale of abandoned gas to the interstate market, as requested by ANR and CIG, would not be good policy. The Commission sees no need to erect a regulatory barrier to movement of the abandoned gas in response to market forces, or to perpetuate the dichotomy between the interstate and intrastate gas markets that Congress sought to eliminate in passing the NGPA.

Under section 7(c) of the Natural Gas Act, sales of natural gas for resale in interstate commerce require certificate authority from the Commission. Although section 601(a) of the NGPA removed certain gas from the Commission's NGA jurisdiction, some of which may be released under the good faith negotiation rule, the only released gas which needs and therefore receives abandonment authority under the rule is the gas which has not been removed from the Commission's NGA jurisdiction. Therefore, since the gas which is abandoned under the good faith negotiation rule has not been removed from the Commission's NGA jurisdiction, the sale of such gas for resale in interstate commerce requires NGA certificate authority. The new § 157.301 grants that authority. No certificate authority is needed for any other sales of the abandoned gas or for sales of gas released under the rule which has been removed from the Commission's NGA jurisdiction.

Tennessee Gas Pipeline Company asks if the blanket certificate authority granted by § 157.301 is limited to the first sale of the abandoned gas, or if is it applicable to all subsequent sales of such gas.[282] The blanket certificate authority under § 157.301 applies to any sale of the abandoned gas by the party who received abandonment authority under the good faith negotiation rule. Thus, if abandoned gas has been sold under the authority of § 157.301 and such sales have then been abandoned under § 157.301(b) (pre-granted abandonment), subsequent sales from the same wells or leases may also be made under § 157.301. However, the sales authority of § 157.301 is available only to the first seller (or its successor) who has abandoned sales of the gas under the good faith negotiation rule. A reseller who purchases such gas must have its own certificate authority to sell the gas for resale in interstate commerce.

Indicated Producers request the Commission to extend the due date for reports of sales made under the authority of the blanket certificate from March 1 to June 1, asserting that data relating to sales during the latter months of the preceding calendar year will frequently not be available from wells operated by other parties and from gas processing plants until several months after the end of the year.[283] The Commission will extend the due date of such reports until April 1 because it appears that some additional time is warranted. If relevant data is not available to a producer until after April 1, an amended report should be filed.

Kansas Power and Light Company *et al.* (KP&L et al.) argue that the Commission erred by failing to provide a hearing before granting blanket sales

[277] APGA at 59.

[278] The fact the purchaser terminated the contract would not deprive it of its section 315(b) rights. *See* Order No. 95-A, FERC Stats. and Regs. ¶ 30,690 (1986) at 30,164-65.

[279] Section 277.204(b).

[280] ANR and CIG at 27.

[281] Florida Gas at 12-15; Transwestern at 6-10. Florida Gas and Transwestern's position on this issue is not entirely clear. They may be arguing that the sale of abandoned gas requires certificate authority only if the sale is for resale in interstate commerce, *i.e.*, a jurisdictional sale under the NGA.

[282] Tennessee at 34.

[283] Indicated Producers at 32.

authorization under § 157.301 because Section 7(c) of the NGA requires that a hearing be held before issuance of a certificate of public convenience and necessity.[284] The Commission believes that the opportunities afforded in this proceeding for comments, reply comments, public hearing, and requests for rehearing satisfy the hearing requirement of section 7(c).[285] The Commission has already found that sale of the abandoned gas for resale in interstate commerce by a producer already authorized to sell the gas to an existing interstate purchaser is in the public interest. A requirement of additional hearings on individual applications for authority to sell such abandoned gas would be unnecessary and impose a detrimental regulatory barrier to the continued movement of the gas in the interstate market, especially since producers have the option to sell the abandoned gas elsewhere without a certificate.

I. Transportation Authority

In the final rule the Commission noted the concern of many commenters that pipelines may release gas under the good faith negotiation rule but then refuse to provide transportation to another purchaser. Since a pipeline which can refuse to transport the released gas to an alternative market is in a position to extract unreasonable concessions from the producer to the detriment of the market generally, or even to refuse to negotiate at all, the Commission acted pursuant to its NGA section 5(a) and other statutory authority to prevent such forms of undue discrimination. Accordingly, the Commission provided for the availability of transportation services by pipelines not subject to the open-access provisions of Order No. 436. The transportation service was authorized to any of the releasing pipeline's existing customers (whether firm or interruptible, sales or transportation customers) and to any interconnecting pipeline. This transportation requirement was a condition on the right of the existing pipeline purchaser to terminate purchases of gas from a first seller under the rule, and on the pipeline's right to nominate contracts or volumes of gas other than those nominated by the producer.[286] The limited transportation requirement assures that the pipeline's existing customers, especially firm sales customers, have continuing access to their original gas supply, and that released gas will find a ready market. The Commission noted that the transportation authorization would ensure that the released gas under the new ceiling price would be brought to market, would serve the public convenience and necessity under NGA section 7, prevent undue discrimination in violation of NGA section 5(a), and would thereby lower prices for all consumers and ensure the just and reasonable operation of the new ceiling price.[287]

In order to avoid regulatory cost to the pipeline, or unnecessary delay in achieving market-responsive benefits to consumers, the Commission provided a blanket transportation certificate under section 7(c) of the NGA to jurisdictional pipelines not already transporting under Order No. 436.[288] The Commission stated that refusals to transport would be scrutinized carefully under the Natural Gas Act and other applicable law.

Requests for rehearing. Several pipelines and others have challenged the grant of transportation authority and the transportation requirement in the rule, alleging that these provisions are outside the scope of the Commission's authority under the Natural Gas Act and NGPA.[289] Such applicants characterize the transportation provisions in the rule as an unlawful imposition of common carrier status on unwilling pipelines. Tennessee and KN Energy both devote several pages of their rehearing applications to a discussion of the legislative history of the Natural Gas Act and the specific language of section 602(b)(2) of the NGPA, to support the proposition that Congress provided that "[n]o person shall be subject to regulation as a common carrier . . . by reason of any transportation . . . authorized by the Commission under section 311(a) of this Act." 15 U.S.C. 3371(a) (1982).[290] The Commission rejects the argument that Order No. 451 subjects transporters to common carrier regulation. Rather, the transportation requirement is a case-specific-requirement arising out of the particular circumstances of individual pipelines, their certificate obligations, and their duty not to discriminate unduly. Some of the applicants also argue that the transportation authority and new ceiling price are so "of one piece" that if the transportation provisions are held to be legally flawed or to require modification, the new ceiling price would become unjust and unreasonable.[291]k

Producers and large industrial consumers of natural gas consider the transportation requirements fully supportable under applicable statutes and Commission precedents, but believe the transportation authorization is too narrow in scope.[292] These applicants urge that the transportation authority be broadened to include intermediate upstream or downstream pipelines if the rule is to have the optimum desired effect of increasing market responsiveness in the natural gas industry.[293] Others suggest that intrastate pipeline transportation should be included,[294] or that the authorized transportation should cover Order No. 436 (open access) pipelines to ensure that transportation of released gas to new purchasers will be adequate.[295]

Commission response. We disagree with the applicants alleging that the transportation authority promulgated in Order No. 451 is beyond the Commission's statutory authority. The transportation obligation placed on a pipeline in certain circumstances is supported by statute and case law, as discussed *infra*.

The statutory provisions relevant to the Order No. 451 transportation requirement include NGPA sections 104, 106, and 501,[296] and Natural Gas Act

[284] KP&L et al. at 18.

[285] *See* Area Rates for the Appalachian and Illinois Basin Areas, 44 FPC 1112 at 1117–1120 and 1132 (1970).

[286] See 18 CFR. 270.201(h).

[287] The Commission found that "failure to condition [avoidance of] the new ceiling price with a transportation provision would cause the new ceiling price to be unjust and unreasonable under section 5(a) of the NGA," insofar as the gas would not be brought to market. 51 FR 22213 (June 18, 1986). This has been apparently misconstrued by some petitioners as an indication that the new ceiling price is somehow not within the zone of reasonableness absent the transportation requirement. This issue is discussed *infra*.

[288] *See* Order No. 451, Appendix B, for pipelines already indicating intent to provide non-discriminatory transportation at the date of issuance. 51 FR 22222–23 (June 18, 1986). Pipelines transporting Gas under the blanket certificate would not become subject to the open-access requirements of Order No. 436 (18 CFR 284.8(b) and 284.9(b)) solely by reason of such transportation. Moreover, when requested by the first seller to provide transportation, intermediary pipelines not subject to Order No. 436 open-access requirements, and upstream from the pipeline releasing gas under the rule, may use the separate transportation certificate under section 7(c) of the NGA provided by new § 284.226.

[289] *See, e.g.*, APGA at 63–68; ACD at 12; and ANR and CIG at 5–6; Florida Gas at 6–12; Texas Eastern at 21–22; MPC/NASUCA at 33–34.

[290] Tennessee at 25–28; KN at 20–25.

[291] *See e.g.*, KP&L *et al.* at 9–10; Southern Natural at 12.

[292] Indicated Producers, PGC.

[293] *See, e.g.*, Indicated Producers at 18–24, PGC at 7–9.

[294] IPAA at 5.

[295] Amoco at 3.

[296] 15 U.S.C. 3314, 3316, and 3411 (1982).

sections 5, 7, and 16.[297] In particular, section 5(a) and its interaction with these other provisions is the central focus of our statutory authority here. Section 5(a) provides that when the Commission finds that

any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order . . . .

15 U.S.C. 717d(a) (1982). Certain applicants simply ignore these relevant statutory provisions and instead focus on NGPA section 311.[298] No "common carrier" status has been mandated that would contravene NGPA section 602(b)(2). Rather, the statutory authority for the essential transportation requirement is found in sections 5(a) and 7 of the Natural Gas Act (NGA), and the general grants of authority in the NGA and NGPA, namely, NGA section 16 and NGPA section 501(a),[299] in conjunction with NGPA sections 104(b)(2) and 106(c).

Some applicants challenge the Commission's power to condition rates under NGPA sections 104(b)(2) and 106(c) and NGA sections 5(a) and 7.[300] As previously emphasized, the Commission's authority here derives from a harmonious interrelationship of NGA section 5 with sections 7 and 16, not from any of them in isolation.

Other applicants acknowledge that the Commission has such authority that may be used to effect access to gas, but argue that the Commission overreached its authority in this instance.[301] These applicants contend that it constitutes an abuse of the Commission's discretion to preserve the pipeline purchaser's transportation obligation as part of the good faith negotiation procedures. This is simply a plea to substitute these applicants' judgment of what requirements are in the public interest for the Commission's. This suggestion is rejected because the Commission finds the public interest will be served by the transportation obligation—by the protection of the existing firm customers and the continuance of the flow of gas to the market—and this is integral to the functioning of the rule.[302] The Commission therefore confirms that the rule, *as promulgated*, benefits all participants in the process—consumers, transmission and distribution companies, and producers—and declines to remove the important transportation obligation from releasing pipelines.

KN and others appear to misapprehend the interrelationship between the Commission's authority to establish just and reasonable rates for the transportation and sale of natural gas under NGA section 5, the new just and reasonable ceiling price, and the transportation requirement. Certain language in the order may be the source of the misapprehension. Accordingly, the Commission would note that its statement that the "failure to condition the new ceiling price with a transportation provision would cause the new ceiling price to be unjust and unreasonable under section 5(a) of the NGA," [303] merely reflects its conclusion that failure to condition avoidance of the new just and reasonable ceiling price on the availability of transportation would cause the new ceiling price to become unjust and unreasonable under section 5(a) of the NGA, insofar as the gas would not be brought to market, the market-responsive benefits of the rule would not be achieved, and the rights of first refusal granted to firm sales customers would be frustrated in operation. Thus, the focus of the transportation provision is not on price *qua* price, but on the essential need to get the gas to market.

There was, in short, no intention to imply that the new just and reasonable ceilinc price is outside the "zone of reasonableness" absent transportation. Rather, the price bid for the section 104 or 106 gas, whether up to the new ceiling or below it, will elicit neither the supply nor price response which is the underlying purpose of the rule, if the gas cannot be brought to market. In that case, the new "just and reasonable" ceiling price would be the product of a meaningless exercise, since lacking the ancillary but integral transportation the gas would have much greater difficulty reaching the market, and the benefits of the rule would be commensurately delayed or curtailed. Furthermore, the significant role of the right of first refusal in protecting firm sales customers and consumers would be frustrated directly and completely without the availability of transportation. In the absence of assured transportation, the right of first refusal would be a hollow gesture, because it could not operate without a separate, contestable transportation authorization. Consequently, the Commission would be seriously constrained in its analysis of the just and reasonable result without the availability of transportation.[304]

As one court has stated, " 'just and reasonable' is merely a term of art for the public interest. . . ." [305] No one

[297] 15 U.S.C. 717d, 717f, and 717o (1982).

[298] They state that while section 311(a)(1) of the NGPA permits the Commission to authorize interstate pipelines to provide interstate transportation for local distribution companies and intrastate pipelines, section 602(b)(2) of the NGPA provides that no person shall be subject to regulation as a common carrier by reason of any section 311(a) transportation. However, the transportation policy of Order No. 451 is not predicated on NGPA section 311(a).

[299] Section 16 of the NGA provides that "[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act." 15 U.S.C. 717o (1982). Section 501(a) of the NGPA provides that "[t]he Commission . . . is authorized to perform any and all acts (including any appropriate enforcement activity), and to prescribe, issue, amend, and rescind such rules and orders as it may find necessary or appropriate to carry out its functions under this Act." 15 U.S.C. 3411(a) (1982).

[300] *See, e.g.*, APGA at 64 n.2, ("section 5(a) contains *no express authority to order transportation*") quoting Order No. 436, FERC Stats. & Regs. ¶ 30,665, p. 31,500 (1985) (emphasis in the original); and APGA at 67 ("the Commission cites its conditioning power under NGPA sections 104(b) and 106(c) as statutory authority authorizing it to impose a mandatory transportation obligation . . . [but] cites no legislative history or case law to support this assertion . . . .")

[301] *See e.g.*, Northern Natural at 25 ("To the extent conditions may be attached to an exercise of this authority at all, these conditions may extend only to the regulated entities that are *changing* the rates" (emphasis in original)). Yet, the pipeline ceasing purchase of high-cost gas (or any gas for that matter) under Order No. 451 is effectively changing its rates as well. INGAA at 13–14 takes a slightly different tack. While acknowledging the Commission's conditioning power, INGAA objects to the transportation provision. ("While INGAA disagrees with the assertion by the Commission of an authority to require pipelines to transport gas, we do not doubt generally that the Commission's conditioning authority can lawfully affect the access of deregulated gas into interstate commerce," *citing* FPC v. Transcontinental Gas Corp. 365 U.S. 1 (1961). *See also* Tennessee at 28–30. Tennessee acknowledges that where "the purchaser will have been granted a valuable right . . . the condition may be lawfully attached." Tennessee at 30.

[302] Because transportation is being required pursuant to NGA sections 5, 7, and 16 the rule is changed by deleting the phrase "deemed to agree" and conforming changes are made at §§ 270.201(h) and 284.225(a) of the regulations.

[303] 51 FR 22213 (June 18, 1986).

[304] This distinguishes Order No. 451 from Opinion No. 245 cited by some petitioners in support of recission of the transportation authorization. Felmont Oil Corporation and Essex Offshore, Inc., 33 FERC ¶ 61,333 (1985), *reh'g denied*, 34 FERC ¶ 61,296 (1986), petition for review pendinq *sub nom.* Consolidated Edison Company of New York, *et al.* v. FERC, D.C. Cir. Nos. 86–1168 *et al.* In Opinion No. 245 the Commission was concerned solely with crafting a proper limited term abandonment so as to protect the rights of all of the several parties in a single abandonment proceeding. Under Order No. 451, however, omission of transportation access would, as discussed in the text, undermine the just and reasonable result.

[305] Pennzoil Co. v. FERC, 645 F.2d 360 at 392 n.27 (5th Cir. 1981).

should misapprehend any language in Order No. 451 as a statement that the new alternative ceiling price under NGPA sections 104 and 106 is not prescribed in the public interest, and just and reasonable as within the reasonable range of replacement costs. However, newly priced gas must be keyed to the availability of transportation, or the market-responsive benefit of the rule would be lost, and the public interest benefits of the new ceiling price also lost. It is in this sense that the new ceiling is only just and reasonable in conjunction with the accompanying transportation provision.

The facilitation of market-responsive pricing undertaken in Order No. 451 by continuation of the transportation requirement for released gas under the Order No. 451 procedures fully comports with NGA and NGPA goals of adequate supply at a reasonable cost. By requiring a pipeline to continue to provide transportation for released volumes, the pipeline is prevented from unduly discriminatinq against the existing seller and harming competition by denying a producer transportation and thereby blocking the benefits of the final rule.[306] The Commission's authority serves as a "first line of defense" against anticompetitive practices.[307]

Nor must the Commission make specific findings for each pipeline; it can exercise its authority under NGA sections 5(a), 7, and 16 generically as it did here.[308] While the seller's side of the wellhead market is workably competitive, considerable evidence suggests that pipeline buyers in the wellhead market have significant market power. Recent studies by EIA [309] and Broadman,[310] for example, reach this conclusion.

In the final rule, the Commission is using its section 5(a) authority to require that the blanket transportation authorization established by the rule be utilized by the former pipeline purchaser. This is, in effect, a continuation of the pipeline's existing service obligation to move the gas to market.[311] If a pipeline refuses, without Commission authorization, to *continue to* transport the volumes of gas its facilities were dedicated to transport, under the circumstances of this rule, that will be considered an unauthorized abandonment, separate and apart from the seller's abandonment of the "sale".[312] The pipeline's abandonment must be considered in light of its "obligation, deeply imbedded in the law, to continue service." [313] This is particularly apposite in the context of the good faith negotiation procedures, should the pipeline's existing firm sales customers—those for whose benefit the facilities were certificated and whose rates supported those facilities—exercise their right of first refusal and purchase the released gas. It is also important so that producers will have market access for these certificated gas supplies.

This Order No. 451 transportation requirement then is not "common carriage" as argued by some commenters. Rather, it is a requirement that in particular circumstances the former pipeline purchaser must utilize the blanket transportation authorization granted under the rule, because it is not being relieved of its existing obligation to move the gas, in order to further the Commission's goals under NGA section 5(a) of protecting existing customers, moving gas to market, and achieving the just and reasonable benefits of the rule.

A number of petitioners note the Commission's authority to direct extension or improvement of transportation facilities under NGA section 7(a).[314] Yet Order No. 451 is not grounded on the exercise of NGA section 7(a) authority and thus allegations of exceeding that authority are misplaced. No extension, improvement, or establishment of facilities occurs under Order No. 451. Rather, existing facilities are likely to be used as they were before, only the business relationships of the parties will have been changed. Accordingly, citations to section 7(a) cases in support of the proposition that the Commission cannot impose transportation obligations are not on point,[315] since under Order No. 451, the Commission is exercising its section 5(a) authority (in conjunction with the other statutory bases discussed herein).

Nor is there any violation of the "able and willing" requirement of NGA section 7(e),[316] as argued by some commenters.[317] If a pipeline elects to bid a lower price than the price which it is obligated to pay under the existing contract and to accept the right to counternominate higher priced old gas (above market levels) in old gas contracts and high-cost gas in multi-vintage contracts for possible reduction, the purchaser signals that it will seek to abandon purchases of that gas if its price terms are not met. If a purchaser is willing and able to purchase and transport gas sold under the producer's certificate, (a finding which was made by the Commission in granting the certificate in the first place,) the Commission finds as a matter of law that the purchaser remains "able and willing" to continue transporting gas released under Order No. 451. The pipeline cannot simply refuse to transport the gas and by that act thwart the Commission's exercise of its remedial authority under sections 5(a) and 16. Nor can the pipeline, by that act, relieve itself of its existing service obligation to transport the gas.

Both the NGA and the NGPA confer general grants of authority to the Commission which have been interpreted broadly by the courts and which support the transportation obligation in the final rule. Under the broad authority granted pursuant to section 501 of the NGPA and section 16 of the Natural Gas Act, the Commission may act to prevent and/or eliminate distortions in the natural gas markets in conjunction with its specific authority

[306] *Cf.* Richmond Power & Light v. FERC, 574 F.2d 610, 623 (D.C. Cir. 1978) (Even though the Commission has no authority to compel transmission service, a different case is presented when the agency acts to prevent undue discrimination or anticompetitive activities).

[307] *See* Gulf States Utilities Co. v. FPC, 411 U.S. 747, 760 (1973).

[308] *See* Wisconsin Gas Co. v. FERC, 770 F.2d 1144 (D.C. Cir. 1985).

[309] Richard P. O'Neill, James B. Tobin, and Henry Clarius, "Pipeline Mergers and Their Potential Impact on Natural Gas Markets," *Natural Gas Monthly*, Energy Information Administration, February 1986, p. XXVIII.

[310] Harry G. Broadman, "Elements of Market Power in the Natural Gas Pipeline Industry", The Energy Journal, Vol 7, No. 1 (1986), p. 136.

[311] United Gas Pipe Line Co. v. FPC, 385 U.S. 83 (1966); Panhandle Eastern Pipe Line Co. v. FERC, 803 F.2d 726 (D.C. Cir. 1986).

[312] *See, e.g.*, United Gas Pipe Line Co. v. McCombs, 442 U.S. 529 (1979); California v. Southland Royalty Co., 436 U.S. 519 (1978); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137 (1960).

[313] See Michigan Consolidated Gas Co. v. FPC, 283 F.2d 204, 214 (D.C. Cir. 1960), *cert. denied*, 364 U.S. 913 (1960).

[314] 15 U.S.C. 717f(a) (1982). *See e.g.*, Southern Natural at 20–21 *citing Rural Energy Systems, Inc.*, 34 FERC ¶ 61,389 (1986).

[315] *See, e.g.*, Southern Natural at 20–21 *citing* Panhandle Eastern Pipe Line Co. v. FPC, 204 F.2d 675, 679–81 (3rd Cir. 1953); Panhandle Eastern Pipe Line Co., 15 FPC 46, 56–59 (1956), *aff'd sub nom.* Central West Utility Co. v. FPC, 247 F.2d 306, 311 (1957); Consolidated Gas Supply Corp., 28 FERC ¶ 61,350 (1984).

[316] 15 U.S.C. 717f(e) (1982) ("[A] certificate shall be issued . . . if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed . . . .")

[317] *See, e.g.*, KN at 31 and at 34 *citing* Atlantic Refining Co. v. Public Service Commission of New York, 360 U.S. 378 (1959), FPC v. Texaco, 417 U.S. 380, 394 (1974); Hunt v. FPC 306 F.2d 334, 341 (5th Cir. 1962) *rev'd on other grounds*, 376 U.S. 515 (1964); Northern California Power Agency v. FPC, 514 F.2d 184, 189 (D.C. Cir. 1975). Not only are these cases inapposite from the perspective of the purchaser's abandonment of its purchases, the facilities to be used for the required transportation will be adequate for the service proposed, since they are already being utilized for that purpose. *See* Northern Natural Gas Co., 25 FPC 540, 544 (1961).

under NGPA sections 104(b)(2) and 106(c), and NGA sections 5(a) and 7. Such general grants of authority, of which NGA section 16 and NGPA section 501 are examples, are "not restricted to procedural minutiae, and . . . authorize means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act." [318] More recently, in *Northern Natural Gas Co.* v. *FERC*, 785 F.2d 338, 343 (D.C. Cir. 1986), the court held that Congress has granted broad remedial authority in section 16 of the Natural Gas Act to carry out the difficult task of regulating the natural gas industry "under appropriate equitable circumstances" and found it appropriate for the Commission to construe its authority broadly.[319]

The statutes discussed herein (NGA sections 5, 7, 16 and NGPA sections 104, 106 and 501) support the Commission's authority, and those applicants that assert there is no statutory basis for an obligation to continue service to bring the gas to market are in error.

Adjustment to transportation authorization. After careful consideration of various commenters' requests,[320] the Commission has determined to expand the transportation authorization in the rule to cover upstream, third-party pipelines which may transport the released gas for redelivery into the system of the former pipeline purchaser. The Commission finds that providing a voluntarily assumable blanket transportation authorization for upstream "feeder" pipelines will serve the twin public interest goals of protecting existing firm customers *and* continuing the flow of gas to the market.

The Commission believes upstream pipelines with available capacity will thus be able to utilize the blanket authorization provided without any regulatory delay or impediment, in order to provide essential transportation services to the same extent they had previously.

The Commission does not believe any blanket transportation authorization is required for interconnecting pipelines downstream of the former pipeline purchaser. Under the final rule, the former pipeline purchaser is already required to deliver the released gas to any interconnecting pipeline, which may continue to transport the gas under such transportation authorization as already exists, or which it may obtain in the future. Interconnecting downstream pipelines thus have the right to purchase released gas and have it delivered by the releasing pipeline to the point of interconnection. Transportation beyond that point requires separate authorization.

In any situation where a producer or end-user believes it is being unduly discriminated against by any third-party upstream or downstream pipeline with respect to transportation services, it may request the Commission to intercede and remedy the situation through the filing of a complaint pursuant to 18 CFR 385.206. The Commission intends the transportation authorization under Order No. 451 to be self-implementing, however, and anticipates that such complaints will be rare.

The Commission also denies requests for expansion of the transportation authority to intrastate pipelines, Canadian producers, domestic producers on a non-releasing pipeline system, or to producers without any old gas.[321] This will in no way be unduly discriminatory or harm such entities. Intrastate producers are in large part beyond this Commission's jurisdiction. In any event, consistent with the goal of eliminating disparities between the interstate and intrastate markets, the rule already provides that gas subject to section 106(b) is eligible for the alternative ceiling price if the seller and purchaser so agree. As for Canadian producers, the Order No. 451 program arises out of the old gas ceiling adjustment provided for in NGPA sections 104 and 106 and does not involve Canadian gas, which is free from any constraints as to price under Title I of the NGPA.[322] In the more market-responsive arena provided by the final rule, Canadian producers as well as domestic producers, whether on non-releasing pipelines or not, will find *less* discrimination and preference as gas sales and purchases become more market-driven. Competitive sellers will more easily find an available market, and may obtain transportation under existing procedures.

Indicated Producers request the Commission to clarify that the first seller may be a shipper under the blanket transportation certificate. Indicated Producers state that there is language in the text of the rule indicating that if a first seller requests transportation service, a separate transportation certificate under section 7(c) is necessary,[323] and request a clarification that the first seller, as well as any other shipper, is entitled to receive transportation under the blanket certificate.[324] The Commission grants the requested clarification that the transportation certificate applies to transportation on behalf of the first seller taking part in the good faith negotiation procedures and to any shipper. This clarification is intended to be consistent with the discussion *supra* regarding upstream and downstream third-party pipelines, however. Thus, although the final rule authorizes and requires transportation by the releasing pipeline on behalf of any shipper-purchaser, the blanket transportation authorization extended to upstream, third-party pipelines is available for their voluntary utilization, but their decision to utilize or not utilize the authorization will be subject to review. Similarly, downstream interconnecting pipelines may not unduly discriminate in the use of their existing transportation authorizations, or authorizations they may obtain in the future. In the vast majority of circumstances then, the Commission anticipates that pipelines both upstream and downstream of the former pipeline purchaser will continue to provide transportation services as before, while billing the actual purchaser or contractor of the transportation service instead of the former pipeline purchaser. Only the former pipeline purchaser is *obligated* to provide transportation to any customer or interconnecting pipeline under the transportation authorization established in the final rule. Refusals to transport by upstream or downstream pipelines may be unduly discriminatory or otherwise unlawful, however, and will be given close and prompt scrutiny in the unlikely event they occur. Unlike former pipeline purchasers, upstream pipelines have no incentive not to continue transporting as before. Accordingly, the Commission finds no current need to make use of the transportation certificate mandatory for upstream pipelines.

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[318] Mesa Petroleum Co. v. FPC, 441 F.2d 182, 187 (5th Cir. 1971), *citing* Niagara Mohawk Power Corp. v. FPC, 379 F.2d 158.

[319] *See also* Consolidated Gas Transmission Corp. v. FERC, 771 F.2d 1536, 1550–51 (D.C. Cir. 1985); Public Service Comm'n of the State of N.Y. v. FPC, 327 F.2d 893, 897 (D.C. Cir. 1964). (Section 16 of the Natural Gas Act held to provide a basis for the Commission to cope with unforeseen problems, and is not confined to procedural regulations, but is a broad grant of authority.)

[320] *See, e.g.*, Indicated Producers at 22–24; PGC at 7–9.

[321] *See* Independent Petroleum Ass'n of Canada; Westcoast Transmission Co., Ltd. and Westcoast Resources, Inc.; IPAA.

[322] 15 U.S.C. 3311(b)(4)(A) (1982).

[323] Indicated Producers at 21.

[324] Id.

J. Transportation Rates

In the final rule the Commission determined that the transportation thereunder would be provided as far as practicable in accordance with the terms and conditions requested by the first seller and its purchaser and at rates promulgated as part of the rule. The rates were based on the § 284.7 concepts established in Order No. 436 and codified in 18 CFR 284.7. In order to expedite access of existing firm sales customers to released gas, such customers were given a right of first refusal.

Where an existing firm sales customer requested transportation of released gas within its existing firm sales contract demand, its cost for such transportation was not to exceed that which it would have incurred in purchasing the gas from the releasing pipeline. To achieve this result, the rate was based on the appropriate components of the commodity charge in the customer's applicable sales rate schedule, with a credit for volumes of gas transported against any minimum commodity bill obligation. This rate was essentially the commodity sales rate of the pipeline less purchased gas costs. No demand charge or reservation fee was assessed since that would be recovered from the customer as part of its sales demand rate.

Where an existing firm sales customer requested transportation of released gas in excess of its existing contract demand, or the gas was transported to any pipeline or customer other than an existing customer on a firm basis, the rate was to be based on a transportation rate schedule on file with the Commission that conformed to 18 CFR 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service. (Thus, the firm rate could include an appropriate reservation fee since the costs associated with use of capacity for transportation in excess of contract demand are not otherwise recovered from such customers as part of any sales demand rate.) Until such rates become effective, the pipeline must use the rate in one of the pipeline's rate schedules on file with the Commission which the pipeline determines covers service comparable to the transportation service authorized.

Requests for rehearing. A number of applicants have raised questions regarding the practical application of the transportation rates established in the final rule. They raise questions about the priority of access to the transportation authorized under Order No. 451, and the relationship of transportation priorities under Order No. 436. Pipeline applicants are concerned that they may underrecover some of their costs and ask that their sales obligations be reduced commensurate with volumes released. Consumers and producers are concerned that the transportation authorization be truly effective in bringing gas to market, and that the transportation rates be non-discriminatory so as to achieve this goal. Distribution companies raise technical questions about the determination of transportation rates under Order No. 451, the impact of existing pipeline tariffs, and the interplay with Order No. 436.

Commission response. The Commission will not grant the requests of several applicants,[325] that a pipeline's sales obligations associated with contract demand for a firm sales customer exercising its right of first refusal under the rule be commensurately reduced, and converted into a firm transportation obligation. Nothing in the rule is intended to unilaterally affect the existing obligations of the pipeline. However, there is likewise nothing in the rule that prevents the pipeline and the firm sales customer from mutually agreeing to changes in existing obligations, or that prevents the pipeline from filing an amendment to its certificate. The Commission recognizes, however, that a firm sales customer who elects to exercise the right of first refusal and have gas transported in lieu of purchasing gas from the pipeline, without a corresponding reduction in the pipeline's sales obligation, should compensate the pipeline for any costs associated with standing by to resume sales service should the firm sales customer subsequently elect to purchase gas from the pipeline rather than transportion service. Accordingly, the Commission shall grant the applicants' request that pipelines be allowed to assess a standby charge where appropriate.[326] The Commission believes that this charge in conjunction with the rate revisions discussed below will ensure that a pipeline receives neither more nor less for providing transportation than it would for providing sales service. A firm customer purchasing transportation service in excess of contract demand under § 284.225(d)(2) of the regulations may already be paying a reservation fee conforming to § 284.8(d).[327] A firm customer purchasing transportation service within contract demand under revised § 284.225(d)(1) should be subject to the same obligation, unless it is already paying a demand charge related to its sales service.

Under § 284.225(d)(1) the Commission intended the pipeline to collect all appropriate transmission, storage, and gathering components in the commodity rate, less purchased gas costs, properly associated with the provision of transportation service. Thus, applicants' assertions of underrecovery, though understandable, are misplaced. Tennessee Gas Pipeline Company expressed the concern, for example, that the credit to the pipeline's minimum commodity bill by volume of gas transported may result in undercollection by the pipeline of the "production cost component" of its sales commodity rate.[328] This is resolved by the Commission clarifying that pipelines may revise their sales rate schedule to recover the costs associated with standing by to serve a firm sales customer who does not reduce contract demand. The standby charge may include production costs if the costs are incurred in providing standby service. Thus, no undercollection would occur. The production cost component should not be included in the transportation rate whether or not transportation is within or in excess of contract demand. If transportation is within contract demand, then a standby charge (associated with sales service) may include production costs. If transportation is in excess of contract demand, then production costs are recovered through the currently effective sales rates. Accordingly, the volumetric credit to the minimum commodity bill in § 284.255(d)(1) is appropriate. The Commission will amend the regulatory text at § 285.225(d)(1) to more clearly follow the § 284.7 concept and include all appropriate transportation cost components, and will allow a pipeline to revise its sales rate schedules to provide a standby service. Thus, the rate for equivalent services paid by distributors, end-users, and others will essentially be the same.

This will address the concerns of Process Gas Consumers Group and others that distributors should not be entitled to any more favorable transportation rate than any other

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[325] *See, e.g.*, Transwestern at 18–20; Natural and United at 14.

[326] The Commission does not intend to permit such standby charges to be "loaded" with inappropriate costs so as to make the rate so exorbitant that it prevents operation of the rule.

[327] Where a customer purchases firm service under § 284.8(d), that section permits the pipeline to impose a reservation fee or charge on the shipper as a condition for providing such service.

[328] Tennessee at 32–33.

shipper.[329] This is consistent with Order No. 436 which established that market-responsiveness is best served by transportation rates that are unbundled and cost-based, whether they apply to existing firm sales distribution customers or to other shippers, and whether within, or in excess of, contract demand.

Under revised § 284.225(d)(1), a pipeline shall file for a rate schedule applicable to firm sales customers which meets the requirements of §§ 284.7 and 284.8(d). To the extent the firm sales customer is currently paying a demand charge related to sales service, the pipeline must waive any § 284.8(d) reservation fee that would otherwise be charged. In addition, the pipeline, as already indicated, may include an appropriate revision to its sales rate schedules to recover costs associated with the pipeline's standing by to serve a firm rate schedule customer who does not reduce its contract demand.[330] Volumes of gas transported will continue to be credited against any minimum bill obligation pursuant to § 284.225(d)(1)(iii). Of course, a firm sales customer and a pipeline that mutually agree to reduce the pipeline's sales obligation, will have to the same extent agreed to reduce any credit required under § 284.225(d)(1)(iii). Thus, all customers who request firm transportation will be served under the pipeline's firm transportation rate schedule designed in accordance with § 284.7. Existing firm sales customers will be protected from paying twice for the same capacity by the requirement in revised § 284.225(d)(1)(ii) that pipelines must waive the transportation reservation fee to the extent transportation and sales do not exceed their current contract levels.[331]

[329] *See, e.g.*, PGC at 10–12.

[330] As is now the case with the rates in § 284.225(d)(2) and (3), until the rate in revised § 284.225(d)(1) becomes effective, the pipeline must use the rate in one of the pipeline's transportation rate schedules on file with the Commission which the pipeline determines covers service comparable to the transportation service authorized under § 284.225(d)(1). The Commission emphasizes that the transportation authorization is self-executing and further that the interim rate requirements for the authorized transportation services do not require any separate regulatory approval by the Commission and do not provide the pipeline with any discretion to avoid or delay providing the transportation services under the interim rate provision. Rather, the pipeline must provide the services using a rate schedule already on file.

[331] "The pipeline must waive the transportation reservation fee to the extent that a customer pays for facilities associated with such transportation service through demand charges under its firm sales rate schedule."

AGD poses two questions with respect to the § 284.225(d)(2) transportation rates for service "in excess of contract demand" to existing firm sales customers. AGD first asks how this excess is determined and whether daily, monthly, or annual contract demand is used. Second, AGD states that since the rate can only be determined after the fact (*i.e.*, until the contract demand is determined, however it is measured, one cannot determine if it has been exceeded), a rate so defined "offends the 'filed rate doctrine' and lends itself to retroactive ratemaking." [332]

In response to AGD's first question, contract demand should be determined pursuant to the contractual arrangement of the parties. Although under many of the more recently executed gas purchase contracts, contract demand may be measured daily, whatever time frame the applicable contract provides for determining contract demand shall govern. As to AGD's second question, the determination of whether the purchaser is within or in excess of contract demand is inherently different from retroactive ratemaking, which involves a change in an established rate, not a determination of which rate to apply. The filed rate doctrine simply requires that providers have a rate on file for different components of service, and that no rate is legal other than the filed rate.[333] The situation under § 284.225(d)(2) is no different from that under current tariffs that require a charge for overruns. The rate is on file for overruns, but the rate cannot be charged until overruns occur, just as the reservation fee in § 284.225(d)(2) cannot be charged unless the firm volumes transported are in excess of the sales contract demand, however measured. Thus the filed rate doctrine is in no way offended by §284.225(d)(2).

Several applicants raise questions related to the adjustment of existing tariff restrictions to comport with the requirements of Order No. 451. The General Service Customer Group note that its members are generally not allowed to purchase natural gas from any natural gas company other than Panhandle Eastern Pipe Line Company (Panhandle) pursuant to Section 1.9 of the GeneralTerms and Conditions of Panhandle's Tariff.[334] Panhandle also

[332] AGD at 14.

[333] Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578 (1981); Montana-Dakota Utilities Co. v. Northwestern Public Service Commission, 341 U.S. 246, 251–54 (1951).

[334] General Service Customer Group at 4. Seventy percent of the gas sales in 1985 on Panhandle's system were to General Service Buyers and Small General Service Buyers under Panhandle' full requirements tariff provision.

seeks guidance on this situation, and notes that full requirements customers purchasing gas under a rate schedule requiring that all of their gas be purchased from the pipeline, but which then purchase gas released under the good faith negotiation procedures, will be in violation of that rate schedule.

The Commission intends that full requirements tariff provisions are waived to the extent necessary to meet the objectives of Order No. 451. Otherwise the right of first refusal granted to existing firm sales customers in Order No. 451 would be a nullity. For a pipeline with a full requirements or sole supplier clause, the pipeline's election to bid less than the highest price permitted under its existing contract necessarily includes an agreement to waive any existing contract and tariff provisions that would prevent an existing firm sales customer from exercising its right of first refusal. No further authorization will be necessary as common sense requires this for the final rule to operate as intended. Accordingly, such full requirements or sole supplier tariff restrictions should be deemed waived with respect to firm sales customers who purchase gas released under the final rule. Since the Commission finds no cost shifting involved in these full requirements customers exercising their right of first refusal and requesting transportation, the Commission finds no basis to justify any rate schedule reclassification because of Order No 451.

Several applicants ask whether transportation on Order No. 436 pipelines should be made pursuant to Order No. 451. Amoco Production Company suggests that where a pipeline exercises its right under the good faith negotiation procedure to discontinue purchases, it should be permitted to transport that gas for the producer unrestricted by the first-come, first-served provisions of Order No. 436.[335] AGD asks for what time period the transportation service is authorized, and also asks how the service relates to the principle of first come, first-served.[336] AGA requests a similar clarification and asks, in addition, where transportation is provided to an existing customer under Order No. 451 and the pipeline subsequently elects to operate under Order No. 436, is the existing customer

[335] Amoco at 5–6.

[336] AGD at 13–14. AGD also asks how the Order No. 451 service is to be integrated with existing tariffs and service, which question is addressed, *supra*.

given a higher priority than any of the pipeline's other existing customers? AGA asks further whether the existing customer could change its receipt or delivery points after the pipeline opted for Order No. 436, or whether it makes any difference whether the existing customer was receiving the Order No. 451 gas within or in excess of contract demand.[337]

To answer the central question, if an Order No. 451 pipeline subsequently becomes an Order No. 436 pipeline, any shippers under Order No. 451 have priority over new shippers; among the pre-existing shippers, they will likely stand in the same priority vis-a-vis themselves after the open-access election under Order No. 436 as they did before it, but this will depend on how their pre-Order No. 436 relationships are constructed. Transportation of gas released by pipelines already participating under Order No. 436 will be made pursuant to Order No. 436 inasmuch as the Order No. 451 transportation authorization is only available to non-open-access pipelines. In some cases, transportation of the released gas through the releasing pipeline on behalf of any purchaser requesting such transportation will continue until the supply is exhausted, in other cases, upon the expiration of a contract.[338] The priorities that would pertain under Order No. 436 if receipt or delivery points were changed, or if deliveries were made within or in excess of contract demand would continue to apply.

AGA indicates that situations exist where gas that may be released under Order No. 451 is currently being transported through some gathering or short-haul pipeline upstream of the releasing pipeline. AGA suggests that if the releasing pipeline continues to transport the gas through this short-haul pipeline it should be made whole in the event it pays the short-haul pipeline for this transportation service.[339] To respond, since the releasing pipeline will no longer be obliged to purchase the released volumes, it is no longer responsible for the transportation of the released volumes with upstream gatherers or short-haul pipelines. Since it is the existing firm sales customer that, having exercised its right of first refusal, will be purchasing directly from the producer, the firm sales customer (or producer-seller) will have to make its own arranqement with the upstream gatherer for transportation into the releasing pipeline.[340]

Two remaining questions also appear to warrant clarification. ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG) ask whether an existing firm *transportation* customer of a releasing pipeline has any rights of purchase or transportation with respect to released gas, and if transportation for such a non-sales customer is to be firm or interruptible.[340a] The brief answer is that only existing firm sales customers have a vested interest in the gas released under the final rule, and only they will have a right of transportation *and* of first refusal thereunder. If they do not exercise their right of first refusal, however, transportation is available to *all* sales and transportation customers pursuant to § 284.225(c), depending on whom the producer seller executes an agreement with.

Florida Gas Transmission Company (Florida Gas) states that the Commission has not expressly limited its rule to take into account factors such as full requirements customers and "transportation rates under existing tariffs which either do not exist or are different from those required under the Commission's rule." [340b] The Commission has already indicated, *supra*, that gas transportation under Order No. 451 operates *pro tanto* to supersede full requirements or sole supplier tariff obligations. Florida Gas' statement regarding transportation tariff rates that do not exist is puzzling. The reference is apparently to the language in §§ 284.225(d) (1), (2) and (3) that requires the pipeline to use as an interim rate "the rate in one of the pipeline's transportation rate schedules on file with the Commission which the pipeline determines covers service comparable to transportation service authorized under this section." [340c] The Commission does not understand Florida Gas' objection and believes that Florida Gas and other pipelines will have sufficiently comparable rates on file until the new § 284.7 rate is established. In particular circumstances, if a pipeline company requires further guidance on this issue, it may request it on a case-by-case basis.

V. Other Issues

A. Gas Subject to Rule

1. Pipeline and Affiliate Production

In Order No. 451 the Commission determined that old gas produced by an interstate pipeline or an affiliate of an interstate pipeline for the pipeline's system supply would be eligible for the new alternative ceiling price, subject to the requirements of the affiliated entities test set forth in section 601(b)(1)(E) of the NGPA.[341] The Commission noted that such eligibility would be consistent with existing Commission policy under Order Nos. 391 and 391–A.[342] Those orders implemented the Supreme Court decision in *Public Service Commission of New York v. Mid-Louisiana Gas Co.* [343] that interstate pipelines are entitled to have intracorporate transfers of gas from their own wells treated as "first sales" and thus be subject to the pricing provisions of the NGPA. After the issuance of Order No. 451, the United States Court of Appeals for the D.C. Circuit remanded Order Nos. 391 and 391–A to the Commission for reconsideration of whether pipelines are entitled to the same prices for their own natural gas production under section 104 of the NGPA as are independent producers.[344]

APGA requests the Commission to grant rehearing on the applicability of the alternative ceiling price of Order No. 451 to pipeline production and to postpone a final ruling thereon pending its action on the remand of Order Nos. 391 and 391–A.[345] APGA also argues

[337] AGA at 36–37.

[338] 51 F.R. 22213 (June 18, 1986). (Authorization for "transportation will continue until the supply is exhausted, or . . . [until] transportation of such gas ceases upon the expiration of a contract where a pipeline subsequently becomes subject to Order No. 436.") *Id.*

[339] AGA at 37.

[340] This situation appears related to the issue of whether the blanket transportation should be expanded to cover all jurisdictional transportation arrangements applicable to the gas released, whether upstream or downstream. As discussed in part IV. I., *supra*, the blanket transportation authorization applies to the pipeline releasing gas under Order No. 451 and to any upstream pipeline, and is required to be utilized as a mandatory obligation for the former purchasing pipeline and as a voluntarily assumable blanket authorization for upstream "feeder" pipelines. Transportation through pipelines downstream of the releasing pipeline will be pursuant to section 7(c) certificates or pursuant to Order No. 436. Thus, transportation from the seller to the former pipeline purchaser or to any interconnecting line may proceed without further regulatory approval, with billing of applicable rates now to be made to the parties actually purchasing the transportation services.

[340a] ANR and CIG at 28.

[340b] Florida Gas at 11.

[340c] *See* 18 CFR 284.225(d) (2) and (3) and revised 284.225(d)(4) (51 FR 22221).

[341] Section 601(b)(1)(E) provides that a first sale of natural gas between an interstate pipeline and its affiliate within the NGPA's maximum lawful price shall be deemed to be just and reasonable if the amount paid does not exceed the amount paid in comparable first sales between persons not affiliated with the interstate pipeline.

[342] 49 F.R. 33849 (Aug. 27, 1984); 50 FR 14374 (Apr. 12, 1985); 18 CFR 270.203 (1986).

[343] 463 U.S. 319 (1983).

[344] Phillips Petroleum Co. v. FERC, 792 F.2d 1165 (D.C. Cir. 1986).

[345] APGA at 69–71.

that the potential for abuse of the good faith negotiation procedures between an interstate pipeline and its production division or affiliate supplier is very high, and that it will be difficult for the Commission to "police" such abuses under the affiliated entities test. Therefore, APGA urges the Commission not to apply the alternative ceiling price for old gas to affiliate or pipeline production. In the alternative, APGA urges the Commission to impose special safeguards on renegotiations of the price of affiliate or pipeline production, such as mandatory arbitration or mediation by an impartial third party, auditing of renegotiations by the Commission staff, or spot auditing of renegotiated prices, to assure compliance with the affiliated entities test.[346]

In *Phillips Petroleum Co.* v. *FERC*, *supra*, the Court noted that prior to the enactment of the NGPA, pipeline production from wells drilled on or before January 1, 1973, (old wells) on leases acquired on or before October 7, 1969, (old leases) was priced on the basis of the actual cost while independent producer rates were based on average costs of production within an area, or nationwide, as was pipeline production from new leases and new wells on old leases. Although the Commission attempted to perpetuate this pricing system after enactment of the NGPA by defining "first sale" to exclude intracorporate transfers of pipeline production from old wells on old leases,[347] the Commission was reversed by the Supreme Court in *Mid-Louisiana, supra*. The Commission then issued regulations in Order Nos. 391 and 391–A which applied the same ceiling prices under section 104 to pipeline production as to gas purchased from independent producers, asserting that, "the *Mid-Louisiana* decision requires parity treatment for producer and pipeline production." [348] However, the Court of Appeals in the *Phillips* case concluded that the Commission misinterpreted *Mid-Louisiana* as requiring absolute parity of pricing. According to the Court in *Phillips*, section 104 of the NGPA could be interpreted to permit parity of pricing for independent producer and pipeline production, but the Commission would have to offer a reasoned rationale for that interpretation and not base such a conclusion on its erroneous belief that *Mid-Louisiana* mandated such a result.

The Commission must determine on remand of the *Phillips* case whether section 104(b)(1) of the NGPA incorporated the cost-of-service rate for each particular pipeline's production from its old wells on old leases or applied the just and reasonable rates established by the Commission for independently produced gas to such pipeline production. However, in Order No. 451 the Commission established an alternative ceiling price under the authority of section 104(b)(2) and the just and reasonable standard of the NGA, and determined that pipeline production would be eligible for that alternative ceiling price, along with all other old gas, regardless of what the otherwise applicable ceiling price might be under section 104(b)(1). Therefore, the resolution of the issue remanded to the Commission in *Phillips*, a question of interpreting section 104(b)(1), does not affect the Commission's decision in this proceeding that the alternative ceiling price for old gas is available for pipeline production.

The Commission believes that interstate pipelines and their affiliate suppliers should be eligible to receive the alternative ceiling price for old gas established in Order No. 451 for the same reasons and under the same conditions as independent producers. The reasons adduced in Order No. 451 for permitting an increase in old gas prices apply to gas owned by pipelines as well as gas owned by independent producers.

The Commission intends to give special scrutiny to a pipeline's recovery of its costs of purchasing repriced old gas from its own production division or an affiliate and believes that the affiliated entities test will effectively serve to limit a pipeline's recovery of such costs to levels no higher than the costs of comparable purchases from other non-affiliated suppliers. While there are unresolved issues concerning the mechanics of applying the affiliated entities test,[349] there should be no more difficulty in applying that test, when those issues are resolved, to prices paid by a pipeline to its affiliated suppliers or its own production division for repriced old gas than for other categories of gas. It is thus unnecessary to impose any "special safeguards" on these transactions beyond the requirements of the affiliated entities test. Accordingly, the Commission will deny APGA's application to grant rehearing on this issue.

2. Minimum Rate and Fixed-Price Gas

The Commission noted in Order No. 451 that contracts for the sale of old gas at the minimum rate or at a fixed rate less than the applicable maximum lawful price would not be eligible for renegotiation under the good faith negotiation procedures because such contracts lack the contractual authority to increase prices necessary to invoke those procedures. Nevertheless, the Commission said that old gas sold under such contracts could be repriced up to the alternative ceiling price if, and only if, the purchaser agreed to pay a higher price after the effective date of Order No. 451.

APGA argues that the alternative ceiling price for old gas should not apply to gas sold under minimum rate or fixed price contracts, even if the purchaser agrees to pay a higher price, because the producers "hold the trump cards under the . . . good faith renegotiation procedure . . . [and] will have the ability to extract major concessions from pipelines." APGA also argues that the Commission should not give producers the right to collect increased rates under their lowest-cost minimum rate and fixed-price contracts without giving pipelines a corresponding right to renegotiate price decreases under their high-cost "problem" contracts.[350]

Since the possibility of abandonment under the good faith negotiation procedures is not available for sales under minimum rate or fixed-price contracts, the Commission fails to see how a producer can secure a purchaser's agreement to pay a higher price for old gas subject to such contracts without making some concession of comparable value to the purchaser. In fact, purchasers have the same right to seek voluntary renegotiations of price under their high-cost problem contracts as producers with minimum rate or fixed-priced contracts. Accordingly, the Commission sees no reason for disqualifying old gas sold under minimum rate or fixed-price contracts from eligibility for the alternative ceiling price, provided the purchaser agrees to a higher price.

3. Optional Procedure Certificates

Tenneco Oil Company and Felmont Oil Corporation seek clarification or rehearing on the applicability of the alternative ceiling price of Order No. 451 to old gas sold under an "optional procedure certificate" issued under the authority of § 2.75 of the Commission's regulations. Nothing in Order No. 451

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[346] APGA at 71–73.

[347] Order No. 58, 44 FR 66577 (Nov. 20, 1979); Order No. 98, 45 FR 53091 (Aug. 11, 1980); 18 CFR 270.203 (1983).

[348] Order No. 391–A, 50 FR at 14378, 31 FERC ¶ 61,036 (Apr. 10, 1985).

[349] *See, e.g.*, Tennessee Gas Pipeline Company, 30 FERC ¶ 63,027 (1985), currently pending before the Commission on exceptions to the initial decision.

[350] APGA at 73–74.

addresses optional procedure certificates.

In 1972 the Federal Power Commission established a special procedure for certification of new gas sales in interstate commerce at rates in excess of the otherwise applicable maximum lawful rate if the producer waived its right to seek future rate increases. Both Tenneco and Felmont hold certificates issued under those procedures under which old gas is currently being sold at contract rates well below current market prices—57 cents per Mcf under a Tenneco contract and 45 cents per Mcf under a Felmont contract. Tenneco and Felmont ask the Commission to clarify or to amend, if necessary, the regulations promulgated in Order No. 451 so they will have an opportunity under the good faith negotiation procedures to renegotiate higher prices for old gas sold under their optional procedure certificates.

In Order Nos. 64 and 64–A,[351] the Commission determined that producers operating under optional procedure certificates could not collect NGPA prices for gas not removed by section 601 of the NGPA from the Commission's NGA jurisdiction. The United States Court of Appeals for the Fifth Circuit upheld those orders.[352] Even if a contract underlying an optional procedure certificate provides contractual authority for escalation to higher rates found just and reasonable by the Commission, rate increases would be barred by the producer's agreement to waive the effect of indefinite price escalator clauses in order to receive an optional procedure certificate.[353] Producers are also barred from increasing their rates except in accordance with the originally certificated contract by the requirement of § 2.75(m) of the Commission's regulations that they waive their rights to make rate filings under section 4 of the NGA. Holders of optional procedure certificates will therefore be ineligible to initiate renegotiations of their underlying contracts under the good faith negotiation rule because such contracts will lack indefinite price escalator clauses, or their rights under such clauses will have been waived in order to qualify for the certificate. However, purchasers may voluntarily negotiate with their producers to reprice old gas within the new alternative ceiling price of Order No. 451. If a purchaser agrees to pay increased prices for such gas, a producer may file a petition for a waiver of the regulation's prohibition against rate filings under section 4 of the NGA.[354]

4. Existing contracts with area rate clauses

The Independent Petroleum Association of America (IPAA) notes that the applicability of the good faith negotiation procedures is limited to contracts that provide authority for the first seller to collect a higher price upon establishment by the Commission of a higher maximum lawful price. IPAA argues that this test "leaves open" all of the interpretive issues addressed by the Commission in the Order No. 23 series [355] regarding whether area rate clauses in existing contracts permit the collection of NGPA ceiling prices. IPAA suggests that the Commission declare that a contract with any form of area rate clause is eligible for renegotiation under the good faith negotiation procedures.

The Commission declines to adopt this suggestion, but believes that past proceedings under Order No. 23–B have already resolved most issues of contract interpretation that might arise under the good faith negotiation rule. Order No. 23–B established certain procedures to determine whether particular price escalation clauses authorize increases to NGPA maximum lawful prices. The most commonly discussed price escalation clause, called an "area rate" clause, escalates the price to whatever lawful rate the Commission allows in an area rate proceeding. Thousands of area rate clauses have been filed by pipelines as part of their "evidentiary submission" [356] and reviewed under the Order No. 23–B procedures. To the extent area rate clauses have been found under those procedures to authorize escalation to NGPA prices, such clauses provide authority for escalation to the alternative ceiling price established by the Commission in Order No. 451. Nevertheless, the Commission cannot say that an existing contract with "any form" of area rate clause will be eligible for renegotiation under the good faith negotiation rule. Whether a contract provides authority to collect a higher price upon establishment by the Commission of a higher maximum lawful price depends on the language of the contract and the intent of the parties. Unresolved disputes concerning such contractual authority may be resolved under the procedures established by Order No. 23–B. However, the argument frequently made in Order No. 23–B proceedings, that area rate clauses authorize escalation to higher rates set by the Commission but not to the NGPA rates set by Congress, will not likely be available to protest the authority of area rate clauses to increase rates to the Commission-set rates of Order No. 451.

B. Block Billing

In the final rule the Commission concurred with the view of most commenters that the block billing [357] proposal in Docket No. RM85–1–000 (Part D) and the Department of Energy proposal that was adopted in modified form by the final rule were to a large extent mutually exclusive. The Commission indicated that any action on block billing would be deferred to the Docket No. RM85–1–000 proceedings.

Rehearing requests. Certain applicants question the Commission's decision to defer action on block billing.[358] Panhandle, for example, asserts that, "[r]ather then taking steps which would require producers to sell gas at market prices, the Commission [in Order No. 451] is attempting to provide higher price levels to producers while otherwise maintaining the contractual status quo . . . ." [359] KP&L argues that the Commission erred "by failing to consider *now* its block billing proposal." [360] and that Order No. 451 does not explain why the block billing proposal does not present an alternative superior to the rule adopted. APGA, for its part, also argues that block billing was a superior alternative for resolving the disparity between old and new gas prices. APGA asserts further that Order No. 451 exceeds the Commission's statutory authority, but block billing would correct the pricing distortions the Commission found to be unjust and unreasonable in the final rule without exceeding the breadth of its statutory authority. APGA states that the

[351] 45 FR 5685 (Jan. 24, 1980); 45 FR 16171 (Mar. 13, 1980).

[352] *Columbia Gas Development Corp.* v. *FERC*, 651 F.2d 1146 (5th Cir. 1981).

[353] *Id.* at 1153; 18 CFR 2.75(f) (1986).

[354] *Id.* at 1160.

[355] Order No. 23, 44 FR 16895 (Mar. 20, 1979); Order No. 23–B, 44 FR 38834 (July 3, 1979); Order on Rehearing of Order No. 23–B, 44 FR 48174 (Aug. 17, 1979).

[356] See 18 CFR 154.94(j) (1984).

[357] Block billing would require pipelines to bill their customers separately for old gas (Block 1) and new gas (Block 2). Block 1 old gas is gas which was committed to interstate commerce when the NGPA was enacted. This gas is subject to the relatively low price ceilings established by NGPA sections 104, 106(a) and 109. Block 2 new gas is gas whose price has been decontrolled or is subject to the relatively high incentive prices established by other sections of the NGPA. Under the block billing proposal, a pipeline's customers could purchase a specified percentage of the pipeline's Block 1 gas based on their level of purchases during the period 1979–1984.

[358] *See, e.g.*, APGA at 74–78; KP&L *et al.* at 22–24; and Panhandle and Trunkline at 10–11.

[359] Panhandle and Trunkline at 11.

[360] KP&L *et al.* at 22.

Commission has sounded the "death knell" for the block billing proposal.[361]

Commission response. The Commission believes it is premature for applicants to characterize Order No. 451 as sounding the final tocsin for the block billing proposal. The Commission does intend to review that proposal at a date after Order No. 451 has an opportunity to operate so that its effects can be gauged. Based on the comments received, the Commission determined that the benefits of Order No. 451 might have been undercut, or made more difficult to measure, had the proposal been put into effect simultaneously with Order No. 451. Moreover, there was evidence that the block billing proposal would merely have shifted inefficiencies to different parts of an already distorted market.[362] It was argued, for example, that the anticipated consumer savings from block billing would not reach consumers because a distributor entitled to a large block of old gas (Block 1) may, by rolling-in Block 2 costs, obscure the true value of the overall supply to its customers, but at a lower level in the distribution chain.[363] After analysis of the evidence compiled in this proceeding, the Commission determined that the most direct means of avoiding market distortion is by eliminating the artificially low gas cushion.

Contrary to the assertions of Panhandle and others, the rule adopted does not maintain the "contractual status quo" but rather offers more of an opportunity for mutuality in negotiations.[364] Under block billing, the pipeline would not be free to offer price changes for old gas, but under Order No. 451 it is free to establish any negotiating posture it wishes, *and* may also seek renegotiation of other contracts. The Commission intends to make a final disposition of the block billing proposal in due course, but will do so in Docket No. RM85-1-000 (Part D).

In essence, those applicants objecting to the Commission's deferral of action on block billing would have had the Commission exercise its judgment differently. As with so many issues in this final rule, the Commission could have drawn a line elsewhere—perhaps to adopt block billing concurrently; or perhaps to reject it on the merits now. That the Commission instead wished the processes in Order No. 451 to operate for a time without concurrent implementation of block billing (which many commenters doubted even could be administered concurrently),[365] does not make the Commission's decision unreasonable or outside its authority.[366]

C. Response to Administrative Law and Procedural Claims

1. Transportation and Right of First Refusal Provisions

Requests for rehearing. Several applicants argue that the Commission failed to provide commenters with adequate notice and an opportunity to comment on the transportation provisions and the right of first refusal provisions adopted in Order No. 451.[367] Applicants point out that DOE's initial proposal for Order No. 451 contained no mention of transportation for gas released under the good faith negotiation procedures or a right of first refusal. Therefore, they argue that by adopting these provisions, the Commission violates the requirements of the Administrative Procedure Act (APA) that agencies provide notice, a concise statement of the basis and purpose of the proposed rule, and an opportunity to comment.[368] According to these applicants, the Commission did not have an opportunity to adequately examine the impact of the transportation requirements or the right of first refusal on the wide range of interests that will be affected by the adoption of these provisions. Additionally, applicants argue that persons adversely affected by the blanket transportation and right of first refusal provisions were not afforded an opportunity to file comments and otherwise participate in this rulemaking proceeding. Applicants, therefore, request the Commission to either vacate Order No. 451 because of this legal deficiency, or invite additional comment.

Commission response. The final rule in this proceeding did not violate the requirements of the APA. Although DOE's proposal and the Commission's notice of procedural schedule preceding Order No. 451 did not specifically provide provisions for transportation and the right of first refusal in connection with the good faith negotiation rule, the Commission was not required to renotice the new provisions and provide for additional comments.

Federal agencies have considerable flexibility under the APA to make changes—even substantial changes—in final rules based on comments submitted during the comment period without renoticing the new provisions.[369] Rulemaking proceedings would never be terminated if the APA were interpreted to require starting the proceeding over again each time the Federal agency modifies a proposed rule in response to comments submitted during the proceeding.[370] As long as the changes represent a logical outgrowth of the initial notice, or develop the rule originally proposed, neither the APA nor the courts require Federal agencies to provide interested persons with a new opportunity to comment.[371]

The Commission concludes that the notice for Order No. 451 fairly apprised interested persons of the issues before the Commission. The Commission believes that the public could determine that gas released under the good faith negotiation procedures involved the issues of transportation and protecting the public interest. In fact, a number of commenters raised the transportation issue in their initial comments. Several commenters expressed concern that pipelines might release gas under the good faith negotiation rule, and then refuse to provide transportation for the released gas to other purchasers.[372] These commenters proposed several alternative solutions to the transportation problem. The Commission notes that since these issues were raised in initial comments, an opportunity was provided for response to these comments not only in

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[361] APGA at 75.

[362] *See* Supplemental Comments of Texaco Inc., filed Feb. 25, 1986, Docket No. RM86-3-000, at 9-10.

[363] *See* J. Kalt "Old Gas Decontrol, FERC's Block Billing for Pipelines, and the Winners and Losers in Natural Gas Policy" (Study sponsored by Natural Gas Supply Association) (1985) at 15. ("In so far as distribution companies are likely to engage . . . in rolled-in pricing of their own, Block Billing would serve primarily to push the problems of gas pricing one step further down the distribution chain.")

[364] *See* Panhandle and Trunkline at 11.

[365] 51 FR 22210 n.271 (June 18, 1986).

[366] See Capital Cities Communication, Inc. v. FCC, 554 F.2d at 1139 (1976). Also, where the Commission exercises its remedial authority, its discretion is "if anything, at zenith." Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 159 (D.C. Cir. 1967).

[367] *See e.g.*, ANR Pipeline Company and Colorado Interstate Westcoast Transmission Company, Ltd. and Westcoast Resources, Inc.; KN Energy, Inc.; Northern Distributor Group; American Public Gas Association; and Northwest Central Pipeline Corporation.

[368] 5 U.S.C. 553(b) (1982).

[369] *See* Mid-Tex Elextric Cooperative, Inc. v. FERC, 773 F.2d 327, 339 (D.C. Cir. 1985); Pennzoil Co. v. FERC, 645 F.2d 360, 371 (5th Cir. 1981); American Iron & Steel Institute v. EPA, 568 F.2d 284, 293 (3rd Cir. 1977); International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973).

[370] International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973); Kennecott v. United States EPA, 780 F.2d 445, 459 (4th Cir. 1985).

[371] Connecticut Light and Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir.), *cert. denied*, 459 U.S. 835 (1982); *see also*, Chocolate Manufacturers Ass'n of United States v. Black, 755 F.2d 1098, 1102 (4th Cir. 1985).

[372] *See e.g.*, Texaco, Inc. (Texaco); Natural Gas Supply Association (NGSA); Indicated Producers; and PGC.

reply comments,[373] but also during the public hearing.[374]

The initial comments, the alternatives proposed in the initial comments, the reply comments, and the testimony presented at the public hearing, made it clear to the Commission that without some provision for transportation added to the final rule, producers could not effectively market the released gas to other customers. Therefore, the Commission concluded from comments submitted that there was no assurance that first sellers could market released gas unless their existing purchasers are operating under the open access transportation provision of Order No. 436.[375] In addition, the Commission concluded that in order for the benefits of Order No. 451 to be realized in terms of both supply and price response, released gas must be marketed in an efficient and effective manner, and therefore promulgated the transportation provisions.

Specifically, the Commission provided limited blanket authority for an existing pipeline purchaser to transport gas released under the good faith negotiation provisions of Order No. 451. In particular, pipelines that release gas must transport any gas released to existing customers or to any interconnecting pipeline, as a condition of the ability of the existing pipeline purchaser to terminate purchases of gas from a first seller under the Order No. 451. This condition would ensure that the price for released gas will continue to be competitive. Without this condition the Commission concluded that both consumers and pipelines would be restricted in their access to gas supplies released under the rule.

The Commission granted the right of first refusal to provide pipeline's firm sales customers, primarily local distribution companies, the ability to protect their access to adequate gas supplies at reasonable costs, since they relied on the pipelines continued access to such gas under its service obligations. The right of first refusal was a logical outgrowth of the abandonment provisions of the good faith negotiation rule. In particular, no natural gas company may abandon jurisdictional facilities, or service rendered by jurisdictional facilities absent a finding that gas supplies are depleted, service is unwarranted, or "that the present or future public convenience or necessity permit such an abandonment." [376] The right of first refusal supports the Commission's finding that the abandonments permitted under the good faith negotiation rule are in the present or future public convenience or necessity.

The Commission also recognized that the right of first refusal could not be exercised unless transportation services are available to the customer. Hence, under the final rule, if a pipeline purchaser chooses to terminate purchases of gas, the right of first refusal and the limited transportation authority ensure that the pipeline's existing customers, especially firm sales customers, have a means of keeping the released gas on-system and of getting the gas transported for their use.

The Commission emphasizes that an ongoing dialog, which began with initial comments filed in this proceeding, continues as the Commission reviews and responds to the petitions for rehearing. The Commission concludes therefore that the adoption of the transportation provision and the right of first refusal were logical outgrowths from the original DOE proposal and the comments thereon filed with the Commission. In addition, the Commission believes that the proposal and comments adequately framed the issues so that commenters were aware of the need to include transportation authority and the right of first refusal in the final rule and had an adequate opportunity to present their views in reply comments, the public hearing, and on rehearing.

2. Environmental impacts

NEPA requires Federal agencies to prepare an environmental impact statement (EIS) any time their actions will or may have a significant effect on the quality of the human environment.

Rehearing petitions. Northwest Central and KN Energy argue that Order No. 451 violates section 102(2)(c) of the National Environmental Policy Act (NEPA).[377] In particular, these applicants argue that the Commission, in violation of NEPA's procedural requirements, failed to consider the environmental impact of raising the price of old gas, which may cause some industrial customers to switch from natural gas to No. 6 fuel oil.

Commission response. The Commission does not believe that it needs to perform a NEPA review of Order No. 451. An environmental analysis of any major Federal action is premised on the existence of a foreseeable direct connection between the Federal action and an environmental effect. This rulemaking has no such foreseeable direct connection, both because of the nature of the rulemaking and because of the rulemaking's relationship to the natural gas marketplace.

With respect to the nature of the rulemaking, Order No. 451 does no more than allow producers to collect a higher price for old gas or to seek alternative markets for their gas pursuant to the Commission's statutory authority. Order No. 451 does not impose any obligation on any person to purchase or sell old gas. It does not require or authorize any person to construct facilities for these purchases or sales. The order by itself does not directly cause any activities having environmental effects.

With respect to the rulemaking's relationship to the natural gas marketplace, the rulemaking is coincident to a variety of economic conditions and activities which themselves may independently have environmental and economic impacts. These intervening economic conditions and activities include the terms of existing and future natural gas contracts, patterns of industrial, commercial and residential gas consumption, the level of industrial activity, general economic conditions, the price of alternative fuels, the marketability of gas, fuel-switching in relation to conversion costs, and gas conservation efforts. In this instance, the rulemaking cannot be said to have any direct environmental effect whatsoever in light of these intervening considerations. In this connection, Northwest Central's [378] argument, that this rulemaking will affect the environment adversely due to fuel-switching that results from higher gas prices, is inaccurate. It fails to account for the marketability of the gas, the price of alternative fuels, and other intervening conditions that will restrain purchasers from agreeing to unnecessarily high prices for old gas and prevent producers from seeking higher prices or the abandonment of service obligations if the producer and pipeline fail to reach agreement under the good faith negotiation rule.

It is unnecessary for the Commission to undertake a NEPA review in this

[373] *See e.g.*, PGC; Indicated Producers; MPC/NASUCA; and Exxon Company.

[374] *See e.g.*, Nicholas J. Bush, NGSA; Charles Jordan, Chevron U.S.A.; Ralph Pearson, Texaco; Ken Notary, Chemical Manufacturing Assn.; William Bennett, Amoco; and Edward Grenier, PGC.

[375] As explained more fully in Order No. 451 and elsewhere in this order on rehearing, the Commission found it necessary to include transportation provisions which would ensure availability of transportation service if a pipeline were not operating under the transportation authority of Order No. 436.

[376] 15 U.S.C. 717f(b) (1982).

[377] 42 U.S.C. 4332(2)(c) (1982).

[378] Northwest Central at 37.

proceeding because of the diverse considerations that are involved. In fact, the Commission has determined that environmental review under NEPA is not necessary if the variables involved render any environmental consequences unforeseeable.[379] The Commission believes in the continued validity of this approach. NEPA does not require agencies to engage in environmental impact statements, when the causal relationship between a Federal action and certain environmental effects is remote and conjectural.[380] The Commission believes that this principle applies here. There is no direct connection between Order No. 451 and any changed patterns of consumption or other market effects, much less the environmental effects of any such actions, that would warrant examination of the issue beyond the economic considerations that the Commission has already taken into account.[381]

D. Filing Fees

In Order No. 451 the Commission said there will be no change in applicable rate filing requirements but that filing requirements would be waived for sales of gas abandoned under the good faith negotiation rule and resold under a blanket certificate.[382] Indicated Producers request the Commission also to waive fees applicable to filings made by producers to collect a price for old gas renegotiated under the rule.[383] Absent such a waiver, there will allegedly be a disincentive to voluntary renegotiation of old gas prices with existing purchasers and an incentive to seek abandonment under the good faith negotiation procedures and resell the abandoned gas under a blanket certificate. IPAA asserts that renegotiations under the rule will trigger an "avalanche" of producer rate filings, which the Commission may wish to avoid by amending the regulations to waive rate filings engendered by negotiations under the rule.[384]

Small producers, *i.e.*, producers not affiliated with a major pipeline company and with jurisdictional sales of less than 10,000,000 Mcf of natural gas per year, are exempt from all rate filing requirements under existing regulations to the extent these rates are authorized by contract.[385] The Commission does not believe that rate change filings by large producers resulting from Order No. 451 will impose an unmanageable administrative burden on the Commission's staff or be unduly burdensome to the producers. The filing fee for producer rate changes is $400, an amount that recovers the costs of processing such filings.[386] The Commission does not believe that the filing fee will substantially affect a large producer's decision to renegotiate the price with an existing purchaser or seek abandonment under the good faith negotiation procedures. Accordingly, the Commission will not waive the filing requirement or the filing fees for producer rate change filings resulting from renegotiated old gas prices under Order No. 451.

E. Requests for Stay

A relatively small number of the applications for rehearing included requests for stay of the effectiveness of Order No. 451. On July 28, 1986, the Commission denied the requests of KN Energy, Inc. and certain Florida Cities for an immediate stay of the effectiveness of the final rule.[387] At that time the Commission noted that several other applicants had requested a stay pending judicial review, in the event their applications for rehearing were denied. These applicants included the American Public Gas Association (APGA), the Interstate Power Company, the Northern Distributor Group, and Laclede Gas Company. On December 5, 1986, AGA, APGA, AGD and UDC also filed a joint petition for a stay of the effective date of the good faith negotiation procedures. The Commission has evaluated the arguments made by these applicants and has in the main denied the requests for rehearing.

In reviewing requests for stay, the Commission applies the standard set forth in the Administrative Procedure Act, 5 U.S.C. § 705 (1982), *i.e.*, if the Commission finds that "justice so requires." [388] For essentially the reasons set forth in its order of July 28, 1986,[389] the Commission finds that justice does not require postponing the effective date of Order No. 451, and the requests for stay not heretofore disposed of are therefore denied.

F. Effective Date and Paperwork Reduction Act Statement

The amendments to the Commission's regulations adopted in this order on rehearing will become effective on January 23, 1987. The effectiveness of the date on which a producer is

[379] *See* Opinion No. 770, "National Rates for Jurisdictional Sales of Natural Gas," RM75-14, issued July 27, 1976, 56 FPC 509, *reh. denied*, Opinion No. 770-A, 56 FPC 2698 (1976), *aff'd*, American Public Gas Ass'n v. FPC, 567 F.2d 1016 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); Order No. 94-C, "Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act," RM80-47-002, *et al.*, issued May 24, 1983, FERC Stats. & Regs., Regulation Preambles (1982-1985), ¶ 30,454.

[380] *See e.g.*, Citizen Advocates for Responsible Expansion v. Dole, 770 F.2d 423 (5th Cir. 1985); Save the Bay, Inc. v. United States Corps of Engineers, 610 F.2d 322, 326 (5th Cir. 1980); Sierra Club v. Hodel, 544 F.2d 1036, 1039 (9th Cir. 1976); Citizens Committee Against Interstate Route 675 v. Lewis, 542 F. Supp. 496, 531 (S.D. Ohio 1982). In addition, the regulations of the Council on Environmental Quality, the agency responsible for administering NEPA, also recognize that there are some Federal actions which, by their nature, do not raise the kind of environmental concerns against which NEPA is intended to guard. These are described as actions which do not individually or cumulatively have a significant effect on the human environment. Neither an environmental assessment nor an environmental impact statement is required for such actions. *See* 40 CFR 1508.4 (1985).

[381] Of particular note are Section IV. D., Supply Response; Section IV. E., Price Response, and Section IV. F., Good Faith Negotiation Rule. Applicants' allegations that the Commission has violated its own regulations by not performing NEPA review are incorrect. The Commission's own regulations require the preparation of an environmental impact statement when the Commission determines that the contemplated activity is a "major federal action significantly affecting the quality of the human environmental." The regulations do not address the situation at issue in this order where the Commission believes that no NEPA review is required. *See* 18 CFR 2.80-2.82 (1986).

[382] 51 FR 22209-10 (June 18, 1986).

[383] Indicated Producers at 30-31.

[384] IPAA at 4-5.

[385] 18 CFR 157.40 (1986).

[386] 18 CFR 381.203 (1986).

[387] 51 FR 27529 (Aug. 1, 1986), 36 FERC ¶ 61,102 (1986).

[388] *See, e.g.*, Arkansas Louisiana Gas Co., 23 FERC ¶ 61,324 (1983). The applicants have framed their arguments under the four factors listed in *Virginia Petroleum Jobbers Ass'n.* v. *FPC*, 259 F.2d 921 (*D.C. Cir. 1958*), and *Metropolitan Area Transit Comm.* v. *Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). Even using those factors, the Commission believes the requests for stay should be denied. As discussed more fully in the text of this order, the Commission has exercised its broad jurisdiction over the parties and contracts affected by Order No. 451 in a balanced way that cannot fairly be characterized as *ultra vires*. Assertions of irreparable harm are also unfounded. Even if the courts modify Order No. 451 on review, only money adjustments need be made to make parties whole. Economic damages, even if they do derive from agency action, are insufficient to constitute "irreparable harm." *See, e.q.*, *Wisconsin Gas Co.* v. *FERC*, 758 F.2d 669 at 674 (D.C. Cir. 1985), *citing* Virginia Petroleum Jobbers Ass'n., 259 F.2d at 925. Moreover, Order No. 451, by providing a significantly greater degree of market-responsiveness in the gas markets will benefit a broad spectrum of the public. A delay in implementation will harm this broad spectrum of parties which includes consumers, end-users, local distribution companies, producers, marketers and pipelines generally. On balance, the long-term public interest benefits of the rule to consumers and to the industry as a whole outweighs any initial detriment to those few entities that benefited from a distorted market. This militates against any stay of the rule and instead underscores the need for its prompt implementation.

[389] Order Denying Petitions for Stay of Order No. 451, Docket Nos. RM86-3-006, RM86-3-062, 36 FERC ¶ 61,102, 51 FR 27529 (Aug. 1, 1986).

permitted to make a nomination request under the good faith negotiation rule in Order No. 451 (18 CFR 270.201) is further postponed until January 23, 1987.

The information collection provisions in this rule are being submitted to the Office of Management and Budget (OMB) for its approval under the Paperwork Reduction Act [390] and OMB's implementing regulations.[391] Interested persons can obtain information on these information collection provisions by contacting the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426 (Attention: Ellen Brown (202) 357-8272). Comments on the information collection provisions can be sent to the Office of Information and Regulatory Affairs of OMB, New Executive Office Building, Washington, DC 20503 (Attention: Desk Officer of the Federal Energy Regulatory Commission).

List of Subjects

18 CFR Part 270

Natural gas, Price controls, Reporting and recordkeeping requirements.

18 CFR Part 284

Continental shelf, Natural gas, Reporting and recordkeeping requirements.

In consideration of the foregoing, the Commission is amending Parts 270, and 284, Title 18, *Code of Federal Regulations as* set forth below.

By the Commission.

Kenneth F. Plumb,

Secretary.

PART 270—[AMENDED]

1. The authority citation for Part 270 continues to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717-717w (1982); Department of Energy Organization Act, 42 U.S.C. 7101-7352 (1982); E.O. 12,009, 3 CFR 142 (1978); Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432 (1982).

2. Section 270.201 is amended by revising paragraphs (a), (b)(1)(i), (b)(3), (c)(2), (d), (e)(1), and (f)(3) to read as follows:

§ 270.201 Good faith negotiation procedures.

(a) *Applicability, definitions, and general rules.* (1) This section applies to requests for renegotiation of the price of old gas sold under an existing contract.

(2) For purposes of this section:

(i) "Old gas" means natural gas which, if sold, would be subject to a maximum lawful ceiling price under section 104 or 106(a) of the NGPA.

(ii)(A) "Existing contract" means a contract in effect on July 18, 1986, or an expired contract pursuant to which sales of natural gas are continuing on that date under the service obligation of a certificate of public convenience and necessity, that includes the sale of any old gas and provides authority for the first seller to collect a higher price upon establishment by the Commission of a higher maximum lawful price.

(B) An existing contract includes the sale of old gas if, on July 18, 1986, the contract encompasses the sale of any gas that has not been abandoned under section 7(b) of the Natural Gas Act and which, if sold, would be priced as old gas, whether or not any old gas is sold on that date.

(iii) The terms "first seller" and "party to a contract" include:

(A) An owner of a working interest in an oil or gas lease that has a direct contractual relationship with a purchaser for a "first sale" of gas, as defined in section 2(21) of the NGPA; and

(B) An operator of an oil or gas lease that has a direct contractual relationship with a purchaser for a "first sale" on behalf of any owner of a working interest in the lease that does not have such a relationship.

(3)(i) Any existing contract under which old gas is sold may be renegotiated or amended at any time to provide for a price up to the alternative maximum lawful price under § 271.402(c)(7)(i) of this chapter without using the good faith negotiation procedures.

(ii) A price for old gas that exceeds the otherwise applicable maximum lawful price under § 271.402 of this chapter may be collected under an existing contract only if the first seller and purchaser agree upon a price up to the alternative maximum lawful price under § 271.402(c)(7)(ii) in accordance with this section.

(4) A party to an existing contract may not request a nomination of a price under the provisions of this section for any gas sold under the contract, if that party:

(i) And the purchaser or first seller have renegotiated the price or any other term for the sale of any old gas under the contract after July 18, 1986, without using the good faith negotiation procedures of this section, and have not agreed in writing to preserve their rights under this section;

(ii) Has previously requested nomination of a price under paragraph (b)(1) of this section for any gas sold under the contract; or

(iii) Has been requested under this section to nominate a price for any gas sold under the contract, and the last date has passed under paragraphs (b)(2) or (b)(3) of this section to request the other party to nominate a price for gas sold under the contract.

(5) Any request for nomination of a price under this section, any nomination of a price in response to such a request, and any notice of abandonment of sales or termination of purchases under this section must be sent by U.S. mail, return receipt requested.

(6) Any deadline under this section for requesting a nomination of a price, or for nominating a price in response to such a request, may be extended by mutual agreement of the parties in writing.

(7) A party nominating a price may propose a change in any other term of the existing contract, and for purposes of this section, the terms "nominated price" and "nomination" may include such a proposed change.

(b) *Requests for negotiation and nomination of price.*

(1)(i) At any time after January 23, 1987, a first seller may request the purchaser to nominate a price at which the purchaser is willing to continue buying old gas under any existing contract by submitting a written request to the purchaser, and may specify the wells or category of wells under each contract for which the first seller requests a renegotiated price.

* * * * *

(3) Within 30 days after receiving a request from a purchaser for nomination of a price for any gas under a contract that is not named in the first seller's request and that includes the sale of any old gas, the first seller may request the purchaser to nominate a price at which the purchaser is willing to continue buying any old gas under that contract, including old gas for which the purchaser has requested a nomination of price by the first seller, by submitting a written request to the purchaser.

* * * * *

(c) *No response to request for nomination.*

* * * * *

(2) If the first seller does not nominate a price in writing within 60 days after receiving the purchaser's request for nomination of a price, the purchaser may terminate its purchases of all or part of the gas named in its request for nomination at any time upon 60-days written notice to the first seller.

(d) *Purchaser's nomination of highest*

[390] 44 U.S.C. 3501-3520 (1982).

[391] 5 CFR 1320 (1986).

price. If the purchaser nominates in writing the highest price to which an existing contract price could escalate with the purchaser's agreement under § 271.402(c)(7)(ii) of this chapter, and the purchaser does not propose a change in any term of the contract, sales must continue at the nominated price under the terms of the existing contract.

(e) *Purchaser's nomination of lower price; first seller's options.* (1) If the purchaser nominates in writing a price less than the highest price to which the existing contract price could escalate or proposes a change in any other term of the contract, the first seller must accept or reject the nominated price in writing within 30 days after receiving the nomination. If the first seller does not accept the purchaser's nominated price in writing within 30 days, the nominated price is deemed rejected.

* * * * *

(f) *First seller's nomination of price; purchaser's options.*

* * * * *

(3) If the purchaser rejects the nominated price, the purchaser may at any time terminate its purchases of all or part of the gas named in its request for nomination upon 60-days written notice to the first seller.

* * * * *

§ 270.201 [Amended]

3. In § 270.201, the first sentence of paragraph (h) is amended by removing the phrase "is deemed to have agreed to" and inserting in lieu thereof the word "must".

PART 284—[AMENDED]

4. The authority citation for Part 284 continues to read as follows:

Authority: Natural Gas Act, 15 U.S.C. 717–717w (1982); Natural Gas Policy Act of 1978, 15 U.S.C. 3301–3432 (1982); Department of Energy Organization Act, 42 U.S.C. 7107–7352 (1982); E.O. 12,009, 3 CFR 142 (1978).

§ 284.225 [Amended]

5. In § 284.225, paragraph (a) is amended by removing the phrase "is deemed to have agreed to" and inserting in lieu thereof the word "must".

6. The table of contents for Part 284 is amended by adding a new section to Subpart G to read as follows:

PART 284—CERTAIN SALES AND TRANSPORTATION OF NATURAL GAS UNDER THE NATURAL GAS POLICY OF 1978 AND RELATED AUTHORITIES

* * * * *

Subpart G—Blanket Certificates Authorizing Certain Transportation by Interstate Pipelines on Behalf of Others and Service by Local Distribution Companies

Sec.

* * * * *

284.226 Transportation by interstate pipelines upstream of pipelines releasing gas under the good faith negotiation procedures.

* * * * *

7. Section 284.225 is amended by revising paragraph (d) to read as follows:

§ 284.225 Transportation by interstate pipelines of gas released under the good faith negotiation procedures.

* * * * *

(d) *Transportation rates*—(1) *Transportation service within contract demand.* If a pipeline provides transportation of gas to an existing customer under this section and, as a result, the total volumes of gas sold and transported to that customer on a firm basis do not exceed existing firm contract demand by that customer, the pipeline:

(i) Must base its transportation rate for such gas on the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and § 284.8(d);

(ii) Must waive any transportation reservation fee to the extent that a customer pays for facilities associated with such transportation service through demand charges under its firm sales rate schedule;

(iii) Must credit the volumes of gas transported against any minimum commodity bill obligation; and

(iv) May recover costs, on an Mcf or MMBtu basis, associated with standing by to serve a firm sales rate schedule customer that does not reduce its contract demand, if the pipeline revises its sales rate schedules on file with the Commission.

(2) *Transportation service in excess of contract demand.* If a pipeline provides transportation of gas to an existing customer under this section and, as a result, the total volumes of gas sold and transported to that customer exceed existing firm contract demand to that customer, the transportation rate for such gas must be the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service.

(3) *Transportation service for other customers.* If a pipeline provides transportation of gas under this section to any pipeline or customer other than an existing customer on a firm basis, the transportation rate for such gas must be the rate in a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service or § 284.9(d) for interruptible service.

(4) *Interim rates.* If a pipeline does not have a transportation rate schedule on file with the Commission that conforms to § 284.7 and either § 284.8(d) for firm service of § 284.9(d) for interruptible service, the pipeline must file such a rate schedule within 60 days after first providing transportation service under this section. Until such a rate schedule becomes effective, the pipeline must provide the transportation service using the rate in one of the pipeline's transportation rate schedules on file with the Commission which the pipeline determines covers service comparable to transportation service authorized under this section.

* * * * *

8. Part 284 is amended by adding a new § 284.226 to read as follows:

§ 284.226 Transportation by interstate pipelines upstream of pipelines releasing gas under the good faith negotiation procedures.

(a) *Applicability.* This section applies to any upstream interstate pipeline that is not subject to the non-discriminatory access provisions of § 284.8(b) or § 284.9(b) of this chapter and that provided transportation of gas immediately prior to its release by any interstate pipeline due to termination or abandonment under the good faith negotiation procedures in § 270.201 of this chapter. Such upstream pipelines were those authorized under a certificate of public convenience and necessity to transport natural gas, prior to the release of that gas due to termination or abandonment under § 270.201 (c), (e), or (f) of this chapter, along any line between the wellhead and a pipeline that must transport the gas under § 270.201(h) of this chapter.

(b) *Blanket Certificate.* Such upstream interstate pipelines are granted a blanket certificate of public convenience and necessity that authorizes transportation of natural gas released due to termination or abandonment under § 270.201 (c), (e) or (f) of this chapter on behalf of any shipper to any interstate pipeline releasinq gas under § 270.201 of this chapter, under the same terms and conditions as previously provided to the releasing pipeline.

(c) *Transportation rates.* The rates charged by such third-party, upstream pipelines for transportation under this section shall be identical to the rates charged under any pre-existing transportation authorization for the same service previously provided to the releasing pipeline.

(d) *Reporting requirements.* An interstate pipeline that transports gas under the certificate granted by this section is subject to the reporting requirements of § 284.223(f).

Editorial Note: These appendixes will not appear in the Code of Federal Regulations.

APPENDIX A.—REQUESTS FOR REHEARING BY APPLICANT AND SUBDOCKET NUMBERS

Applicant	Subdocket
American Gas Association (AGA)	003, 068
American Paper Institute (API)	066
American Public Gas Association (APGA)	004, 068
ANR Pipeline Company and Colorado Interstate Gas Company (ANR and CIG).	047
Amoco Production Company (Amoco)	064
Associated Gas Distributors (AGD)	029, 068
Arkla, Inc. (Arkla)	049
Atlantic Richfield Company, Chevron U.S.A. Inc., Cities Service Oil and Gas Corporation, Exxon Corporation, Hunt Oil Company, Mobil Oil Corporation, *et al.* Sun Exploration and Production Company, et al. and Union Oil Company of California (Atlantic Richfield et al.).	060
Baltimore Gas and Electric Company (BG&E)	032
Citizen/Labor Energy Coalition (C/LEC)	005
California Public Utilities Commission (Cal. PUC).	015
District of Columbia Public Service Commission (D.C. PSC).	048
Elizabethtown Gas Company (Elizabethtown)	022
El Paso Natural Gas Company (El Paso)	023
Felmont Oil Corporation (Felmont)	024
Florida Gas Transmission Company (Florida Gas).	053
Florida Cities	062
General Service Customer Group	065
Interstate Power Company	012
Indicated Producers	018
Independent Petroleum Association of America (IPAA).	031, 067
Independent Petroleum Association of Canada (IPAC).	033
Interstate Natural Gas Association of America (INGAA).	039
KN Energy, Inc. (KN)	006
Kansas Power and Light Company, Kansas Public Service Company, and Missouri Public Service Company (KP&L *et al.*).	042
Kentucky Public Service Commission (Kentucky PSC).	058
Laclede Gas Company (Laclede)	009
Lone Star Gas Company	034
Minnesota Department of Public Service (Minnesota DPS).	011
Missouri Public Service Commission (Missouri PSC).	030
Michigan and the Michigan Public Service Commission (Michigan).	035
Maryland People's Counsel and National Association of State Utility Consumer Advocates (MPC/NASUCA).	046
Midwest Energy Inc. (Midwest)	050
Northern Illinois Gas Company (NI-Gas)	016
Northern Distributor Group (NDG)	013
Northern Natural Gas Company (Northern Natural).	027
Northwest Pipeline Corporation (Northwest)	036
Northwest Central Pipeline Corporation (Northwest Central).	055
New York Public Service Commission (N.Y. PSC).	057
Natural Gas Pipeline Company of America and United Gas Pipe Line Company (Natural and United).	040
Ohio Consumer's Counsel	007
Ohio Public Utilities Commission (Ohio PUC)	014
Peoples Gas Light and Coke Company and North Shore Gas Company (Peoples Gas *et al.*).	010
Plains Petroleum Company (Plains)	017
Process Gas Consumers Group, American Iron and Steel Institute, and Georgia Industrial Group (PGC).	020
Pennzoil Company and Pennzoil Producing Company (Pennzoil).	028
Panhandle Eastern Pipe Line Company, Trunkline Gas Company, and Trunkline LNG Company (Panhandle and Trunkline).	037
Pacific Gas and Electric Company (PG&E)	008
Southern California Gas Company (SoCal)	019
Samson Resources Company (Samson)	041
Southern Natural Gas Company (Southern Natural).	054
Texas Eastern Transmission Corporation (Texas Eastern).	043
Transcontinental Gas Pipe Line Corporation (Transco).	044
Tenneco Oil Company (Tenneco)	045
Tennessee Gas Pipeline Company (Tennessee).	061
Texas Gas Transmission Corporation (Texas Gas).	063
Transwestern Pipeline Company (Transwestern).	038
Union Gas System, Inc. (Union Gas)	059
United Distribution Companies (UDC)	025, 068
Westcoast Transmission Company Ltd., and Westcoast Resources, Inc. (Westcoast).	026
Williston Basin Interstate Pipeline Company (Williston Basin).	021

Appendix B

[Appendix B may be obtained from the Commission.]

BILLING CODE 6717-01-M

APPENDIX C

[1]	[2]	[3]	[4]	[5]	[6]	[7]
	Producer requests nomination of price for A3 gas.		Purchaser responds to producer nomination request made at [2]. Producer requests nomination of B3 gas		Purchaser responds to producer nomination request made at [4]. Purchaser accepts or rejects price nominated by producer at [5].	
any time	30 days	30 days	30 days	30 days	30 days	
[insert date 30 days after publication of this order in the Federal Register]		Purchaser requests nomination for A1 and A2 gas and B1 and B2 gas.		Producer responds to purchaser nomination request made at [3]. Producer accepts or rejects price nominated by purchaser at [4].		Producer accepts or rejects price nominated by purchaser at [6].

Contracts involved

Contract A	Contract B
1. Post-1974 gas	1. Post-1974 gas
2. New gas	2. New gas
3. flowing gas	3. flowing gas

Notes

1. Process ends as to particular gas categories when agreement is reached.

2. Each contract may be negotiated only once under good faith rule.

3. Either producer or purchaser may abandon or discontinue sales or purchases (some or all) at any time after its rejection of nominated price. Producer must have contract with new purchaser. Producer must give 30 days notice. Purchaser must give 60 days notice.

4. Firm sales customers of non-Order 436 pipelines get right of first refusal as to all abandoned gas. Non-Order 436 pipelines must transport.

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federal register

Wednesday
December 24, 1986

Part III

Environmental Protection Agency

40 CFR Parts 260, 264, 265, and 271

Hazardous Waste Management System; Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 260, 264, 265, and 271

[FRL-3075-9]

Hazardous Waste Management System; Standards for Owners and Operators of Hazardous Waste Treatment, Storage, and Disposal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: Under authority of the Hazardous and Solid Waste Amendments (HSWA) of 1984 to the Resource Conservation and Recovery Act (RCRA), EPA is proposing rules to minimize the presence of free liquids in containers holding hazardous waste that are disposed in hazardous waste landfills. The Agency is proposing to prohibit the disposal of containers holding liquid hazardous wastes and free liquids while continuing to exempt certain containers that are specifically designed to hold small quantities of liquid hazardous wastes. Today's proposed rule would require that if hazardous liquids or free liquids in containers are solidified by the use of an absorbent, the absorbent material must not be biodegradable and the absorbent/waste mixture must not release liquids when compressed under pressures experienced in landfills. EPA is also proposing a test protocol in order to determine whether a waste containing hazardous liquids or free liquids when solidified by the use of a non-biodegradable absorbent, would release the free liquids under pressures experienced in landfills. These rules do not apply to owners and operators of landfills in which only polychlorinated biphenyl (PCB) chemical waste regulated under 40 CFR Part 761 are disposed. However, PCBs mixed with a RCRA hazardous waste must comply with all requirements under both RCRA and the Toxic Substances Control Act (TSCA) (40 CFR Part 761). In cases where applicable requirements of the two statutes differ, the most stringent requirements apply.

DATES: Comment date: Comments on these proposed amendments will be accepted until February 23, 1987.

ADDRESS: The public must send an original and two copies of its comments to: EPA RCRA Docket (S-212) (WH-562), 401 M Street SW., Washington, DC 20460.2

Place the docket #F-86-CLIP FFFFF on your comments. For additional details about the OSW docket see the "OSW Docket" section in "**SUPPLEMENTARY INFORMATION.**"

FOR FURTHER INFORMATION CONTACT: For general information and for a copy of today's proposed text, contact the RCRA Hazardous Waste Hotline, Office of Solid Waste (WH-563), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, telephone 800/424-9346 (382-3000 in Washington, DC). For specific information on this amendment, contact Paul Cassidy, Office of Solid Waste (WH-565), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, (202) 382-4654.

SUPPLEMENTARY INFORMATION:

OSW Docket

The OSW Docket is located at: EPA RCRA Docket (Sub-basement), 401 M Street SW., Washington, DC 20460.

The docket is open from 9:30 to 3:30 Monday through Friday, except for Federal holidays. The public must make an appointment to review docket materials. Call Mia Zmud at 475-9327 or Kate Blow at 382-4675 for appointments. The public may copy a maximum of 50 pages of material from any one regulatory docket at no cost. Additional copies cost $.20/page.

Copies of the following documents are available for *viewing only* in the OSW docket room:

1. "Sorbent Pressure Test Development", Report prepared by Research Triangle Institute.
2. "Liquid Release Test for Liquid Loaded Sorbents—Single Laboratory Evaluation of Test Equipment", Research Triangle Institute, April 1986.
3. "Structurally Stable Absorbents", Mason and Hanger-Silas Mason, Co., August 1986.
4. "Development of Criteria to Distinguish Acceptable Absorbents for Containerized Hazardous Liquids", K.W. Brown, March 1986.
5. "List of Commonly Available Absorbents", GCA Corporation, May 1985.
6. Letter and Report to Paul Cassidy from Chemical Waste Management, February 1986.
7. "A Review of Biodegradability Testing of Absorbents", SCS Engineers, January 1986.
8. Letter to Paul Cassidy from Janic F. Artiola, K.W. Brown & Associates, November 12, 1985.

Preamble Outline

I. Background
 1. Previous Regulations
 2. Minimizing the Disposal of Containerized Liquid Hazardous Waste in Landfills
 3. Minimizing the Presence of Free Liquids in Containers Holding Hazardous Waste
 4. Biodegradable Absorbents
 5. Structurally Stable Absorbents
 6. Development of Liquids Release Test (LRT)
 7. Additional Test Results Obtained During the Development of the Liquids Release Test (LRT)
 8. Evaluation of the Liquid Release Test
 9. Selection of Appropriate Pressure for the Liquids Release Test
 10. Relationship of the Paint Filter Liquids Test to Today's Proposed Liquids Release Test
 11. Conforming Changes
II. State Authority
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VI. References
VII. List of Subjects

I. Background

1. Previous Regulations

On May 19, 1980, EPA promulgated regulations that established most of the basic elements of the hazardous waste management program required by Subtitle C of the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6921 et seq. See 45 FR 33066 et seq. (May 19, 1980). Part 265 of those regulations sets forth interim status standards that apply to owners and operators of existing hazardous waste treatment, storage, and disposal facilities pending their receipt of a permit that establishes more detailed requirements under the standards of Part 264. With certain limited exceptions, § 265.314(b), as originally promulgated, would have forbidden the placement in a landfill of a container holding liquid hazardous wastes or free liquids after November 19, 1981.

On February 25, 1982, EPA proposed (1) alternative methods of restricting containerized liquid wastes in landfills, and (2) a paint filter test that was intended to be used to determine the presence of free liquids in containers. See 47 FR 8307 et seq. (February 25, 1982). One method of restricting wastes, the so-called 25 percent by volume method, would have restricted the allowable volumetric fraction of the total volume of the landfill that could have been used for disposal of containers holding free liquids. In the other method, EPA proposed that each container be limited to a prescribed maximum percentage of liquid hazardous waste. The Agency also extended the date by 90 days for compliance with § 265.314(b) to allow time for consideration of this new approach.

On March 11, 1982, in response to two petitions for reconsideration of this extension, EPA held a public hearing to consider whether some interim control might be advisable pending full resolution of the issues concerning containerized liquids. On March 22, 1982, EPA imposed interim restrictions on the disposal of containerized liquid wastes in landfills pending full rulemaking on the issue. See 47 FR 12316 et seq. (March 22, 1982). Under these interim rules (§ 265.314(b)) (redesignated as § 265.314(c) in the current regulations), no container holding free-standing liquids could be placed in a landfill.

On July 26, 1982, EPA issued Part 264 standards for use in issuing final permits for facilities that treat, store, or dispose of hazardous wastes. See 47 FR 32274 et seq. (July 26, 1982). These standards are applicable to owners and operators of new and existing hazardous waste land treatment, storage, and disposal facilities. EPA also amended § 264.314(b) (redesignated as § 264.314(d) in the current regulations) by restricting the disposal of containerized liquids in a manner identical to the interim status standards promulgated on March 22, 1982.

On April 30, 1985, EPA issued a final rule requiring that the Paint Filter Liquids Test be used to determine the presence of free liquids in either a bulk or a containerized waste. The requirement was added in §§ 264.314(c) and 265.314(d). See 50 FR 18370 (April 30, 1985).

On November 8, 1984, the Hazardous and Solid Waste Amendments (HSWA) to RCRA were signed into law. Section 3004(c)(2) of the HSWA requires the Agency to "promulgate final regulations which minimize the disposal of containerized liquid hazardous waste in landfills, and minimize the presence of free liquids in containerized hazardous waste to be disposed of in landfills." The statute also directs EPA to ensure that these regulations specifically prohibit the disposal in landfills of liquids that have been absorbed in materials that biodegrade or that release liquids when compressed as might occur during routine landfill operations.

2. Minimizing The Disposal Of Containerized Liquid Hazardous Waste In Landfills

The recent Amendments to RCRA (HSWA) require that the Administrator of EPA promulgate final regulations that minimize the disposal of containerized liquid hazardous wastes in landfills. The legislative history to section 3004(c)(2) shows that when Congress developed this amendment, they gave serious consideration to prohibiting outright the disposal of all containers of liquid hazardous wastes into any landfill. However, the legislative history suggests that Congress intended to allow EPA to provide an exemption from the ban for the disposal of very small quantities of liquid wastes, particularly for the disposal of lab packs specifically desinged for very small quantities of laboratory wastes. The use of the term "minimize" in section 3004(c)(2)(A) reflects this intent. See, e.g., S. Rep. No. 284, 98th Congress, 1st Session 22 (1983); 129 Cong. Rec. H8141 (daily ed. Oct. 6, 1983) (statement of Rep. Breaux).

The Agency construes the provision to mean that free liquids will be prohibited from being placed in a landfill, except if the free liquids meet certain exemptions or are properly treated (solidified). It is evident that the amendment language allows hazardous liquids to be absorbed under specific conditions in a container and then placed in a landfill. The language states that the disposal of containerized liquid hazardous waste in landfills is to be minimized. One way to minimize the disposal of containers holding hazardous liquids or free liquids is to effectively treat the hazardous liquids (i.e., convert them to solids). Once converted to solids, the amendment does not permit the disposal of the nonliquid waste in a landfill.

Currently §§ 264.314(d) and § 265.314(c) prohibit the placement of containers holding free liquids in a landfill unless certain exemptions are met. The current regulations allow exemptions to the above liquids requirements as follows: (1) All free-standing liquid has been removed by decanting or other methods, has been mixed with an absorbent or solidified so that free-standing liquid is no longer observed, or has been otherwise eliminated; (2) the container is very small, such as an ampule; (3) the container is designed to hold free liquids for use other than storage, such as a battery or capacitor; or (4) the container is a lab pack and is disposed of accordingly.

"Free liquids" are liquids that readily separate from the solid portion of a waste under ambient temperature and pressure. See 40 CFR 260.10. "Free-standing liquids" are those that form a distinct layer above the solid layer in the container, usually during transportation. Free-standing liquids are a subset of free liquids.

In today's rule, the Agency is proposing to eliminate the exemption regarding free-standing liquids in §§ 264.314(d)(1) and § 265.314(c)(1) in order to minimize the disposal of containerized liquid hazardous waste. (See Section 3 of this preamble for further details.) Thus, today's proposal will prohibit the landfilling of certain free liquids that have been disposed in landfills in the past. The Agency will allow containerized liquids to be treated (i.e., converted to a solid) by the use of non-biodegradable absorbents under specific conditions. The Agency will regulate the disposal of liquids to ensure that they are treated in such a manner as to prevent the future release of the liquids due to landfill pressures.

In today's proposal, the Agency will continue to allow exemptions for only the containers discussed below: Lab packs, ampules, batteries, and capacitors. These exemptions are currently codified in § 264.314(d)(2), (3), and (4), and § 265.314(c)(2), (3), and (4). In restricting the exemptions to only these containers, the Agency is indeed minimizing the disposal of containerized liquid hazardous wastes in landfills since most hazardous liquids are disposed of in 55-gallon drums rather than in these containers.

Congress mandated that the Agency minimize rather than eliminate disposal of containerized liquids; therefore, the Agency is not prohibiting all liquids from being placed in a landfill. Containers that are specifically designed to hold small quantities of liquid hazardous waste (i.e., lab packs, ampules, batteries, and capacitors) will continue to be allowed as the only exemptions to the prohibition of landfill disposal of containers holding liquid hazardous wastes. The intent behind these exemptions is not only to uphold the general restriction on the disposal in landfills of containers holding liquid hazardous wastes, but also to allow the disposal of specific containers, such as lab packs that are carefully designed and prepared for relatively safe management of such liquids, and ampules, batteries, and capacitors that contain a small quantity of free liquids. These types of containers, owing to their size and their packaging requirements, will not contain large amounts of liquids and thus can be landfilled without needing to eliminate the liquids.

Lab packs (discussed in §§ 264.316 and 265.316) are most commonly used by laboratories that produce small amounts of many different wastes. These wastes are commonly collected in small containers that range in size from an ampule to 5-gallon pails. The small containers must be a design and constructed of a material that will not react dangerously with, be decomposed by, or be ignited by the waste contained therein. (See §§ 264.316(a) and 265.316(a).) The small containers are usually placed within a 55-gallon drum (the regulations require the outer container to be no more than 110-gallon capacity) and surrounded by a sufficient amount of compatible absorbent material before the drum is placed in a landfill. Containers holding incompatible wastes are prohibited from placement in the same drum (lab pack) in case of possible ruptures. Furthermore, reactive wastes other than cyanide- or sulfide-bearing wastes are prohibited from disposal in lab packs unless the waste is rendered non-reactive prior to packaging. See §§ 264.316 and 265.316. The American Chemical Society reported that the average lab pack contains 3 gallons of hazardous liquid with a maximum of 15 gallons. Approximately 100,000 lab packs are used each year in the U.S. with a cost to the user of $200 to $350 per pack to dispose.

The disposal of lab packs in landfills will therefore continue to be allowed because the Agency believes that such disposal is safe because of the small quantities of waste involved. However, the final Land Disposal Restrictions rule published on November 7, 1986, does not exclude from the land disposal restrictions lab packs if they contain solvents designated as F001–F005 or other restricted wastes. See 51FR 40584 (November 7, 1986).

The concept of lab packs was developed for the disposal of small containers of laboratory wastes. The disposal of a lab pack is a costly alternative for a generator that has a large quantity of liquid wastes to be disposed. Since the cost of lab pack disposal is high, it is not economical for large volumes of liquid wastes to be lab packed. Lab packs are generally used for small amounts of wastes generated by chemistry or hospital laboratories or other small quantity generators, who wish to employ environmentally safe disposal methods. Incineration costs for bulk liquids range from $0.30 to $4.20 per gallon whereas the average cost of lab pack disposal ranges from $67 to $117 per gallon.

The prohibition on landfilling containerized liquid hazardous waste applies to 55-gallon drums and other similar containers, but does not apply to devices that function as containers for hazardous materials during their useful lives, such as batteries or capacitors, or to very small containers, such as ampules. These types of containers are not likely to contribute substantial volumes of liquid to most landfills, and the difficulty of opening and emptying them appears to outweigh the small benefit gained by such action.

For the reasons discussed above, the Agency believes that the continued exemption for lab packs, ampules, batteries, and capacitors results in a minimization of the disposal of containerized liquid hazardous wastes in landfills. Based on this relief, the Agency is continuing to allow an exemption for these types of containers.

The Agency is requesting comments on two issues concerning the disposal of batteries and lab packs. The Agency is aware that lead acid batteries can be disposed of in hazardous waste landfills; however, a large percentage of lead acid batteries are being reclaimed. The Agency is concerned that disposal of lead acid batteries, without proper drainage, could cause problems in the landfill environment, namely, the release of the lead into the environment. The Agency has not in today's proposal required that batteries be drained prior to landfill disposal because we feel that batteries only contain small quantities of hazardous wastes. The Agency, however, specifically seeks comments on whether the current regulations should require the proper drainage of batteries prior to landfill disposal or remain unchanged (i.e., not require drainage.).

The second issue concerns the disposal of lab packs. The Agency has not proposed any rule changes to the lab pack requirements today. However, today's proposal prohibits use of biodegradable absorbents for all other non-exempt containers. The Agency is requesting comments on whether or not the elimination of biodegradable absorbents should apply to lab packs also, or whether biodegradable absorbents should still be allowed to be used in lab packs, since lab packs contain an average of only three gallons of hazardous liquids.

3. Minimizing The Presence Of Free Liquids In Containers Holding Hazardous Waste

Section 3004(c)(2)(B) requires that the Agency minimize the presence of free liquids in containerized hazardous wastes to be disposed of in landfills. The intent of Congress in requiring the Agency to minimize the presence of free liquids in containers is to reduce the risk of cover subsidence and groundwater contamination due to the collapse of metal drums from decay and subsequent release of liquids. If the drums collapse or leak after the post-closure period, significant uncontrolled releases and subsidence of the cover could occur at a time when the leachate collection and removal system (if present) is no longer operated, the ground water may no longer be routinely monitored, and the final cover is no longer maintained. The presence of liquids can dramatically affect the integrity of the landfill as well as increae the mobility of wastes leaving the landfill. Furthermore, hazardous liquids can cause liner failure by contributing hydraulic pressure on the liner as well as weakening the liner through chemical interactions. After a liner is breached, the liquid hazardous wastes can present a serious threat to groundwater resources below the landfill because they react with other wastes in the landfill and enhance the mobility of hazardous wastes leaving the landfill. Congress was very clear both in its desire to minimize the presence of free liquids in containerized wastes and in its rationale for its concern regarding such disposal.

The current regulations (§§ 264.314(d) and 265.314(c)), promulgated prior to the HSWA and in effect until today's proposal becomes final, allow containers holding free liquid to be placed in a landfill if all "free-standing liquid" is removed, mixed with an absorbent, or solidified so that free-standing liquid is no longer observed or is otherwise eliminated.

Prior to the HSWA, the Agency was aware of an inconsistency between the disposal requirements for containerized liquids and for bulk liquids. The March 22, 1982, interim control measure for container created an inconsistency in the Agency's regulations that carried over into the July 26, 1982, regulations. The inconsistency was that for bulk (or non-containerized) liquids, the disposal of "free liquids" in a landfill was prohibited (with certain exemptions), whereas for containerized liquids, the disposal of "free-standing liquids" was prohibited. This inconsistency allowed owners or operators who landfilled containers to treat the liquids in the containers to an endpoint (i.e., removing "free-standing liquids" rather than free liquids) that was less stringent than that for bulk liquids.

Because of Congress' concern over free liquids in landfills, the Agency is proposing new requirements that would regulate the disposal of "free liquids" as opposed to "free-standing liquids." Today's proposal will require that (with the exception of ampules, batteries, capacitors, and lab packs) all containerized free liquids be solidified by a non-biodegradable absorbent prior to being placed in a landfill. The waste/absorbent mixture must not release liquids as determined by the Liquids Release Test (LRT) (Method 9096). The Agency believes that the proposed change regulating free liquids will accommodate Congress' concern about the disposal of free liquids.

Today's proposal does not impose any requirements on the number of containers that must be opened and tested for the presence of free liquids. Curently, containers are being inspected for the presence of "free-standing liquids" in accordance with a facility's written waste analysis plan (see §§264.13(b) and 265.13(b)). Those containers that were previously inspected for free-standing liquids will now be tested for the presence of free liquids. The number of containers that must be opened and inspected for the presence of free liquids will depend upon the specific language in the facility's general waste analysis plan.

In order to check for the presence or absence of free liquids (in cases that do not require the use of LRT), the Paint Filter Liquids Test (Method 9095), as promulgated on April 30, 1985, must be used (see Section 10). The Paint Filter Liquids Test is the appropriate test to use in meeting the Congressional intent to minimize the presence of free liquids because that test was specifically promulgated in order to determine the presence or absence of free liquids in either a containerized or a bulk hazardous liquid waste.

4. Biodegradable Absorbents

Section 3004(c)(2) of RCRA provides that the final regulations concerning containerized hazardous liquids shall prohibit the disposal in landfills of liquids that have been absorbed in materials that biodegrade.

Congress has prohibited the disposal of liquids that have been absorbed in materials that biodegrade because when they biodegrade, they collapse and release free liquids, creating the very situation that Congress is attempting to avoid. Congress mandated that the Agency promulgate regulations minimizing the presence of liquids in landfills in order to reduce the potential migration and leaching of hazardous constituents and the potential for subsidence. The use of biodegradable absorbents in the attempt to minimize or eliminate liquids before landfilling is counterproductive because the effects of gravity or of flushing actions within the landfill would eventually transport constituents that have been released by the biodegraded absorbent. See, e.g., 130 Cong. Rec. S9177 (July 25, 1984) (section-by-section analysis of Chafee amendment).

The current regulations for the disposal of containerized liquids do not prohibit the use of biodegradable absorbents. Agency policy, however, has been to promote the use of non-biodegradable absorbents as a good management practice for the reasons stated above.

The Agency is today proposing to allow containerized liquids to be solidified by only non-biodegradable absorbents. Under today's proposal, a material is defined as biodegradable if its total organic carbon content is greater than one (1) percent. A material that has a total organic carbon content greater than one percent will be prohibited from being used as a solidification material for containerized hazardous liquids.

At present, the Agency is proposing the use of total organic carbon as a criteria to distinguish between biodegradable versus non-biodegradable materials. Carbon is an element that forms organic compounds in combination with hydrogen and oxygen. If an absorbent material has carbon present in its elemental composition, it will then be susceptible to breakdown or biodegradation. The Agency proposes using a limit of one percent (1%) or more total organic carbon content as the criteria to determine whether a material is biodegradable. If the total organic carbon content is less than one percent, the Agency considers the absorbent to be inorganic and thus non-biodegradable.

The threshold of one percent total organic carbon was based upon the best scientific judgment of several experts in the field of soil chemistry. Obviously, a material containing no organic carbon would be considered inorganic and therefore nonbiodegradable. The allowance for up to one percent of total organic carbon allows for the realities of commercial production of absorbents. It is likely that small amounts of organic contamination may occur in the production of absorbents. Likewise, some manufacturers may purposely add very small quantities of organic materials as additives in order that their products may be packed or otherwise handled more easily. These additives are not related to the materials' absorbent properties.

Any biologically synthesized carbon-based (organic) sorbents such as wood fiber, corn cobs, and cellulose are considered biodegradable. Man-made organic sorbents are considered biodegradable given sufficient time. On the other hand, sorbents derived from secondary minerals, such clays and zeolites, of which most common aggregate sorbents are composed, have silicon-aluminum structures with no carbon present, and would therefore be considered inorganic and thus non-biodegradable.

In order to calculate the organic carbon present in an absorbent, the Agency recommends that the regulated community use the modified Mebius procedure (Page, A.L., ed., 1982. Methods of Soil Analysis. Part 2. Chemical and Microbial Properties, Second edition. Number 9 (Part 2). American Society of Agronomy, Inc., Madison). This procedure is a standard soil test using an acid dichromate digestion of the sorbent material followed by a titration to determine the amount of organic carbon oxidized. Owners/operators should obtain the absorbent they plan to use from the manufacturer and perform the test to see if the particular absorbent is non-biodegradable, i.e., contains less than one percent total organic carbon. In lieu of performing this test, the owner/operator can obtain the necessary testing data directly from the manufacturer. Testing for organic carbon need be done only once. A new test will be required only if there is a change in the manufacturing process that will affect carbon content. EPA specifically requests comments on the total organic carbon approach, and on the appropriate test for total organic carbon. EPA also requests comments on the procedure for obtaining proof that the absorbent is non-biodegradable (i.e., whether the owner/operator or manufacturer provides the testing data) and whether it matters who supplies the testing data.

The Agency is also requesting comments on how organic polymers and pozzolanic materials should be treated in regard to the criteria for biodegradation. The Agency's proposed criteria for biodegradation would eliminate from use as absorbents any organic polymers or pozzolanic material that are now used or are under consideration for use if their TOC is greater than one percent. Polymers would be eliminated due to their high total organic carbon content. However, some polymers may not release the absorbed liquid waste even under pressure. Pozzolanic materials such as fly ash may have a TOC greater than one percent. The amount of carbon remaining in the ash is likely a function of the efficiency of the combustion process. Therefore, the Agency is willing to accept comments on how organic polymers and pozzolanic materials should be included in the Agency's approach (i.e., using TOC as an indicator of biodegradation). If commenters believe that organic polymers and pozzolanic materials should be allowed to be used, even if the TOC is greater than one percent, can the Agency be certain that these materials will not release liquids under pressure? Should today's proposed Liquids Release Test be used? Should the Agency allow materials (organic polymers and pozzolanic materials) with a TOC greater than one percent to be used without evaluating the material's resistance to biodegradation? If the Agency were to evaluate a materials resistance to biodegradation, what test method and what period of time (years) should be used?

Another issue that the Agency is requesting comments on is the use of absorbent pillows. The Agency is interested in gaining knowledge concerning when and how often absorbent pillows are used. The Agency also specifically requests comments on how absorbent pillows can be tested using the Liquid Release Test. Can a representative sample be obtained from an absorbent pillow, or does another pressure test need to be specified in order to test absorbent pillows? Would absorbent pillows (i.e., their contents) be considered biodegradable by today's proposal? Are absorbent pillows used only to clean up spills that must be absorbed quickly?

A biodegradable material is a material that is capable of being decomposed by microorganisms (i.e., natural biological processes). The rate of biodegradation (i.e., over what time should a material be evaluated in order to determine whether it is non-biodegradable or biodegradable) is not taken into account for the reasons discussed below.

Virtually all organic materials will be degraded sooner or later by the action of the biological environment, since (1) organic materials contain one or more components that can be utilized as a food source by organisms, (2) organic materials will be affected by the chemical actions of organisms, and (3) most earth environments are mild enough to support some biological activity.

The statutory language requires that EPA prohibit the disposal of liquids that have been absorbed in materials that biodegrade. EPA construes this language to mean that Congress was concerned with materials that biodegrade in a hazardous waste landfill environment. Unfortunately, the concept of biodegradability is complex when related to the disposal of containerized liquids that have been solidified by the use of an absorbent material. No standard test exists for determining whether an absorbent material is biodegradable. The number of absorbent materials that are used, and those that are being developed, to solidify liquid wastes is large, and determining rates of biodegradation for these absorbents would be extremely complex since there is no standard test. Another issue affecting biodegradation rates is the environment in which an absorbent material is tested. The rate of biodegradation under anaerobic conditions may be different from the rate under aerobic conditions. Therefore, the Agency believes that a uniform rate of biodegradation would be difficult to set. The Agency, however, specifically solicits comments on whether the Agency should use a biodegradation rate as a method of determining when an absorbent should be considered biodegradable.

5. Structurally Stable Absorbents

Section 3004(c)(2) further states that the final regulations shall prohibit the disposal in landfills of liquids that have been absorbed in materials that release liquids when compressed as might occur during routine landfill operations.

In order to implement this provision, EPA is today proposing that the waste absorbent mixture must not release liquids as determined by the Liquid Release Test. The Agency had considered another option when implementing the section 3004(c)(2) mandate. That option was to develop a test to determine whether certain absorbents alone (i.e., as a pure product) were to be considered "structurally stable." For the liquids in landfills issue, a structurally stable material is one that does not release liquids when compressed. Since most materials (absorbents) are in a dry state before they are used, testing a dry material before it has been used in the field does not necessarily provide information about whether these materials will release liquids in a hazardous waste landfill when compressed.

EPA therefore developed a test procedure that could be used in determining if liquids could be released from liquid/sorbent mixtures when subjected to compressive forces as experienced in landfills. This effort has resulted in the development of a test, known as the Liquids Release Test (LRT), which EPA is proposing for use in the evaluation of liquid/sorbent mixtures for potential liquid release. This test is set forth in Appendix A to this regulation. EPA is also proposing incorporation of this test into its Solid Waste Testing Manual (SW-846) as Method 9096. The text of the test is available from EPA through the RCRA Hotline at 800/424-9346, (382-3000 in Washington, DC).

The LRT has been evaluated in a single laboratory evaluation of ruggedness and precision, and is currently being evaluated in a multi-laboratory collaborative study. A discussion regarding the LRT's development and evaluation appears below.

6. Development of Liquids Release Test (LRT)

EPA began its development of the LRT with a number of general objectives. It was determined that the test should be qualitative (pass or fail), sensitive to liquid release, easily adapted to indicating release of liquids over a range of pressures, reproducible, easily conducted in the field, and relatively quick and easy to run.

In order to meet these objectives, EPA began investigating two different types of tests that could be used to detect liquid release under pressure (Ref. 1). These were a centrifugation test and a confined compression test. The centrifugation test uses centrifugal action to apply compressive forces on samples of the liquid/sorbent mixture. Specially designed centrifugation tubes were used to physically separate the sample from any liquids that may be forced out of the sample due to the applied compressive forces. This was necessary, as using common centrifugation tubes would allow re-absorption of any released liquid phase back into the sorbent (Ref. 1).

Centrifugation was initially investigated as a quick prescreen to perhaps a more elaborate test. Such a test could be conducted in minutes, was fairly simple, could accommodate a wide range in pressures, and had several other distinct advantages. For example, almost all facilities that have laboratories also have a centrifuge. However, centrifugation also suffers from a number of overwhelming disadvantages.

For example, centrifugation is severely limited by the relatively small sample size that can be accommodated in most readily available (and reasonably affordable) centrifuges. This can contribute to variability, primarily because of the difficulty in obtaining representative samples. Variability can also be caused by the great variety in centrifuges that are commercially available. In addition, centrifugation suffers other problems. For example, when evaluating dark liquids such as oils, it may not always be possible to see a distinct liquid phase in the centrifuge tube. Finally, field application of centrifugation would be difficult.

These factors led EPA to reject centrifugation and to develop a confined compression type test. After a review of available equipment and test methodologies for potential application, it was determined that fabrication of test equipment would be required (Ref. 1).

Laboratory testing, including both development and subsequent evaluation of the test, focused on two typical sorbent materials, Fuller's Earth and Floor Dry, and two liquids, 0.01 N aqueous calcium sulfate and a 5 percent acetone/water solution. The sorbent materials were selected to provide a range in sorbent characteristics used commercially. The calcium sulfate solution was selected because it is widely relied on by researchers and practitioners as a standard liquid for investigation of landfill liner permeability. When mixed with sorbent materials, this solution can serve as a benchmark against which other liquids can be compared. The acetone solution was selected as a representative solvent solution found at hazardous waste landfills (Ref. 1). Additional sorbents and liquids (including oils) were also investigated (Ref. 2). ... EXT. 023 (PART 2, PROPOSED RULES)...A24DE2 62640 Mealey 12-22-86 J. 94-999 F. 1079-1082 —A24DE2.023

Testing of these sorbent/liquid combinations centered around the liquid loading (weight/weight percent liquid), at which a liquid-loaded sorbent might be expected to just begin to release liquid. This was necessary as it is likely that most of the testing conducted in response to today's proposed regulation would be at or near this critical point. Generators and owner/operators of TSD facilities, for obvious economic reasons, would wish to load sorbent materials with the maximum amount of liquid, and the majority of their testing would likely be focused on determining the maximum allowable loading.

The majority of the initial testing was conducted at a pressure of 15 to 45 psi (Ref. 1). Because of resource constraints, evaluation of the test (i.e., single laboratory precision and ruggedness) was conducted at a pressure of 45 psi (Ref. 2). The value of 45 psi was chosen because EPA believes it to be typical of most landfill pressures. The pressure to which landfilled sorbent materials may be subjected depends on a number of factors, including the depth of the facility, the nature and depth of the cover material, and the type of equipment used during landfilling operations. The Liquid Release Test was designed to be applied over a range of pressures. In other words, the test was developed independent from the manner in which the standard test pressure was determined, and would be appropriate for any reasonable pressure chosen for the test.

The concept of a confined compression test involves subjecting materials in a confined (rigid wall) apparatus, to a compressive force and examining various effects on the material. Several types of equipment, involving the same general design, but different means of pressure application were examined. The first device examined, known as a consolidometer, was designed and used at Duke University for measuring the permeability of soils under various degrees of consolidation. This device was modified slightly for use in the LRT and appears in Figure 1.

The top and bottom of the unit were constructed of polyvinyl chloride (PVC) while the cylinder and piston were made of transparent cast acrylic. A ceramic filter stone was used to distribute pressure evenly over the surface of the sample. While EPA recognized that the final equipment used for the LRT must be chemically resistant, this device served as an inexpensive means of investigating and consolidometer-type apparatus.

The apparatus employs two perforated TEFLON® disks to physically separate the sample from absorptive filter papers, which are used to detect liquid release. The TEFLON® disks serve to prevent the filter paper from collecting liquid by capillary suction. Pressure is applied to the sample from a vertical load piston, which is driven by a hydraulic press.

Consolidation of the sample is measured at 15-second intervals for the first minute of the test, and at one minute intervals thereafter. The pressure is continued until equilibrium conditions are achieved. Equilibrium was defined as a consolidation rate of less than 0.001 cm per minute. This equilibrium was achieved for all samples within 10 minutes from initial application of the pressure. Selected long-term (i.e., > 10 minutes) tests were also run to confirm that consolidation had reached a steady value within ten minutes. Following termination of the pressure, the test units are dismantled and the filter papers are examined for the presence of liquid (Ref. 1).

Typical results, in terms of the liquid loading (weight to weight percent) which produces liquid on the filter paper at two pressures are indicated in Table 1 (Ref. 1).

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Figure 1: Modified Consolidometer

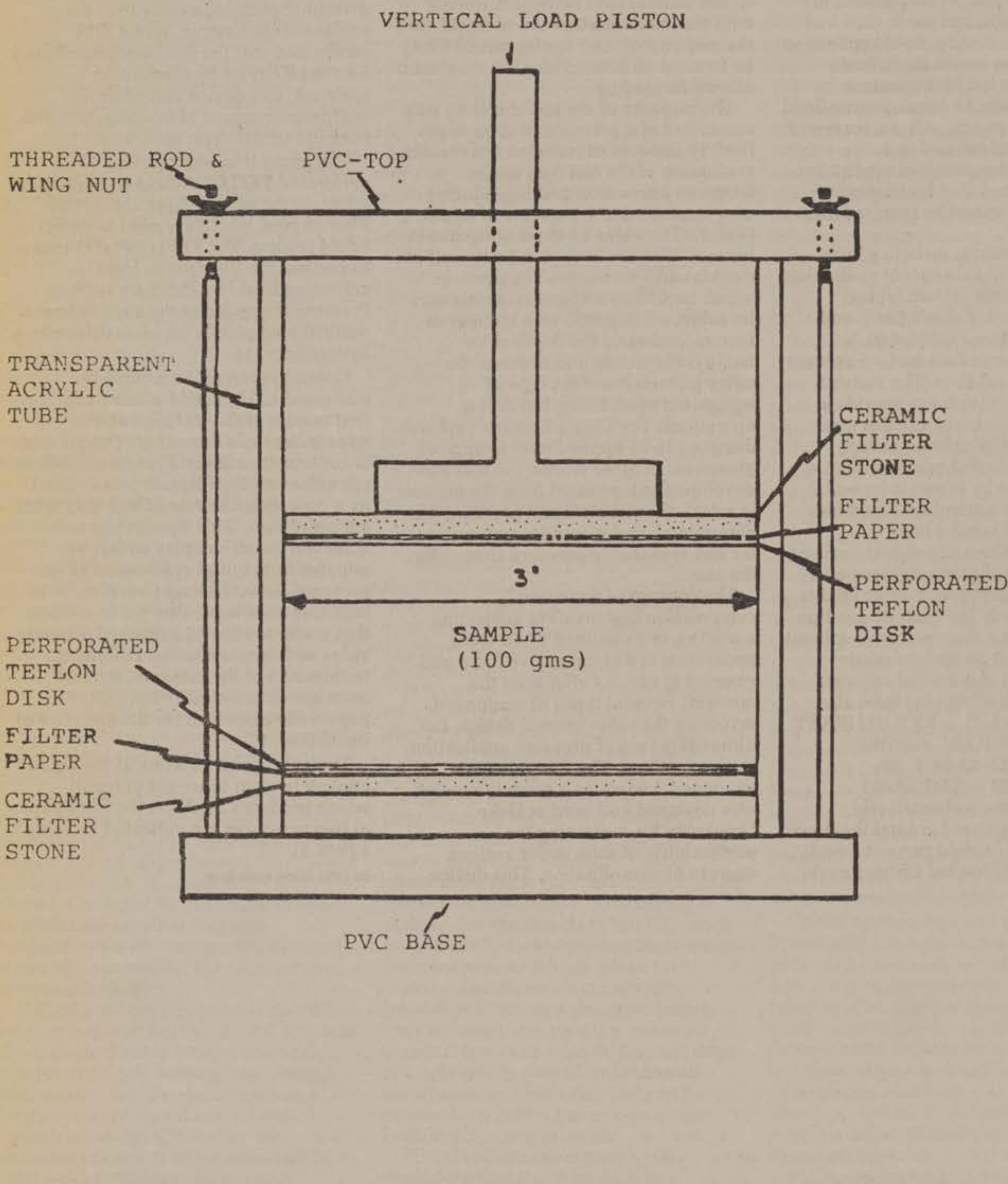

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TABLE 1.—LIQUID RELEASE USING MODIFIED CONSOLIDOMETER AT VARIOUS PRESSURES (WEIGHT/WEIGHT PERCENT LIQUID)

Sorbent	Liquids			
	Calcium sulfate (0.01 N)		Acetone (5 percent)	
	15 psi	45 psi	15 psi	45 psi
Fuller's Earth (clay based)	>70	>55	>75	>60
Floor Dry (silica-based)	>160	>140	>90	>90

The consolidometer (see Figure 1) was then modified in an attempt to extend its capabilities. Provision was made to permit the liquid to drain into a collection vessel, which would permit the test to be applied in a quantitative sense (i.e., measuring the amount of liquid released). In addition, modifications were also made to permit the use of standard weights, in lieu of a hydraulic system for application of pressure. It was determined that while the hydraulic system worked well, its potential field application was limited. In addition, most hydraulic systems would be unable to maintain a steady pressure on the sample without constant adjustment (Ref. 1).

While limited testing with the device modified as described above compared well to testing done with the previous design, there is a real drawback to the use of weights that caused EPA to examine yet another approach. Specifically, due to the need to address pressures like 45 psi, and the limitations in the size of the test cell (i.e., it must be large enough to accommodate a reasonable sample size—100 grams), the weights required are excessive (in the neighborhood of 250 to 500 lbs) (Ref. 1 and 2).

The third (and final) approach to pressure application examined was the use of pneumatic or gas pressure. This design would easily accommodate a reasonable sample size (i.e., 100 grams), and allow use of the same general type of devices, with the perforated TEFLON* disks and absorptive filter papers, as shown in Figure 1. The only real difference is in the mode of pressure application, which entails use of a piston driven by compressed gases (e.g., air or nitrogen).

It was about this time that EPA was in the development stages of a device, known as the Zero-Headspace Extractor (ZHE), which was intended for use in evaluating the leaching characteristics of volatile compounds from wastes under conditions of zero headspace. This device was being developed in conjunction with the new Toxicity Characteristic Leaching Procedure (TCLP), which was proposed on January 14, 1986 (51 FR 1602) for use in the Land Disposal Restrictions Rule and on June 13, 1986 (51 FR 21648) for use in expanding the Extraction Procedure (EP) Toxicity Characteristic (40 CFR 261.24).

The ZHE uses gas pressure to force a piston against a sample to, in effect, squeeze any releasable liquid from the material, and lends itself to application in the Liquid Release Test. In addition, the perforated TEFLON* disk and absorptive filter paper set up can be easily accommodated within the ZHE, as depicted in Appendix A—Figure 1. Note that although the TCLP and the LRT use the same device, the two tests are unrelated.

EPA is proposing use of the ZHE for the LRT. Although the device is fairly expensive (i.e., $1200 to $1500), many laboratories already have the device for use in conducting the TCLP. In addition, since the device is powered by gas pressure, the only additional equipment needed to run the test in the field would be a pressure regulator, a balance, tedlar bags or syringes, and a gas cylinder, hand pump, or compressor. The LRT is presented in Appendix A, and the parameters of concern in running the test are discussed in Section 8 of this preamble.

Note that EPA also considered application of air pressure directly to the sample (i.e., no piston). This approach, however, was not pursued because air would tend to channel through and around the spaces in the material, and would not result in application of the required pressure to the sample.

In addition, to increase the data base for the method, four additional sorbent materials, in combination with three liquids, have been evaluated to determine the range in which the various sorbents/liquid combinations can release liquid. The results are provided in Table 2 (Ref. 2):

TABLE 2: SORBENT LOADING AT WHICH LIQUID WAS RELEASED USING ZERO-HEADSPACE EXTRACTOR AT 45 PSI (WEIGHT/WEIGHT % LIQUID)

Sorbent	Diesel fuel	Trichloroethylene	Xylene
Fly ash (Bituminous Coal)	<10	>42	<10
S-N-D (Silica Based)	>40	>78	>45
Floorco (Silica Based)	>65	>115	>65
Floor Dry (Silica Based)	>80	>140	>80

The Liquid Release Test protocol requires that samples of absorbent/liquid mixtures be tested only once for the detection of liquids being released under pressure. As discussed in section 8 of the preamble, the Agency is concerned that a test duration beyond 30 minutes might result in a significant disruption of offsite commercial landfill operations. This disruption might have the counter-productive effect of encouraging operators to sample fewer barrels of waste for the presence of free liquids, in order to maintain a certain rate of waste processing activities. The Agency is concerned that requiring additional quality assurance procedures (i.e., testing waste/absorbent mixtures a second or third time) to confirm an initial no-release finding would increase this disruption. Such additional testing might result in a total analytical processing time for an individual sample of 60 to 90 minutes, depending upon the number of times that the test needed to be repeated. The Agency is interested in comments concerning quality assurance procedures. What other procedures can the Agency use to increase the probability of detecting liquids in samples that may initially pass the Liquids Release Test (i.e., show no evidence of liquids) without imposing additional time delays for testing?

7. Additional Test Results Obtained During the Development of the Liquids Release Test (LRT)

The Agency conducted two additional laboratory testing programs of liquid-absorbent mixtures that also helped in the development of the Liquids Release Test. The first involved a cylindrical chamber with a plunger that had weights mounted on it. A glass capillary tube was fitted to the conical bottom of the chamber in an attempt to measure the volume of liquid compressed out of the sorbent. A description of this testing program is discussed in reference 3. Disadvantages of the first testing program included the manner in which the initial and final liquid concentrations were obtained (i.e., the modified ASTM ash test). Small sample sizes were used in the ash test which leads to unreproducible results. The glass capillary, although capable of determining whether liquids have been compressed out of the sorbent, did not function in its intended manner. The surface tension of organic liquids tested was not adequate to have a strong meniscus form. Finally, the use of weights was a problem as discussed above.

The second laboratory testing program that contributed to the development of the LRT is discussed in reference 4. The use of different designs and additional liquid/sorbent combinations was accomplished during this work. The sorbents that were used in this testing program and throughout the other laboratory testing are characterized as to their mineralogical content in this report.

8. Evaluation of Liquid Release Test

The proposed LRT was evaluated in a single laboratory for ruggedness and precision, and is presently undergoing evaluation in a multilaboratory collaborative study. The design and results of the collaborative study will be announced in the **Federal Register** when completed. The design and results of the single laboratory evaluation are summarized below (Ref. 2).

Ruggedness testing was done principally to determine the procedure's sensitivity to minor variations in the different test conditions. This testing is necessary to determine which parameters in the test are subject to significant variations and thus need to be controlled or defined more carefully. Single laboratory precision is also determined from the ruggedness data. Table 3 provides the parameters in the test that were evaluated for ruggedness. A discussion of these parameters and the results follow. All testing was done on the floor dry sorbent and with the 5% acetone solution.

TABLE 3: LRT PARAMETERS EVALUATED FOR RUGGEDNESS

Parameter	LRT Specification	Difference tested
(1) Test Duration	30 minutes	30 and 35 minutes
(2) Sample Holding Time.	48 hours	24 and 360 hours
(3) Liquid Loading (weight/weight %).	—	95.5% and 96.6%
(4) Test Pressure	45 psi	45 and 50 psi
(5) Rate of Pressure Application.	within 90 seconds.	within 10 seconds and within 90 seconds
(6) Device Orientation.	piston moving upwards.	right side up and upside down
(7) Sample size	100 ± 0.1 grams.	100 and 105 grams

These parameters are all discussed below.

The proposed procedure (LRT) has been applied to the evaluation of Liquid-loaded sorbents and has been determined to provide results similar to those obtained with the previous devices (i.e., those involving weights) investigated. The test duration of 30 minutes for the LRT was selected to overcome the frictional forces of the piston O-rings against the side-walls of the container (Ref. 2). Also, since the ZHE apparatus has been selected as the device in which liquid/absorbent mixtures are to be tested, 30 minutes is needed to provide results similar to those obtained with the previous devices investigated (i.e., those involving weights), due to the time that appears to be needed to overcome the friction between the internal teflon disks and the walls of the cylinder

Although the Agency has selected 30 minutes as the proposed length of the test, the Agency is concerned with the length of the test. The results of the ruggedness evaluation (Ref. 2) indicated that none of the parameters investigated showed a significant difference at the 5 percent level. The test method may therefore be considered to be rugged with respect to the test conditions investigated. Note, however, that the effect of test duration was significant at the 10 percent level and very nearly so at the 5 percent level. The significance of this observation is that while the test is considered to be adequately rugged with respect to test duration, a longer test duration may provide different results in a small percentage of test runs.

However, a 30-minute time limit may prove disruptive to offsite commercial landfills which process large numbers of containers. A long time period will have some impact on the sampling of containers (i.e., the number of containers inspected and processed will be reduced, as compared to a shorter test duration). The Agency does not want a time limit that may cause problems, such as backlogs of containers or inadequate sampling to eliminate these backlogs. Therefore, the Agency is willing to accept comments on the test duration of the LRT. If upon evaluating these comments, the Agency finds a significant impediment to using a 30-minute test duration, the Agency may instead choose a ten-minute duration in order to assure that the thoroughness of drum sampling is not compromised.

In summary, the value of 45 psi that was used in the evaluation of the LRT was selected because it is representative of pressures found in landfills. The test pressure parameter is discussed at length in Section 9 of today's preamble. As stated previously, the LRT was developed independent from the manner in which the appropriate standard test pressure was developed. The LRT would be appropriate for any reasonable pressure chosen for the test.

The sample size used in the evaluation was selected because it is a commonly used representative sample size among the regulated community.

The effect of sample storage (Parameter 2) was evaluated in this effort in order to determine the effects, if any, of long sample storage times. This was necessary since samples were stored for as long as 15 days before testing during the test's development phase, and because samples may likely be stored for periods of time during the conduction of the ongoing collaborative evaluation. As a result of this evaluation, the Agency found that sample storage time did not alter the results of the test; however, sample testing should be done within 48 hours.

As indicated previously, most of the LRT testing was done on sorbent/liquid samples that were loaded such that they would be right around the critical range where liquid release might be expected to be observed on the filter paper. This was necessary as, for economic reasons, the majority of testing would be designed to provide the maximum liquid loading for liquid/sorbent combinations. The third parameter, liquid loading, was designed to provide results within the range for which one to two positive tests would be expected for every three tests run. This was necessary to make the data analyzable and the results interpretable, in terms of being able to describe quantitatively the ruggedness and precision of the test.

Note that the range of liquid loading investigated (i.e., 95.5 to 96.5 weight/weight %) for the Floor Dry/5% Acetone, is different for the range of liquid release determined initially for the same material, as shown in Table 1. This was due to the fact that a different lot of the sorbent material was used in preparing the samples for the ruggedness testing than was used in the earlier development work. It is apparent that different lots of the same material can have different sorptive properties.

The fifth parameter, rate of pressure application, was examined because work on the ZHE with the TCLP had indicated that instantaneous application of high pressures could cause the filter to rupture. Hence, the LRT was examined under conditions of fast and slow pressure build-up.

The sixth parameter examined, device orientation, was examined in an attempt to determine if it made a difference as to which direction the piston travelled (i.e., upwards or downwards). Although the ruggedness test showed no significant effects with device orientation, both devices tested are oriented so that the piston travels up for the LRT. This orientation was selected to avoid the necessity of flipping the device over after loading, which was shown to disturb the sample.

The ruggedness test was designed based on the need to have a high probability (i.e., 0.9) of finding a difference as great as 0.33 (i.e., at least one positive in three tests) in a one tail statistical evaluation test at the 5 percent significance level. In order to give statistically significant answers, the ruggedness test was conducted at a liquid loading for which the expected proportion of releases was approximately 0.5. Accordingly, if one of the parameters (Table 4) were to change the test results by 0.33 or greater, this would indicate that controlling the parameter may be critical to obtaining reproducible results.

As far as precision is concerned, the observed standard deviation of a single test series (i.e., 3 test runs) indicated the test to be of adequate precision (Ref. 2). Based on the average for the entire set of data generated during the ruggedness tests, the standard deviation for a set of three tests is approximately 0.29.

The Agency is proposing use of the LRT in response to the HSWA requirement to prohibit the disposal in landfills of liquids that have been absorbed in materials that release liquids when compressed, as might occur during routine landfill operations.

9. Selection of Appropriate Pressure for the Liquids Release Test

In regard to the appropriate pressure for today's proposed test, the Agency is proposing that the owner/operator use a value of 50 psi or a value equivalent to the pressure at the landfill in question. The LRT evaluation was conducted at 45 psi; however, it is important to remember that the LRT was developed independent from the manner in which the standard test pressure (50 psi) was selected. The value of 50 psi was selected assuming a bulk density of 70 lbs/ft ^{3} and a depth of 100 ft.

A quick survey of landfill depths conducted prior to the development of the release test indicated that most landfill depths were below 60 feet. The maximum depth was 100 feet. Pressure is a function of depth and bulk density. Soil bulk densities of 110 to 120 lbs/ft ^{3} are not unusual for soil; however, liquid loaded sorbents are not expected to be in this range. The Agency assumes that liquid loaded sorbents will have a bulk density of approximately 60–70 lbs/ft ^{3}; therefore at the maximum depth of 100 feet, this would correspond to a pressure of approximately 50 psi. This option would result in a safety factor being incorporated into the test for shallower landfills (i.e., less than 100 ft).

Another option would be to provide flexibility in the selection of the appropriate pressure value. In this option, the Agency could allow the landfill owner/operator and the permit writer to determine on a case-by-case basis the appropriate pressure value based on the conditions at the landfill in question. The Agency believes that, in either option, the pressure should be calculated at the deepest point in the landfill. The Agency solicits comments on the two alternative approaches. The Agency specifically requests comments on whether a maximum value should be used in all cases (i.e., 50 psi) or whether flexibility should be allowed in determining the correct value of pressure for which the test should be conducted. Is 50 psi the correct value for a maximum pressure? Is the Agency's assumption concerning the bulk density range (60–70 lbs/ft^3) of liquid loaded sorbents correct?

10. Relationship Of The Paint Filter Liquids Test To Todays Proposed Lquids Release Test

There is an interrelationship between the Paint Filter Liquids Test and the LRT. In some situations, a facility may be required to conduct both tests. For example, containerized wastes *without* any absorbents must be tested for the presence or absence of free liquids using the Paint Filter Liquids Test. See §§ 264.314(c) and 265.314(d). If a containerized waste material fails the Paint Filter Liquids Test (i.e., contains free liquids), and is treated (solidified) by the addition of a non-biodegradable absorbent, then today's proposed liquid release test must also be used to determine whether the waste/absorbent mixture will release further liquids under pressure. If liquids are detected in the form of wetness on the filter paper, then additional non-biodegradable absorbent material must be added in order to pass the liquid release test. Once the waste/absorbent mixture passes the liquids release test, it does not need to be retested to pass the Paint Filter Liquids Test.

If, on the other hand, the containerized waste without any absorbents passes the Paint Filter Liquids Test (i.e., is a solid), then this containerized waste is allowed to be disposed in a landfill without further testing. If the waste passes the Paint Filter Liquids Test, it is considered a solid and is therefore not prohibited from being placed in a landfill under section 3004(c)(2).

Under proposed §§ 264.13(c)(3) and 265.13(c)(3), the owner or operator will be required to determine if the generator has added an absorbent to a containerized liquid hazardous waste (see Section 11 of today's preamble). As noted above, today's proposal requires the use of the proposed liquids release test when a non-biodegradable absorbent has been added to solidify the containerized liquids. Owners or operators who know that a non-biodegradable absorbent has been added to solidity the containerized liquids and who employ the Paint Filter Liquids Test rather than the liquids release test will not be in compliance with today's proposal. If the owner or operator adds a non-biodegradable absorbent to the waste or if they determine that the generator added a non-biodegradable absorbent, then the liquids release test is required initially. Re-testing to pass the Paint Filter Liquids Test is unnecessary because the Agency believes that the liquid release test is more stringent than the Paint Filter Liquids Test. The Agency believes that a liquid/absorbent mixture tested under pressure for 30 minutes, during which time no wetness on the filter paper appears, would indeed pass the 5 minutes, no pressure, Paint Filter Liquids Test.

A facility's waste analysis plan requires that either all containers or some percentage of containers be tested, depending on site-specific circumstances, so that a detailed chemical and physical analysis of the waste is obtained. The Agency does not expect that waste analysis plans will change a great deal based on today's proposal; therefore, the frequency of testing using the LRT for conttainerized wastes will be determined based on the facility's current waste analysis plan.

The previous discussion centered on when to use the Paint Filter Liquids Test or the Liquids Release Test. The Agency will accept comments on whether or not the LRT should be used for only continerized wastes, or whether it should also be used for all wastes that are to be disposed in landfills, which would include bulk wastes. Very limited data developed during the refinery listing program indicate that some wastes may pass the Paint Filter Liquids Test but not the filter step in the TCLP which is similar to the LRT. Subjecting all wastes (whether liquids, solids, containerized, or bulk) that are to be disposed in a landfill to a pressure test would remove additional liquids from the landfill. Using one test for containerized wastes would eliminate room for error (i.e., the question of whether an absorbent had been added to a container). All containers must bear up to the same stresses; therefore, all wastes should meet the same standards prior to disposal regardless of whether absorbents have been added or not. In light of HSWA and the concerns on the placement of liquids in landfills, the Agency is specifically requesting comments on whether the LRT should replace the Paint Filter Liquids Test as the test for determining if a waste contains free liquids.

11. Conforming Changes

As a result of adding the requirement for the liquid release to §§ 264.314 and 265.314, several minor conforming changes are being proposed. These conforming changes will add references to existing reference list in Subparts B and E of Part 264 and in Subparts B, E, and N of Part 265. Specifically, technical conforming changes are being made to §§ 264.13 (General Waste Analysis), 264.73 (Operating Record), 265.13 (General Waste Analysis), 265.73 (Operating Record), 265.302 (General Operating Requirements).

In order to comply with the requirements of today's proposal relating to containerized hazardous wastes, the owner/operator of an off-site landfill receiving containerized wastes must determine whether an absorbent material has been added to the containerized waste. Thus, in addition to amending §§ 264.13(b)(6) and 265.13(b)(6) to require the owner/operator to specify in the waste analysis plan the method to be used to (1) determine if the absorbent/waste mixture will release further liquids under pressure, and (2) determine the total organic carbon content, today's proposal would also require the owner/operator of a off-site landfill to specify the procedures to be used to determine whether the generator has added absorbents to the containerized waste.

The generator may supply the information in writing to the owner/operator that identifies any absorbent added to the waste. The information must be sufficiently detailed to allow the owner/operator to determine whether the absorbent is less than or equal to one percent (1%) total organic carbon. If the owner/operator does not receive this information in writing from the generator, the owner/operator must perform an analysis to find out whether absorbents were added and whether they are less than or equal to one percent total organic carbon. The owner/operator must put the results of any analysis or the information received from the generator in the operating records under §§ 264.73(b)(3) or 265.73(b)(3) along with the results of the LRT. If the owner/operator determines that absorbents were added, the containerized waste may be landfilled only if it meets the requirements proposed in §§ 264.314(d)(2) or 265.314(d)(2).

The Agency considered other options in developing the above approach. One option was to change the instructions of the uniform manifest (Subpart B of Part 262) to require the generator to identify any absorbent material added to the containerized waste. EPA rejected this option because allowing the owner/operator to determine the procedures to be used to obtain the information gives the owner/operator the flexibility to make appropriate arrangements with the generator while avoiding unnecessary paperwork.

Another approach was to create a presumption that absorbent materials were added to the containerized waste. This approach would require an owner/operator who was subject to an enforcement action for violations of §§ 264.314(d)(2) or 265.314(d)(2) to bear the burden of proof in demonstrating that absorbents were not added. EPA decided that a presumption was not warranted since it would be burdensome to require the owner/operator to perform the tests or refute the presumption for all shipments of containerized wastes. The presumption would be reasonable in cases where a substantial part of the containerized wastes would be expected to have absorbents added to them; however, the Agency did not have information indicating that this was the case.

By adopting the approach proposed in the rule, EPA believes that it is codifying existing industry practice. EPA believes that the off-site landfills already require extensive waste analysis information from the generator before they accept the generator's waste for disposal. By requiring that this information be placed in the operating record, EPA is enabling the owner/operator to demonstrate compliance with §§ 264.314(d)(2) or 265.314(d)(2).

II. State Authority

1. Applicability of Rules in Authorized States

Under Section 3006 of RCRA, EPA may authorize qualified States to administer and enforce the RCRA program within the State. (See 40 CFR Part 271 for the standards and requirements for authorization.) Following authorization, EPA retains enforcement authority under sections 3008, 7003, and 3013 of RCRA, although authorized States have primary enforcement responsibility.

Prior to the Hazardous and Solid Waste Amendments of 1984 (HSWA), a State with final authorization administered its hazardous waste program entirely in lieu of EPA administering the Federal program in that State. The Federal requirements no longer applied in the authorized State, and EPA could not issue permits for any facilities in the State that the State was authorized to permit. When new, more stringent Federal requirements were promulgated or enacted, the State was obliged to enact equivalent authority within specified time frames. New Federal requirements did not take effect in an authorized State until the State adopted the requirements as State law.

In contrast, under newly enacted section 3006(g) of RCRA, 42 U.S.C. 6926(g), new requirements and prohibitions imposed by the HSWA take effect in authorized States at the same time that they take effect in nonauthorized States. EPA is directed to carry out those requirements and prohibitions in authorized States, including the issuance of permits, until the State is granted authorization to do so. While States must still adopt HSWA-related provisions as State law to retain final authorization, HSWA applies in authoirzed States in the interim.

Today's rule will be promulgated pursuant to section 3004(c)(2) of RCRA, a provision added by HSWA. Therefore, it would be added to Table 1 in § 271.1(j) which identifies the Federal program requirements that are promulgated pursuant to HSWA and take effect in all States, regardless of their authorization status. States may apply for either interim or final authorization for the HSWA provisions identified in Table 1 as discussed in the following section of this preamble.

2. Effect on State Authorizations

As noted above, EPA will implement the standards in today's rule (when finalized) in authorized States until they modify their programs to adopt these rules and the modification is approved by EPA. Because the rule will be promulgated pursuant to HSWA, a State submitting a program modification may apply to receive either interim or final authorization under section 3006(g)(2) or 3006(b), respectively, on the basis of requirements that are substantively equivalent or equivalent to EPA's. The procedures and schedule for State program modifications under section 3006(b) are described in 40 CFR 271.21. The same procedures should be followed for section 3006(g)(2).

40 CFR 271.21(e)(2) requires that States that have final authorization must modify their programs to reflect Federal program changes, and must subsequently submit the modifications to EPA for approval. The deadlines for the State to modify its program for this proposed regulation will be determined by the date of promulgation of the final rule in accordance with § 271.21(e). These deadline can be extended in exceptional cases (40 CFR 271.21(e)(3)). Once EPA approves the modification, the State requirements become Subtitle C RCRA requirements.

States with authorized RCRA programs may already have requirements similar to those in today's proposed rule. These State regulations have not been assessed against Federal regulations being proposed today to determine whether they meet the tests for authorization. Thus, a State is not authorized to carry out these requirements in lieu of EPA until the State program modification is approved. Of course, States with existing standards may continue to administer and enforce their standards as a matter of State law. In implementing the Federal program, EPA will work with States under cooperative agreements to minimize duplication of efforts. In many cases, EPA will be able to defer to the States in their efforts to implement their programs, rather than take separate actions under Federal authority.

States that submit official applications for final authorization less than 12 months after promulgation of EPA's regulations may be approved without inlcuding standards equivalent to those promulgated. However, once authorized, a State must modify its program to include standards substantially equivalent or equivalent to EPA's within the time periods discussed above.

III. Compliance with Executive Order 12291

Executive Order 12291 (Section 3(b)) requires that all regulatory agencies prepare a Regulatory Impact Analysis for all "major" rules. Section 1(b) defines "major" rules as those that are 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 or individual industries, or
3. Significant adverse effects on competition, employment, investment, productivity, innovation, or international trade.

EPA's analysis indicates that the rule prohibiting disposal of containers holding liquids and free liquids does not constitute a "major" rule.

IV. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq) requires a Federal Agency to prepare a Regulatory Flexibility Analysis (RFA) for all regulations that have "a significant economic impact on a substantial number of small entities," where:

- "Substantial number" means more than 20 percent of the affected small entities;
- "Small" is determined by the SBA loan eligibility criteria, unless an alternative definition is proposed and justified; and
- "Significant economic impact" occurs if:
- Annual compliance costs (annualized capital, operating, reporting, etc.) increase total production costs for relevant products or processes by more than 5 percent, or
- Compliance costs as a percent of sales for small entities is 10 percent or more as a percent of sales than for large entities, or
- Capital costs for compliance are a significant portion of capital available (considering internal cash flow and external financing opportunities), or
- Closures of small entities are likely to result.

EPA certifies that this proposed regulation will not have a significant economic impact on a substantial number of small entities; therefore, no Regulatory Flexibility Analysis is needed.

V. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501–3502. The public should submit comments on these requirements to the Office of Information and Regulatory Affairs, OMB, 730 Jackson Place, NW., Washington, DC, marked: "Attention: Desk Officer for EPA." The final rule will respond to any OMB, or public comments on the information collection requirements.

VI. References

1. "Sorbent Pressure Test Development," Report prepared by Research Triangle Institute.
2. "Liquid Release Test for Liquid Loaded Sobents—Single Laboratory Evaluation of Test Equipment," Report prepared by Research Triangle Institute, April 1986.
3. "Structurally Stable Absorbents," Report prepared by Mason and Hanger-Silas Mason, Co., August 1985.
4. "Development of Criteria to Distinguish Acceptable Sorbents for Containerized Hazardous Liquids," Report prepared by K.W. Brown, March 1986.

List of Subjects

40 CFR Part 260

Administrative practice and procedure, Hazardous materials, Waste treatment and disposal.

40 CFR Part 264

Hazardous materials, Packaging and containers, Reporting requirements, Security measures, Surety bonds, Waste treatment and disposal.

40 CFR Part 265

Hazardous materials, Packaging and containers, Reporting and recordkeeping requirements, Security measures, Surety bonds, Waste Treatment and disposal, Water supply.

40 CFR Part 271

Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Dated: December 8, 1986.

Lee M. Thomas,

Administrator.

For the reasons set forth in the preamble, 40 CFR Parts 260, 264, 265 and 271 are proposed to be amended as set forth below.

PART 260—HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

1. The authority citation for Part 260 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001 through 3007, 3010, and 7004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 as amended, (42 U.S.C. 6905, 6912(a), 6921 through 6927, 6930 and 6974).

2. Section 260.11 is amended by revising the fourth reference in paragraph (a) to read as follows:

§ 260.11 References

(a) * * *

"Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846 [Second Edition, 1982 as amended by Update I (April, 1984), Update II (April, 1985), and

Update III [Insert month and year of final publication in FR]]. The second edition of SW-846 and updates I, II, are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20401, (202) 783-3228, on a subscription basis.

* * * * *

Part 264—Standards For Owners and Operators of Hazardous Waste Treatment, Storage, And Disposal Facilities

3. The authority citation for Part 264 continues to read as follows:

Authority: Sections 1006, 2002(a), 3004, 3005 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 as amended (42 U.S.C. 6905, 6912(a), 6924, and 6925).

4. Section 264.13 is amended by revising paragraph (b)(6) and by adding paragraph (c)(3) to read as follows:

§ 264.13 General Waste Analysis

* * * * *

(b) * * *

(6) Where applicable, the methods that will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 264.17, 264.314 (c) and (d), and 264.341.

* * * * *

(c) * * *

(3) The procedures that the owner or operator of an off-site landfill receiving containerized hazardous waste will use to determine whether a hazardous waste generator has added a biodegradable absorbent material to the waste in the container.

5. Section 264.73 is amended by revising paragraph (b)(3) to read as follows:

§ 264.73 Operating Record.

* * * * *

(b) * * *

(3) Records and results of waste analysis peformed as specified in §§ 264.13, 264.17, 264.314 (c) and (d), and 264.341.

* * * * *

6. Section 264.314 is amended by revising paragraph (d) to read as follows:

§ 264.314 Special Requirements for bulk and containerized liquids.

* * * * *

(d)(1) Containers holding free liquids must not be placed in a landfill unless:

(i) The container is very small, such as an ampule; or

(ii) The container is designed to hold free liquids for use other than storage, such as a battery or capacitor; or

(iii) The container is a lab pack as defined in § 264.316 and is disposed of in accordance with § 264.316; or

(2) The containerized liquids or free liquids have been solidified by the use of an absorbent material and, if solidified, (i) the total organic carbon content of the absorbent material is less than or equal to 1.0 percent, and (ii) the waste/absorbent mixture does not release liquids as determined by Method 9096 (Liquids Release Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods."

[EPA Publication No. SW-846].

PART 265—INTERIM STATUS STANDARDS FOR OWNERS AND OPERATORS OF HAZARDOUS WASTE TREATMENT, STORAGE, AND DISPOSAL FACILITIES

7. The authority citation for Part 265 continues to read as follows:

Authority: Sections 1006, 2002(a), 3004, 3005, and 3015, Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act, as amended (42 U.S.C. 6905, 6912(a), 6924, 6925, and 6935).

8. Section 265.13 is amended by revising paragraph (b)(6) and by adding paragraph (c)(3) to read as follows:

§ 265.13 General waste analysis.

* * * * *

(b) * * *

(6) Where applicable, the methods that will be used to meet the additional waste analysis requirements for specific waste management methods as specified in §§ 265.193, 265.225, 265.252, 265.273, 265.314 (c) and (d), 265.345, 265.375, and 265.402.

* * * * *

(c) * * *

(3) The procedures that the owner or operator of an off-shore landfill receiving containerized hazardous waste will use to determine whether a hazardous waste generator has added a biodegradable absorbent material to the waste in the container.

9. Section 265.73 is amended by revising paragraph (b)(3) to read as follows:

§ 265.73 Operating record.

* * * * *

(b) * * *

(3) Records and results of waste analyses and trial tests performed as specified in §§ 265.13, 265.193, 265.225, 265.252, 265.273, 265.314 (c) and (d), 265.341, 265.375, and 265.402.

* * * * *

10. Section 265.302 is amended by revising the comment at the end of the section to read as follows:

§ 265.302 General operating requirements.

* * * * *

[*Comment:* As required by § 265.13, the waste analysis plan must include analyses needed to comply with §§ 265.312, 265.313, and 265.314 (c) and (d). As required by § 265.73, the owner or operator must place the results of these analyses in the operating record of the facility.]

11. Section 265.314 is amended by revising paragraph (c) to read as follows:

§ 265.314 Special requirements for bulk and containerized liquids.

* * * * *

(c)(1) Containers holding free liquids must not be placed in a landfill unless:

(i) The container is very small, such as an ampule; or

(ii) The container is designed to hold free liquids for use other than storage, such as a battery or capacitor; or

(iii) The container is a lab pack as defined in § 265.316 and is disposed of in accordance with § 265.316; or

(2) The containerized liquids or free liquids have been solidified by the use of an absorbent material and, if solidified, (i) the total organic carbon content of the absorbent material is less than or equal to 1.0 percent, and (ii) the waste/absorbent mixture does not release liquids as determined by Method 9096 (Liquids Release Test) as described in "Test Methods for Evaluating Solid Wastes, Physical/Chemical Methods."

[EPA Publication No. SW-846].

* * * * *

PART 271—REQUIREMENTS FOR AUTHORIZATION OF STATE HAZARDOUS WASTE PROGRAMS

12. The authority citation for Part 271 continues to read as follows:

Authority: Sections 1006, 2002(a), and 3006 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a) and 6926).

13. Section 271.1(j) is amended by adding the following entry to Table 1 in chronological order by date of publication:

§ 271.1 Purpose and scope.

* * * * *

Table 1.—Regulations Implementing the Hazardous and Solid Waste Amendments of 1984

Date	Title of regulation
* * *	* *
[Insert date of publication in *FR*].	Containerized Hazardous Liquids
* * *	* *

[FR Doc. 86-28381 Filed 12-23-86; 8:45 am]

BILLING CODE 6560-50-M

Wednesday
December 24, 1986

Part IV

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 723, 724, 845 and 846

Surface Coal Mining and Reclamation Operations; Initial Regulatory Program and Permanent Regulatory Program; Individual Civil Penalties; Proposed Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 723, 724, 845 and 846

Surface Coal Mining and Reclamation Operations; Initial Regulatory Program and Permanent Regulatory Program; Individual Civil Penalties

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the U.S. Department of the Interior (DOI) proposes to amend its Initial and Permanent Regulatory Program procedures to provide for the assessment of individual civil penalties against officers, directors and agents of corporate permittees in accordance with section 518(f) of the Surface Mining Control and Reclamation Act of 1977.

DATES: *Written Comments:* OSMRE will accept written comments on the proposed rule until 5 p.m. Eastern time on March 4, 1987.

Public Hearings: Upon request, OSMRE will hold public hearings on the proposed rule in Washington, DC; Denver, Colorado; and Lexington, Kentucky at 9:30 a.m. local time on February 25, 1987. Upon request, OSMRE will also hold public hearings in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington, where Federal regulatory programs are in effect, at times and on dates to be announced prior to the hearings. OSMRE will accept requests for public hearings until 5:00 p.m. Eastern time on January 23, 1987. Individuals wishing to attend but not testify at any hearing should contact the person identified under "For Further Information Contact" beforehand to verify that the hearing will be held.

ADDRESSES: *Written Comments:* Hand-deliver to the Office of Surface Mining, Administrative Record, Room 5315, 1100 L Street, NW., Washington, DC; or mail to the Office of Surface Mining, Administrative Record, Room 5315L, 1951 Constitution Avenue, Washington, DC 20240.

Public Hearings: Department of the Interior Auditorium, 18th and C Streets, NW., Washington, DC; Brooks Towers, 2nd Floor Conference Room, 1020 15th Street, Denver, Colorado; and Suite 28 Conference Room, 340 Legion Drive, Lexington, Kentucky. The addresses for any hearings scheduled in the States of Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington will be announced prior to the hearings.

Request for public hearings: Submit orally or in writing to the person and address specified under "**FOR FURTHER INFORMATION CONTACT.**"

FOR FURTHER INFORMATION CONTACT: Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202/343-5241 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

I. Public Comment Procedures
II. Background
III. Discussion of the Proposed Rule
IV. Procedural Matters

I. Public Comment Procedures

Written Comments

Written comments submitted on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where practical, commenters should submit three copies of their comments (see "**ADDRESSES**"). Comments received after the close of the comment period (see "**DATES**") may not be considered or included in the Administrative Record for the final rule.

Public Hearings

OSMRE will hold public hearings on the proposed rule by request only. The times, dates and addresses scheduled for hearings at three locations are specified previously in this notice (see "**DATES**" and "**ADDRESSES**"). The times, dates and addresses for the hearings at the remaining locations have not yet been scheduled, but will be announced in the **Federal Register** at least 7 days prior to any hearings which are held at these locations.

Any person interested in participating at a hearing at a particular location should inform Mr. DeVito (see "**FOR FURTHER INFORMATION CONTACT**") either orally or in writing of the desired hearing location by 5:00 p.m. Eastern time on January 23, 1987. If no one has contacted Mr. DeVito to express an interest in participating in a hearing at a given location by that date, the hearing will not be held. If only one person expresses an interest, a public meeting rather than a hearing may be held and the results included in the Administrative Record.

If a hearing is held, it will continue until all persons wishing to testify have been heard. To assist the transcriber and ensure an accurate record, OSMRE requests that persons who testify at a hearing give the transcriber a written copy of their testimony. To assist OSMRE in preparing appropriate questions, OSMRE also requests that persons who plan to testify submit to OSMRE at the address previously specified for the submission of written comments (see "**ADDRESSES**") an advance copy of their testimony.

II. Background

Section 518 of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. 1201 *et seq.*, authorizes the Secretary of the Interior to assess civil and criminal penalties for violations of the Act. Under section 518(a) any person who violates any permit condition or any other provision of Title V of the Act may be assessed a civil penalty, not to exceed $5,000 per violation for each day the violation continues. Section 518(a) requires the Secretary to consider the following criteria in determining the amount of the penalty: (i) The permittee's history of previous violations at the particular surface coal mining operation; (ii) the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; (iii) whether the permittee was negligent; and (iv) the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Under section 518(h) if a violation is not abated within the period set in a notice of violation or order the assessment of a minimum penalty of $750 for each day during which the violation remains unabated is mandatory. Under section 518(f) if a violation is committed by a corporate permittee or a failure or refusal to comply with certain specified orders occurs, then any director, officer or agent of the corporate permittee who willfully and knowingly authorized, orderd or carried out such violation, failure or refusal is subject to the same civil penalties as may be imposed upon the corporate permittee under section 518(a), and to the same criminal sanctions under section 518(e).

Section 518(f) of the Act reads in part as follows:

> Whenever a corporate permittee violates a condition of a permit . . . or fails or refuses to comply with any order issued under section 521 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act . . . any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or

refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

In order to distinguish between a penalty assessed against a corporate permittee under section 518(a) and a penalty assessed against a corporate officer, director or agent under section 518(f), OSMRE refers to the former penalty as a "civil penalty," and the latter penalty as an "individual civil penalty."

On December 13, 1977, OSMRE promulgated in 30 CFR Part 723 initial program regulations for the assessment of civil penalties under the provisions of section 518 of the Act. 42 FR 62702. On March 13, 1979, OSMRE promulgated its permanent program regulations in Part 845 for the assessment of civil penalties under section 518 of the Act. 44 FR 15461. On September 4, 1980, OSMRE revised the regulations in Parts 723 and 845 and incorporated provisions authorizing enforcement action against corporate officers, directors and agents under section 518(f) of the Act. 30 CFR 723.15 and 845.15; 45 FR 58780.

The current regulations in Parts 723 and 845 prescribe a point system by which OSMRE calculates the amount of the penalty to be assessed under section 518(a). 30 CFR 723.13 and 723.14; 845.13 and 845.14. The assessment system is based on the four criteria set forth in section 518(a), and provides for a waiver of the formula upon a determination by the Director that there are exceptional factors which render the penalty demonstrably unjust. 30 CFR 723.16 and 845.16. The regulations permit OSMRE to assess separately a civil penalty for each day of a continuing violation, from the date of issuance of the notice of violation or cessation order to the date set for abatement. 30 CFR 723.15(a) and 845.15(a). Whenever a violation resulting in a notice of violation or cessation order has not been abated within the prescribed abatement period, OSMRE assesses an additional penalty of $750 for each day the violation remains unabated. 30 CFR 723.15(b) and 845.15(b). The $750 penalty is assessed pursuant to section 518(h) and is in addition to the daily civil penalty assessed under the point system pursuant to section 518(a). Under 30 CFR 723.15(b) and 845.15(b), penalties assessed under section 518(h) of the Act may not be assessed for more than 30 days or exceed $22,500.

Sections 723.15(b) and 845.15(b) further provide that if a violation is not abated within 30 days, OSMRE must take appropriate action pursuant to sections 518(e) (criminal penalties), 518(f) (individual civil penalties), 521(a)(4) (permit suspension or revocation for a pattern of violations), or 512(c) (requests for temporary or permanent injunctions).

On January 31, 1985, Judge Barrington D. Parker of the United States District Court for the District of Columbia issued an order (Revised Parker Order) in the case of *Save Our Cumberland Mountains, Inc., et al. v. Clark, et al.*, No. 81-2134 (D.D.C. 1985). The Revised Parker Order resulted from a settlement agreement entered into by the Secretary. Among other matters, the Revised Parker Order addresses the circumstances under which the Secretary would use his authority under section 518(f) of the Act to impose individual civil penalties on officers, directors and agents of corporate permittees. The Revised Parker Order also requires OSMRE to consider the use of authority under section 518(a) to assess individual civil penalties for each day of a continuing violation, and to propose a regulation governing the use of such authority. This notice is being published in accordance with the Revised Parker Order.

As a result of the Revised Parker Order, OSMRE has examined its existing rules and policies related to the assessment of civil penalties. Most civil penalties are assessed based upon the point system set forth in 30 CFR 723.13–723.14 and 30 CFR 845.13–845.14. The use of this point system does not appear practical for, nor strictly applicable to, the assessment of individual civil penalties. The point system does not give the Secretary sufficient flexibility to assess a penalty which fairly considers the particular actions or inactions of an individual. For example, §§ 723.13(b)(1) and 845.13(b)(1) consider the history of the permittee's previous violations without respect to the individual's involvement with them. Although §§ 723.16 and 845.16 provide that the point system can be waived in appropriate cases, in the absence of a rule setting forth procedures for imposing individual civil penalties the simple exercise of the waiver provision would leave OSMRE and the State regulatory authorities without sufficient guidance on how to weigh the actions of an individual and how to calculate an appropriate civil penalty.

This proposed rule would establish a regulatory scheme for imposing individual civil penalties under section 518(f) of the Act. It is modeled in part on the regulations of the Mine Safety and Health Administration (MSHA), U.S. Department of Labor. The legislative history of the Act indicates that the enforcement provisions in the Act, including those in section 518(f), were modeled after similar provisions in the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. 91-173). *See* S. Rep. No. 128, 95th Cong., 1st Sess. 58 (1977). Section 109(c) of Federal Coal Mine Health and Safety Act of 1969 is the predecessor of section 110(c) of the Federal Mine Safety and Health Act of 1977 (Pub. L. 95-164), which is administered by MSHA.

Both sections 109(c) and 110(c) provide for the imposition of an individual civil penalty in language nearly identical to that found in section 518(f) of the Act. Consequently, OSMRE has reviewed the regulations of MSHA at 30 CFR Part 100 for guidance in developing proposed Parts 724 and 846, which set forth the manner in which OSMRE would assess individual civil penalties under section 518(f) of the Act.

Once a final rule governing the imposition of individual civil penalties is promulgated, the States which have achieved primacy will need to amend their regulatory programs in order to contain penalties which are no less stringent than those set forth in sections 518(a) and 518(f) of the Act, and to provide State procedures which are the same as or similar to the procedures contained in sections 518 and 521 of the Act and consistent with those in the final Federal rules. See 30 U.S.C. 1268(i) and 30 CFR 840.13 (a) and (c).

This edition of the **Federal Register** also contains rules being govern the filing of a petition for review of a notice of individual civil penalty assessment. They should be read in conjunction with this proposed rule in order to better understand the regulatory scheme being proposed by the Department.

III. Discussion of the Proposed Rule

Extension of time to request a conference—§§ 723.1 and 723.18; §§ 845.1 and 845.18

In addition to conforming changes to §§ 723.1 and 845.1, the proposed rule would amend §§ 723.18 and 845.18 to extend the time within which a person may request a conference to review a proposed assessment or reassessment of a civil penalty under section 518(a). The time would be extended from the present 15 days from mailing to 30 days following the receipt of a notice or order of proposed assessment or reassessment.

Scope—§ 724.1; § 846.1

Under the proposed rule, Parts 724 and 846 would govern the assessment of individual civil penalties against officers, directors and agents of corporate permittees in accordance with section 518(f) of the Act. Under section

518(f), an officer, director or agent may be assessed an individual civil penalty who willfully and knowingly authorized, ordered, or carried out a violation of a condition of a permit issued pursuant to a Federal Program, a Federal lands program, Federal enforcement pursuant to section 502 of the Act, or Federal enforcement of a State program pursuant to section 521 of the Act, or failed or refused to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under sections 518(b) or 703 of the Act.

Definitions—§ 724.5; § 846.5

While a civil penalty against a corporate permittee under section 518(a) is assessed on a strict liability standard, an individual civil penalty under section 518(f) would require knowing and willful conduct on the part of the individual. Neither the Act nor the legislative history defines the terms "knowingly" and "willfully." In order to provide guidance to the individuals who may be subject to penalty assessments as well as to those who would assess individual civil penalties, OSMRE proposes to define these terms. The proposed rule also contains a definition for the phrase "violation, failure or refusal".

Knowingly: Under the proposed definition, and individual acts "knowingly" if he/she knew or had reason to know that he or she authorized, ordered or carried out some act or omission of the corporate permittee which consitituted a violation, failure or refusal specified in section 518(f). A person would have "reason to know" when he/she had such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer their existence.

This definition is based in part upon the assumption that persons holding a position of officer, director or agent are responsible for the actions which they have authority to control by virtue of the position they hold. This definition is consistent with the prevailing interpretation of the term "knowingly" as used in the individual civil penalty provision of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). *See Secretary of Labor* v. *Kenny Richardson*, 2 MSHC 1114, 1120 (1981), *aff'd, Richardson* v. *Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982).

Violation, failure, or refusal: This term is defined because it is used in a number of places in the proposed rule. Under the proposed definition, violation would mean a violation of a condition of a permit issued pursuant to a Federal Program, a Federal lands program, Federal enforcement pursuant to section 502 of the Act, or Federal enforcement of a State program pursuant to section 521 of the Act. Failure or refusal would mean a failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under sections 518(b) or 703 of the Act. The exception for sections 518(b) and 703 are required by section 518(f).

Section 518(f) of the Act specifically prohibits the Secretary from assessing penalties for failure to comply with an order incorporated in a civil penalty decision rendered under section 518(b), presumably because it would be counter-productive to assess an individual civil penalty for the nonpayment of the original civil penalty assessed against the corporate permittee. In addition, pursuant to section 518(f), the Secretary may not assess an individual civil penalty for failure to obey a decision of the Secretary issued pursuant to section 703 of the Act for discrimination against any employee who has filed or caused to be filed any proceeding under the Act or against anyone who has or will testify in any such proceeding.

Willfully: In civil statutes the term "willfully" generally refers to an act or omission which is intentional, knowing, voluntary and conscious, as distinguished from an act which is merely accidental or negligent. *See e.g., Messina Construction Corp.* v. *OSHA*, 505 F. 2nd 701 (1st Cir. 1974). Also, the courts have consistently construed "willfully" in civil statutes to encompass conduct which is plainly indifferent to statutory or regulatory requirements. *See e.g., Alabama Power Co.* v. *FERC*, 584 F. 2d 750, 752 (5th Cir. 1978).

Accordingly, under the proposed definition an individual acts willfully if he/she does so either "intentionally, voluntarily, consciously, or with careless disregard or plain indifference to legal requirements." This proposed definition is broader than the definition of "willful violation" currently found in 30 CFR 701.5 and 843.5. OSMRE believes that this broader definition will provide OSMRE maximum flexibility in enforcing the individual civil penalty provision of the Act while keeping well within the bounds of sound statutory construction.

When a Civil Penalty May Be Assessed—§ 724.12; § 846.12

Under §§ 724.12(a) and 846.12(a) of the proposed rule, the Secretary may assess an individual civil penalty whenever an individual knowingly and willfully authorized, ordered or carried out (i) a violation by a corporate permittee of any permit condition or any requirement of the Act or implementing regulation, or (ii) the failure or refusal of the corporate permittee to comply with any order under section 521 of the Act or other order incorporated in a final decision of the Secretary. This penatly would be assessed against an individual only after a cessation order had been issued to the corporate permittee and remained unabated for 30 days. Such a procedure would be consistent with the requirements of paragraphs 9 and 12 of the Revised Parker Order and also with OSMRE's policy of using the assessment of an individual civil penalty as an alternative enforcement mechanism. See 30 CFR 723.15(b)(2) and 845.15(b)(2).

Amount of Individual Civil Penalty—§ 724.14; § 846.14

Section 518(f) subjects a corporate officer, director or agent to the same civil penalty that may be imposed upon a person or corporation under section 518(a) of the Act. OSMRE interprets this to mean that the relevant criteria of section 518(a) are to be applied, and that the daily ceiling in section 518(a) on the amount to the penalty must be observed when assessing a civil penalty against an individual. OSMRE does not interpret section 518(a) as requiring the amount of the penalty assessed against the individual to be the same as that assessed against the corporation. This interpretation is reasonable since all of the criteria used in assessing a section 518(a) penalty against a corporation might not apply to a corporate official charged under section 518(f).

This interpretation of the phrase "subject to the same civil penalties" is consistent with how the Department of the Interior interpreted the same phrase in section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 when it administered that law from 1969 to 1977. Section 109(c) of the Federal Coal Mine Health particular surface coal mining operation which would be considered when assessing a penalty. OSMRE believes that a reasonable reading of sections 518(a) and 518(f) together supports this result.

A central goal of the Act and its implementing regulations is the protection of the environment from the adverse effects of surface coal mining operations (see section 102(a) of the Act). In many instances, a chief consequence of a corporate permittee's violation of the Act and subsequent failure or refusal to abate such violation is environmental damage. Section 518(a) directs OSMRE to consider the seriousness of the underlying violation when assessing an individual civil penalty.

OSMRE believes that if a violation leads to environmental damage, the extent of the damage is to be considered. One accurate indicator of its gravity is the amount of money it would cost to abate the violation and/or reclaim the affected area. Accordingly, in measuring the harm to the environment pursuant to the criteria in §§ 724.14(a)(2) and 846.14(a)(2) OSMRE could base its assessment, as a whole or in part, upon the estimated cost to repair the damage caused by a failure to abate the violation.

OSMRE recognizes that in many cases the harm caused by the permittee's violation, failure or refusal cannot be repaired. Accordingly, when assessing individual civil penalties, §§ 724.14(a)(2) and 846.14(a)(2) would allow OSMRE to consider that an individual has taken an action which has caused "irreparable damage to the environment", as defined at 30 CFR 701.5.

Section 518(a) also directs that the health and safety of the public be considered in the civil penalty assessment process. Accordingly, this criterion also is incorporated into the proposed rule in §§ 724.14(a)(2) and 846.14(a)(2).

In the case of a civil penalty assessment against a permittee, section 518(a) requires the Secretary to consider whether the permittee was negligent. OSMRE believes that this criterion is not directly applicable to the assessment of individual civil penalties because section 518(f) of the Act requires knowing and willful conduct, which goes beyond merely negligent behavior.

Finally, section 518(a) requires the Secretary to consider the demonstrated good faith of a permittee in attempting to achieve rapid compliance after notification of a violation, failure or refusal. Sections 724.14(a)(3) and 846.14(a)(3) list this criterion, which along with the other criteria would be used by OSMRE in deciding whether to assess a separate individual civil penalty for each day of a continuing violation, failure or refusal pursuant to §§ 724.14(b) and 846.14(b).

Sections 724.14(b) and 846.14(b) gives OSMRE broad discretion to assess a separate individual civil penalty for any or all days of a continuing violation, failure or refusal from the date of service of the notice of violation, cessation order or other order until the abatement of the violation or compliance with any final order or decision. The authority for this requirement derives from section 518(a), which allows OSMRE to consider each day of a continuing violation a separate violation. In determining whether to assess separate penalties for continuing violations, failures and refusals, the proposed rule requires OSMRE to consider the factors in §§ 724.14(a) and 846.14(a).

While the proposed rule allows the assessment of a separate individual civil penalty for any or all days of a continuing violation, failure or refusal, from the date of service of the notice of violation, cessation order or other order, in some instances a willful and knowing refusal to comply may not be provable until the period set for abatement has expired.

Procedures for Assessment of Individual Civil Penalty—§ 724.17; § 846.17

Under §§ 724.17(a) and 846.17(a) of the proposed rule, OSMRE shall serve a notice of individual civil penalty assessment on the individual who is being assessed a penalty. The notice of proposed assessment would include a narrative setting forth the reasons for the civil penalty and the amount assessed.

Under §§ 724.17(b) and 846.17(b), the assessment would become a final order of the Secretary and payable 30 days after service of the notice of assesement unless within the 30-day period the individual files a petition for review or agrees to a schedule or plan for the abatement or correction of the violation. Unlike §§ 723.19(a) and 845.19(a), which cover other civil penalty assessments, the proposed rule does not require an individual to prepay the penalty before he or she appeals. The Act does not mandate prepayment of the individual civil penalties. Because no prepayment is required, the proposed rule does not contain a provision for assessment conferences. A notice of individual civil penalty assessment could be appealed to an administrative law judge, and, under the proposed OHA rules, then to the Interior Board of Land Appeals at its discretion.

Under proposed §§ 724.17(c) and 846.17(c), OSMRE would establish that for purposes a serving notices of individual civil penalty assessments and final orders, service would be sufficient if it would satisfy the Federal Rules of Civil Procedure. This would ensure that future issues concerning service would be minimized and resolved in a uniform manner.

Payment of Penalty—§ 724.18; § 846.18

Under §§ 724.18(a) and 846.18(a), if pursuant to proposed §§ 724.17(b) and 846.17(b) no petition for review is filed or no agreement is entered into, the penalty would become due to OSMRE upon service of a final order on the individual.

Under §§ 724.18(b) and 846.18(b), if the individual assessed a penalty filed a petition for administrative review as provided in §§ 724.17(b) and 846.17(b), and if the final administrative review results in a final order affirming, increasing, or decreasing the proposed penalty, proposed §§ 724.18(b) and 846.18(b) provide that the penalty shall be due 30 days from the issuance of the order.

Under §§ 724.18(c) and 846.18(c), if the OSMRE and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, the individual named in the notice of individual civil penalty assessment may postpone payment until receiving either a final order from OSMRE that the penalty is due 30 days from the date of such final order or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

IV. Procedural Matters

Federal Paperwork Reduction Act

There are no information collection requirements in the proposed rule which require approval by the Office of Management and Budget under 44 U.S.C. 3507.

Executive Order 12991

The Department of the Interior has examined the proposed rule according to the criteria of Executive Order 12991 (February 17, 1981) and has determined that it is not major and does not require a regulatory impact analysis.

Regulatory Flexibility Act

The Department of the Interior has also determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rule will not have a significant economic impact on a substantial number of small entities. The rule governs the assessment of civil penalties personally upon individual corporate officers, directors or agents for violations of certain provisions of the Act rather than upon the corporate entities engaged in coal mining. No burden would be imposed upon entities operating in compliance with the Act.

National Environmental Policy Act

OSMRE has prepared a draft environmental assessment, and has made an interim finding that the proposed rule would not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The draft environmental assessment is on file in the OSMRE Administrative Record at the address previously specified (see "ADDRESSES"). A final environmental assessment will be completed and a final finding made on the significance of any resulting impacts prior to promulgation of the final rule.

List of Subjects

30 CFR Part 723

Administrative practice and procedure, Penalties, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

30 CFR Part 724

Administrative practice and procedure, Law enforcement, Penalties, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

30 CFR Part 845

Administrative practice and procedure, Law enforcement, Penalties, Reporting and recordkeeping requirements, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

30 CFR Part 846

Administrative practice and procedure, Law enforcement, Penalties, Surface mining, Surface Mining Reclamation and Enforcement Office, Underground mining.

Accordingly, it is proposed to amend 30 CFR Parts 723 and 845, and to add 30 CFR Parts 724 and 846 as follows:

Dated: November 6, 1986.

J. Steven Griles,

Assistant Secretary for Land and Minerals Management.

SUBCHAPTER B—INITIAL PROGRAM REGULATIONS

PART 723—CIVIL PENALTIES

1. The authority citation for Part 723 continues to read as follows:

Authority: Surface Mining Control and Reclamation Act of 1977, secs. 201, 501, 518 (30 U.S.C. 1211, 1251, 1268), unless otherwise noted.

2. Section 723.1 is revised to read as follows:

§ 723.1 Scope.

This part covers the assessment of civil penalties under section 518 of the Act for violations of a permit condition, any provision of Title V of the Act, or any implementing regulations, except for the assessment of individual civil penalties under section 518(f), which is covered by Part 724. This part governs when a civil penalty is assessed and how the amount is determined, and sets forth applicable procedures. This part applies to cessation orders and notices of violation issued under Part 722 of this chapter during a Federal inspection.

3. Section 723.18(a) is revised to read as follows:

§ 723.18 Procedures for assessment conference.

(a) The Office shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 30 days from the date the proposed assessment or reassessment is received.

* * * * *

4. In Subchapter B, Part 724 is added to read as follows:

PART 724—INDIVIDUAL CIVIL PENALTIES

Sec.

724.1 Scope.
724.5 Definitions.
724.12 When an individual civil penalty may be assessed.
724.14 Amount of individual civil penalty.
724.17 Procedure for assessment of individual civil penalty.
724.18 Final assessment and payment of penalty.

Authority: Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*)

§ 724.1 Scope.

This part covers the assessment of individual civil penalties under section 518(f) of the Act.

§ 724.5 Definitions.

For purposes of this part:

Knowingly means that an individual knew or had reason to know in authorizing, ordering or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure or refusal.

Violation, failure or refusal means—

(a) A violation of a condition of a permit issued pursuant to a Federal Program, a Federal lands program, Federal enforcement pursuant to section 502 of the Act, or Federal enforcement of a State program pursuant to section 521 of the Act; or

(b) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under sections 518(b) or 703 of the Act.

Willfully means that an individual acted either intentionally, voluntarily or consciously, or with intentional disregard or plain indifference to legal requirements in authorizing, ordering or carrying out a corporate permittee's action or omission that constituted a violation, failure or refusal.

§ 724.12 When an individual civil penalty may be assessed.

(a) Except as provided in paragraph (b) of this section, the Office may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out—(1) The violation by the corporation of any condition of the permit or of any requirement of the Act or implementing regulation; or (2) the failure or refusal by the corporate permittee to comply with any order issued under section 521 of the Act or other order incorporated in a final decision issued by the Secretary under the Act.

(b) The Office shall not assess an individual civil penalty—(1) Until a cessation order has been issued to the corporate permittee and the cessation order remains unabated for 30 days; or (2) for an order incorporated in a final decision of the Secretary issued pursuant to sections 518(b) or 703 of the Act and the implementing regulations.

§ 724.14 Amount of individual civil penalty.

(a) In determining the amount of an individual civil penalty assesed under § 724.12, the Office shall consider the criteria specified in section 518 of the Act, including:

(1) The individual's history of authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation;

(2) The seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and

(3) The demonstrated good faith of the individual charged in attempting to achieve rapid compliance after notice of the violation, failure or refusal.

(b) The Office may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Secretary until abatement or compliance is achieved.

§ 724.17 Procedure for assessment of individual civil penalty.

(a) *Notice.* The Office shall serve each individual assessed an individual civil penalty a notice of individual civil penalty assessment, including a narrative explanation of the reason for the penalty and the amount assessed.

(b) *Final order and opportunity for review.* The notice of individual civil penalty assessment shall become a final order of the Secretary and payable 30 days after service upon the individual unless—

(1) The individual files within 30 days of service of the notice of individual civil penalty assessment a petition for review in accordance with 43 CFR 4.1300 *et seq.*; or

(2) The Office and the individual or responsible corporate permittee agree to a schedule or plan for the abatement or correction of the violation, failure or refusal within 30 days of service of the notice of the individual civil penalty assessment.

(c) *Service.* For purposes of this section and § 724.18, service is sufficient if it would satisfy the Federal Rules of Civil Procedure (1985 Edition).

§ 724.18 Final assessment and payment of penalty.

(a) *No abatement or appeal.* If a notice of individual civil penalty assessment become a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon service of a final order on the individual.

(b) *Appeal.* If an individual assessed a civil penalty files a petition for review in accordance with 43 CFR 4.1300 et seq., the penalty shall be due 30 days from the date of issuance of a final administrative order affirming, increasing or decreasing the proposed penalty.

(c) *Abatement agreement.* Where the Office and the corporate permittee or individual have agree in writing on a plan for the abatement of or compliance with the unabated order, an individual named in a notice of individual civil penalty assessment may postpone payment until receiving either a final order from the Office that the penalty is due 30 days from the date of such final order or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

SUBCHAPTER L—PERMANENT PROGRAM ENFORCEMENT AND INSPECTION AND ENFORCEMENT PROCEDURES

PART 845—CIVIL PENALTIES

5. The authority citation for Part 845 reads as follows:

Authority: Sections 102, 201, 501(b), 517, 518, 521, 523, and 525 of Pub. L. 95-87, 91 Stat. 448, 449, 468, 498, 499, 504, 510 and 511 (30 U.S.C. 1202, 1211, 1251, 1267, 1268, 1271, 1273, and 1275).

6. Section 845.1 is revised to read as follows:

§ 845.1 Scope.

This part covers the assessment of civil penalties under section 518 of the Act with respect to cessation orders and notices of violation issued under Part 843 (Federal Enforcement), except for the assessment of individual civil penalties under section 5189(f), which is covered in Part 846.

7. Section 845.18, paragraph (a) is revised to read as follows:

§ 845.18 Procedures for assessment conference.

(a) The Office shall arrange for a conference to review the proposed assessment or reassessment, upon written request of the person to whom the notice or order was issued, if the request is received within 30 days from the date the proposed assessment or reassessment is received.

* * * * *

8. In Subchapter L, Part 846 is added to read as follows:

PART 846—INDIVIDUAL CIVIL PENALTIES

Sec.

846.1 Scope.
846.5 Definitions.
846.12 When an individual civil penalty may be assessed.
846.14 Amount of individual civil penalty.
846.17 Procedure for assessment of individual civil penalty.
846.18 Final assessment and payment of penalty.

Authority: Pub. L. 95-87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*)

§ 846.1 Scope.

This part covers the assessment of individual civil penalties under section 518(f) of the Act.

§ 846.5 Definitions.

For purposes of this part:

Knowingly means that an individual knew or had reason to know in authorizing, ordering or carrying out an act or omission on the part of a corporate permittee that such act or omission constituted a violation, failure or refusal.

Violation, failure or refusal means—

(a) A violation of a condition of a permit issued pursuant to a Federal Program, a Federal lands program, Federal enforcement pursuant to section 502 of the Act, or Federal enforcement of a State program pursuant to § 521 of the Act; or

(b) A failure or refusal to comply with any order issued under section 521 of the Act, or any order incorporated in a final decision issued by the Secretary under the Act, except an order incorporated in a decision issued under section 518(b) or 703 of the Act.

Willfully means that an individual acted either intentionally, voluntarily or consciously, or with intentional disregard or plain indifference to legal requirements in authorizing, ordering or carrying out a corporate permittee's action or omission that constituted a violation, failure or refusal.

§ 846.12 When an individual civil penalty may be assessed.

(a) Except as provided in paragraph (b) of this section, the Office may assess an individual civil penalty against any corporate director, officer or agent of a corporate permittee who knowingly and willfully authorized, ordered or carried out—

(1) The violation by the corporation of any condition of the permit or of any requirement of the Act or implementing regulation; or

(2) The failure or refusal by the corporate permittee to comply with any order issued under section 521 of the Act or other order incorporated in a final decision issued by the Secretary under the Act.

(b) The Office shall not assess an individual civil penalty—

(1) Until a cessation order had been issued to the corporate permittee and the cessation order remains unabated for 30 days; or

(2) For an order incorporated in a final decision of the Secretary issued pursuant to sections 518(b) or 703 of the Act and the implementing regulations.

§ 846.14 Amount of individual civil penalty.

(a) In determining the amount of an individual civil penalty assessed under § 846.12, the Office shall consider the criteria specified in section 518(a) of the Act, including:

(1) The individual's history or authorizing, ordering or carrying out previous violations, failures or refusals at the particular surface coal mining operation;

(2) The seriousness of the violation, failure or refusal (as indicated by the extent of damage and/or the cost of reclamation), including any irreparable harm to the environment and any hazard to the health or safety of the public; and

(3) The demonstrated good faith of the individual charged in attempting to

achieve rapid compliance after notive of the violation, failure or refusal.

(b) The Office may assess a separate individual civil penalty for each day the violation, failure or refusal continues, from the date of service of the underlying notice of violation, cessation order or other order incorporated in a final decision issued by the Secretary until abatement or compliance is achieved.

846.17 Procedure for Assessment of individual civil penalty.

(a) *Notice.* The Office shall serve on each individual assessed an individual civil penalty a notice of individual civil penalty assessment, including a narrative explanation of the reason for the penalty and the amount assessed.

(b) *Final order and opportunity for review.* The notice of individual civil penalty assessment shall become a final order of the Secretary and payable 30 days after service upon the individual unless—

(1) The individual files within 30 days of service of the notice of individual civil penalty assessment a petition for review in accordance with 43 CFR 4.1300 *et seq.*; or

(2) The Office and the individual or responsible corporate permittee agree to a schedule or plan for the abatement or correction of the violation, failure or refusal within 30 days of service of the notice of the individual civil penalty assessment.

(c) *Service.* For purposes of this section and § 846.18, service is sufficient if it would satisfy the Federal Rules of Civil Procedure (1985 Edition).

§ 846.18 Final assessment and payment of penalty.

(a) *No abatement or appeal.* If a notice of individual civil penalty assessment becomes a final order in the absence of a petition for review or abatement agreement, the penalty shall be due upon service of a final order on the individual.

(b) *Appeal.* If an individual assessed a civil penalty files a petition for review in accordance with 43 CFR 4.1300 *et seq.*, the penalty shall be due 30 days from the date of issuance of a final administrative order affirming, increasing or decreasing the proposed penalty.

(c) *Abatement agreement.* Where the Office and the corporate permittee or individual have agreed in writing on a plan for the abatement of or compliance with the unabated order, and individual named in a notice of individual civil penalty assessment may postpone payment until receiving either a final order from the Office that the penalty is due 30 days from the date of such final order or written notice that abatement or compliance is satisfactory and the penalty has been withdrawn.

[FR Doc. 86-28885 Filed 12-23-86; 8:45 am]
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Wednesday
December 24, 1986

Part V

Department of the Interior

Office of Hearings and Appeals

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Individual Civil Penalties; Proposed Regulations

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

43 CFR Part 4

Special Rules Applicable to Surface Coal Mining Hearings and Appeals; Individual Civil Penalties

AGENCY: Office of Hearings and Appeals, Interior.

ACTION: Proposed regulations.

SUMMARY: These proposed rules provide procedures for administrative review of the proposed assessment of an individual civil penalty against a director, officer, or agent of a corporation under section 518(f) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1268(f) (1982).

DATE: Comments on the proposed rules are due February 23, 1987.

ADDRESS: Comments may be hand delivered or addressed to: Director, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203.

FOR FURTHER INFORMATION CONTACT: Will A. Irwin, Board of Land Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203. Phone: 703-235-3750.

SUPPLEMENTARY INFORMATION: These rules set forth the procedures for administrative review of the proposed assessment of individual civil penalties under section 518(f) of the Act, 30 U.S.C. 1268(f). (Companion proposed rules under section 518(f) prepared by the Office of Surface Mining Reclamation and Enforcement are also published in this section of the **Federal Register**.) That section provides:

(f) Whenever a corporate permittee violates a condition of a permit issued pursuant to a Federal program, a Federal lands program or Federal enforcement pursuant to section 502 or Federal enforcement of a State program pursuant to section 521 of this Act or fails or refuses to comply with any order issued under section 521 of this Act, or any order incorporated in a final decision issued by the Secretary under this Act except an order incorporated in a decision issued under subsection (b) of this section or section 703 of this Act, any director, officer, or agent of such corporation who willfully and knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (e) of this section.

Subsection (a), in turn, provides:

Sec. 518. (a) In the enforcement of a Federal program or Federal lands program, or during Federal enforcement pursuant to section 502 or during Federal enforcement of a State program pursuant to section 521 of this Act, any permittee who violates any permit condition or who violates any other provision of this title, may be assessed a civil penalty by the Secretary, except that if such violation leads to the issuance of a cessation order under section 521, the civil penalty shall be assessed. Such penalty shall not exceed $5,000 for each violation. Each day of continuing violation may be deemed a separate violation for purposes of penalty assessments. In determining the amount of the penalty, consideration shall be given to the permittee's history of previous violations at the particular surface coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the permittee was negligent; and the demonstrated good faith of the permittee charged in attempting to achieve rapid compliance after notification of the violation.

Rules for the assessment of civil penalties under section 518(a) are set forth in 30 CFR Parts 723 and 845.

Section 518(f) was modeled after section 109(c) of the Federal Coal Mine Health and Safety Act of 1969 (Mine Safety Act), 30 U.S.C. 820(c). *See* S. Rep. No. 28, 94th Cong., 1st Sess. 184 (1975). (For legislative history of section 109(c), *see* H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12, *reprinted in* 1969 U.S. Code Cong. & Ad. News 2513-14). Therefore, where appropriate, cases decided under the Mine Safety Act have been used as guidance in formulating certain provisions of these proposed rules.

Section 4.1300 states that these rules govern review of the proposed assessment of an individual civil penalty against a director, officer, or agent of a corporation. Rules for review of proposed assessments against other persons are set forth in 43 CFR 4.1150 *et seq.*

The individual served with a notice of proposed assessment of a civil penalty under section 518(f) may file a petition for review with the Hearing Division of the Office of Hearings and Appeals. 4.1302 provides that the petition must be filed within 30 days of service of notice of the proposed assessment. 43 CFR 4.1107(f) governs the effective filing date. Failure to timely file a petition shall result in an admission of liability for the proposed penalty and cause any tardy petition to be dismissed.

Section 4.1303(a) provides that a petition shall contain a concise statement of the facts that entitle the individual to administrative relief from the imposition of the proposed penalty. The petition must be accompanied by a copy of the notice of proposed assessment and a copy of the permit, order, or final decision that the corporate permittee is charged with violating or failing or refusing to comply with. The petition should also contain a statement whether the individual wishes an evidentiary hearing or not. Unlike an operator or permittee assessed under section 518(a), an individual is not required to forward the proposed amount of the penalty with the petition for placement in an escrow account in accordance with section 518(c). *See* S. Rep. No. 128, 95th Cong., 1st Sess. 58-59 (1977).

A petition initiates a proceeding in the Office of Hearings and Appeals. Section 4.1303(b) therefore provides that copies of a petition must be served on the appropriate Field or Regional Solicitor of the Department of the Interior in accordance with 43 CFR 4.1109. The current addresses of Field and Regional Solicitors and the states for which they are responsible for Surface Mining Act cases are:

For cases arising in Arizona, Arkansas, California, Colorado, Iowa, Kansas, Louisiana, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Texas, Utah: Office of the Regional Solicitor, U.S. Department of the Interior, P.O. Box 3156, Tulsa, Oklahoma 74101. Phone 918-581-7502.

For cases arising in Connecticut, Delaware, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Vermont, and West Virginia: Office of the Field Solicitor, U.S. Department of the Interior, Suite 502J, U.S. Post Office and Courthouse, Pittsburgh, Pennsylvania 15219. Phone 412-644-4455.

For cases arising in Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee, and Virginia: Office of the Field Solicitor, U.S. Department of the Interior, P.O. Box 15006, Knoxville, Tennessee 37901. Phone 615-673-4233.

For cases arising in Alaska, Hawaii, Idaho, Oregon, Montana, Minnesota, North Dakota, South Dakota, Washington, Wisconsin, and Wyoming: Office of the Regional Solicitor, U.S. Department of the Interior, Denver Federal Center, P.O. Box 25007, Denver, Colorado 80225. Phone 303-236-8444.

Any party or other person shall serve any other documents being filed subsequently with OHA on all other parties and all other persons participating in the proceeding.

Under § 4.1304, the Office of Surface Mining Reclamation and Enforcement (OSM) shall have up to 30 days to file an answer or motion responding to the petition. If OSM elects not to file an answer or motion it shall file a statement to that effect within the same time limit. An individual may amend a petition as a matter of right before receipt of OSM's answer, motion, or statement and may file a motion for leave to amend the petition thereafter under § 4.1305. Section 4.1306 provides for notice of the hearing, which shall be of record and governed by 5 U.S.C. 554.

Section 4.1307 sets forth the elements to be proved, the burdens of proof, and the standard of proof for individual civil penalty proceedings. Since OSM is the proponent of the imposition of the penalty, under § 4.1307(a) it bears the initial burden of proof, *i.e.*, the burden of going forward with the evidence of a prima facie case. 5 U.S.C. 556(d); *Environmental Defense Fund* v. *EPA*, 548 F.2d 998, 1012–15 (D.C. Cir. 1976). The ultimate burden of persuasion of a preponderance of the evidence rests with the individual. *Old Ben Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 523 F.2d 25, 34–41 (7th Cir. 1975). The existence of a corporate violation of failure or refusal to comply with an order may be considered in the individual civil penalty proceeding. *Kenny Richardson*, 2 MSHC 1114, 1116–17 (1981), *aff'd*, *Richardson* v. *Secretary of Labor*, 689 F.2d 632 (6th Cir. 1982); *Everett L. Pritt*, 8 IBMA 216, 84 I.D. 960 (1977). Individual civil penalty proceedings may be consolidated with proceedings initiated under 43 CFR 4.1150, 4.1160, or 4.1180. 30 U.S.C. 1268(b); 43 CFR 4.1113. If a corporate permittee's violation or failure or refusal to comply with an order has been upheld in a final decision on administrative review, under § 4.1307(b) it will be considered established for purposes of a proceeding under section 518(f). Under § 4.1307(c), the individual bears the ultimate burden of persuasion by a preponderance of the evidence.

The administrative law judge's decision, under § 4.1308, shall contain findings of fact and conclusions of law on each of the elements of the case set forth in § 4.1307. 43 CFR 4.1127. *See Dean Trucking Co.*, 1 IBSMA 105, 86 I.D. 201 (1979). If he concludes that the individual is liable for the assessed penalty, he shall include in his decision an order that the penalty be paid to OSM no later than 30 days after the date of issuance of the decision, absent the filing of a petition for discretionary review in accordance with § 4.1309.

Any party to an individual civil penalty proceeding may file a petiton for discretionary review of an administrative law judge's decision with the Board of Land Appeals in accordance with 43 CFR 4.1309.

Determination of Effects

Because these proposed rules merely provide the details of administrative review procedures, the Department has determined that the proposed rules are not major, as defined by Exec. Order No. 12291, and will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

National Environmental Policy Act

The Department has determined that this proposed rule will not significantly affect the quality of the human environment on the basis of the categorical exclusion of regulations of a procedural nature set forth in 516 DM 2, Appendix 1, Section 1.10.

Paperwork Reduction Act

The proposed rules contain no information collection requirements requiring Office of Management and Budget approval under 44 U.S.C. 3507.

The author of these regulations is Will A. Irwin, Administrative Judge, Board of Land Appeals, Office of Hearings and Appeals.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure, penalties, surface mining.

For the reasons stated in the preamble and under the authority of 30 U.S.C. 1201 *et seq.*, §§ 4.1300 through 4.1309 of Subpart L of Part 4 of Title 43 of the *Code of Federal Regulations* are proposed to be added as set forth below:

Dated: December 16, 1986.

Paul T. Baird,

Director.

PART 4—[AMENDED]

1. The authority for 43 CFR Part 4, Subpart L continues to read as follows:

Authority: 30 U.S.C. 1256, 1260, 1261, 1268, 1271, 1272, 1275, 1293; 5 U.S.C. 301.

2. The authority for Part 4, Subpart M, continues to read as follows:

Authority: 5 U.S.C. 301.

3. 43 CFR Part 4, Subpart M, is amended by redesignating existing §§ 4.1300–4.1310 as §§ 4.1600–4.1610. All references to §§ 4.1300–4.1310 are changed to references to §§ 4.1600–4.1610.

4. 43 CFR Part 4, Subpart L, is amended by adding a new center heading and §§ 4.1300–4.1309 to read:

Petitions for Review of Individual Civil Penalty Assessments Under Section 518(f) (30 U.S.C. 1268(f))

Sec.
4.1300 Scope.
4.1301 Who may file.
4.1302 Time for filing.
4.1303 Contents and service of petition.
4.1304 Answer, motion, or statement of OSM.
4.1305 Amendment of petition.
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4.1307 Elements; burdens of proof.
4.1308 Decision by administrative law judge.
4.1309 Petition for discretionary review.

Petitions for Review of Individual Civil Penalty Assessments Under Section 518(f) (30 U.S.C. 1268(f)

§ 4.1300 Scope.

These regulations govern petitions for review of a proposed assessment of an individual civil penalty under section 518(f) of the Act against a director, officer, or agent of a corporation.

§ 4.1301 Who may file.

Any individual served a notice of proposed assessment of an individual civil penalty may file a petition for review with the Hearings Division, Office of Hearings and Appeals, U.S. Department of the Interior, 4015 Wilson Boulevard, Arlington, VA 22203. Phone: 703–235–3800.

§ 4.1302 Time for filing.

(a) A petition for review of the proposed assessment of an individual civil penalty must be filed within 30 days of service of the notice of proposed assessment.

(b) No extension of time will be granted for filing a petition for review of the proposed assessment of a civil penalty as required by paragraph (a) of this section. Failure to file a petition for review within the time period provided in paragraph (a) shall be deemed an admission of liability by the individual, whereupon the notice of proposed assessment of the civil penalty assessed shall become a final order of the Secretary and any tardy petition shall be dismissed.

§ 4.1303 Contents and service of petition.

(a) An individual filing a petition for review of a proposed assessment of an individual civil penalty shall provide—

(1) A concise statement of facts entitling the individual to relief;

(2) A copy of the notice of proposed assessment;

(3) A copy of the permit(s), order(s) or final decision(s) that the corporate permittee is charged with violating or failing or refusing to comply with; and

(4) A statement whether the individual requests or waives the opportunity for an evidentiary hearing.

(b) Copies of the petition shall be served in accordance with 43 CFR 4.1109 (a) and (b).

§ 4.1304 Answer, motion, or statement of OSM.

OSM shall have 30 days from receipt of a copy of a petition to file with the Hearings Division an answer or a motion or a statement that it will not file an answer or motion in response to the petition.

§ 4.1305 Amendment of petition.

(a) An individual filing a petition may amend it once as a matter of right before receipt of an answer, motion, or statement of OSM made in accordance with § 4.1304. Thereafter, a motion for leave to amend the petition shall be filed with the administrative law judge.

(b) OSM shall have 30 days from receipt of a petition amended as a matter of right to file an answer, motion, or statement in accordance with § 4.1304. If the administrative law judge grants a motion to amend a petition, the time for OSM to file an answer, motion, or statement shall be set forth in the order granting it.

§ 4.1306 Notice of hearing.

The administrative law judge shall give notice of the time and place of the hearing to all interested parties. The hearing shall be of record and governed by 5 U.S.C. 554.

§ 4.1307 Elements; burdens of proof.

(a) OSM shall have the burden of going forward with evidence to establish a prima facie case that

(1) A corporate permittee violated a condition of a permit or of any requirement of the Act or implementing regulations or failed or refused to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under section 518(b) or 703 of the Act or implementing regulations);

(2) The individual is a director, officer, or agent of the corporation; and

(3) The individual willfully and knowingly authorized, ordered, or carried out the corporate permittee's violation or failure or refusal to comply.

(b) The existence of a corporate permittee's violation of a condition of a permit or of any requirement of the Act or implementing regulations or of a corporate permittee's failure or refusal to comply with an order issued under section 521 of the Act or an order incorporated in a final decision by the Secretary under the Act (except an order incorporated in a decision issued under section 518(b) or 703 of the Act or implementing regulations) is conclusively established if the violation or order has been upheld in a final decision in a proceeding under 43 CFR 4.1150–4.1158, 4.1160–4.1171, or 4.1180–4.1187, and 4.1270 or 4.1271.

(c) The individual shall have the ultimate burden of persuasion by a preponderance of the evidence.

§ 4.1308 Decision by administrative law judge.

(a) The administrative law judge shall issue a written decision containing findings of fact and conclusions of law on each of the three elements set forth in § 4.1307.

(b) If the administrative law judge concludes that the individual is liable for a civil penalty, he shall order that it be paid to OSM no later than 30 days from the date of issuance of the decision absent the filing of a petition for discretionary review in accordance with § 4.1309.

§ 4.1309 Petition for discretionary review.

(a) Any party may petition the Board to review an order or decision by an administrative law judge disposing of a civil penalty proceeding under § 4.1308.

(b) A petition under this section shall be filed on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

(c) A petitioner under this section shall list the alleged errors of the administrative law judge and shall attach a copy of the order or decision sought to be reviewed.

(d) Any party may file with the Board a response to the petition for review within 10 days of receipt of a copy of such petition.

(e) Not later than 30 days from the filing of a petition under this section, the Board shall grant or deny the petition in whole or in part.

(f) If the petition is granted the rules is §§ 4.1273–4.1276 are applicable.

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